such planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread.

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Arthur H. LaLime, deceased.

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 set forth herein.

Commissioner Anderson concurring in the result; Commissioner Elman dissenting; and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

WALTHAM WATCH COMPANY ET AL.

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

Docket 8396. Complaint, May 15, 1961—Decision, Feb. 28, 1964

Order requiring Chicago importers of watches, watch movements, cases and attachments which they assembled, to cease using inflated prices, in advertising and preticketing, as regular retail prices, misrepresenting, in advertising and labeling, the number of friction bearing jewels, the extent of their guarantee, and that their watches are manufactured in the United States by the well-known Waltham Watch Co. of Mass. by using such terms as "Waltham Premier, a famous name, part of the American scene since 1850," and the name "Waltham" in advertising and labeling to describe their watches.

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 Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole, and Morris Draft, 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 Waltham Watch Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois.

During a part of the time referred to hereinafter the individual respondents Harry Aronson, Ben Cole and Morris Draft were officers of Hallmark, Inc., a corporation organized under the laws of the State of Illinois, which had its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois. Hallmark, Inc., has been merged into the respondent corporation, Waltham Watch Company.

The aforesaid individual respondents are officers of the corporate respondent and they formulate, direct and control the acts and practices of the respondent corporation, and they formulated, directed and controlled the acts and practices of Hallmark, Inc., prior to its merger into the respondent corporation, Waltham Watch Company. The individual respondents' office and principal place of business is the same as that of the corporate respondent.

PAR. 2. In the course and conduct of their business respondents import watches, watch movements, cases and attachments, assemble and sell them. Respondents cause their said products, when sold, to be transported from the State of Illinois and elsewhere, to purchasers thereof located in various other states of the United States and in the District of Columbia.

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

PAR. 3. Respondents have engaged in the practice of attaching or causing to be attached, price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, catalog insert sheets, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact, said prices are in excess of the prices at which said watches are usually and customarily sold at retail and are fictitious retail prices.

PAR. 4. Respondents in their advertising, catalogs, brochures and other promotional material represent that their products are guaranteed by the use of such terms as "guaranteed", "fully guaranteed" or "lifetime guaranteed", and other terms and expressions of which these are typical. Respondents also represent in guarantee certificates that their products will be serviced upon the payment of one dollar. In truth and in fact, the representations as to guarantee are false, misleading and deceptive. The fact that the guarantee provides for payment of a service charge is not set forth in advertising and the respondents frequently impose service charges in excess of that set out in the certificates of guarantee. The terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee.

PAR. 5. The respondents purchase 17-jewel watch movements made in, and imported from, Switzerland, add a device containing 4 or 8 synthetic jewels, and affix attachments to the watches and case the movements. The watches are then represented, advertised, offered for sale and sold by respondents as "21" and "25" jewel watches, to retailers, catalog houses and wholesale distributors.

PAR. 6. By means of the statements that the said watches were 21- and 25-jewel watches, respondents represented that said watches contained 21 and 25 jewels, each of which serves a mechanical purpose as a frictional bearing, and that, each jewel provides a mechanical contact at a point of wear. In fact, the additional jewels in the device added by the respondents are not functional and these watches are not 21- and 25-jewel watches as represented and advertised.

PAR. 7. The respondents have advertised their said watches in newspapers, jewelers' trade magazines, nationally distributed magazines, catalogs, catalog insert sheets and circulars, and on labels and packages. Among and typical, but not all inclusive, of the statements appearing in such advertising material have been the following:

> **Waltham Watches—Timing the Nation since 1850.**
>
> **Waltham Premier, a famous name, part of the American scene since 1850.**

By means of such statements, respondents have represented, directly or by implication, that their said watches are manufactured in the United States by the old and well-known Waltham Watch Company of Waltham, Massachusetts. Such statements are false, misleading and deceptive. In truth and in fact, said watches are not manufactured in the United States by the old and well-known Waltham Watch Company of Waltham, Massachusetts.

PAR. 8. By the acts and practices aforesaid respondents have placed in the hands of retailers and others, a means and instrumentality whereby such retailers may mislead and deceive members of the purchasing public as to the regular and usual retail prices, the character of the guarantee, the number of friction bearing jewels and the origin and manufacturers of respondents' watches.

PAR. 9. Respondents, in the course and conduct of the sale of their watches, have been and are in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of said statements and representations are true, and into the purchase of a substantial number of their watches as a result of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, have been and are, all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Harry E. Middleton, Jr., of Washington, D.C., for the Commission.

Mr. Ben Paul Noble, of Washington, D.C., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

OCTOBER 18, 1962

In a complaint issued May 15, 1961, the Federal Trade Commission charged Waltham Watch Company, a Delaware corporation, and its officers, Harry Aronson, Ben Cole and Morris Draft, both individually and as officers, with engaging in unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. The acts complained of were related to the sale and distribution of watches by the respondents. In general, they were charged with deceptive pricing activities, false representations as to guarantee and jewel content of watches and deceptive use of the Waltham name.

In their answer, the respondents denied generally the allegations of the complaint. They asserted also that they were defending prior Commission proceedings involving identical issues and thus were subjected to a multiplicity of law suits and harassment.

Waltham Watch Company actually was a respondent in two other cases then pending before the Commission.

In one, Docket No. 6914, it was joined with others not parties to this proceeding. Aronson, Cole and Draft were not respondents there. That case was concerned with alleged deceptive practices involving the jewel content of watches and the use of the name "Waltham". It was decided adversely to the respondents there by the Commission on October 16, 1962 [61 F.T.C. 1027].

The other case, Docket No. 7997, was brought against Waltham and Aronson. Other respondents in that case are not respondents here. Ben Cole and Morris Draft, respondents in this case, were not charged there. It was concerned with, among other things, the alleged deceptive use of the name "Waltham" in the sale of clocks. It was decided adversely to the respondents there by the Commission on June 15, 1962 [60 F.T.C. 1692].

Waltham's present officers, the individual respondents here, are admittedly responsible for its most recent business practices. Even though the use of the name "Waltham" was involved in the other cases and jewel content was involved in one of them, this case need not be regarded as a repetition of the prior litigation nor as an unwarranted harassment. Since the individual respondents constitute new management of Waltham and the effect of the allegations was that they were persisting as such in Waltham's prior practices, some of which had been litigated in the other cases, it seems proper that Waltham be joined as a respondent with them. We are here concerned with their conduct in their administration of Waltham's activities. (The fact that Aronson also was a party in Docket No. 7997, involving, among other things, the Waltham name, does not alter this. That was the case concerned with clocks as distinguished from watches.)

Moreover, there is more to this proceeding than jewel count and use of the Waltham name. As stated above, this proceeding is concerned also with alleged deceptive price practices and claimed false guarantees. These last were not involved in the prior cases as far as Waltham and Aronson were concerned.

Together with their submission of proposed findings of fact, conclusions of law and order, respondents have filed a formal "Motion to Dismiss Paragraphs 5, 6, 7 and 8 (in part)" of the complaint. While the Hearing Examiner has some doubt whether he could consider a motion such as this, which attacks the Commission's exercise of its discretion to issue the complaint in this proceeding while the two prior proceedings were pending, in view of the outcome of those proceedings and the action to be taken by the Hearing Examiner in this proceeding, he concludes that respondents' motion need not be decided. To the extent that Waltham Watch Company already is subject to an order of this Commission requiring it to cease and desist from practices related to jewel count and use of the Waltham name, the Hearing Examiner will not duplicate such order or orders by any action here. He believes that one Commission order directing that a party cease and desist from a particular action is sufficient and it is not necessary that an additional order issue providing the same remedy. In a sense, this appears to be the relief sought by respondents in, and the only purpose of, their formal motion.

The Pretrial Order, the Hearing Examiner's certification to the Commission and the Commission's approval of the Hearing Examiner's recommendation that he be permitted to hear this proceeding first in Chicago, then in Milwaukee, then in Minneapolis, and finally, again in Chicago, all were predicated on the expectation that the issues herein would be litigated bitterly and that hurried trips would be made from city to city in order expeditiously to complete the proceeding. However, on the day that the Hearing Examiner left Washington to commence the hearing, he received the decision and opinion of the Commission dated July 20, 1962, in the case bearing Docket No. 6914. These became available to all counsel on the morning set for the opening of the hearing. That decision clearly and definitely ruled that Waltham Watch Company was to cease and desist misrepresenting the jewel content of watches and using the name "Waltham" without clearly stating the country of origin of its watches or using the Waltham name in an historical sense for the purpose of describing its watches. In addition, Commissioner Philip Elman in the opinion stated,

Respondents should be prohibited from using the term "American", or any reference to "Waltham", in any manner or context suggesting that the watches which they sell under the Waltham name are made in the United States. To provide effective relief these provisions are necessary at least until such time as the harmful effects of respondents' deceptive advertising have been erased. If and when this has been accomplished, the Commission will entertain any application for such modification as may then be appropriate. *Cf. Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419.

Respondents appear to have been very much impressed by the possibility that an application for modification at some future time might receive favorable consideration and, in their defense of the instant proceeding, apparently began to lay the groundwork for a demonstration of good faith by cooperating most commendably in the simplification of the issues and the elimination of evidence which would have been necessary to bring the individuals within the restrictions of the order already effective against Waltham. This resulted in more leisurely sessions than had been anticipated.

They have stipulated sufficient to justify the issuance in this proceeding of an order against them similar to that entered against Waltham in the case bearing Docket No. 6914. It should be observed, however, that while their stipulation of facts is sufficient to permit the issuance of such an order in this proceeding, they do not agree thereby, as a matter of law, that, upon the facts stipulated, the order is right.[1] They assume also that, regardless of whether it is right or not, if, in the future, the Waltham order be modified or suspended, they will receive the same treatment and have the benefit of such modification or suspension. (In this connection it should be noted clearly that whether this is to be done is not at all the function or concern of the Hearing Examiner, but the sole prerogative of the Commission.)

This leaves for consideration in this proceeding only the issues involving alleged deceptive pricing and alleged false guarantee. The deceptive pricing portion of the case is concerned with (a) advertising by respondents of published "list" or alleged "retail selling prices" separately from or in catalogue sheets prepared for the use of catalogue companies such as are described at some length by Commission Chairman Paul Rand Dixon, in his opinion in *Leeds Travelwear, Inc.*, Docket No. 8140, October 3, 1961 [61 F.T.C. 152, 165], slip printing pages 4 to 7 inclusive, and, (b) with the tagging, affixing or use of price tickets on or in connection with the watches in

[1] On the legal justification for the jewel count ruling, the Commission's prior decisions and *Allen* v. *Tornek Company*, 276 F. 2d 513, 107 App. D. C. 267, all cited by Commissioner Elman in Docket No. 6914, are conclusive. As to the use of the Waltham name, apart from what was said by Commissioner Elman in his opinion in Docket No. 6914 above, respondents' argument that the owner of a trademark has the right to cheapen or "water it down" leaves this Examiner unimpressed. It ought to be quite clear that, regardless of what trademark a business may own, it cannot use that trademark for the purpose of deception. How long would any man whose own true name was Howard Johnson be permitted to operate a roadside restaurant and call it "Howard Johnson's" without qualification? Would any clothier who happened to have a customer, James F. King, get away with advertising during the John F. Kennedy administration that JFK buys his clothes there?

the form or package in which they are offered and delivered for sale. The evidence as to the deceptive nature of the advertising and use of the list prices, whether the same be in general advertising, in catalogue sheets or in the form of preticketing, is adequate and sufficient to support remedial action in this proceeding. A long dissertation is not necessary here. Numerous witnesses testified, and it is clearly to be concluded from their testimony, that Waltham watches are customarily sold at prices far below (a) the advertised prices, (b) the alleged or stated "retail price" in the catalogue sheets prepared by respondents for the use of catalogue houses, and (c) the prices on the tickets or labels attached to or packaged together with the watches when offered and delivered for sale. Respondents' officers, the individuals involved herein, have too long an experience and background in business, particularly the watch business, not to be fully aware of the manner in which the business of the catalogue houses is conducted. They know, as the witnesses testified here, almost anyone who knows about and has the desire so to do (a) can obtain access to a catalogue house and (b) can purchase any article offered by the catalogue house at the coded price rather than at the so-called or represented "retail price". The Hearing Examiner believes that, separate and apart from this litigation, the individuals involved herein certainly would be embarrassed or outraged if it were suggested that they were so naive that they did not have this awareness or did not know how the catalogue houses for which they supply the catalogue insert sheets operate. *Leeds Travelwear, Inc.*, Docket No. 8140 [61 F.T.C. 152], *Rayex Corporation*, Docket No. 7346 [60 F.T.C. 664], *Baltimore Luggage Co.* v. *Federal Trade Commission*, Docket No. 8382, C. A. 4, 296 F. 2d 608, *cert. den'd*, 369 U. S. 860, *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, C. A. 7.

To the extent that respondents urge that the prices advertised by them should be regarded only as "suggested retail prices", their position is rejected. Their argument seems to be pitched at this Hearing Examiner's reasoning in his Initial Decision in the *Regina* case, November 16, 1961, which was not adopted by the Commission.[2] Nevertheless, the facts in this case are not at all similar. In *Regina* there was no advertising or preticketing. In this case there are both. It also is clear that the respondents here knew that their "list prices" were not the usual and customary retail prices. Since, with that knowledge, they furnished and disseminated to vendors advertising containing such prices, they thereby placed in the hands of their

[2] The Regina Corporation, Docket No. 8323, October 11, 1962 [61 F.T.C. 983].

vendors the means whereby the public was misled and deceived. This case is aggravated far beyond the *Regina* case as far as the respondents are concerned. Their apologia that they cannot control the prices at which their watches are sold does not absolve them from the consequences of their own conduct. While there is testimony that the "retail" prices were only "suggested", the facts are to the contrary.

This leaves only the charge with respect to the alleged false guarantee. The testimony and physical exhibits show that the respondents advertised their watches as "Guaranteed", "Fully Guaranteed" and "Lifetime Guaranteed". It was advertising such as this that, in many cases, induced the purchaser to buy one of respondents watches. This sort of guarantee was featured prominently on all the catalogue sheets. Two propositions of law are elementary. If, at the point when a decision to buy is made, the decision is brought about by a false or deceptive statement, the deceptive practice must be stopped. The word "guarantee" must be accompanied by clear and conspicuous words of limitation if the guarantee is in any way limited, even to the extent of a small fee such as a handling charge. Here, in most instances, the vice was greater. A potential customer, turning the pages of a catalogue for the purpose of purchasing by mail, sees only the expression, "Fully Guaranteed". He has the right to assume that it means what it says, that no strings are attached and that no service charges are imposed. When such a purchaser orders by mail, whether directly or through the medium of a vendor exhibiting the catalogue, he first discovers, on receiving the watch and examining the guarantee certificate, that there is a service charge of one dollar and restrictive language as to just what the guarantee covers. He learns this for the first time only after he has bought and paid for the watch. In this respect, the advertising and representation were false and deceptive.

Counsel supporting the complaint goes further, both in the evidence he offered and in his ninth proposed finding, to claim that charges are made for cleaning and oiling when watches are sent in for performance under the guarantee. There are two reasons why the Hearing Examiner does not accept this proposed finding. First, the complaint does not allege an unfair practice consisting of imposing, arbitrarily, cleaning and oiling charges when watches are sent in for performance of the guarantee. Second, although it is clear the respondents did make charges for cleaning and oiling under such circumstances, the Hearing Examiner is of the opinion that this is a service operation much like the lubrication of an automobile or care for any product in constant use, not normally considered an element of a guarantee unless expressly stated. While the Hearing Examiner recognizes this distinction, he does not condone respondents' practice of taking advantage of the fact that possession of the watch after being sent in for guarantee performance acts as a lever to compel a cleaning and oiling and payment therefor. The better practice would be if, upon examination, a cleaning and oiling is needed, respondents notified the owner of the watch that the same was needed and obtained his authorization to provide it at the charge specified. It may be noted in passing, however, that in some cases when the charge was protested, the respondents canceled it.

Careful consideration has been given to the proposed findings submitted both by counsel supporting the complaint and counsel for the respondents. Many of the proposals have not been accepted or have been considered substantially the same as findings ultimately made herein. To the extent that any proposed finding or conclusion is not adopted, either directly or in substance, the same has been rejected because of irrelevance, immateriality or lack of support in the evidence, as contrary to law, or as unnecessary.

After careful consideration of the entire record, the following are my

FINDINGS OF FACT

1. Respondent Waltham Watch Company (hereafter "Waltham") is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois.

2. During some of the time involved herein, the individual respondents, Harry Aronson, Ben Cole and Morris Draft were officers of Hallmark, Inc. a corporation which had been organized under the laws of the State of Illinois and had its office and principal place of business located where Waltham is now located. Hallmark, Inc. was merged into Waltham in June 1959.

3. The individual respondents thereupon became and have continued to be officers of the corporate respondent. They formulate, direct and control its acts and practices and they formulated, directed and controlled the acts and practices of Hallmark, Inc. prior to the merger. Their offices and principal place of business are the same as that of Waltham.

4. In the course and conduct of their business, respondents import watches, watch movements, cases and attachments, assemble and sell them. Respondents cause such products, when sold, to be transported from the State of Illinois and elsewhere to purchasers located in

various other States of the United States and in the District of Columbia.

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

6. Respondents have engaged in the practice of attaching or causing to be attached price tickets to their products. A price ticket is a label or tag upon which an amount in dollars and cents or dollars alone is printed for exhibition to or view by a prospective customer of the article being offered for sale. Such amount is a representation to the prospective customer that the article is reasonably worth the amount shown and that it is usually sold at that price.

7. Respondents also have disseminated or caused to be disseminated price lists, catalogue insert sheets, brochures, leaflets, newspaper and magazine advertisements and other forms of advertising in which certain amounts are shown as the retail prices of their products.

8. Respondents represent directly or indirectly by such materials that the amounts shown are the usual and regular retail prices.

9. In truth and in fact the prices on the tickets and in the materials mentioned are in excess of the prices at which said watches usually and customarily are sold at retail and are fictitiously retail prices.

10. Respondents, in their advertising, catalogues, brochures and other promotional material, represent that their products are "Guaranteed", "Fully Guaranteed" or "Lifetime Guaranteed".

11. In truth and in fact such representations as to guarantee are false, misleading and deceptive because, only after having purchased a watch, if the purchase be made by mail, or only after having carefully read the guarantee certificate which accompanies the watch at the time of purchase or after the purchase, if the purchase be made over the counter, is the customer informed of the fact that the guarantee is a limited guarantee and that a service charge is required to be paid by the customer incident to the performance of the guarantee, as limited.

12. The respondents purchase 17-jewel watch movements, made in and imported from Switzerland, add a device containing 4 or 8 synthetic jewels, affix attachments to the watches and case the movements. The watches are then represented, advertised, offered for sale, and sold by respondents as "21" or "25" jewel watches to retailers, catalogue houses and wholesale distributors.

13. By means of the statements that the said watches are 21- and 25-jewel watches, respondents represent that they contain 21 or 25 jewels, each of which serves a mechanical purpose as a frictional bearing and that each jewel provides mechanical contact at a point

of wear. In fact, the additional jewels in the device added by the respondents are not functional and the watches are not 21- and 25-jewel watches as represented.

14. The respondents have advertised their watches in newspapers, jewelers' trade magazines, nationally distributed magazines, catalogues, catalogue insert sheets and circulars, and on labels and packages. Among and typical but not all inclusive of the statements appearing in such advertising material have been the following:

> Waltham Watches—timing the Nation since 1850.
>
> Waltham Premier, a famous name, part of the American scene since 1850.

15. By means of such statements, respondents have represented directly or by implication that their watches are manufactured in the United States by the same Waltham Watch Company of Waltham, Massachusetts, which had been an old and well-known company and that they were the same interests which had controlled that company during times long prior to the acquisition by them of their control of the name thereof. Such statements are false, misleading and deceptive. In truth and in fact (a) such watches are not manufactured in the United States, (b) are not manufactured by what had been the old and well known Waltham Watch Company of Waltham, Massachusetts, and (c) respondents acquired only recently control of a company which had been incorporated in Delaware in 1957 under the name "Waltham Watch Company" to acquire assets involved in a "spin off" from the old Waltham Watch Company of Massachusetts.

16. By the said acts and practices respondents have placed in the hands of retailers and others means and instrumentalities whereby such retailers may mislead and deceive members of the purchasing public as to the regular and usual retail prices, the character of the guarantee, the number of frictional bearing jewels and the origin and manufacturer of respondents' watches.

17. Respondents in the course and conduct of the sale of their watches have been and are in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

18. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had and now has the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken beliefs that they are true and into the purchase of substantial numbers of their watches in consequence of such erroneous and mistaken beliefs. Substantial trade in com-

merce has been unfairly diverted thereby to the respondents from their competitors and substantial injury has been done to competition in commerce.

From all of which and upon the whole record I have made the following

CONCLUSIONS

A. That all the respondents, whether charged in their corporate, official or individual capacities, are engaged in the business of importing, assembling and distributing in commerce, watches from Switzerland and that the individual respondents are responsible for the acts and practices of the corporate respondent and for the acts and practices set forth above.

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

C. This proceeding is in the interest of the public.

D. The activities of the respondents, as more particularly set forth in the Findings of Fact, constitute unfair and deceptive acts or practices in violation of the Federal Trade Commission Act.

E. The order hereinafter set forth is necessary and reasonable to effectuate the purposes and policy of that Act.

ORDER

It is ordered, That respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850.", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

It is further ordered, That Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben Cole and Morris Draft individually and as officers of said corporation and their agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of pre-ticketing merchandise at an indicated retail price when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where offered for sale or when there is no generally prevailing retail price for such merchandise in such trade area.

2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalogue sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where offered for sale or when there is no generally prevailing retail price for such merchandise in such trade area.

3. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.

4. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise or the terms of any claimed guarantee affecting the same.

Decision of the Commission and Order to File Report of Compliance

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

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel supporting the complaint, and having determined that the hearing examiner's findings of fact and order should be modified and that respondents' appeal should be denied:

It is ordered, That the initial decision be modified by striking therefrom findings of fact numbered 8 and 9 on page 9 and substituting the following:

8. Respondents represent directly or indirectly by such materials that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory.

9. In truth and in fact respondents know that the retail prices set forth on catalog sheets and tickets attached or accompanying watches furnished by them to catalog house customers are appreciably in excess of the highest price at which substantial sales are made in their trade area by those customers. Thus, these retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of catalog house customers. This practice is dealt with in Guide III of the Commission's revised Guides Against Deceptive Pricing. To provide guidance and assistance to respondents in compliance, an order to cease and desist will be entered in the language of Guide III.

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

It is ordered, That respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stat-

ing in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

It is further ordered, That Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben Cole and Morris Draft, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area.

2. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.

3. Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by the above provisions of this order.

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

It is further ordered, That Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole and Morris Draft 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 Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

MAJESTIC ELECTRIC SUPPLY COMPANY, INC., ET AL.

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

Docket 8449. Complaint, Oct. 31, 1961—Decision, Feb. 28, 1964

Order requiring Skokie, Ill., mail order sellers of general merchandise such as watches, jewelry, cameras, furniture, appliances, sporting goods and others, to individuals, firms and associations, to cease misrepresenting that its merchandise is offered for sale at wholesale prices, and dismissing charges concerning deceptive pricing and saving claims.

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 Majestic Electric Supply Co., Inc., a corporation, and Charles Mostow, Arthur Mostow and Leon Gurny, 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 Majestic Electric Supply Company, 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 8250 Skokie Boulevard, Skokie, Illinois.

Respondents Charles Mostow, Arthur Mostow and Leon Gurny are individuals and officers of the said corporate respondent. They formulate, direct and control the policies, acts and practices of said corporate respondent, including those hereinafter set out. The address of each individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale of various articles of merchandise, including but not limited to watches, jewelry, cameras, furniture, appliances and sporting goods, to individuals, firms, corporations and associations located throughout the United States.

Respondents are also engaged in the wholesale sale and distribution of electrical supplies to hardware stores, electrical contractors, and other wholesale purchasers of such merchandise. This phase of respondents' business is not involved in this complaint.

Respondents cause, and have caused, their said merchandise, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and at all times mentioned herein have maintained a course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of such business in commerce is, and has been, substantial.

PAR. 3. Respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, have advertised the same by means of catalogs and circulars, circulated and disseminated by and through the United States mail to prospective purchasers located in various states other than the State of Illinois.

PAR. 4. Respondents in all of their advertising refer to themselves as wholesalers and to the prices of all of their merchandise as wholesale prices. Among and typical, but not all inclusive, of the statements appearing in respondents' catalogs and other advertising are the following:

> Majestic Wholesale Distributors; A fresh new way to buy wholesale; As a wholesale distributor for over 30 years Majestic etc.; Majestic is a distributor not a discount house, therefore you buy at true wholesale dealer costs.
>
> Retail $21.95—special dealer price $15.37
>
> Save the wholesale way, $13.66 Retail $29.98; Retail $1.79 now 88¢; ½ Carat Diamonds $88; $275 Values.
>
> Example of your hidden wholesale price, 36–1803–6950 Retail $111.50; Stock Number $69.50 your wholesale cost.
>
> Lowest wholesale prices—We don't just meet prices—Majestic sets the prices others cannot meet, that's why you save more.

PAR. 5. Respondents in referring to various articles of merchandise, set forth in their catalogs mailed to prospective purchasers who buy for their own use, set out two prices; one, a so-called coded price, is represented to be the wholesale price of the merchandise and the other, a higher price, is designated as "Retail". By means of such pricing methods, the aforesaid quoted statements, and other of like import not specifically set out herein, respondents represent, directly or by implication, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, as set out in their catalogs, at which the merchandise referred to is offered for sale, are wholesale prices; that the prices designated as "Retail" in their catalogs are the prices at which the merchandise referred to is usually and customarily sold at retail; and that the difference between their coded price and "Retail" price represents savings from the usual and customary retail prices in the trade areas where the representations are made.

PAR. 6. The aforesaid statements, representations and the implications arising therefrom are false, misleading and deceptive. In truth and in fact, respondents are not wholesalers with respect to many of the articles offered for sale and sold by them, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles are in excess of wholesale prices. In many instances the coded prices of many articles of merchandise set out in respondents' catalogs are not wholesale prices but are in excess thereof, and the prices designated as "retail" prices for many of their articles of merchandise are in excess of the prices at which said merchandise is usually and customarily sold at retail in the trade areas where such representations are made. The difference between respondents' said coded and "retail" prices does not represent savings from such usual and customary retail prices.

PAR. 7. At all times mentioned herein respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

PAR. 9. 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(a)(1) of the Federal Trade Commission Act.

Mr. John W. Brookfield, Jr., and *Mr. William A. Somers* for the Commission.

Marks, Marks and Kaplan, Chicago, Ill., by *Mr. William S. Kaplan*, and *Shaffer, Seelig, Mandel & Shapiro*, Chicago, Ill., for respondents.

Initial Decision by Wilmer L. Tinley, Hearing Examiner

AUGUST 13, 1962

The Federal Trade Commission, on October 31, 1961, issued and subsequently served its complaint, charging the respondents named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act by misrepresenting in their mail-order catalogs that they are wholesalers who sell all of their merchandise at wholesale prices, and by using fictitious comparative prices for their merchandise. By their answer, respondents made general denials of the alleged violations and entered certain special pleas.

