

IN THE MATTER OF

RONALD LEVINE, ALSO KNOWN AS RONALD LORING,
ET AL., DOING BUSINESS AS STANLEY GIRL COAT CO.
AND PRINCESS NELL GIRL COAT

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

Docket 6269. Complaint, Dec. 22, 1954—Decision, May 7, 1955

Consent order requiring manufacturers in New York City to cease violating the Wool Products Labeling Act by labeling as "100% Reprocessed Wool," interlinings of girls' coats which consisted of reused wool together with substantial quantities of miscellaneous non-woolen fibers and non-fibrous materials, and by failing to disclose on the labels the name of the manufacturer.

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

Mr. George E. Steinmetz for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Ronald Levine, also known as Ronald Loring, and Stanley Levine, also known as Stanley Loring, each individually and as copartners, trading and doing business as Stanley Girl Coat Co. and Princess Nell Girl Coat, hereinafter referred to as respondents, have violated the provisions of said Acts; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Ronald Levine, also known as Ronald Loring, and Stanley Levine, also known as Stanley Loring, are individuals and copartners trading and doing business as Stanley Girl Coat Co. and Princess Nell Girl Coat. The offices and principal place of business of each of said respondents are located at 209 West 26th Street, New York 1, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January, 1953, said respondents have manufactured for introduction, introduced, sold, transported, distributed, delivered for shipment and offered for sale, in

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commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (1) of said Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were girls' coats containing interlinings, the fiber content of which interlinings were labeled or tagged by respondents as consisting of "100% Reprocessed Wool," whereas in truth and in fact the said interlinings did not consist of 100% Reprocessed Wool as the term "Reprocessed Wool" is defined in said act, but consisted of reprocessed or reused wool fibers, together with substantial quantities of miscellaneous non-woolen fibers and non-fibrous materials.

PAR. 4. Certain of said wool products described as girl's coats were further misbranded within the intent and meaning of Section 4(a) (2) of said Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were not stamped, tagged or labeled as to disclose the name or the registered identification number of the manufacturer thereof, or of one or more persons subject to Section 3 of said Act with respect to said wool products.

PAR. 5. The acts and practices of the respondents as herein alleged, were and are in violation of the Wool Products Labeling Act of 1939, and of the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated May 7, 1955, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on December 22, 1954, issued its complaint under the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 against Ronald Levine, also known as Ronald Loring, and Stanley

Levine, also known as Stanley Loring, each individually and as copartners trading and doing business as Stanley Girl Coat Co., and Princess Nell Girl Coat, charging them and each of them in several particulars with having violated the provisions of said Acts and of the Rules and Regulations of the Commission promulgated under said Wool Products Labeling Act. Said complaint was thereafter duly served upon each of said respondents, but said defendants have failed to answer the complaint.

On March 10, 1955, however, the respondents stipulated in writing with counsel supporting the complaint, therein waiving the filing of an answer and agreeing that a consent order against the respondents be entered herein in terms identical with those contained in the notice issued and served on respondents as a part of the complaint herein. Such written stipulation was approved in writing by the Director and Assistant Director of the Commission's Bureau of Litigation.

By said stipulation, among other things, respondents have admitted all the jurisdictional allegations of the complaint and agree that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; that the parties expressly waive a hearing before the Hearing Examiner or the Commission and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, the parties having waived specifically therein any and all right, power or privilege to challenge or contest the validity of said order. It was also stipulated and agreed therein that the complaint herein may be used in construing the terms of the order provided for in said stipulation, and, further, that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The aforesaid stipulation for consent order as so approved was submitted on March 10, 1955, to the above-named hearing examiner for his consideration in accordance with Rule V of the Commission's Rules of Practice. And upon due consideration of the complaint and the stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein, it having been stipulated they shall be the entire record herein on which such order may be entered, the hearing examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of each and both of the parties respondent herein, both individually and as copartners under the

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trade names above stated; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated by the Commission under the latter Act against the respondents, both as an entirety and in each of the particular violations alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said stipulation is appropriate for the disposition of this proceeding, the same to become final when it becomes the order of the Commission; and that said order therefore should be, and hereby is, entered as follows:

ORDER

IT IS ORDERED, That the respondents Ronald Levine, also known as Ronald Loring, and Stanley Levine, also known as Stanley Loring, individually and trading and doing business under the several firm names of Stanley Girl Coat Company and Princess Nell Girl Coat, or under any other name or names, and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of girls' coats or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool," or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

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

- (a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

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

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

3. Failing to separately set forth on the required stamp, tag, label, or other means of identification, the character and amount of the constituent fibers of the interlinings of any such wool product.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939; and

Provided, further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act of the Rules and Regulations promulgated thereunder.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of May 7, 1955].

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IN THE MATTER OF
ARTISTIC CARD PUBLISHING CORP. ET AL.ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 5984. Complaint, May 12, 1954¹—Decision, May 12, 1955*

Order requiring five corporate manufacturers of greeting cards sold by the box directly to the purchasing public by mail or by house-to-house solicitation, to cease concertedly fixing prices, quantity brackets, and common formulas for calculating prices for their products.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Floyd O. Collins for the Commission.

Rabbino & Rabbino, of New York City, for Artistic Card Publishing Corp., White Plains Greeting Card Corp., Colonial Greetings, Inc., United Craftsmen, Inc. and Artistic Card Co., Inc.

Sherburne, Powers & Needham, of Boston, Mass., for Chilton Greetings Co. and Phillips Card Co.

Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C., for Doehla Greeting Cards, Inc. and Phillips Card Co.

Mr. John I. Robinson, of Springfield, Mass., for Card Mart, Inc.

Mr. LeRoy Stein, of Elmira, N. Y., for Elmira Greeting Card Co., Inc.

Grandeferd & Goodman, of New York City, for Hedenkamp & Co.

Mr. Richard J. Hatchfield, of Brockton, Mass., for Clyde L. Evans and Lawrence E. Evans.

Cooley & Cooley, of Springfield, Mass., for Charles E. Schwer and John L. Schwer.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

On May 8, 1952, the Federal Trade Commission issued its complaint herein, charging the National Association of Greeting Card Publishers, its Secretary and Managing Director, four members of its Executive Committee, nine manufacturing members and fourteen distributor members with agreeing to fix prices, quantity brackets, discounts, terms and conditions of sale, and with separating orders and thereby avoiding consolidation of quantities to avoid lower prices for the larger quantities in a single order, in violation of Section 5 of the Federal Trade Commission Act.

¹ Amended.

After the filing of answers by respondents, five hearings were held at which testimony and other evidence were introduced in support of the allegations of the complaint by counsel therefor before the above-named Hearing Examiner, theretofore duly designated by the Commission.