A prehearing conference was held on January 29, 1962; continuous hearings in support of the complaint were held in Chicago, Illinois, South Bend, Indiana, and Beloit, Wisconsin, beginning on April 24 and ending on May 3, 1962; and defense hearings were held in Chicago, Illinois, on May 14, 15, and 16, 1962. The record of evidence, including the prehearing conference, consists of 1180 pages of transcript and 32 exhibits.

Proposed findings of fact, conclusions of law, and order with supporting briefs were filed by counsel for respondents on June 28, and by counsel supporting the complaint on June 29, 1962, and reply briefs were filed on July 13, and July 9, respectively.

After having carefully considered the entire record in this proceeding and the proposals and briefs of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties which are not adopted herein, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent, Majestic Electric Supply Company, Inc. (sometimes herein referred to as Majestic), 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 8250 Skokie Boulevard, Skokie, Illinois. It also operates under the registered trade name, Majestic Wholesale Distributors.

2. Respondent, Arthur Mostow, an individual, is vice president of Majestic. He functions as the executive head and general manager, and he formulates, directs, and controls the policies, acts and practices of Majestic, including those hereinafter set out. His address is the same as that of Majestic.

3. Respondent, Charles Mostow, an individual, is president of Majestic. He has been semi-retired, and has not actively participated in the business affairs of Majestic for a period of about five years. Respondent, Leon Gurny, an individual, is treasurer of Majestic. He is engaged primarily in the buying and servicing functions of the business, and he has no responsibility for the formulation, direction, or control of the policies, acts, or practices of Majestic which are challenged in this proceeding. At the conclusion of the presentation of evidence, a motion to dismiss the complaint as to the individual respondents, Charles Mostow and Leon Gurny, which was not opposed by counsel supporting the complaint, was granted. Appropriate effect will be given to that action in the order herein.

4. Majestic is engaged in the sale of various articles of merchandise, including, but not limited to, a general line of merchandise intended primarily for personal or household use, such as watches, jewelry, cameras, furniture, appliances, sporting goods, toys, linens, furs, and many others. It sells such merchandise to individuals, firms, and corporations located primarily in the midwestern section of the United States.

5. Majestic has been in business since 1929, and since 1948 it has done a substantial catalog mail order business. During each of the years 1960 and 1961, it mailed between 50,000 and 100,000 catalogs advertising its general line of merchandise to prospective customers located in various States of the United States; and during each of those years, its interstate sales through its catalogs exceeded $500,000.

6. The catalog division of Majestic is located in Skokie, Illinois, and, in addition to the corporate name, it also operates under the trade name, Majestic Wholesale Distributors. In the operation of this division, Majestic contacts its customers and sells its general line of merchandise principally through its mail order catalogs.

7. Majestic also operates a place of business in Chicago, Illinois, where it is engaged in the wholesale sale and distribution of electrical supplies to hardware stores, electrical contractors, and other wholesale purchasers. Although it formerly did so, it has not issued a catalog solely devoted to electrical supplies for approximately the past four years. Some items of electrical supplies, but not the complete line, are included in Majestic's general catalogs, but its sales of electrical supplies are not made primarily through its catalogs.

8. In all of its advertising, Majestic refers to itself as a wholesaler, and to the prices of all of its merchandise as wholesale prices. Among

and typical, but not all inclusive, of the statements appearing in Majestic's catalogs and other advertising are the following:

> Majestic Wholesale Distributors; a fresh new way to buy wholesale; as a wholesale distributor for over 30 years Majestic etc.; Majestic is a distributor not a discount house, therefore you buy at true wholesale dealer costs.
>
> Retail $21.95—special dealer price $15.37
>
> Save the wholesale way, $13.66 Retail $29.98; Retail $1.79 now 88¢; ½ Carat Diamonds $88; $275 Values.
>
> Example of your hidden wholesale price, 36–1803–6950 Retail $111.50 Stock Number $69.50 your wholesale cost.
>
> Lowest wholesale prices—We don't just meet prices—Majestic sets the prices others cannot meet, that's why you save more.

9. Majestic, in referring to various articles of merchandise set forth in its catalogs mailed to prospective purchasers, sets out two prices: one, a so-called coded price, which is its selling price, is represented to be the wholesale price of the merchandise, and the other, a higher price, is designated as "Retail".

10. The essential charges, in substance, are that by means of its pricing methods and representations, Majestic misrepresents: that it sells all of its merchandise at wholesale prices; that the "retail" prices in its catalogs are usual and customary retail prices; and that the difference between its selling prices and the "retail" prices shown in its catalogs represents savings from usual and customary retail prices.

11. On March 6, 1962, before the hearings began, the hearing examiner took official notice that in common and ordinary trade usage in connection with a general line of merchandise intended for personal or household use, the word "wholesale" means "to sell merchandise, usually in quantity lots, to one who intends to resell it in one form or another, or to use it for business needs as supplies or equipment"; and that the word "retail" means "to sell merchandise, usually in single units or in small quantities, to the ultimate consumer for personal or household use". The evidence received herein did not disprove, or materially limit or qualify, these noticed meanings for the purposes of this case.

Wholesale Prices

12. Majestic sends its catalogs to those whose names appear on its mailing lists, which include the names of persons who request a catalog and of persons from whom it receives orders for merchandise.

Eighty to ninety per cent of the names appearing on its mailing lists are those of business firms, but there is no indication as to what proportion of such business firms may be engaged in the resale of the type of merchandise advertised in the catalogs. Majestic sends its catalogs to anyone who requests them or who may be a potential customer, and makes no effort to determine whether any customer is purchasing for use, consumption, or resale. It makes some sales on credit, but the overwhelming bulk of its sales is made for cash.

13. During 1961 Majestic made sales through its catalogs to about 20,000 customers. It was able to determine that in a few cases its customers purchased for resale, but otherwise it has no knowledge and makes no inquiry to ascertain whether its customers are consumers or resellers.

14. Counsel supporting the complaint offered fifteen witnesses as members of the consuming public. The testimony of one was stricken; another had made no purchases from Majestic; and another was engaged in business activities in Albion, Indiana, and purchased from Majestic primarily for resale or for use for business needs as supplies or equipment. (On the basis of 1960 U.S. Census figures, it is officially noticed that the population of Albion is approximately 1300.)

15. The remaining twelve consumer witnesses had made purchases of single units or small quantities from Majestic for personal use or as gifts. One was a dentist who received Majestic's catalog at his office; two ordered from catalogs obtained from acquaintances; four ordered from catalogs which were addressed to business firms, including a law firm and a county highway department; and five received the catalogs directly in their own names. One consumer witness ordered merchandise from Majestic in the name of her employer, a county highway department, because she thought the order would be accepted only if she were an employee; and another ordered in the name of her husband's oil company. Although all of them were not specifically questioned on the point, the testimony of three of these witnesses affirmatively indicated that they considered Majestic's catalogs, and similar catalogs of others, to be wholesale catalogs.

16. The record discloses, therefore, that Majestic sells in single units or in small quantities to ultimate consumers for personal or household use. The record as a whole supports the inference that it does so extensively, and that such sales are substantial and constitute a substantial part of the sales made by Majestic through its catalogs. Accordingly, it is not a wholesaler in transactions in which many articles of merchandise are offered for sale and sold by it.

17. There can simultaneously be more than one wholesale price for an item. For example, the price by a manufacturer to a distributor

for a particular item is frequently lower than the distributor's price to a jobber, which, in turn, is frequently lower than the jobber's price to a retailer. But they are all wholesale prices. A retailer may also sell a particular item at a wholesale price, or at a price equivalent to a wholesale price, for any of a variety of reasons, such as an advertising leader, a quantity sale to an industrial user, an accommodation sale to another retailer, clearance sales of overstocked or obsolete items, etc. It thus becomes necessary to determine the meaning of "wholesale prices" as the term is used by Majestic.

18. One sporting goods dealer in Chicago, who also sells by mail order primarily at retail, and 24 dealers in South Bend, Indiana, and Beloit, Janesville, and Waukesha, Wisconsin, who sell essentially at retail in their local areas, were called as witnesses by counsel supporting the complaint. It is officially noticed, on the basis of 1960 U.S. Census figures, that the Indiana and Wisconsin towns in which these dealers are located range in population from about 30,000 to about 130,000. They testified as to the prices at which each of them purchased in 1961 one or more of an aggregate of 71 of the various items of merchandise which were also advertised and sold in 1961 by Majestic through its catalogs. Most of these witnesses purchased directly from the manufacturers, but in some instances they also purchased certain of the items in question from distributors or jobbers. In the great majority of instances, the prices at which they purchased were substantially below the wholesale prices shown in Majestic's 1961 general catalog.

19. Respondents presented evidence from a mail order house in Chicago which sells a general line of merchandise similar to that sold by Majestic. It distributes catalogs throughout the United States, including specifically the States of Indiana and Wisconsin. It is the policy of this mail order house, expressed in its catalogs and generally adhered to in practice, to sell to retail dealers in small towns, usually of 5,000 population or less, who have established credit with it. It discourages sales on a cash basis, and the overwhelming proportion of its sales are made to dealers. In 1961, this mail order house did not sell all of the articles of merchandise with respect to which the dealers offered in support of the complaint testified. It did, however, sell approximately half of the same items, and on those items the prices at which it sold to dealers were the same, or substantially the same, as Majestic's selling prices. Largely on the basis of this evidence, respondents contend that Majestic's prices on these items were in fact wholesale prices.

20. Although there is evidence that a substantial part of the sales by Majestic through its catalogs are retail sales, there is also uncon-

tradicted evidence that a substantial part of its sales are to retailers, and are therefore wholesale sales. In some of its sales, therefore, Majestic functions as a wholesaler, and in others as a retailer. All of its sales of the same items, however, are made at the same prices, which in some transactions are wholesale prices and in some transactions are retail prices.

21. Whether or not it is deceptive to represent as "wholesale prices" the prices at which sales are regularly made in retail and in wholesale transactions depends upon the circumstances in which such sales are made and the understanding which the representation is likely to convey to the purchaser.

22. Majestic uses two prices in conjunction with each item of merchandise described in its catalogs. One price, which is designated "Retail", appears in plain figures; and the other price, which is designated as Majestic's wholesale price, appears in code. The coded price is substantially lower than the "retail" price, and is the price at which Majestic actually sells to all customers.

23. The coded price used to show Majestic's actual selling price is explained on the inside of the front cover of the catalog:

> Your wholesale price is concealed in the stock number of each item, which is made up of 3 groups of numerals separated by hyphens. The right hand group represents your wholesale cost. Simply point off two places from the right in this group of numerals and add the decimal. This is your wholesale cost price.

In this connection, it is explained, for example, that the stock number 36–1596–325 contains Majestic's "wholesale" price of $3.25.

24. The catalogs representing that Majestic sells at wholesale prices are used extensively by consumers in making purchases. Some of the consumers who testified considered these, and similar catalogs distributed by others, to be "wholesale catalogs", and in some instances they felt that they could not purchase through these catalogs directly in their own names, but must purchase in the name of some business firm. Some who had not compared the prices assumed that the "wholesale prices" in these catalogs were lower than the prices at which they could purchase the same articles in local retail stores.

25. Examination of Majestic's catalogs discloses that the term "wholesale prices", as used in them, conveys the impression that it refers to prices at which the articles in question are ordinarily sold to retail dealers who intend to resell them in their local areas at a profit. This impression is increased and emphasized by showing the "wholesale price" in a code which, although easily decipherable, is ostensibly confidential, and by showing in connection with it in plain figures a comparative and substantially higher "retail" price for the

article. The encoding of Majestic's actual selling prices in its catalogs clearly constitutes a device which lends an aura of credibility to the representation that they are wholesale prices, while avoiding the likelihood that they may be concealed even from obtuse prospective purchasers.

26. From the record in this case, it is clear that in some instances consumers purchase from Majestic through its catalog, rather than from local retailers, in reliance, among other things, upon their understanding, engendered by its catalogs, that Majestic is a wholesaler and that it sells at wholesale prices. Based upon the representations in the catalog, consumers are warranted in believing that the prices which they pay to Majestic are equivalent, or substantially equivalent, to the prices which the local retailers, or at least some of the local retailers, in their areas pay for the same articles for the purpose of reselling them at a profit.

27. The local retailers who testified in this proceeding purchased the articles of merchandise sold by Majestic, with respect to which they testified, at prices which, with very few exceptions, were substantially below the "wholesale" prices shown in Majestic's catalog. There is no evidence that other local retailers in the same areas purchased such articles of merchandise from higher cost wholesale sources, from Majestic or elsewhere, at, or reasonably near, the "wholesale" prices shown in Majestic's catalog.

28. It is concluded, therefore, that, as used by Majestic in its catalogs, the term "wholesale price" means the price at which merchandise sold by Majestic is usually and customarily sold at wholesale in the area or areas where the representation is made. Majestic is not a wholesaler in transactions in which many articles of merchandise are offered for sale and sold by it. In many instances such articles are not offered for sale or sold by Majestic at the usual and customary wholesale prices of such articles in the trade area or areas where such offers or sales are made, but its prices are, in many instances, in excess of such wholesale prices.

Retail Prices

29. In about January preceding the year shown on the cover, Majestic begins contacting its suppliers, looking toward the preparation of its general catalog; and during the latter part of August it begins distributing the catalog. Approximately 50% of the pages in the catalog are furnished by the manufacturers of the merchandise appearing thereon, and the other pages are prepared by Majestic,

using in large measure the art work, literature and information supplied by the manufacturers.

30. The comparative prices in Majestic's general catalog, which are designated "Retail", are based upon retail prices suggested by the manufacturers or upon determinations made by Majestic. The coded prices at which Majestic sells are based on dealer prices suggested by the manufacturers or upon Majestic's own determination of its gross profit, which varies on different items, but which averages approximately 23%.

31. The complaint alleges that, as used in its catalogs, Majestic represents that the prices designated as "Retail" are the prices at which the merchandise referred to is usually and customarily sold at retail. No evidence was offered in support of the complaint as to the public understanding of the term "retail" as used in Majestic's catalogs. Counsel supporting the complaint relied upon previous decisions in cases before the Federal Trade Commission involving the use of this and equivalent representations.

32. Respondents denied that the term "retail", as used in its catalogs, constitutes a representation that the prices so designated are the prices at which the merchandise referred to is usually and customarily sold at retail. In support of their position, they presented, *inter alia*, the testimony of two expert witnesses, one a professor in the School of Business, Northwestern University, and the other a professor in the Graduate School of Business, University of Chicago. Both are doctors of philosophy with considerable background and experience in subjects relating to marketing, and both taught courses in marketing.

33. Both expert witnesses professed unfamiliarity with the term "usual and customary price" either in their own experience or in marketing literature. Both also expressed the opinion that there is no such thing as a usual and customary retail price for a particular article of merchandise in any given market area, with the exception of the limited number of articles upon which manufacturers effectively maintain retail prices. They indicated that there could be no usual and customary price in a market unless all of the retailers of an article sold it at the same price for a long period of time.

34. In expressing their opinions, they discussed the difficulty of determining a prevailing specific price at any one place at any one time. Their discussions indicated that this difficulty arises, among other things, from the fluctuation of retail prices in a particular market area from time to time, the variations of retail prices among different categories of retailers in the same market area, the varia-

tions of retail prices between different market areas, the imprecision of market area definitions, and the effect on retail prices of the different marketing problems involved in selling various types of merchandise.

35. The expert witnesses also testified that the terms "retail price", "list price", "suggested retail price", "manufacturer's suggested retail price", and similar terms are interchangeable, and have substantially the same meanings. They also discussed in some detail their opinions that prices designated with these terms, used in conjunction with actual selling prices, afford useful and helpful information and guides to consumers.

36. One of the expert witnesses was of the opinion that a suggested retail price used in advertising does not indicate to the consumer the usual and customary price at which the article is sold, but that it may indicate the highest retail price at which it is sold. The testimony of the other expert witness was substantially to the same effect, except that he was of the opinion that the term "retail price" does not necessarily mean to the consumer that the article has ever been sold in any market in the United States at the indicated price. Neither of these witnesses had ever made a survey or a study to determine what the term "retail price" means to consumers.

37. In summary, the opinions of the two expert witnesses are in direct conflict with the frequently expressed opinion of the Federal Trade Commission on precisely the same question. For example, in its recent opinion in *Giant Food, Inc.* (Docket No. 7773, issued on June 13, 1962) [61 F.T.C. 326], the Commission stated:

Rightly or wrongly, many people believe that a manufacturer's "suggested list price" expresses his considered and expert judgment as to the approximate retail value of his product, a judgment which necessarily would be inexpert and unsound if it did not in fact reflect his knowledge of what the product actually and generally does sell for in the area. (p. 347)

In that case the finding that there is a public understanding that the term "manufacturer's suggested list price" reflects the usual and customary retail price in the trade area rested on "overwhelming" evidence in the form of testimony of consumer witnesses (Op., pp. 5–6). In appraising the consumer testimony in that case, however, the Commission made it clear that such evidence was not necessary, quoting with approval its statement in *Manco Watch Strap Co.* (Docket No. 7785):

"This is an area of administration that has evolved to a point at which the accumulated experience and knowledge of the Commission may properly be invoked in exercising its fact-finding function." (Op., fn. 2, p. 347)

38. On the authority of the Commission's recent decisions in *Giant Food, Inc.*, (*supra*) and *The Regina Corporation, et al* (Docket No. 8323, Opinion June 13, 1962) [61 F.T.C. 983, 996], and the authorities therein cited, further analysis of the considerations here presented is not warranted. If there is any difference in the meanings of the terms "manufacturer's suggested list price" and "retail price", the latter is clearer and more specific, and leaves no room for interpretation or misunderstanding.

39. It is, accordingly, found that, as used in its catalogs, Majestic represents that the prices designated as "Retail" are the prices at which the merchandise referred to is usually and customarily sold at retail in the areas where its catalogs are distributed. No evidence was required in the present record to establish this meaning. Insofar as the opinions of the expert witnesses who testified are at variance with this meaning, they are rejected as being inconsistent with the common and ordinary meaning of the term "retail price" and with the public understanding of that and equivalent terms as determined by the Commission in many prior proceedings.

40. Counsel supporting the complaint offered the testimony of retailers concerning the prices at which they sold in 1961 seventy-one of the various items of merchandise which were also advertised and sold in 1961 by Majestic through its general catalog.

41. One of these retailers was a sporting goods dealer with four stores located in Chicago and three in the suburbs. This dealer also sells by mail order, primarily at retail, through a catalog distributed all over the United States. This dealer testified as to his 1961 prices on seven items, one fishing rod and six reels. No other witness in support of the complaint testified concerning the retail prices of any of these seven items. The Chicago dealer testified that his prices varied greatly from those of his competitors, and that it was not the policy of certain of his competitors, who were identified, to cut prices as much as he did. It is apparent, therefore, that the record does not establish that the prices at which this retailer sold these seven items were the prices at which they were usually and customarily sold at retail in his area of competition. Since no other witness in support of the complaint testified with respect to them, the record provides no basis for a finding that Majestic misrepresents the usual and customary retail prices of these seven items.

42. Testimony in support of the complaint was also received from twenty-four dealers in South Bend, Indiana, and Beloit, Janesville, and Waukesha, Wisconsin, which, as hereinbefore officially noticed, are towns ranging in population from about 30,000 to about 130,000.

These dealers sell essentially at retail in their local areas, and they will sometimes herein be referred to collectively as the local dealers. Their testimony related to sixty-four items of merchandise which were advertised and sold by Majestic through its 1961 general catalog.

43. Thirty of these items were sold in 1961 by one or more of the local dealers at prices which were the same, or substantially the same, as the comparative "retail" prices appearing in Majestic's catalog. As to these items, which include photographic film, cameras, projectors, pens, typewriters, baseballs, soft balls, golf balls, and shears, the record discloses that the comparative "retail" prices advertised by Majestic were not in excess of the usual and customary prices in the areas in which the dealers were located.

44. Two of the items, vacuum cleaners, were advertised in Majestic's 1961 general catalog at "retail" prices substantially in excess of the prices at which they were sold by the local dealers in 1961. These two vacuum cleaners were also included in the 1961 Spring and Summer Catalog of Majestic, which advertised only a part of its whole line of merchandise. In that catalog, the comparative retail prices shown for the two vacuum cleaners in question were substantially the same as the prices of the local dealers. There is no evidence as to whether or not these items have subsequently been advertised by Majestic at excessive retail prices. It is unnecessary to determine whether or not Majestic's 1961 Spring and Summer Catalog was adequate to correct its advertising of excessive retail prices on these items in its 1961 general catalog. The decision herein does not depend upon Majestic's advertising of these two items, and accordingly, for the purposes of this decision, they will be disregarded.

45. Two other items, photographic projectors, were advertised in Majestic's 1961 general catalog at "retail" prices which were the same as the prices at which they were sold by the local retailers during the first two months of 1961. In March of 1961, however, the manufacturer of these items reduced its suggested retail prices substantially below the "retail" prices advertised in Majestic's 1961 general catalog, and the local dealers thereafter sold at the lower suggested retail prices. It is unnecessary to determine whether or not Majestic's "retail" prices on these two items contained in copies of its 1961 general catalog distributed after the March, 1961 price reduction by the local retailers, are justified as representations that they were the prices at which the items were sold by others in the recent regular course of business. The decision herein does not depend upon Majestic's advertising of these two items, and accordingly, for the purposes of this decision, they will be disregarded.

46. This leaves for consideration the advertising by Majestic in its 1961 general catalog of thirty items at comparative "retail" prices substantially in excess of the prices at which they were sold in 1961 by the local retailers. The evidence with regard to these items is summarized in the tabulation which appears below. Some of these items were sold by several of the local retailers, and in some instances each of them sold at the same prices and in others their prices varied. Except as otherwise specifically noted, the highest price at which any of the local retailers sold an item is the price included in the tabulation. The tabulation shows the number of local retailers in each town who testified with respect to each item. Beloit and Janesville are located approximately thirteen miles apart, and are in the same trade area.

Comparison of (1) the retail prices of local dealers with (2) Majestic's advertised comparative retail prices and with (3) Majestic's actual selling prices in 1961 on 30 items

Item	(1) Highest local retail price	(2) Major advertised comparative retail price	(3) Major actual selling price (code)	Number of dealers in South Bend, Beloit, Janesville, and Waukesha			
				SB	Be	Ja	Wa
Hoover 31	[1] $59.95	$79.95	$53.97	3	2	------	1
attachment set for Hoover 31	9.95	15.95	9.90	1	------	------	------
Hoover 67	89.95	[2] 109.95	73.97	3	2	------	------
Hoover 66	79.95	99.95	68.97	3	1	1	------
Rawlings:							
Stan Musial Trap-Eze glove	32.50	39.95	25.90	1	------	1	------
Stan Musial autograph glove	12.95	15.95	10.40	1	1	------	------
Eddie Matthews autograph glove	17.95	21.00	13.60	1	1	------	------
Mickey Mantle autograph glove	5.95	7.45	4.90	1	1	------	------
Remington:							
Quiet-riter	126.50	137.85	119.95	2	1	------	------
Travel-riter	75.00	85.35	69.95	1	------	------	------
Royal Futura 800	126.50	142.28	109.95	4	2	1	------
Royal Diana	95.00	126.07	89.88	2	------	------	------
Royalite	53.11	79.75	49.95	3	1	1	------
Smith-Corona Galaxy	130.00	149.27	109.77	4	2	1	------

See footnotes at end of table.

Comparison of (1) the retail prices of local dealers with (2) Majestic's advertised comparative retail prices and with (3) Majestic's actual selling prices in 1961 on 30 items—Continued

Item	(1) Highest local retail price	(2) Major advertised compara- tive retail price	(3) Major actual selling price (code)	Number of dealers in South Bend, Beloit, Janesville, and Waukesha			
				SB	Be	Ja	Wa
Spalding:							
Rocky Colavito glove	11.50	13.45	8.80	1	------	1	1
Super Trappper mitt	10.95	13.45	8.80	------	------	------	1
Yogi Berra mitt	17.95	21.00	13.60	1	------	1	1
Pancho Gonzales racket	9.95	12.45	8.73	------	------	1	1
Doris Hart racket	10.95	12.45	8.73	1	------	1	1
Ashley Cooper racket	14.95	17.50	12.30	1	------	------	1
Fast-Play racket	4.95	6.00	4.30	1		1	1
Official basket-ball	7.50	8.45	5.60	1	------	1	------
Bill Sharman basketball	9.95	12.45	8.00	------	------	1	------
Wilson:							
Hol-Hi golf balls dozen	10.95	15.00	10.00	1	------	------	------
12-in softball	2.95	3.50	2.35	1	------	------	------
Little League baseball	2.00	2.40	1.65	1	------	------	------
Luis Aparicio glove	13.95	17.00	11.20	1	------	------	------
Nelson Fox glove	22.95	32.00	20.80	1	------	------	------
Championship tennis balls (3)	2.35	2.75	2.10	1	------	------	------
TV basketball	18.95	21.25	14.13	1	------	------	------

[1] One dealer in Beloit sold at $64.95. The other 5 dealers sold at $59.95 or below.
[2] Majestic's 1961 Spring and Summer Catalog shows $99.95.

47. The local dealers, whose testimony is summarized in the foregoing tabulation, were not so-called discount stores, and there is nothing to suggest that they followed cut-price policies or policies of underselling competition generally. On the contrary, they were essentially department stores and specialty stores, including camera shops, sporting goods stores, and typewriter stores, and their testimony generally was to the effect that they sold their merchandise at

prices as high as they were able to obtain under the local competitive conditions which they were required to meet.

48. The prices of the local retailers reflected the general competitive level of retail prices in their local areas. The items of merchandise referred to in the foregoing tabulation were not usually and customarily sold at retail in 1961 in those trade areas at higher prices. As to those items, therefore, the prices designated as "retail" in Majestic's 1961 general catalog were substantially in excess of the prices at which such items were usually and customarily sold at retail in those trade areas in 1961.

49. The local dealers discussed their sources of the merchandise with respect to which they testified, the prices which they paid, and the margins of profit which they endeavored to obtain. They also discussed the problems and considerations which affected them in determining their selling prices, including price fluctuations from time to time, price variations among different categories of retailers, the activities of discount stores, the effects of prices in nearby market areas, price changes by manufacturers, and the influences of suggested retail prices and of resale price maintenance. Two witnesses who were presented by respondents as experts in the field of marketing, testified in some detail that these are factors normally affecting prices in retail markets.

50. The record indicates that the competitive experiences and problems of the dealers who testified were not peculiarly different from those of other dealers similarly situated. On the basis of this record, there is substantial reason to presume that the competitive conditions existing in the towns of South Bend, Indiana, and Beloit, Janesville, and Waukesha, Wisconsin, are not peculiarly different from competitive conditions existing in other towns of comparable size in the midwestern section of the United States. It is, accordingly, inferred that the competitive level of retail prices in those towns is generally representative of such prices in many other areas in which Majestic's catalogs are distributed.

51. Majestic's general catalog advertises more than 10,000 articles of merchandise. The evidence that it advertises comparative "retail" prices in excess of usual and customary retail prices is limited to thirty items. Respondents contend that the evidence reflects an insubstantial quantity of proof and does not sustain the burden of supporting the allegation that the prices designated by Majestic as "retail" prices on *many* of its items were in excess of usual and customary retail prices.

52. Counsel supporting the complaint offered evidence of the selected items as typical of Majestic's method of pricing, and the record indicates that the selected items did not represent isolated or exceptional instances. On thirty items the prices designated by Majestic as "retail" were substantially in excess of usual and customary retail prices, and on at least as many other items they were not. The evidence is sufficient to be convincing that there was a substantial number of items in each category, but there is nothing to indicate what proportion of the more than 10,000 items in Majestic's catalog was in each category. Presumably the proof with respect to both categories could be multiplied many times without being materially more definitive or conclusive on this point.