At the conclusion of these hearings on March 24, 1953, at which time the attorney in support of the complaint closed his case in chief, and within the time allowed by the Hearing Examiner, respondents moved to dismiss the complaint supported by briefs to which counsel in support of the complaint filed answering brief. Thereafter, the hearing examiner on June 10, 1953, ordered the complaint dismissed for lack of sufficient evidence to constitute a prima facie case against the following respondents: The National Association of Greeting Card Publishers; Stephen Q. Shannon, individually and as Secretary and Managing Director of respondent Association; Thomas Doran, A. I. Fidelman, Julian Friede and Charles J. Hedenkamp, individually and as Members of Executive Committee of such Association; Allied Greeting Card Corporation; Messenger Corporation; National Printing Company, Inc.; Standard Greetings, Inc.; McKenzie Engraving Company; Southern Greeting Card Company; Friendship Studio, Inc.; General Card Company; and Wallace Brown, Inc., in the form of initial decision pursuant to the rules of the Commission. No appeal was filed to such order and on July 30, 1953, the Commission affirmed such dismissal. The motions to dismiss the complaint as to the remaining respondents were denied by appropriate order of the Hearing Examiner on June 10, 1953, from which an appeal was filed on behalf of one respondent, Elmira Greeting Card Co., Inc., but this appeal was denied by the Commission on July 30, 1953. Thereafter, three hearings were held at which the remaining respondents introduced testimony and other evidence in opposition to the allegations of the complaint and the evidence introduced in support thereof, and the case was closed on the record for the taking of further testimony December 15, 1953. January 25, 1954, was fixed as the time for the filing of any proposed findings and conclusions by counsel. Several days prior thereto counsel in support of the complaint notified the Hearing Examiner that he desired to ask the Commission to issue an amended complaint, and thereupon the order fixing time for filing proposed findings and conclusions was set aside.

Thereafter, on May 12, 1954, the Commission issued its amended complaint, identical with the original complaint except that it omitted the respondents previously dismissed on motion as parties, and added

a new distributor respondent, Artistic Card Company, Inc., alleging that its stockholders and directors were the same as those of Artistic Card Publishing Corp., a manufacturer respondent. Thereafter, counsel for all remaining respondents, and counsel for the new respondent stipulated to stand on their answers filed to the original complaint, as being their answers to the amended complaint, and further stipulated that the record made under the original complaint should be considered as the record under the amended complaint and as the basis of disposition of this proceeding. Proposed findings of facts and conclusions were thereafter filed by all counsel except on behalf of Card Mart, Inc. and Elmira Greeting Card Co., Inc., and the case closed August 6, 1954. Upon consideration of the entire record herein and from his observation of the witnesses, the Hearing Examiner finds that this proceeding is in the interest of the public and finds the facts as follows:

1. (a) Respondent Artistic Card Publishing Corp. is a corporation organized and doing business under the laws of the State of New York with its home office located at 1575 Lake Street, Elmira, New York.

(b) Chilton Greetings Company is a corporation organized and doing business under the laws of the State of Massachusetts, having its office and principal place of business at 147 Essex Street, Boston, Massachusetts.

(c) Respondent Doehla Greeting Cards, Inc., is a corporation organized and doing business under the laws of the State of Delaware, having its principal office and place of business at Nashua, New Hampshire.

(d) Respondent White Plains Greeting Card Corp. is a corporation organized and doing business under the laws of the State of New York, having its office and principal place of business at 1220 Bank Street, White Plains, New York. Said respondent operates its business in two divisions, namely; Thomas Doran Co. and Cheerful Card Co. The first named division operates the wholesale distribution part of said respondent and the latter handles the retail distribution part of said business. The foregoing respondents are engaged in manufacturing and distributing greeting cards, as hereinafter more fully described, to distributors and also, with the exception of Artistic Card Publishing Corp., directly to the public through direct selling agents and are known in the industry as direct sellers. The above-named respondents will hereinafter be referred to as manufacturing respondents.

2. (a) Respondent Card Mart, Inc., is a corporation organized and doing business under the laws of the State of New York, having its principal office and place of business at 642 South Summer Street, Holyoke, Massachusetts.

(b) Respondent Colonial Greetings, Inc., is a corporation organized and doing business under the laws of the State of Massachusetts, having its principal office and place of business at 600 Boston Post Road, Greenwich, Connecticut.

(c) Respondent Elmira Greeting Card Co., Inc., is a corporation organized and doing business under the laws of the State of New York, having its principal office and place of business at 501 East Clinton Street, Elmira, New York.

(d) Respondent Phillips Card Company is a corporation organized and doing business under the laws of the State of Massachusetts, having its principal office and place of business at 50 Hunt Street, Newton, Massachusetts.

(e) Respondent United Craftsmen, Inc., is a corporation organized and doing business under the laws of the State of Ohio, having its principal office and place of business at 1400 State Street, Cincinnati, Ohio.

(f) Respondent Hedenkamp & Co., Inc., named as Hedenkamp & Company in the amended complaint, is a corporation organized and doing business under the laws of the State of New York, having its principal office and place of business at 361 Broadway, New York, New York.

(g) Respondents Clyde L. Evans and Lawrence E. Evans are individuals and copartners trading and doing business under the partnership name of New England Art Publishers with their principal office and place of business at North Abington, Massachusetts.

(h) Respondents Charles E. Schwer and John L. Schwer are individuals and copartners trading and doing business under the partnership name of Charles E. Schwer Co. with their home office and principal place of business at 165 Elm Street, Westfield, Massachusetts.

(i) Respondent Artistic Card Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York with its home office and principal place of business located at 1575 Lake Street, Elmira, New York. The stockholders and directors of this respondent are the same as the stockholders and directors of respondent Artistic Card Publishing Corp.

The above-named respondents are distributors of greeting cards, buying in excess of 80 percent thereof from the direct sellers described in Paragraph One hereof for resale through direct selling agents to the consuming public and will be hereinafter referred to as distributor respondents.

3. The commodities involved in this proceeding are boxed greeting cards which are used by the purchasing public throughout the United

States on such occasions as Christmas, Easter, Fathers Day, Mothers Day, birthdays, funerals, weddings, anniversaries, etc. They are packaged and sold as an assortment in a single box containing from 14 to 20 cards each, which cards vary in design, quality, novelty, etc., and which boxes are classified in the industry as Christmas boxes and Everyday boxes. Practically all of these boxes are retailed to the consumer at \$1.00 each. A very minor part of the production is able to command \$1.25 a box. The economic and commercial experience of the industry has been that such boxes cannot be sold to the public in any profitable volume at more than \$1.00.²

4. The manufacturing respondents, in the course and conduct of their business, manufacture greeting cards as above described and consistently purchase greeting cards from each other to make up these box assortments and sell and ship such box assortments, or cause the same to be sold and shipped, to direct selling agents and to distributors such as and including those named in Paragraph 2 hereof from their respective places of business to such purchasers located in the various States of the United States other than the State of origin of said shipments, and have carried on and engaged in, and do now carry on and engage in, commerce as that term is defined in the Federal Trade Commission Act.

5. Distributor respondents have been, in the regular course and conduct of their businesses, purchasing greeting cards in boxes from manufacturers thereof, including those named in Paragraph 1 hereof, to the extent of 80 percent of their requirements or more, and causing such merchandise, when purchased, to be shipped from the various places of manufacture to their respective places of business and in turn selling and shipping such merchandise, or causing the same to be sold or shipped, to direct selling agents, many of whom are located in various States of the United States other than the State of origin of said shipments or the State in which said distributor respondents are located and have carried on and engaged in, and do now carry on and engage in, commerce as the term is defined in the Federal Trade Commission Act.

6. In the course and conduct of their selling, offering for sale, and shipping in commerce of said greeting cards, packaged as described, said manufacturing respondents except for the agreement and understanding hereinafter found, would have been in the past, and would now be, in competition with each other. Said distributor respondents are in competition with each other.

² Whether or not the business of respondents herein amounts to 20 percent or 80 percent of the box card business done in the United States is immaterial, if there was an agreement on price.

7. It is the custom, and has been for a number of years, of manufacturing respondents, many months in advance of the season for which the cards are intended, to issue price lists in the form of order blanks, one for the Everyday assortment and one for the Christmas assortment. Prices are scaled to quantities and in 1948 these quantities uniformly among manufacturing respondents provided for 65¢ each on purchases from 1 to 9; 60¢ each of purchases from 10 to 24; 55¢ each on purchases from 25 to 49; and 50¢ each on purchases of 50 or more. Each of the manufacturing respondents' price lists for the year 1948 are the same as to these prices and quantities.

8. In September of 1948 an informal group discussion among respondents was held following the convention of the National Association at which prices were discussed. Although there were 20 or more representatives at the meeting, only 7 were identified. Four of these present testified and testimony of one was stipulated. Apparently, the cause of this discussion was a 12-25 percent increase in postal rates which would become effective during the year of 1949 and since respondents sell entirely by mail this represented a substantial increase in operational cost, and ways and means of how to absorb this cost increase by passing it on by price increase was the principle subject discussed.

9. Herman Chilton of respondent Chilton Greetings Company testified that he had a change in quantity discounts (price increase for 1949) pretty well set in his mind and had adopted a plan to increase prices prior to this meeting, and in fact had price scales already made out but that after hearing the discussion he made one change in those price scales. Another direct seller present at this meeting testified that the price list he subsequently came out with had the same quantity brackets as were discussed at the meeting. Harry Doehla of respondent Doehla Greeting Cards, Inc., whose testimony was stipulated, and which company is the largest producer of greeting cards among respondents, said that he announced at the meeting that he was going to increase the quantity requirements necessary for agents to secure discounts; that he anticipated that his distributors would adopt a similar policy, and further, that at that time he had reason to believe that some of his principal competitors were going to adopt an identical quantity discount scale for sales to agents, although he would not know this for certain until they issued their order blanks several months later. Thomas Doran of respondent White Plains Greeting Card Corp. testified that at this meeting he heard specific quantity brackets mentioned; that he liked the idea of the meeting and would put in the prices but not until December when he knew

what his competitors were doing. All of them denied that any agreement was reached.

10. Within one to five months subsequent to this meeting, price lists issued by respondents show increases from an identical level to a new and increased identical level, and it is assumed that respondents made substantial sales thereafter at these uniform prices.³

11. Without more, this clearly indicates an understanding and agreement among both manufacturing respondents and distributor respondents on prices to be charged to direct selling agents. It has been many times held by the courts that identical prices charged by competitors with evidence of meetings thereof at which prices were discussed, raises a strong and reasonable inference of price agreement. Respondents, however, claim that the inference which arises from this uniform, parallel and common action on their part is destroyed and a contrary inference is established by two factors: First, the flat and uniform increase in postal rates, representing, of course, an operational cost; and second, that distributor respondents who purchase from the manufacturing respondents were already under an economic compulsion to follow the prices of respondent manufacturers so that agreement to do so would be futile.

12. It appears from the record that manufacturing respondents who design, pictorialize, lithograph or print greeting cards can only afford to do so with a limited number of new cards because it costs in excess of \$20,000.00 to produce one line of cards; consequently, to obtain assortments for box merchandise and to obtain volume, which is economically necessary for sheer existence, each manufacturer buys from other manufacturers. Likewise, it appears from the record that all manufacturing respondents with one possible exception sell to all distributor respondents and that the distributor respondents purchase, likewise, from each other. It is not economically feasible for distributors to buy quantities of various cards and make up their own box assortments. It further appears from the record that both distributor respondents and manufacturing respondents, with one exception, sell almost entirely through direct selling agents whose recruitment is an annual, expensive and competitive process. These direct selling agents, solicited by full-page advertisements in such magazines as Good Housekeeping, McCalls and Woman's Home Companion, select their lines of merchandise in accordance with what

³ While it is true that the Artistic Card Publishing Corp. did not issue price lists and did not sell to direct selling agents, the Artistic Card Company, Inc. did do so, and since these two respondents have the same management and ownership, the effect is the same. It is immaterial in this proceeding whether a management group takes an action with its right hand or its left.

they think they can sell best to the consumer and shop around among manufacturing respondents and distributor respondents for samples of the lines of each, frequently selling one line one season and another line another season. They sell to the user by mail, personal solicitation and through social groups.

13. The uncontradicted evidence in the record shows that although no formal announcements are customarily made by manufacturing respondents to that effect, nevertheless, it is well understood in the industry that a manufacturer will not sell to a distributor who in reselling undercuts pricewise that manufacturer's prices to the latter's own direct selling agents, and that the manufacturers advise distributors as to the prices such manufacturers will charge their direct selling agents. Obviously, a manufacturer could not obtain direct selling agents if the latter could purchase the same box assortment from the distributor for less than he would have to pay the producer of such box assortment. Distributors, consequently, must maintain the same resale prices to direct selling agents as their suppliers do or they will be unable to obtain a sufficient volume of boxed greeting cards to remain in business. The record reveals that from 80 percent to 95 percent of purchases of these respondent distributors are made from the four manufacturing respondents remaining in this proceeding, and that the other 5 percent to 20 percent of their purchases made from other manufacturers, would not sustain them in business.

14. This economic picture, which is uncontradicted in the record, raises an equally, if not more reasonable, inference that there was no understanding or agreement, on the part of distributor respondents upon prices, or stated otherwise, the quantity brackets at which these greeting card boxes would be sold. It is a well-known fact of ordinary life that businessmen generally do not engage in futile acts, especially where there is a definite risk of expense and public embarrassment. The inference of agreement arising from the testimony hereinabove set forth is destroyed by the lack of necessity for such agreement, or stated otherwise; by the established fact that the purpose of such an agreement had already been accomplished by the economic facts of life pertinent to this industry.

15. The claim of respondents that the increase in postal rates, uniform in amount and applicable to all respondents, was an economic justification for the increase in price is not sustained. The price increase was identical from an identical or uniform level, and such an assertion could not be maintained in the absence of a showing that all respondents had absolutely uniform operational costs in all elements so that an increase in any element thereof would produce ex-

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actly the same increase in total operational cost in that all respondents shipped the same quantities by weight, the same distances. Evidence of operational costs was offered by only one respondent manufacturer and this, in the form in which it was presented, being by conjecture or forecast based on past averaging, fell far short of producing or justifying the price increase made in 1949.

16. The inference of agreement among the four manufacturing respondents, therefore, had not been refuted or explained on the economic or any other basis and it is therefore found that in September 1948, or shortly thereafter, manufacturing respondents Artistic Card Publishing Corp., Chilton Greetings Company, Doehla Greeting Cards, Inc., and White Plains Greeting Card Corp. did enter into an agreement or understanding between and among themselves to fix the prices, terms and conditions, including uniform identical quantity brackets for pricing purposes of the boxed greeting cards which they sold, and since Artistic Card Company, Inc., has the same stockholders as Artistic Card Publishing Corp., it is found by reason of such common ownership and control to have been a party to such agreement.

17. There is no evidence to support the charge in the complaint that any respondents have by agreement or understanding "separated and thereby avoided consolidation of orders with the effect of avoiding lower prices applicable to the larger quantities which would have been involved in consolidated orders" or that they have "separated quantities and thereby avoided consolidations of quantities in different price classes in a single order with the effect of avoiding the lower prices which would have been applicable by reason of the greater quantities."

ORDER

It is ordered, That respondents, Artistic Card Publishing Corp., a corporation, Chilton Greetings Company, a corporation, Doehla Greeting Cards, Inc., a corporation, White Plains Greeting Card Corp., a corporation, doing business in its own corporate name or in the name of its division, Thomas Doran Co., or any other name, Artistic Card Company, Inc.,⁴ a corporation, and the officers, agents, employees and representatives of each of them, directly or indirectly, jointly or severally or through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of greeting cards in interstate commerce, as "commerce" is defined in the

⁴ Since Artistic Card Publishing Corp. and Artistic Card Company, Inc. have common ownership, direction and control, any order against one alone could be easily ignored by the other, therefore both are included. The one is the alter ego of the other.