53. Evidence must be limited to practical dimensions. The circumstances here involved, as disclosed by the record as a whole, require the presumption that the evidence with regard to specific items and prices is representative of Majestic's method of pricing generally. The evidence supports the allegation that the prices designated by Majestic as "retail" prices for many of its articles of merchandise are in excess of the prices at which such articles of merchandise are usually and customarily sold at retail in the trade areas where such representations are made.

54. Majestic's use in its catalogs of comparative retail prices for many of its articles of merchandise is, therefore, false, misleading, and deceptive. To the extent that Majestic sells such articles to consumers for personal or household use, the comparative retail prices constitute misrepresentation of the prices at which such articles are usually and customarily sold at retail in the trade areas where such sales are made. To the extent that Majestic sells such articles to dealers for resale, the comparative retail prices constitute misrepresentation of the retail value of such articles; and they provide such dealers with an instrument for misrepresenting to their customers the usual and customary retail prices of such articles.

55. The use by Majestic in its catalogs of its actual selling price, which is in code and which is represented as a wholesale price, in conjunction with a higher comparative price, which is designated as "retail", constitutes the representation that the difference between the two prices represents savings from the usual and customary retail price in the trade areas where the representation is made. The difference between Majestic's actual selling price and the comparative retail price which it advertises for many of its articles of merchan-

dise does not represent savings from usual and customary retail prices.

Request for Stay of Order

56. Respondents have identified twenty-five or more direct competitors in the "catalog industry" who are engaged in businesses similar to that of Majestic. The form and context of the catalogs of these competitors are similar to those of Majestic, the same general line of merchandise is offered, the same type of dual price system is used, including coded selling prices and comparative retail prices, similar wholesale status representations are made, and some of these competitors solicit the same types of customers in the same general areas. It is contended that this is a relevant industry of limited membership to which Majestic belongs, and that the practices and competitive features of this industry are such as to indicate that all of its members should be treated in identical fashion.

57. In these circumstances, respondents contend that if Majestic were required to discontinue its present method of pricing while its competitors in the catalog industry are left unhindered, it would be placed at a serious competitive disadvantage. They assert that it would be preempted from competing effectively and that it would be put out of business in the catalog field. These contentions are supported by the uncontradicted opinion testimony of Majestic's chief executive officer and the two expert witnesses who testified. Respondents urge, therefore, that if an order to cease and desist should be issued in this matter, its effective date should be stayed until similar orders are entered and made effective against all other members of the catalog industry.

58. There are now outstanding at least two proceedings by the Federal Trade Commission, charging similar violations by companies identified by respondents as competitors of Majestic in the "catalog industry", *National Porges Company, et al* (Docket No. 8248) and *Continental Products, Inc., et al* (Docket No. 8517), but this record does not disclose whether or not corrective action is warranted in those proceedings. An official of another company identified as a catalog competitor was called as a witness by respondents. That company follows a policy and method of operation substantially different from Majestic, and this record does not disclose whether or not its representations, under the conditions of its policy and operations, are false, misleading, and deceptive. There is no basis in this record for determining whether or not all or any of the other catalog

competitors identified by respondents are also engaged in unfair and deceptive practices similar to those of Majestic, or whether or not or when proceedings may be instituted by the Federal Trade Commission against any of them.

59. The record discloses, however, that Majestic's competition is not limited to other members of the "catalog industry" identified by respondents. It is also in competition with the many local retailers who operate stores in the area in which its catalogs are distributed. Consumer customers of Majestic who appeared as witnesses testified generally that they made purchases through its catalogs, rather than from local stores, largely because they believed its prices were lower than those of local retailers. At least two major catalog mail order companies, Sears Roebuck and Company and Montgomery Ward & Company, do not use a dual price method of advertising in their catalogs. Although respondents contend that no valid comparison can be drawn between the catalogs of those companies and of Majestic, there can be little doubt that those companies are competitive with Majestic.

60. The record also discloses that the dual method of pricing is not limited to Majestic's direct competitors in the catalog industry. The practice of advertising selling prices in conjunction with higher retail prices based upon manufacturers' suggestions or other factors is frequently used by the local dealers who testified, and there is testimony in the record that the practice is widespread among local retailers generally. It is also apparent from the numerous proceedings instituted and corrective orders issued by the Federal Trade Commission, that the practice of fictitious price advertising is widespread and warrants vigorous remedial action.

61. Under all of the circumstances, it appears that it would be contrary to the public interest to postpone an order prohibiting continued violations of law by these respondents for an indefinite period while the practices of a selected group of Majestic's competitors were examined and their propriety determined. Any attempt on a broad basis to postpone effective action against particular offenders until all of their competitors are similarly restrained would be hopelessly abortive.

62. Respondents' unfair and deceptive acts and practices have the capacity and tendency to mislead and deceive Majestic's customers, to provide others with instruments for deception, and unfairly to injure its competitors, and they should be stopped. In the Matter of *The Clinton Watch Company, et al* (Docket No. 7434), with respect to a request for a stay of the effective date of an order against

fictitious pricing, the Commission said in its opinion of July 19, 1960 [57 F.T.C. 222, 231]:

We have carefully considered the grounds set forth by respondents in support of this request, and it is our opinion that the public interest far outweighs the private considerations urged by respondents.

Similar circumstances are present here, and the request by these respondents for a stay of the effective date of an order must be governed by the same considerations. It is, therefore, denied.

CONCLUSIONS

1. The use by respondents, Majestic and Arthur Mostow, of the false, misleading, and deceptive statements, representations, acts, and practices, as herein found, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were, and are, true and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

2. The aforesaid acts and practices of said respondents were, and are, all to the prejudice and injury of the public and of Majestic's 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(a)(1) of the Federal Trade Commission Act.

3. Respondents Charles Mostow and Leon Gurny, in their individual capacities, have not been responsible for the formulation, direction, or control of the acts or practices of Majestic which are challenged in this proceeding.

ORDER

It is ordered, That respondents Majestic Electric Supply Company, Inc., a corporation, and its officers, and Arthur Mostow, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Any merchandise is offered for sale or sold at a wholesale price unless the price at which it is offered is, in fact, the price at which the merchandise or product is usually and customarily sold at wholesale in the trade area or areas where the representation is made.

(b) Any amount is the usual and customary retail price of merchandise when it is in excess of the price at which the merchandise is usually and customarily sold at retail in the trade area or areas where the representation is made.

(c) Any savings are afforded in the purchase of respondents' merchandise from the usual and customary retail price in respondents' trade area unless the price at which said merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold in said trade area or areas where the representation is made.

2. Misrepresenting in any manner the amount of savings available to purchasers of respondents' merchandise or the amount by which the price of said merchandise has been reduced from the price at which it is usually and customarily sold at retail in the trade area or areas where the representation is made.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents, Charles Mostow and Leon Gurny, in their individual capacities.

Opinion of the Commission

FEBRUARY 28, 1964

The complaint in this matter charges respondents with violating Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents (except for respondent Charles Mostow and Leon Gurny as to whom the complaint was dismissed) to cease and desist from the practices found to be unlawful. Respondents, having been granted a petition for review, have filed exceptions to the initial decision and the matter is now before us for consideration.

The respondent corporation, Majestic Electric Supply Company, Inc., hereinafter referred to as Majestic, is engaged in the business of selling general merchandise such as watches, jewelry, cameras, furniture, appliances, sporting goods, toys, linens and furs. Since 1948 it has sold merchandise through catalogs and circulars distributed through the mail to customers located in about 25 States of the United States. During each of the years 1960 to 1961 it distributed between 50,000 and 100,000 catalogs in commerce and during each of these years its interstate sales through its catalogs exceeded $500,000.

In all of its advertising, Majestic is referred to as a wholesaler and the prices of all of its merchandise are designated as wholesale prices. The following representations are typical of those appearing in Majestic's catalogs and other advertising:

> Majestic Wholesale Distributors; A fresh new way to buy wholesale; As a wholesale distributor for over 30 years Majestic etc.; Majestic is a distributor not a discount house, therefore you buy at true wholesale dealer costs.
>
> Retail $21.95—Special dealer price $15.37.
>
> Save the wholesale way, $13.66 Retail $29.98; Retail $1.79 now 88¢; ½ Carat Diamonds $88; $275 Values.
>
> Example of your hidden wholesale price, 36-1803-6950 Retail $111.50, Stock Number $69.50, your wholesale cost.
>
> Lowest wholesale prices—We don't just meet Prices—Majestic sets the prices others cannot meet, that's why you save more.

Majestic, in referring to various articles of merchandise set forth in its catalogs mailed to prospective purchasers, sets out two prices: one, a so-called coded price, which is its selling price, is represented to be the wholesale price of the merchandise, and the other, a higher price, is designated as "Retail".

The complaint alleges, in effect, that respondents through use of claims such as those quoted above have falsely and deceptively represented that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, at which their merchandise is offered for sale, are wholesale prices; that the prices designated as "Retail" are the prices at which the merchandise referred to is usually and customarily sold at retail; and that the difference between their coded price and "Retail" price represents savings from the usual and customary retail prices in the trade areas where the representations are made.

Respondents have taken numerous exceptions to the initial decision, contending that the evidence does not support the findings upon which the examiner's conclusions as to the deceptive nature of respondents' practices are predicated.

With respect to the allegations concerning respondents' use of "wholesale price" claims, respondents do not deny that they have held themselves out as wholesalers or that they have represented that the prices at which their merchandise is sold are wholesale prices. They maintain that these claims are true, arguing that the majority of their sales are made either to retailers or to other business firms that buy in quantity for use as gifts, premiums, etc. Respondents further contend that the only evidence offered by counsel supporting the complaint to prove that they are not wholesalers was the testimony of several consumer witnesses who had purchased from respondents "isolated products upon isolated occasions" and that it cannot be inferred from such evidence that respondents sell primarily to the ultimate consumer.

We think the basic issues raised by the aforementioned allegations are whether respondents generally sell to the ultimate consumer and, if so, whether the representations that they are selling at wholesale prices have the capacity and tendency to mislead such purchasers.

As to the first question, we have no doubt from our review of the record that respondents sell to the consuming public as a general practice. Looking first at respondents' catalogs, we note that various representations appearing therein are directed to persons who ordinarily buy at retail prices merchandise of the type featured in the catalog. Such a claim as "Save the Wholesale Way" is susceptible of no other interpretation. Certainly, retailers who customarily buy at wholesale prices would not consider the "wholesale way" as a different method of doing business or as a new way of saving. The reader is also invited to visit respondents' "Buying Centers" in Chicago and Skokie, Illinois, and is assured of "Ample Free Parking," "Car Loading Service" ("When your parcels are difficult to carry, we load them safely into your car."), and "No salesmen to bother you, and No Waiting, No Lines" ("Faster than self-service, incomparably faster than dep't. store service * * *"). Those who order from the catalog and wish to have the merchandise shipped by truck or rail are given the following instructions:

If your address is a Post Office Box or Rural Route, give brief directions to assist Carrier to locate your *house*. For example: South on Route 66, turn right at Super Mart, *first white house on left*. (Emphasis added.)

Doctors, lawyers, architects, and other "people of professional standing" are advised that they can open a Majestic charge account. A special sales catalog, two hundred thousand copies of which were distributed, states that Majestic had "One Price—The Lowest—To Everyone." (This catalog was distributed in addition to Majestic's regular catalog.)

The testimony of Arthur Mostow, executive head and general manager of respondent corporation, is also most revealing. Mostow admitted that Majestic's catalogs are sent to anyone who asks for one and that no investigation is made to determine the purpose for which the merchandise is purchased.[1] He further testified that sales were made to the public at the "coded" or "wholesale" prices in Majestic's "Buying Centers". Mostow also testified that the "average person" ordering from Majestic must pay cash or have the merchandise

[1] Mostow could not recall from memory the name of a single retailer out of 20,000 customers.

sent c.o.d. and that this type of transaction represented the great bulk of the sales made by Majestic. This same witness also testified that Majestic's *selling price* is determined by applying its average mark-up over cost of approximately 23%.[2]

Counsel supporting the complaint also called the aforementioned consumer witnesses to show that members of the public could, and did, purchase merchandise from Majestic for their own use. Their testimony on this point serves to corroborate the other evidence of record adduced to show the true nature of the business operated by respondents. It is our opinion, therefore, that the evidence adduced by counsel supporting the complaint establishes that respondents sell generally to the ultimate consumer in the ordinary course of their business.

It is also apparent from the testimony of respondents' two expert witnesses that they believed that Majestic was selling as a retailer. As a matter of fact, one of them testified that the only difference between Majestic and a discount house was that Majestic sold through catalogs whereas the discount house sold directly to the purchaser; and that there would be no difference between them if the discount house sold through a catalog.[3]

The next question to be decided is whether members of the public would be deceived by the representations that respondents are selling to them at wholesale prices. The examiner held in this connection that the term "wholesale prices" is understood to mean the prices at which the articles in question are ordinarily sold to retail dealers who intend to resell them in their local areas at a profit. The hearing examiner further found, and the record shows, that retail dealers in various trade areas purchased articles of merchandise sold by respondents at prices substantially below the "wholesale prices" shown in respondents' catalog.

Respondents contend, however, that their coded prices are wholesale prices since the examiner has also found that a substantial part of their catalog sales are "to resellers, and are therefore wholesale sales."[4] In making this argument, respondents are in effect saying that such sales are literally and technically wholesale transactions

[2] Respondents' brief erroneously states that the amount designated in Majestic's catalogs as the "Retail" price is determined by applying an average markup over cost of approximately 23%.

[3] Sales by a discount house are retail sales. See *Helbros Watch Company, Inc.* v. *Federal Trade Commission*, 310 F. 2d 868 (1962), wherein the court stated that "A retail sale is the transaction by which the merchandise comes into the possession of the ultimate consumer, regardless of the title by which the vendor may choose to denominate himself."

[4] This finding is apparently based solely on the testimony of respondent Arthur Mostow.

since they are made to customers who purchase for resale, and that the prices at which such sales are made are therefore wholesale prices. (See *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 F. 46 (1915), and *L. & C. Mayers Co., Inc.* v. *F.T.C.*, 97 F. 2d 365 (1938)). It appears, however, that the only type of retailer that purchases from respondents' catalog is one that resells from the catalog, maintaining no inventory or showroom. Mostow testified as follows with respect to these retailers:

Q. * * * You testified that you sell to retail dealers for resale to their customers. Do you know whether they use your catalogs to display merchandise?

A. I would think that would be the only way they have of selling it.

The Hearing Examiner: Did you intend the answer to mean you do know that they use your catalog?

The Witness: I have never been to their display to see them in a transaction with a customer, no, but how else would the customer know about it?

The Hearing Examiner: Is it your understanding that they use it in that way?

The Witness: Yes.

The record shows that the prices to such customers are the same as the prices at which respondents sell to the ultimate consumer and are substantially greater than the wholesale prices paid by respondents or by other retailers buying from the same sources as respondents.

Whether or not respondents' sales to purchasers who resell from respondents' catalog can be characterized as "wholesale" transactions is wholly irrelevant to the issue of whether the consumer may be deceived by the representation that respondents are selling to him at wholesale prices. The theory of the complaint here is that respondents sell to the ultimate consumer and that the consumer is led to believe by respondents' "wholesale" price claims that he can buy at the prices at which retailers purchase. A person reading respondents' catalog would not construe the term "wholesale prices" to mean only those prices at which articles of merchandise are sold to persons or firms who resell through respondents' catalog or some similar catalog. A prospective purchaser could reasonably interpret "wholesale prices" to mean the prices at which retailers normally purchase, or even the lowest prices at which any retailer purchases. Certain representations used by respondents undoubtedly convey the latter meaning. Cf. *Brown Fence & Wire Co.* v. *F.T.C.*, 64 F. 2d 934 (1933). For example, "Majestic is a DISTRIBUTOR not a Discount House, therefore you buy at true wholesale dealer cost" and "Lowest Wholesale Prices—we don't just meet prices—Majestic sets the prices others cannot meet, that's how you save more." It is clear from the record that these claims are untrue. The evidence adduced by counsel supporting the complaint and corroborated by respondents' own witnesses is that Majestic is not a "Distributor" or a wholesaler but a retailer that makes some sales to a particular type of reseller at the same prices at which it sells to the public. These prices are not the "Lowest Wholesale Prices," nor do they represent the "true wholesale dealer cost," nor are they "wholesale prices" as that term is understood by the public. We find, therefore, that the examiner did not err in holding that respondents' designation of their selling price as "wholesale" was misleading and deceptive, and our order will prohibit respondents from using this representation in connection with their sale of merchandise to the ultimate consumer.

Respondents next take exception to the hearing examiner's holding that they had made misleading and deceptive representations as to the usual and customary prices of the products listed in their catalog and as to the savings which would be realized by purchasers of such products. This part of the appeal will be granted.

We have recently issued Guides Against Deceptive Pricing (effective January 8, 1964) which specifically cover the use of pricing claims such as those made by respondents. Guide III discusses the advertising of retail prices which have been established or suggested by manufacturers. Although not so designated, the higher "Retail" prices in respondents' catalog are, for the most part, retail prices which have been suggested by the manufacturers of the products. Guide III specifically states in this connection that:

> * * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list of pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price), which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice.

The evidence in this case establishes that some of the articles listed in respondents' catalog were not usually and regularly sold in certain communities in which the catalog was disseminated at the represented higher "Retail" prices. But no showing was made, and, in view of the allegations of the complaint, no attempt was made to show, that the so-called "Retail" prices were appreciably in excess of the highest price at which substantial sales of the merchandise were being made throughout the area in which respondents' catalog was circulated. Consequently, the record does not support a finding that respondents' claims as to the "Retail" prices of their merchandise were deceptive under the new pricing guides. That part of the complaint challenging respondents' use of such claims will be dismissed.

Respondents have taken other exceptions to that part of the initial decision holding that they had made deceptive pricing representations. Since we are dismissing the charges covering use of such claims, it will be unnecessary to rule on these exceptions.

To the extent indicated herein respondents' appeal is granted and in all other respects it is denied. As modified by this opinion, the initial decision will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

Decision of the Commission and Order to File Report of Compliance

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

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking therefrom paragraphs 31 through 62 and substituting therefor the following:

> 31. The evidence does not show that the prices designated "Retail" in respondents' catalogs were in excess of the prices at which substantial sales of the articles referred to were being made in the area in which the catalogs were distributed. Consequently, the evidence fails to establish that respondents' use of comparative pricing claims has the capacity or tendency to mislead or deceive the public.

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

ORDER

> *It is ordered*, That respondents Majestic Electric Supply Company, Inc., a corporation, and its officers, and Arthur Mostow, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise to the ultimate con-

sumer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that said merchandise is being offered for sale at wholesale prices.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents, Charles Mostow and Leon Gurny, in their individual capacities.

It is further ordered, That the allegations of the complaint that the respondents falsely and deceptively represented that the prices designated as "Retail" in their catalogs were the prices at which the merchandise referred to was usually and customarily sold at retail and that the difference between their coded price and "Retail" price represented savings from the usual and customary retail prices in the trade areas where the representations were made, be, and they hereby are, dismissed.

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

It is further ordered, That respondents Majestic Electric Supply Company, Inc., and Arthur Mostow 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 Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

GRUEN INDUSTRIES, INC., TRADING AS GRUEN WATCH COMPANY

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

Docket 8455. Complaint, Dec. 7, 1961—Decision, Feb. 28, 1964

Order requiring a leading manufacturer of watches to cease the practice of attaching to its watches or placing in conjunction therewith, tickets or tags bearing fictitious amounts which are represented thereby as the usual retail prices in the trade areas where the representations are made.

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 Gruen Industries, Inc., a corporation, trading as Gruen Watch 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 Gruen Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 20 West 47th Street, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacturing, assembling, advertising, offering for sale, sale and distribution of watches to retailers, wholesalers and others for ultimate resale to the public.

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

PAR. 4. Respondent, for the purpose of inducing the purchase of its products, has engaged in the practice of using fictitious prices in connection therewith by attaching or causing to be attached tickets to their said watches, or by placing or causing to be placed in conjunction therewith tickets or tags, upon which certain amounts are printed, thereby representing, directly or by implication, that said imprinted amounts are the usual and customary retail prices of said watches in the trade areas where the representation is made and where said watches are offered for sale. In truth and in fact, the said amounts are fictitious and in excess of the usual and customary retail prices of said watches in the trade areas where the representation is made and where said watches are offered for sale.

PAR. 5. Respondent, by the aforesaid acts and practices, provides means and instrumentalities whereby retailers and others may mislead the public as to the usual and customary retail price of their said watches.

PAR. 6. In the conduct of its business, and at all times mentioned herein, respondent has been in substantial competition in commerce with corporations, firms and individuals in the sale of watches of the same general kind and nature as that sold by respondent.

PAR. 7. 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 products by reason of said erroneous and mistaken belief.

PAR. 8. 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 and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Sheldon Feldman and *Mr. Anthony J. Kennedy* supporting the complaint.

Cahill, Gordon, Reindel & Ohl, New York, N. Y., *Mr. Denis G. McInerney* and *Mr. Marshall H. Cox, Jr.*, for respondent.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

NOVEMBER 29, 1962

STATEMENT OF PROCEEDINGS

Complaint in this matter was issued by the Federal Trade Commission December 7, 1961, and was duly served on respondent. It charges the use of fictitious prices to promote the sale of Gruen watches. Specifically, it alleges that Gruen pretickets its watches with amounts represented to be the usual and customary retail prices when actually, the preticketed prices are higher than usual and customary prices. Thus, according to the complaint, Gruen provides "means and instrumentalities whereby retailers and others may mislead the public" as to the prices of Gruen watches. Violation of Section 5 of the Federal Trade Commission Act is alleged.

After being served with the complaint, respondent appeared by counsel and filed answer making certain admissions but denying generally any violation of law, and also advancing certain "further and additional defenses," concluding with a plea for dismissal of the complaint.

A prehearing conference was held in Washington, D.C., March 29, 1962, and hearings were held, also in Washington, May 14–16, 1962.

Because of stipulations of fact entered into between counsel, providing for the admission of considerable documentary evidence, it was unnecessary for Government counsel to call any witnesses. Respondent called three of its officials and two retail jewelers as witnesses in its defense.

After closing of the record, Government counsel filed a motion to reopen the proceeding for the presentation of newly discovered evidence. The motion was granted, over respondent's opposition, and further hearings were scheduled in Seattle, Washington. Again, however, counsel stipulated the facts and agreed to the admission in evidence of the documents proposed to be adduced, and no additional hearings were required.

Before filing of the supplemental stipulation of facts, respondent, pursuant to leave granted, filed an amended answer admitting all the material allegations of fact in the complaint. That amended answer presented certain additional matters, as more fully set forth hereinafter, and proposed that no order be entered against Gruen until its competitors are similarly enjoined.

Thus, this record presents no real issue of fact for the hearing examiner to determine. On the contrary, the only factual issues framed by the pleadings have either been stipulated or are substantially uncontroverted, and the basic legal issues are likewise subject to no real dispute.

The one issue remaining to be resolved is the timing of the order—the question whether a stay is called for. This is a material issue of discretion concerning which the hearing examiner is required to make "findings and conclusions, with the reasons or basis therefor." [1]

Accordingly, although an admission answer has been filed, and the evidence in the record is largely uncontroverted, it is necessary for an informed determination that the facts and circumstances concerning the practices and present status of Gruen be clearly set forth —not simply a *pro forma* series of findings in the language of the complaint.

At the hearings referred to, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, and this testimony and evidence were duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by

[1] Rules of Practice, § 4.19(b).

counsel supporting the complaint and counsel for respondent. Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, and the proposed findings, conclusions and order filed by both parties, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of the entire record and his observation of the witnesses, makes the following findings of fact and conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent Gruen Industries, Inc.,[2] also trading as Gruen Watch Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 20 West 47th Street, New York, New York.

2. Gruen is now, and for some time last past has been, engaged in the manufacturing, assembling, advertising, offering for sale, sale and distribution of watches to retailers, wholesalers and others for ultimate resale to the public. Its manufacturing and assembling operations are conducted through a wholly owned subsidiary, Gruen Watch Manufacturing Company, S. A., Bienne, Switzerland.

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

4. In the conduct of its business, and at all times mentioned herein, Gruen has been in substantial competition in commerce with corporations, firms and individuals in the sale of watches of the same general kind and nature as that sold by respondent.

5. For the purpose of inducing the purchase of its products, Gruen has engaged in the practice of attaching, or causing to be attached, tickets to its watches, or placing, or causing to be placed, in conjunction therewith tickets or tags upon which certain amounts are printed. For example, such tags are placed in the boxes in which its watches are displayed to the purchasing public by retailers.

[2] Sometimes referred to herein as Gruen or as respondent.

The amounts printed on such tags or tickets are Gruen's "suggested" retail prices. Although a Gruen official testified that there is a single national suggested retail price for each model or style of watch, and that this is reflected in Gruen's price tags, the evidence shows fictitious pricing in its classic sense—not simply a price figure suggested in good faith by the manufacturer that turns out to be higher than the prevailing price in a given trade area, but deliberate deceptive inflation for some retailers of the price figure printed on the Gruen tickets. (See Par. 22–29, *infra.*)

6. Gruen thereby has represented, directly or by implication, that the imprinted amounts are the usual and customary retail prices of its watches in the trade areas where the representations are made and where the watches are offered for sale.[3]

7. In truth and in fact, the imprinted amounts are fictitious and in excess of the usual and customary retail prices of Gruen's watches in some of the trade areas where the representations are made and where such watches are offered for sale.

8. In the Philadelphia, Pennsylvania, and the Newark, New Jersey, trade areas, Gruen watches usually and customarily sell at retail at amounts which are substantially—*i.e.*, more than 10 percent—below the amounts shown on the Gruen price tickets. Of the approximately 30 or more different model watches sold by Gruen in those trade areas, preticketed with amounts from $19.95 to $89.95, only the four models which are preticketed at $19.95 usually and customarily sell at that price.[4]

A Gruen executive testified that Gruen sales in Philadelphia and in Newark account for approximately 1⅞ percent and ⅞ percent, respectively, of Gruen's total sales.

9. The Government's evidence is limited to those areas and, as developed below, to certain West Coast states,[5] but since Gruen admitted in its amended answer that all of the material allegations of fact in the complaint are true, there is basis for a finding—as proposed by Government counsel—that the preticketed prices are

[3] Even if Gruen had not admitted the truth of this allegation, the principle is well established by Commission and Court decision that a price ticket attached to or placed in conjunction with an article of merchandise constitutes a representation that the amount shown is the usual and customary price of the article in the trade area where the representation is made. *Clinton Watch Co.*, Docket 7434 (July 19, 1960), 291 F. 2d 838 (7th Cir. 1961), *cert. denied,* 368 U.S. 952 (1962); *The Baltimore Luggage Co.*, Docket 7683 (March 15, 1961), 296 F. 2d 608 (4th Cir. 1961), *cert. denied,* 369 U.S. 860 (1962). Also, Gruen's own witnesses testified to the effect that the tickets were price representations.

[4] These facts stipulated by the parties.

[5] Actually, the evidence as to the West Coast States does not establish the "usual and customary price" in any trade area, but it leaves no doubt that Gruen engaged in fictitious pricing practices.

higher than the usual and customary retail prices in *all* trade areas where the representations are made. However, in its reply brief, Gruen argues that the term "some trade areas" more accurately reflects the facts of record.