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Federal Trade Commission Act, do forthwith cease and desist from engaging in, entering into, participating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between any two or more of said respondents, or between any one or more of said respondents and another, or others not parties hereto, to do or perform any of the following acts or things: fixing or establishing prices at which said greeting cards are to be sold or offered for sale, fixing or establishing quantity brackets, fixing or establishing any common method or formula for calculating prices or using any such method or formula so established or fixed and from holding meetings at which prices, terms, conditions of sale, or trade practices or policies designed to eliminate competition in price or otherwise are discussed or acted upon.

It is further ordered, That all motions to dismiss this proceeding as to them, filed by the above-named respondents, be, and the same are, hereby denied.

It is further ordered, That this proceeding be, and the same hereby is, dismissed as to respondents Card Mart, Inc., Colonial Greetings, Inc., Elmira Greeting Card Co., Inc., Phillips Card Company, United Craftsmen, Inc., Hedenkamp & Co., Inc., all corporations, and as to respondents Clyde L. Evans and Lawrence E. Evans, copartners doing business under the partnership name of New England Art Publishers, and as to respondents Charles E. Schwer and John L. Schwer, copartners doing business under the partnership name of Charles E. Schwer Co., and motions to that end, filed by these respondents, are accordingly granted.

ON APPEAL FROM INITIAL DECISION

Per CURIAM:

STATEMENT OF THE CASE

On May 8, 1952, complaint issued herein charging The National Association of Greeting Card Publishers, its Secretary and Managing Director, four (4) members of its Executive Committee, nine (9) manufacturing members and fourteen (14) distributor members with violation of Section 5 of the Federal Trade Commission Act through (a) agreeing to fix prices, (b) agreeing to fix quantity brackets, (c) agreeing to fix discounts, (d) agreeing on terms and conditions of sale, and (e) separating orders and thereby avoiding consolidation of quantities to avoid lower prices for larger quantities in a single order. On March 24, 1953, counsel in support of the complaint closed his case in chief and respondents moved to dismiss. Briefs in support of and in opposition to these motions were filed.

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On June 10, 1953, the hearing examiner in an initial decision dismissed the complaint for failure to establish a prima facie case against the National Association, its Secretary and General Manager, the four (4) members of its Executive Committee, five (5) manufacturing members and four (4) distributor members. No appeal therefrom was taken except by one distributor member, Elmira Greeting Card Co. The latter's appeal was denied by the Commission on July 30, 1953, and on the same date the Commission affirmed the dismissal of the complaint as ordered by the hearing examiner's initial decision of June 10, 1953.

After further hearings and the introduction of evidence, the case was closed on the record for the taking of further testimony December 15, 1953. Prior to expiration of the time for the filing of proposed findings and conclusions by counsel, the attorney in support of the complaint moved the Commission to issue an amended complaint identical with the original complaint except that it omitted respondents previously dismissed as parties, and added a new distributor respondent Artistic Card Company, Inc., alleging that its stockholders and directors were the same as those of Artistic Card Publishing Corp., a manufacturer respondent. The Commission granted that motion and thereafter on May 12, 1954, the amended complaint issued.

By agreement between counsel it was stipulated that respondents named in the amended complaint would elect to, and did, stand upon answers filed to the original complaint and it was further stipulated that the record made under the original complaint should be considered the record under the amended complaint and as the basis for disposition by the hearing examiner of the proceeding. In due course motions to dismiss were filed and the case was closed August 6, 1954, the hearing examiner having previously stated on the record that said motions to dismiss would be disposed of in his initial decision on the whole record.

On August 11, 1954, the hearing examiner filed his aforesaid initial decision dismissing the complaint as to the remaining distributor corporations and partnership (in effect granting their motions to dismiss, previously filed) and holding that the manufacturing corporations and affiliates had engaged in the unfair methods of competition and unfair acts and practices alleged (in effect denying the latter's motions to dismiss, previously filed).

Counsel in support of the complaint appealed from that part of the hearing examiner's initial decision dismissing the complaint as to the distributor respondents. Counsel for manufacturing respond-

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ents Artistic Card Publishing Corp. (Artistic Card Company, Inc.), Chilton Greetings Company, Doehla Greeting Cards, Inc., and White Plains Greeting Card Corp. also appealed in toto from the initial decision, filing numerous exceptions and allegations of error on the part of the hearing examiner through his failure to adopt certain findings. These manufacturing respondents "In the event that Respondents' Appeal from the Initial Decision in toto should not be sustained, * * * appeal from the form and substance of the Order thereto appended and urge that such Order should be modified in the respects hereinafter urged." Briefs were filed, oral argument was heard by the Commission on February 1, 1955, and the case was taken under advisement.

STATEMENT OF FACTS

This proceeding involves the manufacture, and distribution in commerce, as that term is defined in the Federal Trade Commission Act, of boxed greeting cards, packaged as single box assortments of from 14 to 20 cards each, for sale to consumers by "direct selling agents" (door to door salesmen, church, school and civic organizations, etc.) at the customary and traditional price of \$1.00 per box. Not involved here is that segment of the industry which manufactures and/or sells greeting cards through retail stores. The cards are used by the purchasing public on Christmas, New Year's, Easter, Father's Day, Mother's Day, birthdays, funerals, weddings, anniversaries, etc. The manufacturing respondents create, design, print and sell boxed assortments to each other and to the distributor respondents. Manufacturing respondents *and* distributor respondents sell in competition with each other to the "direct selling agents." It is the pricing practices at this level of distribution that are involved here.

The greeting card industry has two selling seasons, one for the Everyday assortment and one for the Christmas assortment. It has been the custom over a period of years for manufacturing respondents to issue many months in advance of each season price lists in the form of order blanks. Prices are quoted by manufacturing respondents to quantity schedules; and in 1948 all manufacturing respondents involved here uniformly quoted the price for each box to "direct selling agents" as:

- 65¢ each for 1 to 9 boxes
- 60¢ each for 10 to 24 boxes
- 55¢ each for 25 to 49 boxes
- 50¢ each for 50 boxes or more.

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In the summer of 1948, pursuant to statutory authority, the Post Office Department announced parcel post rate increases to become effective January 1, 1949, which would result in rate increases for manufacturing respondents of from 12% to 25% in different categories and proportionally direct increases in their operational costs. Thereafter, in September of 1948, informal group discussions among respondents were held following the convention of the National Association at which prices and ways and means of how to meet this increased operational cost were the subject. In these groups specific changes in quantity brackets were discussed.

The hearing examiner found the facts to be substantially as briefly recited above and further found as an ultimate fact that, within one to five months subsequent to the September meeting, price list order blanks issued by respondents (both manufacturers and distributors) showed increases from an identical level to a new and increased identical level. In this connection, the hearing examiner reviewed the evidence bearing upon the activities and discussions at the September gathering and for details in that connection reference is made to his initial decision.

The new, and uniform, price list promulgated subsequent to the September 1948 discussions was as follows:

- 65¢ each for 1 to 19 boxes
- 60¢ each for 20 to 49 boxes
- 55¢ each for 50 to 99 boxes
- 50¢ each for 100 boxes and over.

APPEAL OF COUNSEL SUPPORTING COMPLAINT

Counsel in support of the complaint has appealed from that part of the initial decision wherein the hearing examiner in effect dismissed the complaint as to distributor respondents by granting motions to that end filed by those respondents. Specifically, in this appeal, exception is taken to Paragraph 14 of the initial decision and, incidentally, to the form of order to cease and desist, insofar as it fails to include the distributor respondents.