10. There is evidence to support a finding that in Norfolk, Virginia, and Raleigh, North Carolina, Gruen watches customarily retail at Gruen's preticketed price.

The evidence shows that Bosse Jewelers, Inc., identified by Gruen's vice president as the purchaser of 72 percent of all Gruen watches sold in 1961 in Raleigh, North Carolina, sold them at preticketed prices.

Similarly, Barr Brothers Jewelers was identified as the purchaser of 83 percent of the Gruen watches sold in 1961 in Norfolk, Virginia. The testimony was that approximately 95 percent of Barr's sales were at preticketed prices.

11. There may be a basis for questioning the validity of the inference that Bosse's prices in Raleigh and Barr's in Norfolk were the usual and customary prices,[6] but even accepting the premise that they were, such a fact does not, of course, constitute any defense to the uncontroverted showing of fictitious pricing elsewhere. *The Baltimore Luggage Co.*, Docket 7683 (March 15, 1961), 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962). The finding of misrepresentation in some areas is sufficient to support an order to cease and desist. Indeed, respondent makes no issue of this.

12. By the acts and practices described above, Gruen provides means and instrumentalities whereby retailers and others may mislead the public as to the usual and customary retail price of Gruen watches.

Not only has Gruen admitted this allegation, but it also is supported by the evidence and, in any event, is an inescapable inference from the other facts found.

13. Gruen's retail accounts are offered proportionally equal advertising allowances and are furnished with a mat service supplied by

[6] The retailers themselves did not clearly demonstrate their qualifications to testify as to usual and customary prices. Bosse did state that "there is no cut price advertising in Raleigh, North Carolina, on watches of any description," and he was not aware of any stores there selling Gruen watches at a discount. However, on cross-examination, he conceded he did not know whether his ten competitors in Raleigh were selling Gruen watches and if so, at what price. According to Gruen's vice president, the only other purchaser of Gruen watches in Raleigh is Raleigh Distributing Company—presumably a wholesale distributor. Regarding Norfolk, Barr testified that only one other jewelry store—out of 35 or 40—carried Gruen watches. He stated also that he thought the GEX discount store there sold Gruen watches at a discount.

On balance, and particularly in view of the purchase volume shown by the record for these two retailers, it is found that their prices—and hence, Gruen's preticketed prices—were the usual and customary prices in those trade areas.

Gruen. The mat service contains illustrations of watches and, in immediate conjunction therewith, the same amounts found on the price ticket enclosed with each watch. The local retailers prepare and run their own ads without any control by Gruen, and they may disregard the Gruen mat service or use only parts of it. After the retailer's ad has been published, a "tear sheet" or copy of it may be forwarded to Gruen, where an adjustment is made for linage attributable to Gruen. This policy is the same for direct mail advertising and for radio and television advertising.

Gruen has paid advertising allowances for ads in which retailers have displayed Gruen's suggested (or preticketed) price in conjunction with their own lower price, thereby showing the prospective purchaser a purported saving between the preticket price and the retailer's lower selling price. An example is CX 7b, an ad for Getz Jewelry Co., a large midwestern chain, showing preticketed prices stricken.

The Getz ad proclaims that the chain "breaks the price barrier" in selling at "½ off regular factory list prices."

14. Gruen has no control over the prices at which its customers resell to the public. It does not attempt to insist that its customers use the price tickets which it supplies or that they set their retail prices to correspond to those shown on such tickets. Although Gruen's customers are free to discard the price tickets, they generally use them because they consider them helpful sales aids.[7]

15. In its original answer, Gruen defended its preticketing as "a practice adopted * * * in good faith to meet the similar practices of competitors," and as a practice that "has served reasonably to inform both retail merchants * * * and the watch-purchasing public with respect to the value of watches sold by respondent."

It contended further that if respondent is forced to cease preticketing, it "will suffer serious financial loss and retail merchants and the watch-purchasing public will be deprived of useful and valuable information."

16. In the hearings, Gruen's quality control manager testified that "* * * if the price ticket is put on by a company such as Gruen, it is my belief it would be more sincere than if an individual jeweler or anyone who is selling the watch would put a ticket on it." He

[7]Although these facts have been stipulated, and must be taken as true, they take on a different coloration in the context of the evidence developed subsequent to the execution of this initial stipulation, as set forth in the supplemental stipulation (CX 54), showing Gruen's active sponsorship of fictitious price advertising. See *infra*, Par. 22–29.

referred to the price ticket attached by Gruen as "the only measuring stick the consumer can go by."

17. Similarly, Gruen's vice president in charge of advertising, described preticketing as a practice begun by Gruen 50 years ago "to establish a standard of value for any customer who bought a Gruen watch and to take it out of the area of permitting a retailer to charge whatever the traffic would bear." In defending preticketing as especially useful in connection with the sale of watches, he explained:

> A watch to a consumer is a very blind item. He does not have the vaguest idea of the quality of the watch inside or the quality of the watch outside. He must therefore depend upon the integrity or the stability of the company whose product he buys as a guide to himself as to whether he is receiving a fair and honest value.

Gruen has "one national suggested retail price for each individual watch," and this is the preticketed price, according to this official. He stated that the preticketed price "is what we have established as the fair retail price for this watch and it applies to any customer of ours and to any consumer throughout the country who wishes to buy this watch." However, it is not intended, he said, to represent to consumers that it is the actual retail selling price in any given market.

18. After both sides had rested their case, a motion to reopen the proceeding for the reception of newly-discovered evidence was made by Government counsel and granted by the hearing examiner over respondent's objection. No further hearings were held, however, the new evidence being presented through a supplemental stipulation of facts (CX 54).

19. In the light of the additional evidence thus presented, Gruen's protestations of establishing, by means of its price tickets, a "standard of value"–"a fair retail price"–to guide the consumer to "a fair and honest value," based on the "integrity" of the manufacturer, are exposed as window-dressing for a deliberate scheme to mislead and deceive the watch-purchasing public–a plan to use fictitious price tags to make the consumer think he is realizing "tremendous savings."

If the "sincere" price tickets furnished for Gruen watches constitute "the only measuring stick the consumer can go by," the evidence here presented suggests that he would be well-advised to buy "blind."

20. The picture disclosed by this additional evidence is one calculated to give meaning to the warning *caveat emptor*.

The facts developed in CX 54 and the accompanying exhibits spell out a sordid story of commercial immorality–of a cynical disregard for the "integrity" of the 88-year-old Gruen Company.[8]

21. From the stipulation (CX 54) and the supporting exhibits, there emerge the facts detailed in Paragraphs 22–29.

22. In June 1961,[9] Weisfield's, a retail jewelry chain with 34 stores in the States of Washington, Oregon, Idaho and California,[10] ordered 200 watches from Gruen. The cost to Weisfield's was $12.95 each.[11]

Gruen's suggested retail price on these watches was $19.95. This was the price at which they were customarily preticketed by Gruen.

But Weisfield's requested that they be preticketed at $49.50. Gruen complied and shipped the watches with $49.75 price tickets included. (Why it raised the ante a quarter is not explained.) It appears that the transaction was with the knowledge–actual or constructive–of Gruen's president and its vice president in charge of sales.

Successive orders followed. Each time, the watches, usually preticketed at $19.95, were preticketed, instead, at $49.75.

Weisfield's advertised and sold these watches at special "sale" prices of $17.77 and $18.88.

23. According to the stipulation, this promotion achieved the desired purpose: "to bring customers into the store so that an opportunity would be afforded to salesmen to sell the customer an article which carried a greater margin of profit."[12]

24. The stipulation matter-of-factly recites:

Both respondent and Weisfield's knew that these watches were ordinarily shipped to retailers with a $19.95 preticket and respondent knew that these

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[8] This kind of operation was foreshadowed, perhaps, by evidence admitted earlier. Pushing to sell watches in ever-increasing volume, Gruen's vice president in charge of sales was surprised to find a jeweler reluctant to embrace the deceptive practices urged. This Gruen official, in a memorandum to a salesman, appears to sneer at a merchant who "talks about the dignity of the jewelry business," and who worries about where this cut-rate and comparative price advertising "will head the chain." (CX 19) There is evidence too (CX 20a-b) of Gruen's encouragement of advertisements featuring watches at "less than ½ price," where the selling price is contrasted with the "factory ticketed" price.

[9] The record indicates that the practice here described probably was in effect at an earlier date.

[10] In addition, Weisfield's owns four Valu-Mart discount houses in the state of Washington and maintains jewelry concessions in Phoenix, Arizona, and Portland, Oregon. It annually devotes approximately $500,000 to newspaper advertising. In 1961, its gross sales, exclusive of Valu-Mart, were $18,617,507.

[11] Less 10% advertising allowance.

[12] See CX 39, a Weisfield's memorandum to store managers pointing out that the chain doesn't "make a legitimate profit" at the $17.17 price, so that "step-up selling is necessary."

watches were the subject of a promotion whereby these watches were advertised in newspapers and prominently displayed in stores in conjunction with the $49.75 preticket and were offered for sale at $17.77 and $18.88. Respondent also new that Weisfield's never had any intention to offer these watches to the public at $49.75.

25. That wasn't all.

Gruen watches customarily preticketed at $49.75 were specially preticketed at $71.50 and shipped to Weisfield's. Stores of that chain advertised and sold them at $37.50.

Other watches, usually preticketed at $59.50, were preticketed at $85, and Weisfield's sold them at $44.75. Still another Gruen model, sold to Weisfield's at $17.06, was preticketed at $65, then advertised and sold at $32.50.

26. The same sort of arrangement was blown up into sales promotions in which the public was urged to "save ½ and more." Again, the watch formerly preticketed at $19.95 blossomed forth with a "regular" price of $49.50, with the customer required to "pay only $18.88."

27. On a bigger scale, Gruen devised and fostered an advertising and sales scheme that it calls its "Nationally Advertised Watches" promotion.

Like the Weisfield's deal, it involves shipment of watches with extraordinarily high pretickets. For example, the prime item would be watches costing the retailer $12.95 and ordinarily preticketed at $19.95. But for this promotion, they are preticketed at $49.75, and the retailer advertises and sells them at "bargain" prices of $17.77 or $18.88.

Gruen suggests this promotion to its customers, old and new, and grants an advertising allowance for advertisements carrying it out.

There's an additional "kicker" to this promotion that Gruen points out to its customers (CX 48a). The suggested advertisements picture a Gruen watch, with the Gruen trademark "Precision" visible, but the brand name "Gruen" is omitted.

Instead, Gruen admitted in the stipulation, the advertisement is headlined "Nationally Advertised Watches" for the purpose of giving the consumer the impression that the retailer sponsoring the ad offers *all* national brands, not just Gruen, at drastically reduced prices.

28. The "Nationally Advertised Watches" promotion has been widely sponsored by Gruen in many parts of the country. It has involved other retail jewelry chains besides Weisfield's, including Gordon Jewelers, one of the largest jewelry chains in the United States, which has purchased almost $300,000 worth of watches from Gruen.

29. Copies of advertisements featuring this promotion and similar deals involving the use of fictitious comparative prices are sent by Gruen to other jewelers. Through a campaign of correspondence, according to the stipulation, efforts are made to persuade the retailer that if he uses such promotions, they will bring customers into his store, where specially trained salesmen will have the opportunity to sell other items of merchandise carrying a greater margin of profit.

Gruen grants advertising allowances for retailer advertisements of this kind.

30. When Government counsel, in its motion to reopen, made known the substance of the evidence set forth in Paragraphs 22 through 29 of these findings, respondent's counsel, after determining that the allegations were substantially correct, filed a Motion for Leave to Amend Answer, accompanied by the amended answer. Duly received and filed without objection, the amended answer admitted all the material allegations of fact in the complaint. It also alleged that:

1. The use of price tags or tickets in the manner complained of herein as a practice followed by respondent's competitors and affords a competitive advantage to the user over one who does not follow that practice.

2. If respondent is required to cease and desist from that practice while its major competitors continue to do so, respondent will suffer serious and irreparable financial loss and will probably be forced out of business.[13]

In support of those contentions, the record contains evidence giving rise to the findings set forth in Paragraphs 31 — 41.

31. Many years ago, leading watch companies, including Gruen, adopted the practice of preticketing their watches with their suggested retail prices. Gruen has done so for about 50 years. The practice of preticketing watches with purported suggested retail prices is prevalent throughout the industry and is followed by Bulova, Benrus, Waltham, Elgin and all other brand-name watch companies. These preticketed prices are frequently not the actual retail selling prices.

32. Gruen's principal competitors in the watch industry are Bulova Watch Company and Benrus Watch Company, Inc.; Waltham Watch Company is also a major competitor. Complaints alleging substantially the same charge as that made against Gruen here are pending against each of these three principal competitors (Dockets 7352, 7583 and 8396).[14] Gruen watches are of at least comparable

[13] Cf. Paragraph 15. Note the deletion of the claim of "good faith" and also of the allegation that pretickets provide retailers and consumers with useful and valuable information respecting the value of Gruen watches.

[14] All three cases are pending before the Commission on petitions for review.

quality to competitive watches bearing similar preticketed prices.

33. If an order in the form proposed by Government counsel—which is the order being issued by the hearing examiner—were to be entered, the practical effect of such an order would be to require Gruen to stop all preticketing. (This may be speculative, but the uncontradicted evidence to that effect is persuasive.)

34. If Gruen were to stop preticketing its watches while its competitors continued the practice, substantial customers would cease to do business with Gruen.[15] It is estimated that the company's sales would fall off by at least 20 percent and probably by as much as 31 or 32 percent.

35. After a history of profitable operations extending through the fiscal year ended March 31, 1954, in which it earned $886,985, Gruen suffered severe reverses which resulted in the following losses by it:

Fiscal years ended March 31	*Losses*
1955	$1,125,674
1956	965,799
1957	2,333,481
1958	3,553,278
1959	2,920,528
1960	1,830,723

36. In 1959 a new group of investors became financially interested in Gruen and late that year brought the present management into the company. Gruen was then in desperate financial straits. Outstanding bank loans exceeded $4,000,000; each week brought a crisis as to whether the company could meet its payroll and pay its suppliers; Gruen's manufacturing subsidiary was virtually inactive since Gruen lacked funds to finance the manufacture of watches by it; and the company's watch inventory was excessive and in large part obsolete.

37. Gruen's new management was able to effect substantial savings by a number of stringent cost-cutting measures, including moving its offices and reducing its inventory from $1,800,000 to $800,000. The company was also able to enter into a revolving credit arrangement with The Chase Manhattan Bank under which it regularly pledged its receivables in return for loans of 85 percent of their value. This made available working capital which permitted the respondent to reactivate its Swiss manufacturing plant, to re-establish credit with its suppliers in the United States, and otherwise to meet its obligations as they came due.

[15] The importance of preticketing in the watch trade is illustrated by the testimony of the two retail jewelers who testified at the hearing. Each testified that Gruen's price tickets were of sufficient importance to him that he would stop buying Gruen watches if Gruen stopped furnishing tickets with its watches. There is other evidence indicating this attitude is widespread.

38. Under the new management, the company reduced its losses in the fiscal year ended March 31, 1961 to $508,759. Final consolidated figures for the fiscal year ended March 31, 1962, were not available at the time of hearing, but preliminary, unaudited figures for the parent company alone showed a profit for the year of $11,011, and the consolidated figures were expected to show a profit of approximately that figure.

39. Gruen's financial condition, although greatly improved in the two years of its current management, nonetheless remains precarious. The company, because of its lack of capital, is still dependent upon continuously pledging new receivables in order to maintain working capital. It has no other collateral on which to obtain more funds and no further source to which to turn for funds.

40. There is uncontradicted testimony that in its present financial condition, Gruen would be forced out of business if sales should drop 15 percent to 20 percent, since the company would then be unable to generate sufficient cash from receivables to continue operations. A 20 percent drop in sales was the minimum forecast by a Gruen official, on the basis of his experience, if Gruen stops preticketing its watches while its principal competitors continue the practice. Thus, there is basis for believing that if the order here sought were to become effective immediately, it would force Gruen out of business.

41. Gruen would be severely and irreparably injured, indeed it might be eliminated as a competitor in this field, if it were required to cease preticketing its watches while its principal competitors continued that practice.

42. Although Gruen's present precarious economic status obviously is no defense in this proceeding, there is merit in the argument that any order herein should be so fashioned as to enable it to continue in business. Although it has foreign subsidiaries, Gruen is an American-owned and operated company, in business here since 1874. It has over 700 employees and is a substantial enterprise.

Not only Gruen's interest, but more important, the public interest, would be better served by keeping Gruen as a healthy, vigorous competitor in this field.

43. Simultaneously with the filing of its amended answer, Gruen also made application to the Commission for the promulgation of a "Trade Regulation Rule" providing substantially as follows:

No manufacturer, wholesaler, or other person selling watches in commerce shall, with respect to such watches:

(a) represent, directly or indirectly, by means of preticketing or in any other manner, that any amount is the usual and regular retail price of said watches when such amount is in excess of the price at which they are usually and regularly sold at retail in the trade area or areas where the representation is made; or

(b) furnish or place in the hands of others any means or instrumentality, or put into operation any plan or device, with knowledge that others may thereby mislead the public as to the usual and regular retail price of said watches.

44. Calling attention to the pendency of proceedings against Gruen's major competitors complaining of preticketing practices, the amended answer then "prays that the effect of any order against [Gruen] be suspended until similar orders have been entered against its major competition or until the Commission has promulgated an industry rule prohibiting the practice * * *."

45. In its Proposed Findings of Fact and Conclusions of Law, respondent specifically proposes that the order to cease and desist herein be subject to a proviso as follows:

PROVIDED, HOWEVER, that this order shall not become effective until after the Commission has acted on the Application of Gruen Industries, Inc., filed July 24, 1962, for the promulgation of a trade regulation rule prohibiting misleading representations regarding the retail price of watches and, if said application is granted, until the effective date of said rule. In the event that said application is denied or no such rule is promulgated, this order shall not become effective until the proceedings in Commission Docket Nos. 7583, 7352 and 8396 are concluded.[16]

46. In considering Gruen's proposals, we are met by a threshold question whether they properly may be entertained by the hearing examiner, or at least, whether he may provide, in an initial decision, for stay or suspension of an order to cease and desist.

We begin with the proposition that the Commission obviously has discretionary authority to suspend or stay its cease and desist orders for good cause shown, *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958). And it has exercised that authority in numerous instances comparable to the instant matter.

However, for reasons that are not altogether clear, Government counsel take the position that the hearing examiner has no authority to include a proviso for suspension in his initial order.

There appears to be no valid reason why, in a proper case, the hearing examiner may not provide for suspension of a cease and desist order in an "initial" order that is subject to appeal to the Commission or to review by the Commission *sua sponte*.

47. According to § 8 of the Commission's Statement of Organization, in *Rules of Practice, Procedures and Organization* (June 1962),

[16] These proceedings involve Bulova Watch Company, Benrus Watch Company and Waltham Watch Company, identified as major competitors of Gruen. See footnote 14, *supra*.

"Hearing examiners are officials to whom the Commission, in accordance with law, delegates the initial performance of its adjudicative functions to be exercised in conformity with Commission policy directives and with its Rules of Practice."

Under § 4.13 of the *Rules of Practice*, hearing examiners are empowered "To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adversary proceeding * * *."

Additionally, § 4.19(b) of the *Rules* provides:

An initial decision shall include a statement of (1) findings and conclusions, with the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) an appropriate order.

48. To rule initially on the instant matter is to carry out the Commission's "adjudicative function" delegated to the hearing examiner for "initial performance." Likewise, this may be considered in the nature of a motion "appropriate in an adversary proceeding," which the hearing examiner is called upon to "consider and rule upon, as justice may require."

Finally, the question whether the facts and circumstances of a particular case warrant suspension of an order to cease and desist also appears to be an issue of discretion upon which the hearing examiner is required to rule. Similarly, the question of the effective date of an order appears to be one embraced in the question of what constitutes "an appropriate order."

49. The only case cited by Government counsel in support of their position is *Clinton Watch Company*, Docket 7434 (July 19, 1960).[17] That case, however, does not stand for the proposition contended for. There, the question before the hearing examiner was the acceptance of a consent settlement agreeable to both parties but conditioned on the part of the respondent by a proviso that the Commission decision be withheld until all pending cases against competitors were also ready for decision—a condition opposed by Government counsel.

That is a far different situation from that obtaining in the instant case.

50. Thus, it is concluded that the matter is one on which the hearing examiner may rule initially.

51. That determination having been made, the question for decision is what action should now be taken.

[17] 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962). Despite Government counsel's citation of the Court's decision, the point here in issue—that is, the role of the hearing examiner—was not considered in the appeal. The only ruling on that point was that of the hearing examiner, who held he could not accept the settlement.

52. Interestingly enough, it is on the *Clinton Watch* case that respondent principally relies in seeking suspension of the order to cease and desist. In reviewing the initial decision in that case, the Commission took note that:

> Throughout this proceeding, respondents have requested that the Commission stay the effective date of any cease and desist order with respect to the fictitious pricing charge until Commission proceedings involving similar charges against certain of their competitors are completed.

Rejecting that petition, the Commission stated:

> We have carefully considered the grounds set forth by respondents in support of this request, and it is our opinion that the public interest far outweighs the private considerations urged by respondents.

On review, the Court of Appeals for the Seventh Circuit took note of the claim that to require Clinton to discontinue its deceptive advertising and ticketing practices while larger competitors (against whom Commission proceedings were pending) persisted in those practices would mean that Clinton "would thereby be placed in a disadvantageous competitive position, would sustain heavy financial loss, and would possibly be eliminated from competition * * *." The Court stated:

> Petitioners' theory is not without flaws. They are prematurely assuming that pending proceedings against competitors will culminate in findings of violations of the Act and in the issuance of orders to cease and desist. Further, petitioners are asking this court to *assume* that they will be prejudiced by discontinuance of the deceptive practices. *There is no evidentiary basis from which it must be inferred that petitioners will be forced out of business if they are restricted to honest practices while their competitors are free to employ questioned methods pending termination of Commission proceedings against them.* The circumstances of this case do not warrant resort to the court's equitable powers or interference with the Commission's exercise of its wide discretion in the choice of remedy deemed adequate to cope with deceptive trade practices. Petitioners have failed to show that there has been a patent abuse of discretion by the Commission.[18]

53. Commenting, during the hearings (Tr. 120), on the lack of evidentiary basis in the *Clinton Watch* record for a conclusion that the respondent might go out of business as a result of the order being entered, respondent's counsel stated "Now, we do not propose to have our record barren in that respect. We propose to offer proof of that."

As a result, the record here, unlike that in *Clinton*, is replete with evidence that Gruen will in fact be forced out of business if an order in the form proposed is entered against it while its principal competitors remain unaffected.

[18] 291 F. 2d at 841. Emphasis added. The language certainly suggests that the presence of evidence such as is contained in this record might have led to a different result.

54. The Commission in the past has not hesitated to adopt appropriate means to assure that an industry-wide practice would be banned as to all members of the industry at the same time.[19]

55. The instant case may be distinguished from that of *E. Edelman & Co.*, Docket 5770, 51 F.T.C. 978, 1008 (1955),[20] where the Commission held that there was "no valid reason" for making the hearing examiner's order "inoperative until all of respondent's competitors are put under similar restraints. To advance the argument is to answer it—obviously this Commission could not function under such restrictive and unwielding [*sic*] procedures. Orders would be forever pending, and unlawful industry practices rarely, if ever, corrected." Involved also in that determination was a misinterpretation of the order by respondent.

Here, there is no such sweeping request as was involved in *Edelman*. The request does not contemplate an order "forever pending."

56. It should be emphasized that this is not relief that respondent can demand as a matter of right, particularly under the circumstances of this case. It is a matter within the sound discretion of the Commission, a determination here made initially by the hearing examiner.

The cases teach that the test is not the effect on the *private interests* involved but the effect on the *public interest*.

We have already seen that this was the test applied by the Commission in *Clinton Watch*. Similarly, in the case of *The Great Minneapolis Surplus Store, Inc.*, Docket 7589, 56 F.T.C. 917 (1960), a petition that a consent order prohibiting deceptive pricing be suspended or modified on the ground that competitors were engaging in the practices forbidden to respondent was denied. The Commission said that no showing was made that modification of the order would be *in the public interest* (Order Denying Petition to Modify, July 22, 1960).

57. In the opinion of the hearing examiner, this is an appropriate case for the exercise of the Commission's discretion to stay an otherwise justified order to cease and desist in order to prevent undue

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[19] For example: *Sperry Rand Corporation,* 55 F.T.C. 655 (1958); *Schick, Inc.*, 55 F.T.C. 665 (1958); *North American Phillips Company,* 55 F.T.C. 682 (1958); *Ronson Corporation,* 55 F.T.C. 1017 (1959); the *Carpet Industry* cases, Dockets 7420, 7421, 7631, 7632, 7633, 7634, 7635, 7636, 7637, 7638, 7639 and 7640 (1960, 1961, 1962); *Swift & Co.,* Docket 8304 (dismissed July 20, 1962); *American Home Products Corp.,* Docket 8318; *Bristol-Myers Co.,* Docket 8319; *Plough, Inc.,* Docket 8320 and *Sterling Drug, Inc.,* Docket 8321 (suspense orders, June 25, 1962).

[20] *Affirmed,* 237 F. 2d 152 (7th Cir., 1956), *cert. denied,* 355 U.S. 941, *rehearing denied* 356 U.S. 905.

competitive injury to a respondent—injury that may be fatal, with consequent lessening of competition.

This conclusion is reached despite the fact that respondent's petition does violence to the concept that one seeking equity must come into court with "clean hands." The flagrant nature of the practices engaged in by Gruen does not commend the case as one warranting special consideration for respondent.[21]

Furthermore, it is repugnant to the principles and standards for which this Commission stands to make a concession permitting a continuation of deceptive practices, even temporarily, in apparent recognition of the claim that they are necessary for Gruen to stay in business.

Nevertheless, all things considered, suspension appears appropriate on the basis of the showing made of the possibility, if not the probability, that because of its already precarious financial situation, Gruen might be forced out of business if it were forced to stop preticketing[22] before its principal competitors are subject to the same prohibitions.

58. It may be argued that an order must be entered against Gruen immediately because orders already have been entered against other members of the watch industry. But none of those other respondents made the showing of irreparable injury to a substantial enterprise that Gruen has made here, and none of those cases can justify an order removing Gruen from the field of competition for practices which all national brand watch companies still pursue. It is protection of the public interest and not survival of the most dilatory that the Commission should seek.

59. Regarding Gruen's petition to the Commission to initiate a rule-making proceeding, pursuant to § 1.61 *et seq.* of the Commission's Rules of Practice, it is evident that if the Commission initiates the rule-making proceeding and issues the rule requested by Gruen, the entire industry would be required to abandon preticketing at the

[21] In fairness to respondent and its counsel, it should be noted that both before and after the complaint was issued, Gruen voluntarily produced to the Commission all files or other data requested of it. Moreover, despite Gruen's admitted interest in postponing the entry of any order, respondent has made no effort to delay this proceeding. On the contrary, Gruen's counsel expedited the proceeding at every stage by entering into stipulations of fact making it unnecessary for counsel supporting the complaint to introduce any testimonial evidence. These stipulations, and respondent's cooperation in bringing all its witnesses to Washington, made it possible to conclude the actual hearings before the examiner in two-and-a-half days and to avoid expensive and time-consuming hearings in Philadelphia, Pennsylvania; Newark, New Jersey; and Seattle, Washington. The Gruen complaint was issued December 7, 1961, and respondent concluded its testimony on May 16, 1962. (See Statement of Proceedings, *supra.*)

[22] Granted that the order prohibits preticketing only where it is deceptive, nevertheless, respondent has persuasively demonstrated that the practical effect is to preclude altogether the use of preticketing in the sale of its watches. See Par. 33, p. 1206.

same time. Thus, the Commission's objectives would be accomplished without further competitive injury to any individual industry member resulting from its being under an order while its competitors are free to continue the preticketing practice.