Paragraph 14 of the initial decision, to which counsel supporting the complaint excepts, in substance is a finding that the facts disclosed in the record raise a reasonable inference that there was, on the part of distributor respondents, no understanding or agreement upon prices or quantity brackets at which greeting card boxes would be sold.

There is in the record evidence that manufacturing respondents sell to each other and to all distributor respondents who, in turn, also

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purchase from each other. Both distributor respondents and manufacturing respondents, in competition with each other, sell through "direct selling agents." While the record discloses no formal announcement to that effect, it is well understood in the industry that a manufacturer will not sell to a distributor who resells to direct selling agents at prices less than the manufacturer sells to direct selling agents. If the distributors did sell for prices under those of the manufacturers, the former, it is obvious, would have no source of supply. It follows that, of necessity, distributors must maintain the same resale prices to direct selling agents as the manufacturers do.

The inference of agreement on the part of distributors, if any such inference be considered as reasonably arising from testimony regarding the September 1948 events, is, in our opinion, dissipated by the complete lack of any necessity for such agreement. The distributor respondents had no alternative but to maintain the resale prices to direct selling agents that they did, in order to remain in business. The hearing examiner has weighed the evidence on this score, including the demeanor of witnesses testifying before him, and found no agreement by distributor respondents. On the whole record we agree with him that the economic picture, in the circumstances peculiar to this industry, supports the conclusion. The exceptions taken in this connection must fall and the appeal of counsel supporting the complaint should be denied.

RESPONDENTS' APPEAL IN TOTO

(a) *Assignments of Error*

Respondents assign as error the hearing examiner's refusal to adopt seven specific proposed findings and the conclusions of law submitted by respondents. Respondents also except, in whole or in part, to certain designated paragraphs of the initial decision.

At the outset respondents contend that the examiner erred in refusing to adopt findings concerning the weight and effect to be given to the testimony of a disinterested witness (Sugden) that no agreement was entered into by respondents at their discussions in September, 1948. The law is well settled that no formal agreement is necessary to constitute an unlawful conspiracy. In circumstances where, as here, identical prices were charged by competitors after the holding of meetings at which prices were discussed, the hearing examiner was fully justified in concluding that a conspiratorial price agreement did in fact exist. The testimony of the witness relied upon as a basis for the contrary finding proposed by respondent was wholly insufficient

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to overcome this inference, and the hearing examiner's refusal to adopt such finding cannot be said to have been erroneous. Respondents' assignment of error in this respect, accordingly, is overruled (Respondents' Appeal Brief, Point III). Our ruling here is equally applicable to respondents' assignment of error on the hearing examiner's part in refusing to adopt findings that there is no evidence of any agreement, understanding or planned common course of action as to prices, terms or conditions of sale, including uniform quantity discount brackets to dealers. This assignment of error (Respondents' Appeal Brief, Point IX) also is overruled.

Respondents further contend it was error for the hearing examiner to refuse to adopt proposed findings to the effect that (a) price uniformity existed prior to the alleged conspiratorial meeting in September, 1948; (b) that usually and normally the dealer prices of each publisher legitimately were available to other publishers prior to the printing of price lists each new season; and (c) that Doehla Greeting Cards, Inc. was the largest publisher in the direct selling field, the first to announce dealer prices each season, and that other publishers awaited such announcement before establishing their own dealer prices. If, in fact, the uniformity in respondents' price lists subsequent to September 1948, was the result of an agreement and understanding as to prices, it makes no difference what the pre-existing circumstances were as to price uniformity, availability of competitors' prices, Doehla's predominant size in the industry, etc. Proposed findings on the enumerated points, therefore, were immaterial in the face of the hearing examiner's finding that unlawful combination did obtain. We conclude, and find, that the hearing examiner correctly refused to adopt these proposed findings (Respondents' Appeal Brief, Points IV, V and VI).

Respondents except to the hearing examiner's characterization of the increase in quantities required to be purchased in order to qualify for discounts as an "increase in price." If this characterization of the uniform changes in quantity discount schedules by manufacturing respondents is subject to the interpretation placed upon it by respondents—that in all instances after 1948 all purchasers of all quantities were required to pay increased prices—it is probably inaccurate. If that is what it means, then to that extent respondents' exception probably is well taken. If however, as the Commission understands it, the characterization of the change as an "increase in price" means that purchasers of given quantities before 1948 had to pay increased prices after 1948 on the same quantities (except in the case of purchasers in quantities of from 1 to 9 boxes and from 20 to 24 boxes), then the

characterization is both accurate and appropriate. The Commission so interprets the term "increase in price."

In this same connection respondents also assign as error the hearing examiner's failure to adopt Doehla's proposed Finding 39 (a) to the effect that the increase in the minimum number of boxes of greeting cards required to be purchased in order for dealers to qualify for the maximum discount did not result in any dealer paying any more than he had under the previous schedule, provided such dealer ordered somewhat larger quantities than he had previously, except that the smallest dealers, who buy 9 boxes or less per order and dealers who purchased from 20 to 24 boxes per order, encountered no increase whatever. While this proposed finding may be considered as stating the facts, these facts do not upset nor disturb the conclusion that there had been a conspiratorial tampering with the quantity purchase schedule. It is thus apparent that the hearing examiner's rejection of this proposed finding was in nowise prejudicial.

In view of the foregoing, respondents' exception is denied and its assignment of error in this connection is overruled (Respondents' Appeal Brief, Point VII).

Respondents contend also that the hearing examiner erred in refusing to adopt a finding to the effect that Doehla's parcel post cost for 1949 increased 12% on the per dollar of sales basis and 13.5% per box sold basis over 1948 costs. In the initial decision it is clear that the hearing examiner fully considered the evidence adduced with relation to this proposed finding, weighed it and expressly found that "Evidence of operational costs * * *, in the form in which it was presented, being by conjecture or forecast based on past averaging, fell far short of producing or justifying the price increase made in 1949." On the record as made the hearing examiner was justified in rejecting this proposed finding as "unreliable." In our opinion, the pertinent evidence based as it is on conjecture and forecast projected on past averaging was inconclusive, speculative and, therefore, unreliable. We so find (Respondents' Appeal Brief, Point VIII).

(b) *Respondents' Exceptions*

We turn now seriatim to respondent's exceptions which are directed to the whole, or part, of specific paragraphs of the hearing examiner's initial decision.

Respondents except to the hearing examiner's statement in Paragraph 4 of the initial decision to the effect that manufacturers purchase greeting cards from each other to make up box assortments. A correct statement would be that manufacturers purchase *boxed assort-*

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ments of cards from each other to fill out their various lines for resale. Technically, this objection is well taken and the exception is granted without, however, changing the result herein (Respondents' Appeal Brief, Point XI).

Respondents except to the following part of Paragraph 5 of the initial decision:

"Distributor respondents have been * * * purchasing greeting cards in boxes from manufacturers thereof, including those named in Paragraph 1 hereof, to the extent of 80 percent of their requirements or more * * *."

The contention is that, as written, this gives rise to a misconception. Obviously, as stated by respondents, what was meant was that these distributors purchase

"* * * greeting cards in boxes from manufacturers thereof named in Paragraph 1 hereof, to the extent of 80 percent of their requirements or more * * *."

The hearing examiner recognized this in the last sentence of Paragraph 13 of his initial decision where he found:

"The record reveals that from 80 to 95 percent of purchases of these respondent distributors are made from the four manufacturing respondents * * *."

We grant this exception, noting, however, that such action does not affect our ultimate disposition of the appeals herein (Respondents' Appeal Brief, Point XII).