60. If the Commission should decline to initiate such a proceeding for any reason, it appears to the hearing examiner that the impact of any order against Gruen should at least be stayed until final disposition of the proceedings pending against its three principal competitors, Benrus, Bulova and Waltham. This alternative form of relief, in the examiner's opinion, would be less satisfactory from both public and industry viewpoints, because it would expose Gruen to competitive injury resulting from the continuing practices of other competitors as to whom there may be further delay before entry of an enforceable Commission order. However, such relief, in the examiner's opinion, would constitute the bare minimum necessary to enable Gruen to survive in what appears to be a fiercely competitive industry.

61. Gruen's problem of how to stop preticketing and yet stay in business is a problem faced in greater or lesser degree (depending upon individual economic strength) by each company in the industry. Although obviously, Gruen is not eager to abandon preticketing, because it does not know what the effect of abandonment will be on the sales of watches generally, its present concern is with the perilous prospect of being forced to abandon preticketing while other companies continue the practice.

62. To sum up, the record here demonstrates Gruen's precarious economic condition, and the irreparable injury that would result to Gruen from the immediate entry of the order proposed by Government counsel. The company's executives have testified, on the basis of past experience and without undue pessimism, that abandonment of preticketing by Gruen while its competitors continue the practice would be a fatal blow to Gruen.

Yet the order here, as a practical matter, would effectively prohibit preticketing. To enforce such an order against Gruen alone under these circumstances, while all other national brand watch companies are allowed to continue preticketing, would not, in the opinion of the examiner, be in the public interest.

63. Accordingly, the hearing examiner is entering (as Paragraphs 3 and 4 of the initial order) the order proposed by Government counsel — the same order that the Commission in its complaint indicated would be appropriate "if the facts are found to be as alleged" —and has provided for suspension of its effective date pending further order of the Commission.

64. The hearing examiner has avoided making the termination date of the suspension specifically dependent on Commission action on the proposed Trade Regulation Rule, or, alternatively, on Commission and perhaps Court action in three other pending cases. Those appear to be appropriate matters to take into account, but the hearing examiner is aware that to tie one case to another, and more particularly, to a group of cases, poses practical and legal problems that cannot be foreseen at the time such a provisional order is entered.

65. In the opinion of the hearing examiner, if the Commission concurs that the public interest requires suspension of the broad order in this case, at least until respondent's major competitors are similarly enjoined, that result may be achieved by the order here entered, and without the complications inherent in making suspension specifically dependent on some action in the indefinite future. In that way, the relief requested by respondent is provided for so long as the Commission considers suspension to be in the public interest. Respondent is entitled to ask no more than that.

66. However, this record makes it clear that during the period of suspension, the public—including consumers, Gruen's competitors and honest retailers—must be protected from the gross form of fictitious pricing described in Paragraph 22 to 29 of these findings—the wholly artificial and flagrantly deceptive inflation of price tickets shown in the Weisfield's transactions, for example.

Obviously, there should be *immediate* cessation of that type of practice, and this is provided for in Paragraphs 1 and 2 of the initial order. Furthermore, the initial order has made the suspension of Paragraphs 3 and 4 of the order dependent on a showing of good faith by respondent in regard to Paragraphs 1 and 2.

CONCLUSIONS OF LAW

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The acts and practices of respondent, as found herein, have had, and may have, the capacity and tendency to mislead and deceive members of the purchasing public with respect to the usual and customary retail prices of its watches, and into the purchase of substantial quantities of such products as a result. As a consequence, trade has been, and may be, unfairly diverted to respondent from its

competitors, and substantial injury has thereby been done, and may be done, to competition in commerce.

4. By its acts and practices respondent placed in the hands of retailers and others means and instrumentalities by and through which they might deceive and mislead the purchasing public as to the usual and customary retail prices of respondent's merchandise.

5. The acts and practices of respondent, as herein established, 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 and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

6. Although respondent does not come before the Commission with "clean hands" so as to entitle it to demand relief in the nature of equitable relief, it has made a showing that it may suffer irreparable injury—with consequent injury to competition—unless the order to cease and desist proposed by Government counsel is stayed or suspended. Such stay or suspension would be to the interest of the public.

7. The public interest requires, however, that there be immediate cessation of respondent's deliberate, wholly artificial and flagrantly deceptive inflation of price tickets, as described in Paragraphs 22 to 29 of the foregoing Findings of Fact.

ORDER

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

1. The act or practice of preticketing merchandise at an indicated retail price, or otherwise making representations to the public, directly or indirectly, concerning retail prices, when respondent knows, or has reason to know, that the indicated retail price is fictitious and in excess of the price at which the merchandise is sold, or is reasonably expected to be sold, at retail in a substantial segment of the trade area where the representation is made.

2. Supplying to or placing in the hands of any distributor or retailer any price tags or tickets, or other materials displayed to the purchasing public, which contain retail prices, list prices, suggested retail prices or suggested list prices, whether so designated or not, when respondent knows, or has reason to know, that such price figures are fictitious and in excess of the price at which the merchandise is sold, or is reasonably expected to be sold, at retail in a substantial segment of the trade area where the representation is made.

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

4. Furnishing or placing in the hands of others any means or instrumentalities, or putting into operation any plan or device, whereby others may mislead the public as to the usual and regular retail price of respondent's products.

Provided, *however*, That the effective date of Paragraphs 3 and 4 of this order be, and it hereby is, suspended until further order of the Commission; and

Provided further, That such suspension be, and it hereby is, conditioned on the execution by respondent, within 20 days after service on respondent of the initial decision herein, of assurances satisfactory to the Commission that respondent is complying and will comply with Paragraphs 1 and 2 of this order.[23]

Opinion of the Commission

FEBRUARY 28, 1964

By Elman, *Commissioner:*

The complaint in this matter charges respondent, a leading manufacturer of watches, with having preticketed its merchandise with fictitious retail prices, in violation of Section 5 of the Federal Trade Commission Act. In its amended answer, respondent admitted that it had engaged in the unlawful practice charged in the complaint. Consequently, the trial before the hearing examiner was concerned solely with the question of relief. In his initial decision, the exam-

[23] This procedure is undoubtedly novel, but it is designed, in the light of § 4.19 of the Rules of Practice, to give the Commission opportunity, if no petition for review is filed, to determine, on the basis of respondent's assurances, whether to permit the initial decision to become its decision on the expiration of the 30-day period after service, or whether it is necessary or desirable to docket it for review.

iner entered a cease and desist order containing four paragraphs. Paragraphs 1 and 2 are intended to forbid the specific form of deceptive pricing in which respondent was found to have engaged—what the examiner described as "the wholly artificial and flagrantly deceptive inflation of price tickets" (initial decision, p. 1214). Paragraphs 3 and 4, on the other hand, are intended to forbid the deceptive practice of a manufacturer's advertising or disseminating fictitious suggested retail prices. However, in a proviso to paragraphs 3 and 4, the examiner ordered these provisions of the order suspended, on the ground that immediate entry of a "broad" order against respondent would be inequitable because its principal competitors were not subject to such orders.

Complaint counsel have appealed from the initial decision, challenging the suspension proviso and also suggesting certain modifications in the language of the examiner's order. Respondent has also appealed, contending that paragraphs 1 and 2 of the examiner's order are too broad and that paragraphs 3 and 4 should be suspended pending promulgation of a Trade Regulation Rule by the Commission (see Section 1.67 of the Commission's Procedures and Rules of Practice (August 1, 1963)) dealing with the general problem of fictitious pricing in the watch industry.

As already noted, there is no issue as to respondent's violation of law. Concededly, respondent preticketed merchandise with retail prices it knew to be grossly in excess of what the merchandise would actually command in the retail market. These prices were not *bona fide* estimations of retail value; they were not respondent's customary suggested retail prices for the merchandise in question. These inflated prices were, rather, deliberate fabrications made at the demand of certain retailer customers of respondent who were bent on deceiving the buying public with the offer of nonexistent bargains.

Nothing in the Commission's newly revised Guides Against Deceptive Pricing (issued January 8, 1964) justifies respondent's conduct. On the contrary, the unlawfulness of such conduct is made explicit in Guide III: "a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions" (p. 5). However, while the revised Guides do not change the law with respect to such conduct, they have a definite bearing on the issue of relief—the only issue before the Commission.

As both the parties and the hearing examiner appear to recognize, the fact that respondent has been found guilty of a particularly flagrant form of an unlawful practice does not justify an order limited to the particular flagrant acts; rather, it emphasizes the necessity for an order that will effectively prevent the recurrence of the unlawful practice—here, the practice of a manufacturer's advertising or disseminating fictitious suggested retail prices for his merchandise. Guide III of the Commission's newly revised Guides Against Deceptive Pricing deal explicitly and at length with this practice. Accordingly, we have drafted an order to cease and desist in the language of Guide III.

Should respondent desire guidance with respect to the requirements of this order, the provisions of Guide III should prove helpful. The Guides are designed to afford practical, concrete guidance and assistance to the businessman as to the requirements of law, or, in this case, to respondent as to the requirements of the cease and desist order. If respondent in the future conforms in good faith to the standards set forth in Guide III, it will be in compliance with the Commission's order. In addition, if Guide III does not answer all of the specific questions that may arise as to respondent's duties under the order, the Commission's procedures afford ample opportunity for obtaining definitive advice from the Commission as to the application and interpretation of the order. Section 3.26(b), Procedures and Rules of Practice (August 1, 1963); see, e.g., *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F. 2d 480, 488 (2d Cir. 1962).

Our modification of the cease and desist order contained in the initial decision renders unnecessary an extended discussion of respondent's contention that the "broad" parts of the order should be suspended pending promulgation of an industry-wide Trade Regulation Rule. The unduly broad portions of the order contained in the initial decision, which caused concern to the examiner and to respondent, have been eliminated. With respect to the modified order we are entering, what the Commission recently stated in rejecting a similar contention made by another watch manufacturer is apposite:

> The Commission does not believe that the public interest warrants a suspension of the existing order pending completion of the Commission's proceedings against respondents' competitors. However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. Compliance with such orders, as thus modified, should not impose on respondents any onerous or unreasonable burden. The Guides give adequate recognition to the legitimate interests of the businessman and are not punitive or inflexible. The fact that respondents are formally obliged to comply with the order should not interfere with the effective marketing of their products or place respondents at an unfair competitive disadvantage vis-a-vis their competitors who, though not under formal order, are equally

bound by the substantive requirements of the Federal Trade Commission Act, as defined and particularized—in relation to fictitious pricing—by the recently revised Guides. *Clinton Watch Co.*, F.T.C. Docket 7434 (Order Denying Petition to Reopen Proceeding, issued February 17, 1964 [p. 1443 herein].

Commissioner MacIntyre did not concur, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

FINAL ORDER

Upon consideration of the cross-appeals of the parties from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That the initial decision be, and it hereby is, adopted by the Commission to the extent consistent with the accompanying opinion, and rejected to the extent inconsistent therewith.

It is further ordered, That respondent, Gruen Industries, Inc., a corporation doing business under the name of Gruen Watch Company or under any other name, and its officers, representatives, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches, or any other merchandise, in commerce, do forthwith cease and desist from:

(1) Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondent's trade area;

(2) Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by subparagraph (1) of this order.

It is further ordered, That respondent shall file with the Commission, within sixty (60) days of receipt of this order, a written report setting forth in detail the manner and form of its compliance with the order.

Commissioner MacIntyre not concurring for the reason he believes the Commission in this case did not adequately and properly consider the petition of the respondent with reference to the institution of a trade regulation rule proceeding, which proceeding prospectively would have provided greater precision in guide lines and equitable treatment to business and protection for the consuming public than anything now provided in recent actions by the Commission. Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

VIRGINIA DARE STORES CORPORATION

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

Docket 8476. Complaint, Apr. 2, 1962—Decision, Feb. 28, 1964

Order requiring the corporate operator of numerous department stores using "Atlantic Mills" as part of their trade name and selling to the general public clothing and other merchandise purchased from manufacturers, to cease misrepresenting that it is a manufacturer and to cease using the word "Mills" or other word of similar meaning as part of its trade name.

COMPLAINT

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

PARAGRAPH 1. Respondent Virginia Dare Stores Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 111 8th Avenue, New York, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the operation, in various states of the United States, of numerous department stores using "Atlantic Mills" as part of their name.

Said stores are operated through subsidiary corporations wholly owned and controlled by respondent. Through the aforesaid stores respondent sells clothing and other merchandise to the purchasing public.

Respondent causes and has caused merchandise, which it purchases from manufacturers, to be shipped to its several stores for resale to the purchasing public. In many instances shipments are made to respondent's stores in states other than the state in which said shipments have originated. Respondent has maintained, and now maintains a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, as aforesaid, and for the purpose of inducing the purchase of its merchandise which had been shipped and received in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has used the name "Atlantic Mills" in advertisements of its merchandise in newspapers having general circulation in various states of the United States, and in radio and television broadcasts having sufficient power to carry across state lines.

PAR. 4. Through the use of the word "Mills" as part of the respondent's trade name, respondent represents that it owns or operates a mill or factory in which the clothing and other merchandise sold by it are manufactured.

PAR. 5. Said representation is false, misleading and deceptive. In truth and in fact, respondent does not own or operate the mill or factory in which the clothing and other merchandise sold by it are manufactured, but buys from manufacturers for resale to the purchasing public.

PAR. 6. There is a preference on the part of many members of the purchasing public to buy merchandise, including clothing, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing and other merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. 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 products by reason of said erroneous and mistaken belief.

PAR. 9. 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 and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

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

Mr. Sigmund Timburg, Washington, D.C., *Mr. Elliott A. Wysor* and *Mr. Harry Schneider*, *Jaffin*, *Schneider*, *Kimmell & Galpeer*, New York, N.Y., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

FEBRUARY 15, 1963

Virginia Dare Stores Corporation, hereinafter called respondent, is charged with false, misleading and deceptive representations by using the word "Mills" as part of the trade name of department stores which it operates in various cities in the eastern one-half of the United States, allegedly in violation of the provisions of Section 5 of the Federal Trade Commission Act.

The complaint issued April 2, 1962, alleges *inter alia*, that, through use of the word "Mills" as part of the name of the department stores which it operates, respondent represents that it owns or operates a mill or factory in which the clothing and other merchandise sold by it are manufactured; that said representations are false, because respondent does not own or operate a mill or factory in which the clothing and other merchandise sold by it are manufactured but buys from manufacturers for resale to the purchasing public. There was also an allegation that many members of the purchasing public prefer to buy merchandise, including clothing, direct from factories or mills, believing that by so doing, lower prices and other advantages thereby accrue to them. Respondent answered and denied that it is engaged in "commerce" and denied the charging paragraphs of the complaint.

Prior to the hearing, counsel supporting the complaint filed a motion requesting that the hearing examiner take official notice of the validity of the following statements:

1. "That the use of the word 'mills' in a corporate or trade name constitutes a representation that the user owns and operates mills or factories in which products sold by it are manufactured.

2. "That a preference exists on the part of many purchasers to buy directly from mills or factories believing that by so doing lower prices and other advantages thereby accrue to them."

The above motion for the taking of official notice was denied by the hearing examiner. Application by Commission counsel for permission to file an interlocutory appeal from this order of the hearing examiner was denied by the Commission.

A hearing was thereafter held in New York, New York, at which time oral testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. Thereafter, proposed findings of fact, conclusions of law and order were filed by respective counsel. These have been considered. All proposed findings of fact and conclusions of law not found or concluded herein are denied. Accordingly, upon the basis of the entire record herein, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. Respondent Virginia Dare Stores Corporation is a corporation organized under the laws of the State of Delaware. Its principal office and place of business is located at 111 Eighth Avenue, New York, New York.

2. Respondent operates two different types of retail stores. One type, womens' apparel shops, in downtown locations, are not involved in this proceeding, and no further findings will be made in respect thereto. The stores which are involved in this proceeding are approximately 34 low mark-up, self-service junior or discount department stores operated by respondent through wholly-owned subsidiaries for each store under the name "Atlantic Mills Thrift Center Store." The Atlantic Mills Thrift Center Stores sell clothing and other merchandise and are located in various cities of the United States east of an imaginary line drawn from Minneapolis to Texas.

3. There is no claim by Commission counsel that respondent or either of its Atlantic Mills Thrift Center Stores has made any affirmative statement or representation that respondent is a manufacturer or manufactures any of the products advertised for sale in the Atlantic Mills Thrift Center Stores. Counsel relies solely on respondent's use of the word "Mills" in the trade name and advertising of its 34 Atlantic Mills Thrift Center Stores and the alleged inference from respondent's use of the word "Mills" that respondent manufactures the clothing and other merchandise sold by it in its Atlantic Mills Thrift Center Stores.

4. Respondent opened its first self-service, or so-called "Thrift" department store in New Bedford, Massachusetts, in 1955. This store was opened in a vacant building on the outskirts of New Bedford, out of the downtown, higher-rent district. The building is located at the base of the bridge leading to Fairhaven, Massachusetts. It was a familiar landmark in the area, known as Fairhaven Mills. For this reason, respondent chose the name "Fairhaven Mills Bargain Center" for this first store.

5. A second store was also opened in 1955, in Providence, Rhode Island, in a large building formerly occupied by the Atlantic Mills Division of A. D. Julliard Company. This was a well-known building in Providence, and respondent called this store "Atlantic Mills Thrift Center." In the spring of 1956, a third store was opened in Trenton, New Jersey, in a building formerly occupied by the Simonize Corporation. This corporation was still active in business, and

its name could not be used for the store. Respondent settled on the name "Atlantic Mills Thrift Center" for this third store. Later, respondent decided to reduce costs by syndicating its advertising, and, in so doing, changed the name of each store to "Atlantic Mills Thrift Center Store." Since the opening of this third store, 34 additional stores have been opened, each under the name Atlantic Mills Thrift Center Store.

6. The buildings in which Atlantic Mills Thrift Center Stores are located are generally of one floor, approximately 70,000 square feet of floor space, with ample parking area in front of the building. Some of the buildings are of old construction and, where not available, a new building has been built to respondent's specifications. The principal consideration respondent uses in selecting the location of a store is ample floor and parking space, away from the downtown, higher-rent district. A picture showing the front of a store and the name "Atlantic Mills Thrift Center" across the front of the building is shown in CX 18.

7. Each Atlantic Mills Thrift Center Store has approximately 21 major departments, divided into 75 sub-departments. Of the 21 major departments, 8 are company-owned and 13 are leased departments.[1] RX 2A–G, 3A–L, 4A–F and 5A–G show the interior of four Atlantic Mills Thrift Center Stores, one in Chicago, Illinois, one in New Bedford, Massachusetts, and two stores in the Detroit, Michigan, area. These photographs are representative of the interior of the stores and illustrate some of the types and wide varieties of merchandise displayed for sale in the stores. There are more than 30,000 different products sold in the Atlantic Mills Thrift Center Stores, purchased from approximately 7,500 different suppliers. Only a small percentage of the items displayed, offered for sale and sold in the Atlantic Mills Thrift Center Stores are produced in mills. Suits, dresses and coats are hung and displayed on racks. Other merchandise is displayed on tables and open counters, convenient for inspection and examination by customers. There are no clerks nor sales people. The customer is provided with a metal basket built on wheels, similar to those used in modern supermarkets, which the customer pushes through the aisles of the store, placing in the basket merchandise selected by him for purchase. After completing his selection of merchandise, the customer pushes the basket to one of several check-out counters, where a cashier totals the price of each item of merchandise in the shopper's basket and collects the aggregate amount due from the customer.

[1] A leased department is one owned and operated by third parties.

8. The respondent is not a manufacturer. It is solely a retailer. The respondent maintains a buying office in New York. All of the merchandise sold in the Atlantic Mills Thrift Center Stores is purchased through this buying office. Respondent also maintains a warehouse in New York in which merchandise purchased from manufacturers and other sources is stored and ticketed prior to shipment and distribution to the 34 Atlantic Mills Thrift Center Stores. In excess of $35,000,000 in merchandise at cost was shipped from respondent's New York warehouse to its stores during the year ended July 31, 1962. The respondent, through its owned and operated departments in Atlantic Mills Thrift Center Stores, did a volume of approximately $55,000,000 during the year ended July 31, 1962. Thus, respondent maintains a substantial course of trade in merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

9. The advertising expenditures for respondent during the fiscal year ending July 31, 1961, was $716,000. For 1962, the advertising expenditures reached approximately $1,000,000. More than 90 percent of respondent's expenditures for advertising is in the form of newspaper advertisements, with less than 10 percent spent for radio. The stores carry more than 700 nationally advertised brand products. All advertising for the Atlantic Mills Thrift Center Stores is handled by the Goldsmith-Tregar Company, an advertising agency, with headquarters in Providence, Rhode Island. All advertising is approved by respondent's New York office. The advertising includes merchandise sold in the company owned and operated departments as well as the leased departments.

10. The owned and operated departments of Atlantic Mills Thrift Center Stores sell womens' apparel, mens', boys' and girls' wear, and domestics, which includes curtains and draperies. They also sell records, candy, and a limited range of food items. Recently, the luncheonette and snack bar has become company owned and operated. The leased departments sell millinery, shoes, housewares, hardware, toys, health and beauty aids, and costume jewelry.

11. There is no difference in the appearance of the leased departments from the company owned and operated departments. A customer in an Atlantic Mills Thrift Center Store has no means of distinguishing between a store owned and a leased department. The method of display of the merchandise in the store is the same and the advertising of the merchandise is the same for both the company owned and leased departments.

12. In the conduct of its business and to induce the purchase of merchandise in its Atlantic Mills Thrift Center Stores, respondent

has placed various advertisements in newspapers and on radio broadcasting stations, advertising merchandise for sale in its various Atlantic Mills Thrift Center Stores. Some of these advertisements form the basis of the complaint in this proceeding. The advertisements relied upon by counsel supporting the complaint to establish the allegations in the complaint emphasize the words "Atlantic Mills." As examples, spot announcements on radio station WRIT, in Milwaukee, Wisconsin, advertising respondent's Atlantic Mills Thrift Center Store in Milwaukee, broadcast on Thursday and Friday, July 16 and 17, 1960, (CX 16A), were as follows:

> Another big Atlantic Mills scoop! Today * * *
> For Father's Day * * * The greatest collection
> of sport shirts you've ever seen * * * Price?
> 1.34! You heard me right! 1.34 for handsome
> sport shirts * * * now from Atlantic Mills!
> Father's Day flash! Right now! Today! Atlantic
> Mills has the greatest collection of fine sport
> shirts *ever* at 1.34! That's right * * * 1.34 You
> can afford to give *more* * * * only with Atlantic Mills!

Spot announcements broadcast on the same station, June 30 and July 1, 1960 (CX 16B), were as follows:

> Extra—Savings flash from Atlantic Mills! Today!
> a galaxy of gorgeous summer dresses at 2.88! Cool,
> all occasion, go-*everywhere* dresses in junior,
> misses, and half-sizes! All wanted fashions and
> fabrics * * * 2.88 * * * *Only* from Atlantic Mills!
> Special Pre-Fourth value riot from Atlantic Mills!
> gorgeous cool summer dresses to take you everywhere
> in high style * * * 2.88! 2.88 for sun dresses,
> shirt waists, 2-piece models * * * *All* wanted
> fashions and fabrics * * * *Only* from Atlantic Mills!

13. Some examples of respondent's newspaper advertisements offered in evidence by Commission counsel to support the allegation in the complaint that respondent, through the use of the word "Mills" as part of its trade name, represented that it owns or operates a mill or factory in which the clothing or other merchandise sold by it are manufactured, are CX 1, 2, and 3. CX 1 is a newspaper advertisement which appeared in The Commercial Appeal, Memphis, Tennessee, on Wednesday, December 16, 1959. In the advertisement on this page of the newspaper, the trade name of respondent's stores involved in this proceeding, namely, Atlantic Mills Thrift Center Store, is not mentioned. Across the top of the advertisement, in large block letters approximately 2¼ inches high, are the words "ATLANTIC

MILLS." Underneath are pictures of various articles of merchandise advertised for sale, with the prices shown for each item. Some of the merchandise advertised were ladies' reversible car coats, lounging pajamas, brocade slippers, girls' dresses, comforters, blankets, infants' booties, toys, metal Christmas trees and spike lights.

CX 2 is an advertisement which appeared on another page of the same newspaper. In this advertisement, unlike CX 1, no name appears across the top of the advertisement. In CX 2, the name ATLANTIC MILLS appears in the lower left-hand corner of the advertisement, in letters approximately 3/4 inch high. Underneath the words ATLANTIC MILLS, in small letters, are the words "America's Largest Self-Service Thrift Department Stores, 2500 Lamar Avenue, 2 Blocks East of Airways, Memphis." In this advertisement, pictures of various items of merchandise are also shown, with the price for each item, including ladies' sweaters, mens' sport shirt and tie sets, mens' sweaters, ladies' gloves, boys' sport shirts, mens' leather slippers, Remington Electric Shavers and window candelabras.

CX 3 is an advertisement which appeared on Wednesday, November 2, 1960, in the Trenton Evening Times, Trenton, New Jersey. Across the top of the advertisement are the words, "America's Largest Self-Service Thrift Department Stores," and underneath, are pictures of the articles of merchandise advertised for sale, among them being a lady's housecoat, lady's skirt, girl's 2-piece slack set, lady's winter coat, slippers and socks for men, ladies, boys, misses and children, infants' blankets, and a walking doll. At the bottom of the page, underneath the pictures of the articles advertised, are these words in large letters: "ATLANTIC MILLS." Underneath, in smaller letters: "325 Jersey Street, Off 504 Lalor Street, Trenton, America's Largest Self-Service Thrift Department Stores."

14. At the hearing, Commission counsel offered the testimony of seven witnesses together with eight newspaper advertisements and the scripts of spot announcements broadcast on radio station WRIT in Milwaukee, Wisconsin, advertising merchandise offered for sale in Atlantic Mills Thrift Center Stores, to support the allegations of the complaint. One of the witnesses, Mr. Harold Gottfried, is a vice president, secretary and director of respondent. Another witness was Mr. Leonard Lev, attorney-examiner, in the New York office of the Federal Trade Commission, who testified concerning his visit to respondent's Atlantic Mills Thrift Center Store, in Trenton, New Jersey, on July 27, 1962, subsequent to the issuance of the complaint in this proceeding. The other five witnesses were so-called consumer or public witnesses.

15. The testimony given by Mr. Lev will not be discussed in detail. Mr. Lev described the building, location, and general appearance of both the exterior and interior or respondent's Atlantic Mills Thrift Center Store in Trenton, New Jersey, and testified that he examined some of the merchandise in the store, including mens' clothing; that some of the mens' shirts bore various labels, such as "Atlantic Mills" and "Made Expressly for Atlantic Mills"; and that some of the shirts bore no labels at all. Mr. Lev purchased two mens' athletic shirts which were contained in a transparent plastic bag, bearing the label "Atlantic Mills" (these two athletic shirts were received in evidence at the hearing as CX 19). Some of the towels on display in the store bore the label "Atlantic Mills, Tarleton Quality." On cross examination, Mr. Lev testified that, from his limited inspection of the store and the number of articles of merchandise displayed for sale, it did not appear to Lev that the Atlantic Mills Thrift Center Store manufactured the bulk of the items displayed for sale.