Respondents except to Paragraph 6 of the initial decision to the extent it states respondent-publishers are not in competition with each other. We think the record discloses that, except for the agreement and understanding found by the hearing examiner to exist, the manufacturing respondents would be in competition with each other price-wise. The ultimate fact found, however, is that through agreement and understanding price lists issued by respondents showed increases from an identical level in 1948 to a new and increased identical level in 1949. Respondents may be considered to have remained on a competitive basis insofar as service and quality, among other things, are involved, but not as to price. Respondents' exception in this respect is denied (Respondents' Appeal Brief Point XIII).

Respondents except to the second sentence of Paragraph 9 of the initial decision reading as follows:

"Another direct seller present at this meeting testified that the price list he subsequently came out with had the same quantity brackets as were discussed at the meeting."

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It is respondents' contention here that the hearing examiner intended to refer to a "Publisher-Respondent" rather than to a "direct seller"; that what the examiner has done is to take the testimony of a distributor and make it appear as testimony of a publisher as a basis for his ultimate conclusion of conspiracy.

The term "direct seller" is used in the industry to describe a "publisher-respondent." The initial decision ⁵ so finds with regard to respondent White Plains Greeting Card Corp. and the hearing examiner had reference to the testimony of Thomas Doran of Thomas Doran Co., a division of manufacturing respondent White Plains, who testified that he was a manufacturer of greeting cards as well as a distributor ⁶ and that the price list he subsequently came out with had the same quantity brackets as were discussed at the meeting.⁷ Respondents' exception on this point is, therefore, without merit and is denied (Respondents' Appeal Brief, Point XIV).

Respondents except to the first sentence in Paragraph 11 of the initial decision which concludes that record evidence of the fact that prices were discussed in the September, 1948, groups, plus the established fact that prices subsequently actually were increased uniformly from one identical level to a new identical level, "Without more" clearly establishes that an understanding existed to agree on prices to be charged direct selling agents.

Respondents except to use of the phrase "Without more" by the hearing examiner and contend he had no right to conclude there was nothing more, by way of evidence, relevant to the inference of conspiratorial price agreement. Respondents, in this regard, rely principally on the testimony of Sugden, a disinterested witness, and upon the related contentions made in connection with their Point III attacking the hearing examiner's refusal to adopt findings as to the weight and effect of Sugden's testimony that no agreement was entered into at the September, 1948, meeting.

We have already determined above that in the circumstances disclosed by the record the hearing examiner correctly concluded that an unlawful conspiratorial price agreement existed and that the rejection of the respondents' proposed finding to the contrary was not erroneous. Respondents' exception to the phrase "Without more" and its concomitant inference that there was collusive price agreement must, therefore, be denied (Respondents' Appeal Brief, Point XV).

Respondents except to Paragraph 16 of the initial decision which in substance is a finding that since the inference of agreement among the

⁵ Initial Decision, Paragraph 1 (d).

⁶ Transcript 138.

⁷ Transcript 142.

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four manufacturing respondents had not been refuted nor explained, the latter, therefore, "did enter into an agreement or understanding between and among themselves to fix the prices, terms and conditions, including uniform identical quantity brackets for pricing purposes of the boxed greeting cards which they sold." Our rulings above on respondents' assignments of error (Respondents' Appeal Brief, Points III, IV, V, VI and IX) adequately dispose of this exception to Paragraph 16 of the hearing examiner's initial decision and it is denied (Respondents' Appeal Brief, Point XVI).

Respondents have appealed generally from the initial decision and generally from the hearing examiner's action on their proposed findings. They, the respondents, have termed this their "Appeal from the Initial Decision in toto." Our rulings so far dictate respondents' appeal "*in toto*" should be denied.

RESPONDENTS' APPEAL IN THE ALTERNATE FROM FORM OF ORDER

Having disposed of respondents' appeal in toto from the initial decision we now turn to respondents' appeal from the form and substance of the hearing examiner's order to cease and desist. This portion of respondents' appeal is in two parts.

First, it is contended by respondents that the hearing examiner acted improperly and unjustifiably in including within the ambit of the order to cease and desist "the officers, agents, employees and representatives of each of them [corporate manufacturing respondents]." Respondents cite in support of this contention the decision of the United States Court of Appeals for the Seventh Circuit in the *Reynolds Tobacco Co.* case⁸ that the Commission's inclusion of "officers, agents and employees" in an order to cease and desist was unjustified.

Subsequent to that decision, we held in the matter of *Hato Company, Inc.*⁹ that the decision of the United States Supreme Court in the *Regal Knitwear Co.* case¹⁰ "fully disposes of the issue in this matter, until such time as the Supreme Court shall speak further on the question." The Supreme Court has not ruled further and no compelling argument has been presented here that persuades us to reverse the *Hato Company, Inc.* decision. The hearing examiner was correct in ruling that the order herein should run against the "officers, agents, employees and representatives" of the corporate manufacturing respondents. Respondents' appeal from this ruling, accordingly, should be denied.

⁸ *Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535 (1951).

⁹ *In the Matter of Hato Company, Inc., et al.*, Docket No. 5807 (Decided October 6, 1952).

¹⁰ *Regal Knitwear Co. v. N. L. R. B.*, 325 U. S. 9 (1945).

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Secondly, we turn to the respondents' appeal from the hearing examiner's failure to include saving clauses in the order to cease and desist so as properly to limit its scope. Respondents did not request the hearing examiner for the inclusion of these exclusionary provisos. The proposition was, however, incorporated in their appeal brief and, although not pressed in oral argument before us, will be disposed of here for the record.

Respondents seek inclusion in the order of three provisions which, in effect, would assure that the inhibitions of the order shall not be construed to prohibit:

(1) Agreements on prices, terms, or conditions of sale independently offered and accepted by a buyer and a seller when such agreements are bona fide and are not made for the purpose nor have the effect of restraining competition;

(2) The maintenance of a bona fide relationship between principal and agent;

(3) Agreements, discussion or other action between a corporate respondent and its officers, or between a corporate respondent and its subsidiaries or affiliates relating solely to the business of such corporate respondent and its subsidiaries and affiliates, "when not for the purpose or with the effect of restricting competition."

Respondents argue that such provisos are necessary because the part of the order immediately preceding the enumeration of inhibited activities forbids:

"* * * any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents and another, or others not parties hereto * * *,"

and state that the purpose of such provisos is to protect the rights of individual respondents to carry on their normal business relationships.

We believe the provisos sought to be included in the alternative in the order to cease and desist herein are unnecessary. This question of the inclusion of such provisos in Commission orders was dealt with by the Seventh Circuit Court of Appeals in the case *The Milk and Ice Cream Can Institute et al. v. F. T. C.*¹¹ where it was sought to amend a Commission order by inserting a proviso permitting respondents to do independently that which they were enjoined from doing conspiratorially or by agreement. On the precise problem presented here the Court there said:

¹¹ 152 F. 2d 475 (C. C. A. 7, 1946).

Conclusion

"It is argued, among other things, that the order prohibits lawful action, disassociated from a conspiracy to fix prices, that it is indefinite in its terms and that it is susceptible of the construction that it prohibits independent action by petitioners. We are convinced from a study of the order that there is little, if any, merit in the criticism made concerning it. The order provides that respondents (petitioners here) 'do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, mutual agreement, understanding, combination, or conspiracy between and among any two or more of said respondents or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or practices' * * * It will be noted that each of the prohibited acts is directed solely at price fixing in connection with an agreement or conspiracy. It is not a valid criticism to say that they are enjoined from the activities mentioned when used independently or even by an agreement unrelated to the price structure. The Commission in its brief concedes what we think is obvious: *'It is wholly unnecessary that the order be amended so as to expressly reserve to petitioners their rights of independent action. They have those rights regardless of the order and those rights would not be changed or protected in the least by adding such a proviso. The time when such questions should properly be determined is not in connection with the present consideration of the order but whenever the order is alleged to have been violated by a given set of facts. If those facts embody a condition of independent action it will be a perfect defense. The Commission knows as well as petitioners that no violation of the order in its present form can be established by any showing of independent action * * *.'*" (Italics provided.)