16. The five consumer or public witnesses testified concerning their respective impression from examining and reading three of respondent's newspaper advertisements, CX 1, 2, and 3, (described in paragraph 13 hereof) exhibited to them by counsel supporting the complaint, and their preference in purchasing from a manufacturer rather than from a retailer. Neither of the consumer witnesses had ever visited or shopped in an Atlantic Mills Thrift Center Store and their knowledge concerning Atlantic Mills Thrift Center Stores was limited to their examination and reading of the "Atlantic Mills" newspaper advertisements exhibited to them by counsel supporting the complaint (CX 1, 2, and 3). The aggregate of the testimony of four of these witnesses is to the effect that the advertisements exhibited to them by counsel indicated to them that "Atlantic Mills" sells clothing, that the word "Mills" indicates that "Atlantic Mills" manufactures the clothing, and that the witnesses prefer to purchase from a manufacturer. One of the witnesses, a publicist, testified that, in looking at the advertisements, he could not say who the manufacturer was, "it never entered my mind actually as to who the manufacturer of these products is."

17. Of the five witnesses who testified that they prefer to buy merchandise direct from the manufacturer rather than from a retail store, only one of these witnesses had ever actually made a purchase direct from a manufacturer, and this purchase was under special circumstances. The witness testified that she purchased a dress from a manufacturer who did not ordinarily sell to the general public. However, the witness had a friend who was an employee of the

manufacturer and, through the intercession of this employee-friend, the witness was able to purchase a dress or dresses direct from the manufacturer. Several of the other witnesses testified that they had purchased merchandise direct from manufacturers through "factory outlets." These witnesses did not actually know that these socalled "factory outlets" were owned and operated by the manufacturer. This was pure speculation and supposition on the part of these witnesses. With respect to this testimony, that there is a preference on the part of the public to purchase direct from the manufacturer rather than from a retail store, it must first be shown that the public is able to purchase direct from manufacturers. A preponderance of the reliable and probative testimony is to the effect that the general public is not able to purchase merchandise direct from manufacturers. Accordingly, a preponderance of the evidence does not establish the allegation in the complaint that many members of the purchasing public prefer to buy merchandise direct from the manufacturer.

18. The newspaper advertisements CX 1, 2, and 3, as well as the radio spot announcements CX 16A & B, and the label "Atlantic Mills" on CX 19, are misleading and deceptive on their face. The words "ATLANTIC MILLS" are shown in large, heavy type, either at the top or bottom of the newspaper advertisements and emphasized in the radio spot announcements. It will be noted that in neither of these advertisements is respondent's trade name Atlantic Mills Thrift Center Store, as such, even mentioned—only the name ATLANTIC MILLS. Therefore, it is reasonable to conclude that some members of the purchasing public, in reading or hearing these advertisements, especially CX 1 and CX 16A & B, might believe that ATLANTIC MILLS was a manufacturer of at least some of the items shown in the advertisement or broadcast in the spot announcement and patronize the store for this very reason. Of course, after arriving at the store and seeing the name "Atlantic Mills Thrift Center" in large letters on the outside front of the store building and the wide variety and types of merchandise displayed for sale within the store, some of it nationally advertised trade-marked merchandise, a reasonably prudent person would likely conclude that the Atlantic Mills Thrift Center Store was not the manufacturer of any of the merchandise advertised and offered for sale. Nevertheless, if the customer was attracted to the store by reason of the newspaper advertisement or radio spot announcement which caused him to mistakenly believe that ATLANTIC MILLS was a manufacturer of some of the merchandise advertised, respondent would be guilty of violating Section 5 of the Act. The Commission has held that, where the initial impression created by an advertisement is deceptive, Section 5 of the Act is

violated even though the true facts are made known to the buyer before he enters into the contract of purchase. *Exposition Press Inc., et al.*, v. *F.T.C.*, Docket No. 7489, 295 F. 2d 869; *Carter Products Inc.*, v. *F.T.C.*, 186 F. 2d 821.

19. The findings made herein with respect to CX 1, 2 and 3, 16A & B do not apply to all of respondent's advertising. In its own behalf, respondent offered a great number of its newspaper advertisements in evidence, including RX 9A through 9A-108, inclusive. These advertisements, unlike those offered by counsel supporting the complaint, state that Atlantic Mills Thrift Center Store is the advertiser. In none of the advertisements, RX 9A–9A–108, are the words ATLANTIC MILLS used alone, without using respondent's full trade name, Atlantic Mills Thrift Center Store. In fact, the evidence seems to indicate that respondent has not used newspaper nor radio advertising listing only the words ATLANTIC MILLS since more than two years ago. Most of the newspaper advertisements which respondent has used during recent years show respondent's full trade name, Atlantic Mills Thrift Center Store, as the advertiser. Furthermore, most of the advertisements indicate that Atlantic Mills Thrift Center Stores are retailers and emphasize the wide variety and types of merchandise available by reason of respondent's large number of buyers who make their selections from various manufacturers. Some of respondent's advertisements (RX 9A–41) affirmatively state, among other things, that the Atlantic Mills Thrift Center Stores are "Retailers Only, not manufacturers, so our buyers have the choice of all the leading brands made, assuring you of the most fabulous selections possible in fashions, household and outdoor living needs." (Contained in an advertisement in the Oklahoma City Times of April 19, 1961.) However, the circumstance that some of respondent's advertising may not be misleading or deceptive does not excuse respondent from violating the provisions of Section 5 of the Federal Trade Commission Act.

20. Accordingly, it is found that respondent's use of the aforesaid false, misleading and deceptive statements in said newspaper advertisements 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 true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

21. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing and other

merchandise of the same general kind and nature as that sold by respondent.

CONCLUSIONS

1. Respondent's acts and practices, as found herein, are to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

2. The order proposed by counsel supporting the complaint would have the effect to excise the word "Mills" from respondent's trade name. In the opinion of this hearing examiner, the record does not support such harsh a remedy. Over the years, respondent has expended a considerable sum of money in advertising. Its trade name is a valuable business asset. Excision is not warranted if there is some other means by which the deceptive implications of the word "Mills" can be removed. As this hearing examiner interprets Commission counsel's contention, it is respondent's use of only the words "Atlantic Mills" in its advertising, as distinguished from its full trade name Atlantic Mills Thrift Center Stores, which is false and deceptive. Respondent's use of its complete trade name Atlantic Mills Thrift Center Stores in its advertising is not, in itself, misleading or deceptive. The likelihood of deception from use of only the words "Atlantic Mills" in its advertising would be eliminated if persons reading or hearing the advertisements and dealing with respondent at its stores are adequately informed of the true nature of the business operations of the stores. This can be accomplished through the use of a concise statement on advertising, including radio broadcasts and television telecasts, to the effect that "Atlantic Mills" is not a manufacturer or mill, but is a retail store. The *Lafayette Brass Manufacturing Company, et al.*, Docket No. 6671 [57 F.T.C. 704].

ORDER

It is ordered, That respondent Virginia Dare Stores Corporation, a corporation, and its officers, 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 clothing or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly, using only the words "Atlantic Mills" or "Mills" or any other words of similar import or meaning in its advertising, as distinguished from respondent's full trade name Atlantic Mills Thrift Center Stores, unless in immediate connection and conjunction with each such name or names a clear and conspicuous disclosure is made that "Atlantic Mills" or "Mills" is a retail store and not a factory or mill where any clothing or other merchandise is manufactured.

Opinion of the Commission

FEBRUARY 28, 1964

By Anderson, *Commissioner:*

The respondent herein, Virginia Dare Stores Corporation, was charged with violations of Section 5(a)(1) of the Federal Trade Commission Act.[1] Virginia Dare, a Delaware corporation with its principal offices in New York City, operates thirty-four low markup, self-service discount stores throughout the eastern, midwestern, and southern portions of the United States. Each of these stores is a wholly owned subsidiary of Virginia Dare and all but one operate under the trade name "Atlantic Mills Thrift Center Stores." The respondent is solely a retailer and has never owned or operated a mill or manufacturing plant. The complaint charged that the use of the term "Mills" in the trade name and advertisements of the discount stores was a representation that respondent owned or operated a mill in which at least some of the merchandise offered for sale in the stores was produced. The complaint further alleged that many members of the consuming public prefer to purchase directly from a manufacturer in the belief that by so doing, they receive lower prices and other advantages and that the above representation is deceptive and has the capacity and tendency to induce the purchase of substantial quantities of respondent's merchandise.

The matter is presently before the Commission on cross-appeals. The hearing examiner found that the use in newspaper advertisements of the abbreviated title, "Atlantic Mills," as distinguished from the complete trade name, "Atlantic Mills Thrift Center Stores," was misleading and deceptive. Accordingly, he issued an order requiring respondent to cease using only the words "Atlantic Mills" or "Mills" in its advertising, as distinguished from the full trade name, unless in immediate conjunction with such usage there was conspicuous disclosure that the store is a retail store and not a factory or mill. The examiner found no preference on the part of members of

[1] 66 Stat. 631 (1952), 15 U.S.C. 45(a)(1) (1958).

the purchasing public to buy directly from a manufacturer, and, correspondingly, no deception on the part of respondent in the use of "Mills" when used as a part of the complete trade name. Respondent now asserts, *inter alia*, that the failure of the examiner to find such a preference and the absence of proof of actual deception require dismissal of the complaint. Counsel supporting the complaint contends that there was sufficient evidence for a finding of the alleged preference and that an order should issue excising the term "Mills" from respondent's trade name.

We first consider whether the evidence establishes that many members of the consuming public prefer to purchase directly from a manufacturer.[2] Complaint counsel's evidence on this point consisted of five consumer or public witnesses from the New York metropolitan area, an area in which respondent operated no store at the time of the hearing.[3] These witnesses were unfamiliar with respondent's advertising and organization, and none had shopped in an Atlantic Mills Thrift Center. There is no indication of bias on their part. Four of the witnesses testified that they preferred to purchase goods directly from a manufacturer where possible. Unanimously they gave as their reason the belief that they would be able to obtain merchandise at lower prices than would be available to them in retail outlets.

In an effort to rebut this testimony, respondent called an associate professor of merchandising from the School of Retailing at New York University. This witness stated that the practice of buying direct from the manufacturer was so small that it was not reported by the Department of Commerce and that it was generally confined to friends and relatives of employees of manufacturers. He further testified that it was his observation that the public prefers to purchase from a retailer instead of from a manufacturer, because the retailer is more conveniently located than a manufacturer, will grant refunds and exchanges, has a wider selection, and markets seasonal merchandise in season.

[2] The preference is significant from the standpoint of determining the degree of public interest. *Federal Trade Commission* v. *Royal Milling Co.,* 288 U.S. 212 (1933). In determining whether a proposed proceeding will be in the public interest, the Commission exercises a broad discretion. *Federal Trade Commission* v. *Klesner,* 280 U.S. 19 (1929).

[3] Counsel supporting the complaint had moved prior to the hearing that the examiner take official notice of the facts "[t]hat a preference exists on the part of many purchasers to buy directly from mills or factories believing that by so doing lower prices and other advantages thereby accrue to them," and that respondent, by the use of "Mills" as part of its trade name, represents that it owns or operates a mill or factory in which the clothing and merchandise sold by it are manufactured. The examiner declined to take official notice of these facts; a subsequent interlocutory appeal to the Commission from this ruling was denied.

Contrary to the decision of the examiner, it is our conclusion that the absence of an opportunity to purchase directly from a manufacturer is not grounds for concluding that no preference to so purchase exists. Merely because members of the consuming public are in most cases unable to purchase directly from a manufacturer does not mean that they have no such desire or preference when the opportunity is available. Moreover, after sifting all of the testimony on preference, it appears to us that where the prime consideration in the consumer's mind is price, he would prefer to purchase from a manufacturer. However, where he is concerned with wider selections, better service, or convenience of access, he will purchase where these considerations are available, irrespective of whether the seller happens to be a manufacturer or retailer. The statement by respondent's expert that consumers prefer to purchase from retailers for specific reasons may thus be reconciled with the testimony of the consumer witnesses that they prefer to purchase from manufacturers in the expectation of receiving lower prices. Such a conclusion is supported by the concession of respondent's expert on cross-examination that if a manufacturer could offer the same selections and services as a retailer, consumers would purchase from the manufacturer. It is therefore our holding that the evidence is sufficient to establish a preference on the part of many members of the purchasing public to buy directly from a manufacturer. The examiner's finding to the contrary is not adopted.

The evidence in this case also establishes that respondent emphasized the abbreviated trade name "Atlantic Mills" in its newspaper and radio advertisements. On some occasions, the abbreviated trade name was used without further explanation or qualification. On other occasions, there appeared elsewhere in the advertisement the words "America's Largest Self-Service Thrift Department Store." On a few occasions, respondent specifically disclaimed a manufacturing status by the words "Retailers only, not manufacturers, so our buyers have the choice of all the leading brands made, assuring you of the most fabulous selections possible in fashions, household and outdoor living needs." On all occasions, however, "Atlantic Mills" appeared in large, bold-faced type, while the words of qualification or explanation appeared in thinner, smaller type. One of the consumer witnesses stated that the word "Mills" in respondent's newspaper advertisements "looks at you, stares at you."

On numerous occasions, respondent referred to its price as "our usual mill price" when making a comparison with the "usual retail price." Those products so advertised were for the most part textile products. In the same advertisements, other products were offered for sale at an "anniversary price." Near the top of these advertisements appeared the phrase, "These unbelievable prices made possible by the cooperation of the manufacturers who supply us regularly." The words "Atlantic Mills" appeared in large letters, followed in smaller letters by the words "Shopping Center," "Shoppers World," or "America's Self-Service Thrift Department Stores." Since some of the products in these advertisements were preceded by "our usual mill price" while others were preceded by "anniversary price," the qualifying words cannot be interpreted as an adequate disclaimer of a manufacturing status.

The initial misrepresentation created by respondent's use of "Mills" in its advertising and trade name was not necessarily dispelled when the prospective customer arrived at the store and observed the vast array and multiplicity of products offered for sale.[4] Various articles, such as blankets, towels, lingerie, diapers, and men's underwear and sox, were labeled "Atlantic Mills." Other products bore no labels at all. Thus, although respondent carried many nationally branded items which it obviously did not manufacture, the customer who arrived at the store with the impression that respondent manufactured some of the goods offered for sale might retain that impression. In addition, even though the more sophisticated might recognize the true nature of respondent's operations, there is a substantial possibility that the less wary and less observant would not achieve the same degree of awareness and thus would need protection. *Standard Mills, supra; Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (2d Cir. 1944).

We conclude, therefore, that respondent, through the use of the word "Mills" as part of its trade name, in its newspaper and radio advertising, and on some of its labels, represents to the public in an affirmative manner that it owns and operates a mill or factory in which at least some of the clothing and other merchandise sold by it are manufactured. *Federal Trade Commission* v. *Mid West Mills, Inc.*, 90 F. 2d 723 (7th Cir. 1937); *Bear Mill Mfg. Co., Inc.* v. *Federal Trade Commission*, 98 F. 2d 67 (2d Cir. 1938); *Herzfeld, et al.* v. *Federal Trade Commission*, 140 F. 2d 207 (2d Cir. 1944); *Rudin & Roth, et al.*, 53 F.T.C. 207 (1956); *Standard Mills, et al.*, Docket No.

[4] The examiner concluded that the initial misrepresentation created by respondent's use of its abbreviated trade name in its advertising was clarified by a visit to one of respondent's stores. He nevertheless found a violation of the Federal Trade Commission Act as a result of the initial misrepresentation. *Exposition Press, Inc., et al.* v. *Federal Trade Commission*, 295 F. 2d 869 (2d Cir. 1961). We disagree only with his finding of fact.

8484, 63 F.T.C. 978, September 30, 1963; cf. *Federal Trade Commission* v. *Army and Navy Trading Co.*, 88 F. 2d 776 (D.C. Cir. 1937). We also conclude, in light of the testimony on preference for purchasing from a manufacturer in the belief that lower prices thereby ensue, that this is a material misrepresentation requiring action on our part. Our own examination of the advertisements, coupled with consumer testimony to the effect that respondent's advertisements conveyed the impression that respondent was a manufacturer, convinces us that the misrepresentations have the capacity and tendency to mislead and deceive members of the purchasing public. The absence of proof of actual deception does not affect our decision. The Commission may nevertheless act where, as here, it is convinced that the representations have the requisite misleading capacity and tendency. *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149 (1942); *Herzfeld, et al.* v. *Federal Trade Commission, supra; Northern Feather Works, Inc.* v. *Federal Trade Commission*, 234 F. 2d 335 (3d Cir. 1956); *United States Retail Credit Association, Inc., et al.* v. *Federal Trade Commission*, 300 F. 2d 212 (4th Cir. 1962).

In determining the proper remedy, we must consider all relevant facts and weigh the danger of public deception against the private inconvenience and expense of a change in trade name. Where a respondent engages in some type of milling or converting activity, words of qualification or explanation used in conjunction with the trade name have been held to be sufficient to dispel any misrepresentation or deception. E.g., *Federal Trade Commission* v. *Royal Milling Co., supra; Standard Mills, supra.* However, where a respondent does not operate any manufacturing, milling, or converting facilities whatsoever and where the proposed words of qualification or explanation are in complete and absolute contradiction with the words which convey the deceptive and misleading impression, excision has been held to be the appropriate remedy. *Federal Trade Commission* v. *Army and Navy Trading Co., supra; Herzfeld, et al.* v. *Federal Trade Commission, supra; Deer, et al.* v. *Federal Trade Commission*, 152 F. 2d 65 (2d Cir. 1945); *Rudin & Roth, et al., supra.*

In the instant case, any words of disclaimer would be in contradiction with the word "Mills." Further, since respondent makes contact with the consuming public through a broad program of radio and newspaper advertising and deals directly in its stores with persons of varying degrees of sophistication, great difficulty would be encountered in arriving at adequate and practical methods of disclaiming a manufacturing status. We are therefore of the opinion that the public interest in an accurate portrayal of respondent's true business status is substantial and of greater importance than the expense and inconvenience involved in the alteration of respondent's trade name.[5] We conclude that excision of the term "Mills" from respondent's trade name is the appropriate remedy.

For the aforementioned reasons, we grant complaint counsel's appeal and reject that of respondent. An order will issue, striking portions of the examiner's initial decision and requiring excision of the term "Mills" from respondent's trade name. Those portions of the examiner's initial decision which are in conflict with our findings and conclusions herein are not adopted. The remaining facts found by the examiner are hereby adopted. Rules of Practice, § 3.24(b), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

Commissioner Elman dissented, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

FINAL ORDER

This matter having been heard by the Commission on cross-appeals from the hearing examiner's initial decision filed by counsel supporting the complaint and by respondent, and on briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that respondent's appeal should be denied and complaint counsel's appeal granted and that the initial decision should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision, filed February 15, 1963, be modified by striking therefrom paragraphs 3, 17, 18, and 20 of the Findings of Fact and paragraph 2 of the Conclusions, and substituting therefor the findings and conclusions of the accompanying opinion.

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[5] Respondent experienced little difficulty in changing the name of its first store from "Fairhaven Mills" to "Atlantic Mills" by advertising for a period as "Fairhaven Atlantic Mills," then reversing the name to "Atlantic Fairhaven Mills," and ultimately omitting "Fairhaven" from the name altogether. Dropping "Mills" from "Atlantic Mills Thrift Center Stores" is a change much less stark and does not alter the name to the point where it is unrecognizable.

It is further ordered, That the aforesaid initial decision be modified by striking therefrom the order issued by the examiner and substituting therefor the following:

ORDER

It is ordered, That respondent, Virginia Dare Stores Corporation, a corporation, and its officers, and respondent's agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of clothing or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the word "Mills" or any other word of similar import or meaning in or as a part of respondent's corporate or trade name, or representing in any other manner that respondent is the manufacturer of the clothing and other merchandise sold by it unless and until respondent owns and operates, or directly and absolutely controls, the manufacturing plant wherein such clothing and other merchandise is made; provided however, that should respondent so desire for reasons of continuity, it may use the identifying phrase "formerly Atlantic Mills Thrift Center Stores" or words of similar import in its advertising for a period not to exceed one year from the effective date of this order.

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

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

Commissioner Elman dissenting and Commissioner Reilly not participating from the reason that he did not hear oral argument.

IN THE MATTER OF

GENERAL ELECTRIC COMPANY

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

Docket 8487. Complaint, May 28, 1962—Decision, Feb. 28, 1964

Order dismissing—the record being inadequate for a determination on the merits—complaint charging a manufacturer of household appliances, among other products, with violation of Sec. 2(d) of the Clayton Act and the Federal Trade Commission Act through use of a cooperative advertising plan with its wholesale distributors and retail dealer customers under which advertising allowances were credited to the accounts of retailers who did not sell at prices lower than those listed in respondent's schedule entitled "Minimum Retail Prices Eligible for Cooperative Advertising Claims", but were not offered to competing retailers who advertised lower prices than those so listed.

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 subsections (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), and has been, and is now, using unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, the Commission hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH 1. Respondent General Electric Company 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 1 River Road, Schenectady, New York.

PAR. 2. Respondent is now and for a number of years has been engaged in the manufacture, distribution and sale of numerous household or consumer used products and appliances, such as but not limited to toasters, irons, clocks, blankets, electric light bulbs, photo lamp equipment and others of various description.

Respondent General Electric Company consists of a number of divisions, one of which is the General Electric Supply Company. The General Electric Supply Company has approximately 100 offices located in major cities throughout the United States, which are engaged in the sale and wholesale distribution of respondent's household or consumer used products and appliances.

Respondent also has a large number of independent distributors in cities throughout the United States engaged in the sale and wholesale distribution of respondent's said products and appliances.

Respondent is the largest producer of such household or consumer used products and appliances in the United States and its volume of business in the sale and distribution of such products and appliances is substantial.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent is now engaged, and for the past several years has been engaged, in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, having sold and distributed its aforesaid products and appliances manufactured in plants in various states and transported, or caused the same to be transported, from these plants to purchasers located in other states of the United States and other places under the jurisdiction of the United States.

PAR. 4. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or authorized payment of, money, goods or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished or agreed to be furnished by or through such customers in connection with the processing, handling, sale or offering for sale of respondent's said products and appliances and respondent has not made or contracted to make such payments, allowances, or consideration available on proportionally equal terms to all its other customers competing in the sale and distribution of such products and appliances.

For example, respondent on January 1, 1959, promulgated and put into effect a cooperative advertising plan with its wholesale distributors whereby advertising allowances are paid or credited to the account of retail dealers purchasing respondent's household appliances from said wholesale distributors. In addition, respondent, through its General Electric Supply Company, also offers the plan to its retail dealer customers. Under this plan respondent contributes to the cost of advertising only on condition that:

(a) Prices mentioned in such advertising are no lower than those listed in a schedule entitled "Minimum Retail Prices Eligible for Cooperative Advertising Claims" issued by respondent.

(b) Advertising of premium or combination offers will not reduce the price below the prices listed in said schedule of minimum retail prices.

(c) In some instances prices mentioned in advertising are no higher than those shown in respondent's schedule of suggested list prices.

(d) Price comparisons are not made in advertising.

(e) Proposed advertising is cleared and authorized in advance by wholesale distributors.

(f) That such advertising is audited by respondent or its agents after publication to determine compliance with its terms, and

(g) That in lieu of suggested minimum prices, retail advertiser may elect to advertise without mentioning price.

Such advertising or other allowances received by some retailers, as alleged in the particular example above, are not offered or otherwise made available on proportionally equal terms to competing retailers who advertise merchandise at prices lower than those listed in respondent's schedule of "Minimum Retail Prices Eligible for Cooperative Advertising Claims". Moreover, in addition to the foregoing and as alleged in the first paragraph of Paragraph Four above, such compensation or allowances were not offered or made available on proportionally equal terms to all other customers competing with the favored customers.

PAR. 5. The acts and practices of respondent, as alleged in Paragraphs One to Four are all in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

COUNT II

PAR. 6. Paragraphs One through Four of Count I are hereby set forth and with the same effect as if set forth here verbatim.

PAR. 7. In the course and conduct of its business, respondent General Electric Company has been for some time past, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it has shipped its products or caused them to be transported from its place of business to said customers with places of business located in the several states of the United States and in the District of Columbia.

PAR. 8. Except to the extent that competition has been hindered, frustrated, lessened and eliminated, as set forth in this complaint, respondent has been and is now in competition with persons, firms, and other corporations likewise engaged in the manufacture, sale and distribution in commerce of household appliances. Many of the wholesale distributors to whom respondent sells such household appliances were, and are, in competition, some in commerce, with each other and with respondent's wholly owned General Electric Supply Company which sells to retail dealers in competition with said wholesale distributors. Many of the retail dealers who purchase respondent's household appliances and sell such products to consumers are in competition with each other.

PAR. 9. In the course and conduct of its business as a manufacturer and wholesale distributor, respondent promulgated and put into operation a cooperative advertising plan, as outlined in Paragraph

Four herein. Respondent by itself and in combination, understanding, course of dealing and agreement with its independent wholesale distributors sought by said cooperative advertising plan to induce and persuade, and did induce and persuade, in unreasonable restraint of trade, certain retail dealers of its household appliances to hinder, lessen, or eliminate or abandon price competition through the restriction of advertising to ultimate consumers and prospective purchasers by said retail dealers.

PAR. 10. The aforesaid acts and practices of the respondent manufacturer and wholesale distributor of household appliances in competition with independent wholesale distributors of its household appliances and acting in combination with them and through them to suppress and restrain retail price competition by the restriction of advertising are unfair, oppressive and to the prejudice and injury of the ultimate consumer and prospective purchasers of said household appliances in depriving them of knowledge of price competition and the benefit of competitive prices in the sale of appliances and are all to the prejudice and injury of retail dealers in such appliances competing by means of retail price advertising with retail dealers who have been and are being induced and persuaded to suppress or abandon such competition in return for such allowances.

PAR. 11. The acts, practices, methods and agreements of respondent as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to unduly hinder competition and restrain trade, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER DISMISSING COMPLAINT

This case has been heard by the Commission on cross-appeals by the parties from the initial decision of the hearing examiner. The Commission has determined that the record is not adequate to enable an informed determination on the merits. Rather than remanding the case to the hearing examiner for the taking of further evidence, the Commission considers that the public interest would be better served by instructing its staff to maintain a close scrutiny of respondent's Cooperative Merchandising Plans to determine whether their purpose or effect is to bring about retailers' adherence to resale prices specified or suggested by respondent, or otherwise to constitute an unlawful price-fixing or price-stabilizing arrangement. Accordingly, and without adjudicating any issue of fact or law contested on this appeal,

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

Commissioner MacIntyre not concurring for the reason that he believes the Commission should have adjudicated the issues involved here. It is his view that the public interest would be better served by the Commission reaching and rendering a judgment in the disposition of this important case. It is his understanding that this case is a forerunner of other like important situations, the resolution of which will be required by the public interest.

IN THE MATTER OF

SINKRAM INCORPORATED, ET AL.

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

Docket 8490. Complaint, June 7, 1962—Decision, Feb. 28, 1964

Order requiring Brooklyn, N.Y., sellers of a home instruction course or program known as "The Height Increase System," to cease representing falsely by use of the words "Height Increase" as part of their trade name and by other statements in advertisements in newspapers and magazines that their course would permanently add inches to the body height of all persons who followed the instructions 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 Sinkram Incorporated, a corporation, and Samuel N. Kram, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sinkram Incorporated 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 982 East 106th Street, Brooklyn, New York. Respondent Samuel N. Kram is an officer of said corporation. He directs and controls the policies and practices of the corporate respondent. His address is the same as that of the corporate respondent.