For the reasons stated by the Court above, respondents' appeal in this regard here should be denied.

CONCLUSION

We have fully considered the entire record herein, including the transcript of hearings, exhibits, briefs of both parties and oral argument of counsel before the Commission.

For the reasons hereinabove stated, we conclude that the hearing examiner's initial decision is correct, that the appeal therefrom of counsel in support of the complaint and the appeal of respondents, Artistic Card Publishing Corp., Artistic Card Company, Inc., Chilton Greetings Company, Doehla Greeting Cards, Inc. and White Plains Greeting Card Corp., from the initial decision, together with the exceptions and assignments of error thereto filed by both sides, includ-

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ing the said respondents' assignment that the hearing examiner erred in refusing to adopt their proposed conclusions of law, are without merit (except as hereinabove noted in some minor respects) and that such appeals should be, and they hereby are, denied. Accordingly, the initial decision of the hearing examiner will be affirmed and appropriate order will be entered.

Commissioner Howrey did not participate in the foregoing for the reason that he did not hear oral argument herein.

FINAL ORDER

This matter having come before the Commission on appeals from the hearing examiner's initial decision filed by counsel in support of the complaint and on behalf of respondents Artistic Card Publishing Corp., Chilton Greetings Company, Doehla Greeting Cards, Inc., White Plains Greeting Card Corp., and Artistic Card Company, Inc.; and the matter having been heard on briefs and oral arguments; and the Commission having rendered its decision denying the appeals and affirming the initial decision:

It is ordered, That the aforesaid 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 contained in said initial decision.

Commissioner Howrey not participating for the reason that he did not hear the oral argument.

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IN THE MATTER OF
CROWN ZELLERBACH CORPORATION

ORDER AND OPINION

Docket 6180. Complaint, Feb. 15, 1954—Order, May 16, 1955

Interlocutory order in Sec. 7, Clayton Act, proceeding denying the appeal of counsel supporting the complaint from the hearing examiner's order sustaining respondent's objections to the receipt into evidence of Commission's Exhibit 62 for identification, and remanding the case for further proceedings;

Holding also

- I. That said Exhibit 62, the tabulation or survey of sales of coarse paper before and after the challenged acquisition of a competitor, was not objectionable as hearsay; and
- II. That the Commission's order of Jan. 18, 1955, was unnecessarily restrictive, and in lieu thereof

Ordering that the work papers used in compiling aforesaid survey be made available to respondent at the discretion of the hearing examiner, with the provision that no information that could be identified with the reporting companies should be admitted into the public record.

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

Mr. L. E. Creel, Jr., Mr. J. Wallace Adair, Mr. Dwight L. Carhart and *Mr. William R. MaHanna* for the Commission.

Mr. Philip S. Ehrlich and *Mr. Philip S. Ehrlich, Jr.*, of San Francisco, Calif., and *Sullivan & Cromwell*, of New York City, for the respondent.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

This is an interlocutory appeal by counsel supporting the complaint. The questions involved have to do with a tabulation identified as Commission's Exhibit 62.

The complaint charges respondent (which is engaged in the business of producing and selling pulp, paper and paper products) with violation of Section 7 of the Clayton Act in connection with the acquisition of St. Helens Pulp & Paper Co. Subsequent to the issuance of the complaint, the Federal Trade Commission, by resolution, authorized the Bureau of Economics to collect data, ascertain market characteristics, and prepare statistical compilations for use in this proceeding.

At the hearing Dr. Irston R. Barnes, an economist of the Federal Trade Commission in charge of developing the economic work relating to Section 7 matters, testified that he had charge of the carrying out of the above resolution and he related in detail various steps taken under his supervision. He testified in substance that St. Helens had

reported 98% of its sales in the Western and Pacific States were converters and jobbers. Questionnaires were prepared classifying the various papers formerly manufactured and sold by St. Helens into certain specified types. The questionnaires to converters classified the products into eight types of coarse paper; those to jobbers covered six types of coarse paper and three types of coarse paper products. Both jobbers and converters were instructed to show the dollar volume of such purchases from each named supplier of such products for specified periods of time, both before and after the acquisition. If the company's records did not supply prices on the product basis specified in the report, estimates based on company records were to be used. The list of jobbers and converters was made of from St. Helens' sales book, from respondent's sales analysis, from Lockwood's Directory of the Paper & Allied Trades for 1953 and from other sources. Some wholesale grocers were also included. Answers to the questionnaires were required to be certified by an officer of the corporation. Reports received were tabulated both as to dollar volume and percentage of aggregate sales by each supplier shown in the reports.

At the conclusion of the direct testimony of Dr. Barnes, the tabulation (Commission's Exhibit 62) was offered in evidence. Respondent objected on the ground that the basic material on which the survey was based had not been made available for cross-examination. The Hearing Examiner ruled that unless the material were made available, it would be necessary to sustain the objection. At that point an adjournment was taken and counsel supporting the complaint took up with the Commission the matter of authorizing the respondent to make some examination of the reports.

On January 18, 1955, the Commission directed the Bureau of Economics to transmit the records to the Bureau of Litigation with authority to make the data available to counsel for respondent under the following conditions:

"(1) It shall be made available to such counsel in the Washington Office of the Commission solely for inspection and for use during the examination of the witness or witnesses who received and edited the replies and compiled the Survey. No information secured on FTC forms EE-1 or EE-2 that can be identified with reporting companies shall be admitted into the public record for any purpose.

"(2) The Survey documents shall not be removed from the Washington Office of the Commission. An employee of the Commission familiar with the records shall have custody of same at all times during the inspection or other use thereof. He shall have full responsibility for the preservation of such records and shall cooperate with and assist those using them "

Respondents insisted that the disclosure permitted under the Commission's order was inadequate, which view was sustained by the Hearing Examiner and he entered an order "that the objections of the respondent to Commission's Exhibit 62 for identification be sustained."

The questions involved are (1) Is the tabulation (Commission's Exhibit 62) admissible in evidence as an exception to the hearsay rule? (2) Are the limitations placed by the Commission on respondent's examination of the questionnaires such as to deny it a fair trial?

In the general discussion on hearsay in Wigmore on Evidence, 3rd edition, Volume V, Section 1420 and following, the distinguished author says: "The purpose and reason of the hearsay rule is the key to the exceptions to it." He points out that cross-examination "is, beyond any doubt, the greatest legal engine ever invented for the discovery of truth * * *". The theory of the rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare, untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test * * * may in a given case be superfluous; that is, not needed or impossible of employment. * * * If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary sense), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured."

Wigmore concludes that a consideration of two principles has been responsible for most of the hearsay exceptions. These principles are, first, the circumstantial probability of trustworthiness and, second, the necessity for the evidence.