PAR. 2. Respondents under the trade name of The Height Increase Institute are now, and for some time last past have been, engaged in the sale and distribution of a home instruction course, or program offered for the increasing of body height. The name of said course is The Height Increase System.

PAR. 3. Respondents cause said course when sold to be transported from their place of business in the State of New York to purchasers thereof located in various other states of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said instruction course in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, hereinbefore described, and for the purpose of inducing the purchase of their said course, respondents advertise the same by means of advertisements inserted in newspapers and magazines of general circulation and by pamphlets, brochures and other advertising material distributed through the United States mail. Typical, but not all inclusive, of the statements contained in said advertisements are the following:

> New Scientific method will add inches to your present height, even after maturity! Are you too short? Let us show you how you can be taller in only 6 weeks at absolutely no cost to you, scientific proven method.
>
> Yes, you can increase your height in only a matter of weeks by using the famous Height Increase System. Science has shown that growth after maturity is still possible through the proven principle of "Iterstitial Accretions". It has helped many small men and women, and it can help YOU! The Height Increase System is based on scientific facts and designed to utilize the full "growing power" of your body.
>
> Since 1957 the Height Increase Method has helped hundreds of men pass their measurements for the police and fireman physical exams without the use of drugs, pills or mechanical apparatus and without harmful effects. This is a revolutionary system that permits your body to extend itself with visible results in a few weeks.
>
> This course is expressly for the adult who has already acquired his full stature regardless of age thereafter or sex, and youngsters whose growth for some reason or another has been stunted.
>
> Quick results positively guaranteed.

PAR. 5. By and through the use of the words "Height Increase" as a part of their trade names, and various other statements appearing in the aforesaid advertisements, and other statements of the same import but not herein set forth, respondents represented, and now represent, that the use of the said course of instruction, sold by them, will permanently add inches to, and increase the body height of, any and all persons who follow the instructions set forth therein.

PAR. 6 In truth and in fact the said course of instruction will not increase the body height of anyone. The aforesaid representations, therefore, are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the purchase of their instruction course, respondents have represented that said course is "positively guaranteed", thereby representing that respondents' instruction course is guaranteed in every respect.

PAR. 8. In truth and in fact the guarantee is limited, and the terms, conditions and the extent to which said guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed in said advertising material. Respondents' guarantee representation, as aforesaid, therefore is false, misleading and deceptive.

PAR. 9. Respondents, through the use of the trade name "The Height Increase Institute", have represented, and do represent, that they are an institute devoted to the study of means of increasing body height.

In truth and in fact, respondents are not an institute devoted to the study of means of increasing body height. On the contrary, respondents are primarily engaged in the sale of their instruction course for profit. The aforesaid representation, therefore, is false, misleading and deceptive.

PAR. 10. The use by the respondents of the foregoing false, misleading and deceptive statements has had, and now has, the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of respondents' book by reason thereof.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson supporting the complaint.
Mr. Stanley M. Estrow, New York, N. Y., for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

JANUARY 8, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission, on June 7, 1962, issued its complaint charging Sinkram Incorporated, a corporation, and Samuel N. Kram, individually and as an officer of said corporation, with violation of the provisions of the Federal Trade Commission Act. The complaint alleges that respondents, under the trade name of "The Height Increase Institute", have for some time last past engaged in the interstate sale and distribution of a home instruction course or program claimed to increase body height called "The Height Increase System". It is alleged that for the purpose of inducing the purchase of said course, respondents, through use of the words "Height Increase" and other statements of the same import appearing in advertisements inserted in newspapers and magazines of general circulation and by pamphlets, brochures and other advertising material distributed through the United States mail, represent that the use of the said course will permanently add inches to, and increase the body height of, any and all persons who follow the instructions therein set forth. Respondents' said representations are alleged to be false, misleading and deceptive for the reason that the said course of instruction will not increase the body height of anyone as claimed.

It is also alleged that for the purpose of inducing the purchase of the said course, respondents have further represented that said course is "positively guaranteed" in every respect, and that this guarantee representation is false, misleading and deceptive, because said guarantee is limited, and the terms, conditions and the extent to which said guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed in said advertising material. It is finally alleged that respondents through use of the trade name "The Height Increase Institute", represent that they are an institute devoted to the study of means of increasing body height, and that such representation is false, misleading and deceptive because respondents are in fact primarily engaged in the sale of their home instruction course for profit.

Answer to the complaint was filed by the respondents on July 11, 1962, following which an order was issued cancelling the hearing scheduled in the complaint and setting a prehearing conference for August 16, 1962. Prior to the prehearing conference, counsel supporting the complaint filed a motion requesting that official notice of certain facts be taken relative to the charge in the complaint concerning respondents' use of the word "Institute". Following oral answer made to said motion by counsel for respondents during the prehearing conference, said motion was granted to the extent set forth in the order issued herein on August 17, 1962. By agreement of respective counsel, the prehearing conference was made part of the public record herein.

A stipulation as to relevant facts not in dispute was entered into by counsel supporting the complaint and counsel for the respondents during the prehearing conference and made of record during the opening hearing on October 10, 1962. Following the certification to the Commission of a Certificate of Necessity, the Commission granted leave for hearings to be held in Washington, D. C., and in New York, New York, subject to the conditions set forth in said certification.

A hearing was held in Washington, D.C., on October 10 and 11, 1962, during which respondent Samuel N. Kram, New York, New York; Dr. Felix P. Heald, Director, Adolescent Unit, Children's Hospital, Washington, D.C.; Dr. J. Lawrence Angel, Curator of Physical Anthropology, Smithsonian Institution, Washington, D.C.; and Dr. Henry L. Feffer, Associate Clinical Professor of Orthopedic Surgery, George Washington University School of Medicine, Washington, D.C., appeared and testified as witnesses and following which the case-in-chief was closed.

A hearing for the presentation of repsondents' defense was held in New York, New York on October 15 and 16, 1962, during which Mr. Clifford Atkins, 545 West 146th Street, New York, New York, a user of respondents' home instruction course; Dr. Charles J. Lakritz, Doctor of Osteopathy, 6838 Clyde Street, Forest Hills, New York; and respondent Samuel N. Kram, appeared and testified as witnesses and following which the case for the defense was closed.

Respective counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses, and to introduce such evidence as is provided for under Section 4.12(b) of the Commission's Rules of Practice for Adjudicative Proceedings. The record exhibits marked for identification and received in evidence in this proceeding are Commission exhibits 1 through 14 A–B; respondents' exhibits marked for identification 1 through 31 A–B were rejected.

Respondents' rejected exhibits are subject to Section 4.12(f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent Sinkram Incorporated 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 700 Dumont Avenue, Brooklyn, New York. Respondent Samuel N. Kram is an officer, the president, of Sinkram Incorporated and directs and controls the policies and practices of said respondent corporation. Said individual respondent's address is the same as that of the corporate respondent. Respondents' former address was 982 East 106th Street, Brooklyn, New York.

2. Sinkram Incorporated and Samuel N. Kram, president, under the trade name of "The Height Increase Institute", have been since the corporation was organized on April 20, 1961, engaged in the sale and distribution of a home instruction course, or program, for the increasing of body height known as "The Height Increase System". Said course or program consists of a booklet entitled "The Height Increase System—Treatise and Application" and a blank chart to be kept daily by the purchaser entitled "20 Week Height Increase Progress Chart".

3. Respondents Sinkram Incorporated and Samuel N. Kram have caused the said course or program, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other states of the United States. Prior to incorporation on April 20, 1961, respondent Samuel N. Kram operated the said business as a sole proprietorship under the laws of the State of New York. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in the sale of said course or program in commerce as "commerce" is defined in the Federal Trade Commission Act.

4. An example of statements and representations for the purpose of inducing the sale of said course or program and appearing in advertisements caused to be disseminated by respondent Samuel N. Kram, prior to the incorporation of Sinkram Incorporated on April 20th, 1961, in the New York Daily News, the New York Herald Tribune, the New York Journal American, the New York Enquirer, all daily newspapers published in the City of New York, New York, and in other publications throughout the United States, is the following:

Be Taller

New scientific method will add inches to your present height, even after maturity! Quick results positively guaranteed. Send 25¢ (to cover cost of handling & postage) for complete data and literature, to:
Height Increase Institute, Dept. EN-33 G.P.O. Box 1902, New York 1, N.Y.

5. An example of statements and representations for the purpose of inducing the sale of said course or program and appearing in advertisements caused to be disseminated by respondents Sinkram Incorporated and Samuel N. Kram, subsequent to the date of the incorporation of Sinkram Incorporated on April 20, 1961, in the New York Journal American, the New York Daily News, the New York National Enquirer, all newspapers published in the City of New York, New York, and magazines with a national circulation such as Sterling's Men's Publications, Sterling's Detective Publications, and Leonard Green's Publications, all of which newspapers and other publications are distributed throughout the United States, is the following:

Are you too short?
Let us show you how you can become taller in only 6 weeks
At absolutely no cost to you
Scientific proven method

Yes, you can increase your height in only a matter of weeks by using the famous Height Increase System. Science has shown that growth after maturity is still possible through the proven principle of "Interstitial Accretions." It has helped many small men and women, and it can help You! The Height Increase System is based on scientific facts and designed to utilize the full "growing power" of your body.

No drugs
No harmful effects

Since 1957 The Height Increase Method has helped hundreds of men pass their measurements for the police and fireman physical exams without the use of drugs, pills or mechanical apparatus and without harmful effects. This is a revolutionary system that permits your body to extend itself with visible results in a few weeks.

Introductory offer

Act now. Get the complete facts. Documented and illustrated information is yours (sent in plain wrapper) for only 25¢ to cover the cost of postage and handling.

Height Increase Institute, Dept. J-18, Box 1902, New York 1, N.Y.

6. The following statements and representations by respondents for the purpose of inducing the sale of said course or program, appear, among others as hereinafter set forth in finding seven following, in a letter or brochure entitled The Height Increase Institute sent by respondents to each prospective purchaser of The Height Increase System, by United States mail, upon receipt of an inquiry in response to respondents' above and other advertising promotions:

This course if for the adult who has already acquired his full stature regardless of age thereafter or sex, and youngsters whose growth for some reason or another has been stunted.

We would be the last to contravene that gland performance and natural hereditary qualities are important factors in determining a person's height. We also agree that proper food, rest and relaxation are prime factors in developing an enviable stature.

Can an adult add to his height? The answer is an emphatic *yes* as you will now find out.

The diagrams juxtaposed represent a typical section of the spinal column joints which constitute the flexibility of the spinal column. These so-called joints are in reality, pads or discs which have the ability to expand and contract. Between morning when you awaken and evening when you retire, there may be as much as a whole inch difference. Consequently you are about one inch taller in the morning than in the evening.

These discs are known as the 'Invertebral Discs' of the spinal column. They separate the 'Bodies of Vertebrae' of the spine. The Bodies of Vertebrae themselves have no flexibility.

Our purpose is therefore to expand these discs—rebuild and *add* cartilaginous tissue, consequently resulting in an increasing thickening of the joints. Our aim is to maintain a gradual cumulative expansion and thickening process which increases each day and each week through the height increasing program. This process is known by medical men as "Interstitial Accretions."

The multiplicity of ligaments and joints in the spinal column accounts for its flexibility. The Height Increase System will stretch, thicken and consequently elongate the Invertebral Discs. The spine herein is our major concern, as this is the factor involving the overall difference in height. The Invertebral Discs will react by the body's own natural process.

7. In addition to the statements and representations set forth in finding number six above, respondents' aforesaid letter or brochure contains the following:

In almost a decade of persistent work, dedicated exclusively to physical culture, but particularly to growth, we have been able to develop an organization of wide renown—the greatest in this field. Our systematic, progressive method to attain increased height is the only one in its class, based on principles which have been studied and elaborated by medical men and anthropologists for many years.

This letter or brochure entitled, The Height Increase Institute, shows an ornate appearing building of considerable size in an apparent park-like setting. Respondents' business operation in actuality is limited to one room located in a store in a combination commercial-residential area. This room is used for mailing purposes, and the storage of such notes, photostat copies and materials as has been gathered from outside libraries by respondent Samuel N. Kram. The business has no library facilities and no employees, and is solely operated by respondent Samuel N. Kram as president, with his wife acting as secretary-treasurer of the corporate respondent.

Respondent Samuel N. Kram's formal education is that of a Bachelor of Science in Civil Engineering obtained in February, 1957 from the School of Engineering, City College of New York, New York. Said individual respondent alone is responsible for the preparation and placing of the corporate respondent's advertising as aforedescribed. Said individual respondent alone prepared the letter or brochure entitled The Height Increase Institute and the pamphlet entitled The Height Increase System and accompanying material sent to prospective purchasers and purchasers of said course or program.

The business operation of respondents Sinkram Incorporated and Samuel N. Kram is not an "Institute" as such term is properly used and applied. It is not an organization for the promotion of research, experimentation, investigation and study in the science of body growth, and maintains no trained technical staff, properly equipped laboratory, or other facilities for such purpose.

Respondent Samuel N. Kram has not had any formal medical education or other training sufficient as a background to qualify for proper research as such term is properly used and applied, and any alleged research conducted by said individual respondent, must necessarily have been limited to a medically uninformed and uncritical assessment as to the medical truth of any controversial statements, representations or claims, which may have appeared in the various books, articles, or published materials read or reviewed by said respondent.

Respondents Sinkram Incorporated and Samuel N. Kram are primarily engaged in the commercial sale of their aforesaid instruction course or program for profit. Said sales have been substantial in that about 3,000 or more sales are made annually. Approximately fifty percent of the dollar sales volume received by said respondents has been from sales made to purchasers in states other than New York.

Official notice is further taken in conformance with the prior order issued herein on August 17, 1962, and the finding is made, based on the additional evidence now of record in this proceeding, that such use of the word "Institute" by the respondents in their trade name and in the advertising, solicitation, sale and distribution of their said instruction course or program, constitutes a misrepresentation of the status of a business which is, in reality, not an institute but, to the contrary, is a business operated primarily for profit, and that such representation is false, misleading and deceptive to the public and induces a substantial number of the public to purchase the said instruction course or program because of such erroneous and mistaken belief. See, *In the Matter of Post Institute* (1941) 34 F.T.C. 394; *In the Matter of Natural Foods Institute* (1953) 50 F.T.C. 434.

8. Respondent Sinkram Incorporated and respondent Samuel N. Kram, individually and as an officer of said corporation, by and through the use of the words "Height Increase" as a part of their trade name, and various other statements and representations appearing in their aforesaid advertising, sales letter or brochure, or other solicitations for the purchase of said instruction course or program, have and do represent that the use of the said course or program, sold by them and used as directed, will permanently add inches to, and increase the body height of, any and all persons who follow the instructions therein set forth. These said representations are false, misleading and deceptive to the purchasing public, for in fact, respondents' said course or program when used as directed will not increase the body height as respondents claim.

The above is found to be amply demonstrated and shown by the overwhelming weight of the probative testimony of record introduced in this proceeding through Dr. Heald, Dr. Angel and Dr. Feffer. In the light of this testimony, little or no weight can be given the testimony of Dr. Lakritz, and the two lay witnesses, Mr. Atkins and Mr. Kram, with relation to any alleged body height increase claimed due to actual body growth directly or indirectly attributed to use of the respondents' exercise instruction course or program.

9. Dr. Felix P. Heald, basically trained in pediatrics and engaged in the full time teaching of research in adolescent medicine, is the Director, Adolescent Unit, Children's Hospital, Washington, D.C. and holds the degree of medical doctor received from the University of Pennsylvania Medical School in 1946. Prior to his present position, the witness's medical experience included, among others, a residency in pediatric pathology, and a medical resident in pediatrics,

Children's Medical Center, Boston, Massachusetts; and an instructor in pediatrics, Harvard University Medical School, with full time hospital teaching research in adolescent medicine, 1949–1960. The witness was certified in 1952 to the American Board of Pediatrics and, in connection with his specialty, the exhibit record in this proceeding discloses a two-page list of numerous medical journal articles authored by the witness alone or in collaboration with others.

Dr. Heald testified adolescent medicine would encompass medical, nutritional and psychological disorders, and would necessitate a considerable amount of knowledge about the adolescent growth spurt. This growth spurt was described as the time since birth during which the most rapid growth of the human organism occurred during the entire growing period. An adolescent boy was stated to have achieved eighty percent of his adult height by age twelve and to finish out the additional twenty percent in height at or around age seventeen. The witness testified as to the examination of many young patients coming to him in the interest of increasing their body height, and related the tests for evaluating at what stage an adolescent is in the growth spurt, and the manner of predicting how much more, if any, growth would proceed.

The witness testified that height is no more nor no less than a measure of bone growth, since linear growth is entirely oseous development. There being approximately twenty-six oseous growing bones in the hand-wrist, the witness stated one chooses a hand-wrist X-ray to find out about bone growth. By comparing the X-ray to a standardized atlas for hand-wrist X-rays, estimates can be made as to whether the individual's oseous growth is normal, delayed, or accelerated. This observation was said to be one of the most important things to be done in evaluating growth, for when an epiphysis is fused, the particular bone can no longer grow. The epiphysis was explained to be the growing part of the bone, and it was further stated that growth and height is, in general, related to the growth of the long bones in the leg and in the spine, and that when the epiphyses in both of these regions fuse, growth ceases.

This cessation in body or bone growth was said to be at a time period that would correspond to the end of the growth spurt. The witness adding, but there is evidence in the literature that growth of the spine will continue in adult life up to about the 40th year, but this change is "very, very small, very small". Any such body or bone growth as tended to be indicated by this literature would be due to oseous development in the epiphysis and would be minute. In other words, said Dr. Heald, "it has been fairly well shown that by the 16th year in girls, 16½ years in girls, and by the 17¾ year in boys that by and large adult height has been achieved, plus or minus 10 months, either way."

With relation to the management of young patients coming to him in the interest of a body height increase, the witness testified that the usual approach is a conventional good history and physical examination to make sure there is not a chronic disorder such as diabetes, renal, or cardivascular disease, or a severe nutritious disorder which would produce short stature. In the absence of poor posture or physical deformity, exercise is not used, because it was stated exercise will not increase ultimate body height, nor speed the attainment of ultimate body height.

With reference to respondents' exercise instruction course or program, the witness stated its use would have no effect on the growth spurt as biologically determined, and such exercise could not affect the epiphysis fusion in the bones. It was further stated that exercise has no relationship to velocity or intensity of growth, that biologically there are growth processes which do go on strikingly during adolescence and that this growth essentially is over by late adolescence, and that exercise in addition to the biologically determined growth could not add permanently to height.

The witness testified that posture should not be equated with height because once growth ceases and height becomes stable, a correction in posture can alter height to the extent of standing more erectly and thus obtaining whatever inherent growth one has achieved. It was stated that position can give you all kinds of variation in height and that anatomical height is what one measures at the end of growth. According to the witness, "if one has poor posture so that one slumps, visibly slumps, if one stands erect, this increases his height, but not his anatomical height."

10. Dr. J. Lawrence Angel, Curator of Physical Anthropology, Smithsonian Institution, Washington, D.C., holds a Doctor of Philosophy degree received from Harvard University in 1942. Since graduation, the witness taught anthropology at the Universities of Harvard, California, and Minnesota, following which he was appointed to the Anatomy and Physical Anthropology Department of Jefferson Medical College, Philadelphia, Pennsylvania, from which he retired as a full professor on August 31, 1962, to his present position. For five years prior to such retirement from Jefferson Medical College, the witness also taught a course in surgical anatomy to surgeons at the United States Naval Hospital, Philadelphia, Pennsylvania. The exhibit record in this proceeding contains a list of seven pages showing the biography and education of the witness, his pub-

lications, abstracts of papers given at scientific meetings, books reviewed, and research and travel grants received from the Guggenheim Foundation and the Wenner-Gren Foundation, New York, New York, the American Philosophical Society, and from the United States Public Health Service.

Dr. Angel testified to having engaged in study and research pertaining to the anatomy and structure of the spinal column and the bone changes which might take place in it with age in the adult. The witness expressed familiarity from his research, with the factors that determine the ultimate body height that would be reached by a person at maturity. The witness testified that to his knowledge, there is no new scientific method which would add inches to the height of an individual after maturity, and that no growth was possible after the closure of the epiphyses of the long bones and the vertebral column.

With reference to respondents' exercise course and various of the representations therein set forth, the witness testified that exercises which involved a rigorous routine of stretching might improve posture, but would not lead to an increase in height after maturity; that an eventual permanence in the expansion and thickening of the joints could not be so achieved; and that an increase in the size of the joints by natural growth could not be accomplished by interstitial accretions, because in relation to bone, growth cannot take place by interstitial accretions. The witness stated the term "interstitial accretions" to have been introduced into the anatomical literature some decades back, because at one time it was considered to be a possible way of growth in bone. According to the witness, this theory has since been investigated and disproved.

With reference to the representation made in respondents' instruction course or program that "Men and women of 40 are still growing and the process continues into the fifth and sometimes sixth decade according to anthropologists of the Smithsonian Institute", Dr. Angel testified that such was not a reflection of the official position of the Smithsonian Institute. The witness stated he knew of no scientific or medical evidence that would support the proposition, that there could be an increase in the bone structure or an enlargement of the intervertebral discs by reason of any system of exercises which would be particularly directed to stretching in their execution. The witness further stated there was evidence opposed to it, in that, the common observation of individuals who have exercised strenuously and had been measured repeatedly through their lives, shows that once the epiphyses have permanently closed, their body stature does not increase. As a practical illustration of this, the witness cited the example of ball players.

11. Dr. Henry L. Feffer, Associate Clinical Professor of Orthopedic Surgery, George Washington School of Medicine, Washington, D.C., holds the degree of medical doctor received from Indiana University School of Medicine in 1942. Following graduation the witness trained in orthopedics in Kings County Hospital, New York, and Gallinger Municipal Hospital, Washington, D.C. The witness was an orthopedic surgeon in the United States Army, 1945–1947, and since then has been in the practice of orthopedic surgery in Washington, D.C. He is a consultant to the National Institute of Health; Mount Alto Veterans Hospital; D.C. General Hospital; and George Washington University Hospital, all of Washington, D.C.

Dr. Feffer, a Diplomate of the American Board of Orthopedic Surgery, testified that he was a member of a four-man symposium picked to discuss intervertebral discs before the American Academy of Orthopedic Surgery in January, 1962, and that the study of intervertebral discs has been his principle interest. The exhibit record in this proceeding contains a two-page list of Dr. Feffer's professional qualifications and publications.

Dr. Feffer explained at length the structure and functioning of an intervertebral disc. The intervertebral disc was stated to be the shock absorber like structure which lies between each two vertebral bodies and functions as a distributor of forces. Its center contains a gel or fluid able to absorb force and thus prevent bone damage, which was stated to be its primary function. The witness testified that in older people when the bones soften, that a disc could increase in height but then only with an equivalent loss of bone, because before the disc will extend it will fracture bone, and that in the case of a damaged intervertebral disc, the healing or replacement process was not a growth process in the spine in the context of a height increase.

The witness further stated that he had never undertaken any experimental work with respect to the effect of mechanical motion upon the intervertebral discs in living persons, and did not see how it could be done, because one would not operate on normal tissue in a living person just before and after physical exercise to determine its effect on an intervertebral disc. Nor had the witness undertaken any laboratory experimentation in connection with the physical makeup of the intervertebral disc from the particular viewpoint of determining the effect upon it of exercise, because in a dead person that would be impossible.

With regard to various of the statements and representations made by respondents in the advertising and sale of their exercise instruction course or program, Dr. Feffer testified to having no objection to the said exercises and that such would probably make the individual stand straighter. The witness then added, "But when the advertisement and the system claims a growth factor, with scientific proof thereof and an increase in height due to the ability of living cells to multiply, this is absolutely fallacious."

With reference to respondents' representation that the purpose of respondents' exercise course or program was directed "above all, to stretch, restretch, and achieve eventual permanence in the expansion and thickening of the joints", Dr. Feffer stated such claim also to be false.

The witness testified that to his knowledge there was no scientific method known to make the cells multiply themselves, stating, the intervertebral disc is one of the earliest parts of the body to undergo degenerative stages, it starts to go in the teens. There is no increase in cellular content. It is just the opposite, in spite of anything anybody has ever been able to do. "There is no, there is absolutely no, way to increase growth" once the growth of the individual epiphyseal centers are closed, there is no way to open them and start growth again. "This is ridiculous", according to Dr. Feffer.

The witness further testified that the period in a person's life when the epiphyseal growth centers close vary in all parts of the body. In the spine it was stated to be in the mid-teens and once they were closed, it was impossible to reopen them again, and growth has then stopped. The witness stated that there are tables available for all the different joints, and that you can determine the bone age of an individual through their use. In the case of disorders of growth, such as endocrine imbalance, one can use X-rays and from comparison with such tables, bone age can be determined in contradistinction to chronological age.

Dr. Feffer distinguished between body growth and an increase in body height. As to body growth, this was stated to be regulated by endocrine gland performance and hormone output in the body, or in the normal adult, to menopause age in women and to the approximately equal age in men. The witness then testified that the growth centers close by a trigger mechanism of the pituitary gland output which occurs at puberty. In other words, stated the witness, the same pituitary gonadotrophic hormone which stimulates the gonads to develop into functional sexual organs closes the growth centers. Dr. Feffer testified that in speaking of the growth centers reference was being made to the bones, stating that to have an "increase in longitudinal length you would have to have change in bone size since this is what holds everything else together."

The witness also testified to using exercises in his practice, and further, that the exercises in respondents' course were good but standard, and that the witness could devise 100 different kinds that would do the same thing to correct posture and eliminate excessive spinal curvatures. As to what extent respondents' exercise course would increase the height of a person with excessive spinal curvature, the witness stated it would depend upon the curve to be straightened and that an increase in apparent height of a quarter of an inch through exercise would be a pretty good result. The witness added that considerably more would be produced if there was a fantastic, severe, idiophatic scolios or a severe curvature of the spine which one actually operated upon and straightened. In the case of a severe curvature, the witness testified exercises would not straighten it out, but one could attempt to afford some correction.

12. Dr. Charles F. Lakritz, 6838 Clyde Street, Forest Hills, New York entered Kirksville College of Osteopathy and Surgery, Kirksville, Missouri, in 1936 and graduated in 1940, with the Degree of Doctor of Osteopathy. The witness also holds the Degree of Master of Arts in Psychology received in 1957 from the New School for Social Research, New York, New York. Dr. Lakritz served his interneship in the Gleason Hospital, Larned, Kansas, 1940–1941, and since has been licensed to practice in the States of Ohio and New York. He is a member of the New York State Osteopath Society, an associate member of the American Psychological Society, and an associate member of the New York Clinical Psychologists. The record shows no published work by the witness.

The witness testified osteopaths are distinguished from medical doctors by the fact that they employ manipulative therapy in the treatment of a disease. This therapy is usually applied to the back, the spine, the vertebral column, and other areas of the body as well, according to the witness. Dr. Lakritz testified that no one had ever come to him with the specific request that his height be increased, but that he had on occasion observed a height increase collaterally resulting from his therapy.

The witness testified that patients have been referred to him by medical doctors for manipulative or osteopathic treatment. The particular example testified to by Dr. Lakritz in this proceeding, to support an observation of alleged height increase, represented an abnormal situation dealing with an apparent posture defect. The witness testified he had observed an increase in height in an elderly man of 60 who allegedly increased in height about five or six inches resulting from his therapy. This man according to Dr. Lakritz, had a slipped intervertebral disc in the lumbar area for which he was being treated in a New York hospital without apparent improvement, and had decided to try osteopathic treatment before resorting to an operation. Dr. Lakritz testified to treating this man, who came to him in pain with a contorted posture, with medicines and the application for about 90 to 100 days of a harness using traction of about 50 to 70 pounds applied to the problem area. The doctor testified that in his opinion this traction, in principal, was the equivalent of a stretching exercise, and that the mechanical therapy he applied, in principal, was similar to what would be received by a person following respondents' exercise course or program.

Dr. Lakritz further testified that he had made some research of the effect of exercise on the spine at respondent Samuel N. Kram's request, although the extent of such research of the literature, and on what literature Dr. Lakritz based his testimony in this proceeding in such regard, was not stated or made clear on the record. The witness, on the question of body growth, generally testified that exercise would increase metabolism, that the endocrine gland partaking in this increase in metabolism would increase the amount of their production, and that this would mean a heightened amount of endocrine secretion in the body, and the witness then concluded with the statement that body growth could only occur in the presence of endocrine activity. The only example the witness could give from personal observation as to any joints of the body which might expand their structure due to an increase of endocrine production, in an adult past the growth spurt, was an expansion in the pelvic joints during pregnancy which, according to the witness, was believed to be due to increased endocrine production. The witness stated with relation to such belief, that to his knowledge, no one knew how the body channels such increased endocrine production to the pelvic area, and added, "I think there are many assumptions, of course. But I don't believe that anybody has declared with certainty that this is so and nothing else."

Previous medical testimony was to the effect that physical exercise had no relation to bone growth, and that body growth and height were, in general, related to the growth of the long bones in the leg and the spine, and further, that when the epiphyses in both of these regions fuse, growth ceases. This fusion had been stated to occur, in general, at a time period corresponding to the end of the adolescent growth spurt. It had also been testified that "there is evidence in the literature that growth of the spine will continue in adult life up to about the 40th year, but this change is "very, very small, very small."

Dr. Lakritz, after testifying that the epiphysis centers are in the vertebral body and that the vertebral body is distinct from the intervertebral disc which is not a bony substance, was read the above quoted testimony to which he stated his agreement. The witness was then asked if exercises were localized to the vertebral column, and based on his prior testimony that exercises would stimulate hormone or endocrine gland activity, whether in his opinion such endocrine action would focus upon the epiphyseal center of the vertebrae. To this Dr. Lakritz answered: "I can only say to you that I could entertain it as a possibility." The witness was then further asked if, in his opinion, this could result in an epiphyseal growth: to which the answer was: "Yes, sir; it's a possibility."

In assessing this testimony by Dr. Lakritz as to any such resulting bone growth in the vertebral column, little or no probative value can be given to the conjectural possibilities arrived at on such a speculative basis. The great weight of the acceptable probative testimony in this proceeding is found to be that while physical exercise may, to some degree, correct posture and cause one to stand more erect and thus create a height increase appearance, it cannot accelerate bone growth and the attainment of biologically determined ultimate body height, and further, that no bone growth resulting in or producing any permanent increase in actual body height or structure, can be caused by or result from physical exercise of any description or application.

13. Witness Clifford Atkins, purchased and used respondents' exercise course for an unspecified four weeks sometime in 1961. Mr. Atkins testified he was five feet seven inches tall at the beginning of the exercises, and at the end of four weeks when he concluded such exercises, that he had gained an inch and one half in height. Mr. Atkins, a man of very limited education, age 54, for the past 19 years of his life has been engaged as a porter in work involving the lifting of heavy objects. His testimony as to an increase in body height was based on two measurements taken by his wife with a tape measure as he stood against a wall in his house. Obviously the accuracy of his wife's visual observations as orally related to the witness, and in turn orally related by the witness on the witness stand, was both hearsay and not convincing evidence that Mr. Atkins' body grew one and one half inches, at his age and in four weeks, as a direct re-

sult of the use of respondents' exercise course. At best, and even if such an alleged increase in body height measurement figures were to be accepted as accurate, they could reasonably only be taken under such circumstances to indicate an improvement in posture causing the witness to stand more erect and appear taller than formerly.

14. Respondent Samuel N. Kram, age 30, testified that at the earlier age of twenty years, he was five feet three and one half inches tall. Witness Kram testified that at such earlier age he had read an article in a physical culture magazine on exercises alleged to increase body height, that he diligently performed such exercises for a period of six or seven months and thereby gained an inch and a quarter in stature. The witness stated the foregoing exercises to be similar to those contained in respondents' instruction course as offered for sale, and further claimed that he had since retained most of this increase but not all of it up to the date of his testimony. Respondent's alleged body height increase was based on measurements he alone made of himself on a measurement scale in the Brooklyn YMCA. The witness testified that prior to these exercises he was an ardent weight lifter and that the new exercises undertaken were stretching exercises that tended to counter his weight lifting exercises which were body compressing. Under these circumstances, it is again more reasonable to relate any alleged body height increase to a postural improvement and not bone growth as a direct result of the exercises in question.

The witness also testified as to certain library materials he had personally researched both prior and subsequent to the preparation of said course. The so-called research material gathered by respondent Samuel N. Kram and attempted to be introduced into evidence through said respondent comprised respondents' exhibits marked for identification 1 through 31 A–B which were rejected for receipt in evidence. They included, for example, exhibit 2–A for identification, a photostat of a New York Times newspaper article dated February 1937; exhibits 11, 12 and 13 for identification, which were 1928, 1960 and 1937 articles offered as written in the original French and which were testified to have been translated by the respondent with the aid of a French dictionary; exhibit 14 for identification, being certain pages from a book stated to have been written by a nonmedical author and published in 1939; exhibits 15 through 20 for identification being articles in various medical journals written in 1939 and reviewing said exhibit 14; and finally a group of exhibits marked for identification 23 through 31, being letters of various dates received by the respondents from alleged satisfied users of their exercise course or program.

None of the authors or writers of the articles, books, book reviews, or respondents' course or program users' letters were attempted to be presented for cross-examination as to their background, the verity of the underlying data, and the probity of any controversial statements or assertions which might therein appear. None of the witnesses, Dr. Heald, Dr. Angel or Dr. Feffer, relied on such exhibits as the basis for their testimony in this proceeding, nor was any showing made that such exhibits were generally known and accepted as authoritative, or as reputable works by any part of the medical profession. It is also significant that no attempt was made through respondents' witness, Dr. Lakritz, either to identify or ascertain whether any of said exhibits were considered either authoritative or a well-known reputable work.

15. The Commission's Rules of Practice for Adjudicative Proceedings, Section 4.12(b) with reference to admissibility states, "Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded." Respondents, notwithstanding, urge the admission herein of these rejected exhibits in the obvious presence of a lack of opportunity for adequate cross-examination in such regard. Respondents would also urge that this rejected material should have been allowed to be used in cross-examination of the expert witnesses in this proceeding.

Respondents rely upon and quote from *Dolcin Corporation* v. *Federal Trade Commission* (1954) 219 F. 2d 742. In the *Dolcin* case, however, we find the court stating, "When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions," citing 6 Wigmore, Evidence, Third Edition, Section 1690.

In *Wybrant System Products Corporation, et al.* (1958) 54 F.T.C. 1681, 266 F. 2d 571, *cert. den.* 361 U.S. 883, the Commission stated: "Finally, on their appeal respondents assert that the examiner erred in ruling that passages from medical treatises were inadmissible as evidence. Respondents offered as evidence four excerpts from books on dermatology, described by them as written by well-recognized authorities. The examiner refused to admit the excerpts because the authors were not present for cross-examination. Respondents argue that this ruling conflicts with the holding in *Dolcin Corporation, et al.* v. *Federal Trade Commission*, 219 F. 2d 742 (1954), *cert. denied* 75 S. Ct. 571 (1955). The Commission does not so understand the *Dolcin* decision. The court there stated that:

When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions. (Emphasis supplied.)

It went on to say that cogent arguments can be made in favor of their use, but recognized the difficulty under the hearsay rule. 'Yet that objection,' the court said, 'may be largely obviated by requiring the introduction of the articles through experts in the field who will, themselves, be subject to cross-examination.' No such procedure was followed herein. Moreover, not only did the court in Dolcin note that the examiner should have a certain broad discretion in this connection, it did not reverse the decision because of the exclusion of the scientific writings. It stated that it would do this only where substantial justice so requires and that it would hesitate in most cases to say that a rule almost universal in the courts would, in an administrative proceeding, deny the parties substantial justice. Under the circumstances, we cannot find that the examiner committed error here in refusing to admit the scientific writings."

The court in the *Wybrant* case stated: "The firm testimony of the Commission's several expert witnesses that petitioners' preparations and treatments cannot cure male pattern baldness provides ample basis for the Trial Examiner's conclusion that the advertisements were false. And since these witnesses freely conceded that some authorities had expressed somewhat contrary views, we do not think the Trial Examiner's refusal to receive in evidence the medical treatises that petitioners offered constituted reversible error. See *Dolcin Corp.* v. *F.T.C.*, D.C. Cir. 219 F. 2d 742, 747–749 [5 S.&D. 646], *certiorari denied* 348 U.S. 981."

In the *Dolcin* case, the court states in a footnote that before *Reilly* v. *Pinkus* (338 U.S. 269) the circuits were split on whether or not works on which the witness had not relied could be used in cross-examination. In the *Dolcin* opinion, the court states, *Reilly* v. *Pinkus*, we think, stands for the general proposition that an expert witness who bases an opinion to a *significant* degree upon his *reading* may be cross-examined as to that opinion by reference to other *reputable* works in *his field* (italics supplied).

Another footnote in the *Dolcin* case states with reference to *Reilly* v. *Pinkus* that the court does not therein say how the authority of those works is to be determined. The footnote further states that it seems clear from the facts given in the opinion that it is unnecessary for the witness himself to recognize the authority of the work [but see Lawrence v. Nutter, 203 F. 2d 540 (4th Cir. 1953)] or even to have read it [but see Shaw v. Duncan, 194 F. 2d 779 (10th Cir. 1952)]. We think the authority of the work is for the presiding officer to decide. And we think he should have a broad discretion in determining what—and how much—evidence may be presented on that question.

Shaw v. *Duncan*, cited in the above footnote, following its construction of the opinion in *Reilly* v. *Pinkus* holds: "We do not think it was error to sustain the objection to the question propounded to Dr. Norris with respect to the teachings in "Modern Dermatology and Syphilology" as it treats of acne, because of his answer that he never read the work."

Lawrence v. *Nutter*, cited in the above footnote, following its construction of *Reilly* v. *Pinkus* holds: "We need go no further in the pending case than to hold that the attention of an expert may be called in the course of cross-examination to statements in conflict with his testimony contained in relevant scientific works which he recognizes as authorative."

In the present proceeding it will be noted that respondents' exhibits marked for identification 2–A through 31 A–B and rejected, were identified and sought to be introduced into evidence through the lay witness respondent Samuel N. Kram. Omitting respondents' satisfied customer letters, proposed exhibits 2 and 23 through 31, none of the above exhibits would have qualified for receipt in evidence or for use on cross-examination under the foregoing case law. Moreover, in the attempt to identify various of these latter exhibits through the prior witnesses, Dr. Heald, Dr. Angel and Dr. Feffer for attempted use in the cross-examination of these witnesses, respondents were met with the statement that the authors and their work was unknown to them. The record discloses this with particular reference to the attempted use of exhibits marked for identification 1 A–E, 2–A, and 9 A–C, as regards Dr. Heald; 9 A–C, as regards Dr. Angel; and 2–A, 3 A–D, with regard to Dr. Feffer.

The fact that Dr. Heald, Dr. Angel and Dr. Feffer were not acquainted with said exhibits in no way detracts from the expert qualifications and the probative value of the testimony of these expert witnesses. See, *United States* v. *Wood* (1955) 226 F. 2d 924; *Irwin* v. *Federal Trade Commission* (1944) 143 F. 2d 316.

With reference to the irrelevancy, in addition to the hearsay character of respondents' rejected exhibits, the so-called satisfied customer letters marked for identification 2 and 23 through 31, see *Independent Directory Corporation, et al.* v. *Federal Trade Commission* (1951) 188 F. 2d 468 at 282; *Erickson Hair and Scalp Specialists* v. *Federal Trade Commission* (1959) 272 F. 2d 318 at 322, *cert. den.* 362 U. S. 940.

16. Respondents Sinkram Incorporated and Samuel N. Kram, in the solicitation and the sale and for the purpose of inducing the sale of their aforesaid course or program, have advertised and repre-

sented as shown in finding number four, supra: "Quick results positively guaranteed."

The above representation is unqualified. In truth and in fact the guarantee is limited, and the terms, conditions and the extent to which the guarantors will perform thereunder are not disclosed in said advertising material. Respondents' said advertised guarantee representation is therefore found to be false, misleading and deceptive to prospective purchasers of said course or program.

Prospective purchasers, responding to respondents' above advertisement, are first informed that such guarantee is limited and confined to only the return of the purchase price, upon receiving respondents' mailed sales letter or brochure. This letter or brochure adds the following further limitation: "A written guarantee that your entire money will be returned if you follow the system steadfastly and rigidly and you do not increase your height to your own complete satisfaction."

Prospective purchasers responding to the advertisements set forth in findings number four and five, supra, and forwarding twenty-five cents to the respondents, are not shown by the record in this proceeding to have been returned such forwarded money following a reading of this letter or brochure sent them by the respondents. The purchase price of respondents' course or program is stated in said letter or brochure to be $15, with $5 being initially paid, and the balance of $10 due as stated in said letter or brochure: "Only after you have received complete satisfaction and are simply overjoyed over the gains you have made."

While the record does not disclose the number of prospective purchasers that sent respondents 25 cents and thereafter received respondents' letter or brochure and then declined to purchase respondents' course or program, respondent Samuel N. Kram testified to making approximately 7,000 sales since early 1960. The witness further estimated that of this number, about ten per cent of the purchasers paid the additional $10 balance over and above the initial $5 payment, and that about 35 dissatisfied purchasers had requested and been refunded whatever purchase price respondents had received for said course or program.

The record discloses the advertisement shown in finding number four, supra, to have been used prior to April 20, 1961, and further, there is testimony to the effect that respondents' exercise course or program and their letter or brochure had undergone a recent change in nomenclature, and that the term "Institute" had been discarded although the tenor of said course or program remains the same. In

Clinton Watch Company v. *Federal Trade Commission* (1961) 291 Fed. 838, it was held: "Voluntary discontinuance of an unfair trade practice does not necessarily preclude issuance of a cease and desist order. The order to desist from an abandoned unlawful practice is in the nature of a safeguard for the future. Other than the mere discontinuance at an undisclosed time of their practice relating to the guarantee of their merchandise, petitioners have shown no facts before the Commission which would require that this portion of the order be set aside (citing cases)." See also, *Inter-Communication System of America, Inc.* v. *Federal Trade Commission* (1948) 45 F.T.C. 361; *Parker Pen Company* v. *Federal Trade Commission* (1946) 159 F. 2d 509.

17. Applicable to the prior findings herein that the use of the word "institute", the unqualified guarantee representation, and respondents' body height increase representation and claim, are each and all false, misleading and deceptive, is the following from the case law.

In *Carter Products, Inc.* v. *Federal Trade Commission* (1951) 186 F. 2d 821, it was held: "The law is violated if the first contact or interview is secured by deception even though the true facts are made known to the buyer before he enters into the contract of purchase (citing cases)."

In *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission* (1944) 143 F. 2d 676, it was held: "That the Commission did not produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown in Federal Trade Commission proceedings (citing cases). Representations merely having a 'capacity to deceive' are unlawful (citing cases)."

The court in the above case further held: "There is no merit to petitioner's argument that, since no straight-thinking person could believe that its cream would actually rejuvenate, there could be no deception. Such a view results from a grave misconception of the purposes of the Federal Trade Commission Act. That law was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous,' and the 'fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.' The important criterion is the net impression which the advertisement is likely to make upon the general populace. And, while the wise and the worldly may well realize the falsity of any representations that the present product can roll back the years, there remains 'that vast multitude' of others who, like Ponce de Leon, still seek a perpetual fountain of youth. As the Commission's expert further testified, the average woman, conditioned by talk in magazines and over the radio of 'vitamins, hormones, and God knows what,' might take 'rejuvenescence' to mean that this 'is one of the modern miracles' and is 'something which would actually cause her youth to be restored'. It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements, and should have the discretion, undisturbed by the courts, to insist if it chooses 'upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein." (citing cases)"

18. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, and acts and practices as hereinbefore found and set forth in Paragraphs 1 through 17, supra, 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 a substantial number of respondents' exercise instruction courses or programs by reason of said 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 complaint herein states a cause of action, and this proceeding is in the public interest.

3. The aforesaid acts and practices of respondents, as hereinbefore found and set forth in Paragraphs One through Eighteen of the Findings of Fact, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Sinkram Incorporated, and its officers, and Samuel N. Kram, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of an exercise instruction course or program for body height increase, or any other course or program of a similar nature and purpose, sold under the same or any other name, do forthwith cease and desist from:

1. Using the word "Institute", or any simulation thereof, in or as part of a corporate or trade name, or otherwise in any manner through any means or device, representing directly or by implication, that the business operated by them, or any of them, is an organization for the promotion of research, experimentation, investigation and study, or anything other than a private business enterprise for profit.

2. Using the words "Height Increase" or any other words of similar import to describe a course or program, or representing or implying in any other manner that the use of a course or program will thereby cause, contribute to or result in an increase in ultimate body height.

3. Representing directly or by implication that a course or program, or the results of the use thereof, are guaranteed, unless the terms and conditions of such guarantee, and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

Opinion of the Commission

FEBRUARY 28, 1964

The complaint in this matter charges respondents—a corporation, and the individual who controls it, doing business under the name of The Height Increase Institute—with falsely and deceptively advertising that their home instruction course can "add inches" to the user's height, and with other deceptive acts or practices, in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner filed an initial decision in which he upheld the complaint and entered an order to cease and desist, and respondents have appealed. Only one of the contentions urged by respondents on this appeal—viz, that the examiner erred in making certain evidentiary rulings—has sufficient merit to warrant discussion in this opinion.

The contention is that the examiner erred in refusing (1) to admit, on direct examination, scientific writings offered in evidence by respondents, and (2) to permit respondents to use these writings, on cross-examination, to impeach the testimony of expert witnesses supporting the complaint. We do not find it necessary to decide whether these rulings of the examiner were erroneous. The excluded documents are part of the record before us on this appeal, and the Commission has studied them at first hand. We have also reviewed the examiner's findings and conclusions, and the evidence on which they are based, in the light of the excluded materials. On the basis of the entire record, including those materials, we conclude that the examiner's ultimate findings and conclusions are warranted by the evidence and are correct.

Complaint counsel argued before the examiner that the questioned scientific writings should be excluded as evidence because of the hearsay rule. This argument, as the examiner recognized in his initial decision, is wide of the mark. Evidentiary hearings before the Commission are not governed by the common-law exclusionary rules, such as the hearsay rule. Rather, "any oral or documentary evidence," so long as it is "reliable, probative, and substantial," is competent and admissible in Commission proceedings. Administrative Procedure Act, Section 7(c); see, e.g., *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924). As stated in the Commission's Procedures and Rules of Practice, (August 1, 1963), "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded." (Section 3.14(b).)

The test governing use of scientific writings as evidence in administrative proceedings has been stated in *Reilly* v. *Pinkus*, 338 U.S. 269 (1949), and *Dolcin Corp.* v. *Federal Trade Commission*, 219 F. 2d 742 (D.C. Cir. 1954). Emphasizing the inapplicability of the hearsay rule to agency proceedings, the court stated in the *Dolcin* case: "We think authoritative scientific writings can—and should—be freely used by administrative agencies." *Id.*, at 749. While the proper rule is that scientific writings are not, as a class of evidence, inadmissible in Commission proceedings, they should be excluded when they are irrelevant, immaterial or unduly repetitious, or when they are patently unreliable or worthless—in the language of the *Dolcin* decision, not "authoritative."[1]

As to the use of scientific writings on cross-examination, the Supreme Court stated in *Reilly* v. *Pinkus*, 338 U.S. 269, 275:

> In cross-examination respondent sought to question these witnesses concerning statements in other medical books, some of which at least were shown to be respectable authorities. The questions were not permitted. We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.

[1] In *Dolcin*, the court "assumed" authoritativeness of the scientific writings offered through qualified experts who could be cross-examined on the science in the field, including the literature offered, but made it clear that ordinarily the authority of the work is for the hearing examiner to decide.

This test was further elaborated in the *Dolcin* decision:

> *Reilly v. Pinkus*, we think, stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field. It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use. And we do not think that the Court limited its ruling to cases involving fraud. The *Reilly* case also holds that the trial examiner has broad discretion to determine the extent of the cross-examination on written authorities. He probably has, in some cases, discretion to determine whether there should be any such cross-examination at all. But it is error to exclude such questions by blanket rule, without more. 219 F. 2d, at 746-47.

The rules established in *Reilly* v. *Pinkus* and *Dolcin* have the advantage of simplifying the conduct and consideration of Commission proceedings. Under these rules, a hearing examiner should not by blanket rule exclude from evidence scientific writings shown to be reliable, but on the other hand should prevent a deluge of material of comparatively small value; and in determining the extent, if any, to which the use of such writings may be permitted on cross-examination, he should exercise a "broad discretion" in the light of all the circumstances surrounding the testimony of the expert sought to be cross-examined.[2]

Considered as a whole, the initial decision in this case indicates that the hearing examiner followed these general principles, and. accordingly, we are denying the respondents' appeal. An appropriate order will be entered.

Commissioner Anderson concurred in the result. Commissioner MacIntyre did not concur. Commissioner Reilly did not participate for the reason that he did not hear oral argument.

SEPARATE OPINION OF THE COMMISSION

FEBRUARY 28, 1964

By MacIntyre, *Commissioner:*

I cannot concur in the opinion of the Majority, for I believe the statements made therein may have unfortunate and far-reaching results.

The first question here presented is: Are scientific writings offered to prove purported factual statements ~~made therein admissible~~ into evidence without their author present in the courtroom? Of course,

[2] In a proper case it may be presumed—in the absence of a showing to the contrary—that articles written by apparently qualified experts in reputable scientific journals are "respectable authorities" within the meaning of *Reilly* v. *Pinkus*.

such writings are hearsay when offered for such a purpose and their admissibility depends upon a host of factors. In general, however, it can be said that such evidence should be accepted when its incompetence is overcome by a showing that the writing is of such an authoritative nature as to be generally accepted by a substantial segment of the scientific community involved. Proof of such acceptance will more often stem from the expertise and reknown of the author, rather than from the nature of the publication. But these are questions for the hearing examiner to decide and he must be permitted to exercise his discretion unencumbered by ambiguous Commission fiats that " * * * evidentiary hearings before the Commission are not governed by the common-law exclusionary rules, such as the hearsay rule." The simple truth is that some hearsay is admissible and some is not and it is up to the hearing examiner to sift the wheat from the chaff, with the end in view of compiling a factual record of reliable evidence.

In this proceeding the hearing examiner ruled that the writings offered were not authoritative and could not be relied upon for the truth of the statements contained therein and rejected them as hearsay. I believe that these rulings were correct and the Commission should have so ruled. The Majority quotes from *Dolcin Corp.* v. *Federal Trade Commission*, 219 F. 2d 742 (D.C. Cir. 1954), to the effect that " * * * authoritative scientific writings can—and should —be freely used by administrative agencies." With this statement, say my colleagues, the court was "Emphasizing the inapplicability of the hearsay rule to agency proceedings * * * ." As I read *Dolcin*, it holds only that authoritative scientific writings, vouched for by a qualified witness, may be "used" by administrative agencies. To opine from this narrow holding that the hearsay rule is inapplicable in a Federal Trade Commission proceeding is stretching the decision far beyond its proper scope.

It is my fear that the Commission's opinion may be interpreted by hearing examiners and counsel as an invitation to amass records with hearsay evidence which in the final analysis is incapable of supporting an order to cease and desist, for only evidence which is "reliable, probative, and substantial" can support such an order. Administrative Procedure Act, § 7(c), 5 U.S.C. 1006(c) (1952).

There appears to be a good deal of support among members of the bar and the judiciary for the proposition that the rules of evidence should be relaxed in administrative proceedings. I am in full sympathy with the view that evidence which would not be admitted in a criminal or civil proceeding tried before a jury can and should be freely admitted in administrative proceedings. However, this sensible rule should not be adulterated to permit the admission of incompetent evidence lacking corroboration or other support as to its reliability. After all, we, no less than the courts, are dealing with the absolutes of fact and truth and the nature of neither changes with the tribunal. There is absolutely no reason or justification why the evidentiary basis of, for example, an order of divestiture should vary depending upon the unhappy accident of whether the Justice Department or the Federal Trade Commission instituted the Section 7, Clayton Act, proceeding. Respondents and defendants are entitled to equal justice.

The second question presented by this proceeding is: Was the hearing examiner's refusal to permit the respondents' counsel to utilize certain scientific writings in cross-examining the Commission's expert witnesses reversible error? The Majority, relying upon *Reilly v. Pinkus*, and *Dolcin*, held that the use of scientific writings on cross-examination should be left to the discretion of the hearing examiner, to be exercised in the light of the circumstances surrounding the expert testimony. While I am in substantial agreement with this ruling, I would point out that hearing examiners should follow a more relaxed rule in permitting materials to be used for cross-examination purposes than is used to govern the admissibility of evidence. The probing of cross-examination is such an important part of the judicial search for truth that it must never be unduly restricted or curtailed. Most of the considerations which bar the admission of hearsay documentary evidence do not apply when the material is utilized solely for cross-examination purposes. If the witness being examined is properly qualified, he will evaluate the materials used to question him. If he is not qualified, the materials may help to expose this fact and that is an important purpose of the cross-examination.

Final Order

Upon consideration of respondents' appeal from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That:

(1) The findings of fact and conclusions of law contained in the initial decision are adopted by the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;

(2) The order contained in the initial decision is adopted and incorporated herein as the final order of the Commission:

(3) Respondents shall file, within sixty (60) days of receipt of this order, a written report setting forth in detail the manner and form of their compliance with the order.

Commissioner Anderson concurring in the result; Commissioner MacIntyre not concurring; and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

SYLVANIA ELECTRIC PRODUCTS, INC.

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

Docket 8501. Complaint, June 13, 1962—Decision, Feb. 28, 1964 *

Consent order requiring a Waltham, Mass., manufacturer of photographic lighting products, including flash lamps, flood lamps and projection lamps, to cease violating Sec. 2(d) of the Clayton Act by such practices as paying a membership service corporation composed of wholesale druggists at least $18,000 as compensation for advertising and at least $2,700 for promotional or other services furnished in connection with the sale of respondent's products, while not making comparable allowances available to all competitors of the favored wholesale druggists.

COMPLAINT

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

PARAGRAPH 1. Respondent Sylvania Electric Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 63 Second Avenue, Waltham, Massachusetts.

PAR. 2. Respondent is now and has been engaged in the business of manufacturing, selling and distributing flash lamps, flood lamps, projection lamps and other miscellaneous type of photographic lighting products. It sells its products to drug and sundries wholesalers located throughout the United States. The total sales of re-

*This proceeding was reopened, cease and desist order vacated and the complaint was dismissed on Feb. 24, 1965.