These principles have been considered and applied in a great variety of cases, many of which are cited in the briefs. For example, tabulations or surveys made by a competent witness have been admitted in evidence where the tabulations were made from evidence already properly in the case. *U. S. v. Grayson*, 1948, 166 F. 2d 863; *Harper v. U. S.*, 1944, 143 F. 2d 795; *U. S. v. Feinberg*, 1944, 140 F. 2d 592. In some cases tabulations or audits have been admitted, even though the records or data on which the exhibits were based were not formally in evidence but were available for examination. *Northern Pacific Railway Company v. Keyes*, 1898, 91 Fed. 47 and *Butler v. U. S.*, 1951, 53 F. 2d 800.

Another type of case has to do with surveys based on consumer opinion. As example is *U. S. v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 1951, 187 F. 2d 967, which was a libel proceeding under the Food, Drug and Cosmetic Act. There, the court

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admitted surveys covering answers given by 3,539 individuals to questions prepared by the government. These questions concerned conclusions drawn by the individuals (based on certain advertising) as to the contents of the product in question. Other cases commenting on the admissibility and value of this type of evidence are *Bristol-Myers Company v. F. T. C.*, 1950, 185 F. 2d 58; *Gulf Oil Corporation v. F. T. C.*, 1945, 150 F. 2d 106; *Rhodes Pharmacal Company v. F. T. C.*, 1953, 208 F. 2d 382. In the latter case the court said "Obviously, the value of a survey depends upon the manner in which it is conducted, whether the techniques used were slanted or fair." In none of the cases does it appear that the individuals whose opinions were collected were available for cross-examination.

Some of the language in *Elgin National Watch Company v. Elgin Clock Company*, 1928, 26 F. 2d 376, seems to indicate a view contrary to that expressed in the above cases. There, a petition was filed for an injunction restraining defendant from using "Elgin" in connection with its products. Plaintiff, relying on equity rule 48, asked permission to file an affidavit of Arthur Lynn, based on answers to questionnaires mailed to many retail jewelers. Questionnaires asked not only for the opinions of the individual jewelers as to the impressions made by the word "Elgin" but also asked what the opinions of the jewelers' customers were. The court's conclusion seems to have been based largely on its opinion of the purpose and meaning of equity rule 48.

In addition to the public opinion or consumer surveys, the courts have also admitted in evidence tabulations of factual data, which data was gathered by numerous persons not available for cross-examination. In *U. S. v. Aluminum Company of America*, 1940, 85 F. Supp. 820, one of the issues concerned bauxite deposits in Arkansas. Exhibit 1684 was a tabulation made by a witness of facts shown by the records of the drillings of 605 test holes. The court ruled against the government's claim that the individual and numerous drillers should be called to testify as to what each had learned in his separate drilling operations. The court overruled the objections that the offered exhibit was hearsay. The drillings had not been done for the purposes of the law suit. It also appeared that it had been the general custom to accept such test hole reports as correct without calling the makers to verify them. *Powhatan Mining Company, et al v. Ickes*, 1941, 118 F. 2d 105, involved an application to the Bituminous Coal Division of the Department of Interior for changes in minimum coal prices. The Director of the Division admitted in evidence 25 pages of tabulations based upon invoices filed with the Division under Section 4, II(a) of the Bituminous Coal Act, purporting to show the

prices of coal of similar quality sold to one of the largest consumers in the district. Section 4, II(a) provided "All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it * * * copies of all invoices * * *. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information." The court held that the tabulations were admissible under the liberal rules applicable to administrative hearings and that the exhibit was not hearsay.

American Employers Insurance Company v. Roundup Coal Mining Company, 1934, 73 F. 2d 592, was an action to recover on a fidelity bond because of fraud and embezzlement of an employee, Bunker. One claim was that Bunker embezzled money received from the company's customers and failed to credit such payment on the books. Exhibit 65 was made up by an auditor from replies to letters to various customers, in which replies was set out what purported to be the true status of the individual accounts. The exhibit was held to be "not only hearsay, but also made up of a series of self-serving declarations." Thus, it appears that the showing of the circumstantial probability of trustworthiness was unsatisfactory nor was there adequate showing of the necessity for the evidence. In fact, it appears that the evidence, even if admitted, would have had no direct bearing on the real question at issue.

Concerning the second principle, that is, the necessity for the evidence, Wigmore points out that necessity, in one form or another, is found in all the hearsay exceptions. Wigmore on Evidence, Volume V. Section 1630. In applying this principle, Wigmore recommends a reasonable and practical approach as is shown by the following statement from *U. S. v. Aluminum Company of America*, 35 Fed. Supp. 820 at 823:

"In effect, Wigmore, says that, as the word necessity is here used, it is not to be interpreted as uniformly demanding a showing of total inaccessibility of firsthand evidence as a condition precedent to the acceptance of a particular piece of hearsay, but that necessity exists where otherwise great practical inconvenience would be experienced in making the desired proof (Wigmore, 3rd Ed., Vol. V. sec. 1421; Vol. VI, sec. 1702). As will be seen by scrutinizing the cases cited above as being in accord with or supporting the Merriam case, it is inconceivable that what the courts whose decisions control in this court have said can properly be construed as requiring that physical inability be shown in order to establish the type of necessity which constitutes one of the conditions precedent for using hearsay. If it were otherwise, the result would be that the exception created to the

hearsay rule would thereby be mostly, if not completely, destroyed."

This matter of necessity for the evidence has been emphasized particularly in antitrust cases, where the inquiry often takes a wide range. In commenting on this fact, the court in *U. S. v. Minnesota Mining and Manufacturing Company*, 1950, 92 Fed. Supp. 947, said at page 948:

"Relevant political and economic facts can be presented to the court in an informal way. It is not necessary to comply with those minimal standards of evidentiary competence suitable for the proof of other types of facts, even in the comparatively loose procedure commonly followed in an anti-trust case where the government seeks an injunction. Cf. *U. S. v. U. S. Machinery Corporation*, D. C. 89 Fed. Supp. 349. It is sufficient that the economic and political facts come from published sources recognized as authoritative, persuasive or reliable by the profession of economists and political scientists, and if the publications are presented at a time and in a manner which give the adverse party adequate opportunity to examine, to challenge, to rebut and to argue upon them."

See also *Cub Fork Coal Company v. Glass Company*, 1927, 19 F. 2d 273.

In applying these two tests of admissibility in the instant case, consideration must be given to the statute under which the data was collected and tabulated. Section 6 of the Federal Trade Commission Act provides:

"That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission

may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

Section 10 of the Act provides:

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, * * * shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment."

As against the required trustworthiness and necessity, respondent urges, among other things: that the surveys were conducted by mail; that they were made after complaint was issued and for purposes of this litigation; that Dr. Barnes, while a trained economist, is not an expert in the paper business; that the classification of products was not correct; that the method of selecting customers (particularly those of respondent and St. Helens Pulp & Paper Co.) was unfair and would result in biased answers; that the persons supplying the evidence are not available for cross-examination.

These are all matters which may be inquired into and evaluated at the proper time. They have to do with the weight of the evidence rather than its admissibility. Dr. Barnes' testimony, already in the record, sets out the steps taken to insure the accuracy of the data sought under Section 6 of the Federal Trade Commission Act. One of the developments of our complex economic life is the increase in the use of information of this character, both by government and business. The personal property tax system of many States relies on data collected by officials and certified by the individual taxpayer to be correct. Tabulations of this data so collected are later used by boards in equalizing taxes between governmental subdivisions. The use of information collected by the Census Bureau is another example. Surveys made by independent organizations on a variety of subjects are used and relied upon in the field of business. Such a survey was considered admissible

and as having probative value in the matter of Pillsbury Mills, Inc., Docket No. 6000.

It is our conclusion that Commission's Exhibit 62 is not subject to the objection that it is hearsay.

II

The second question (and the one immediately before us) has to do with the limitation placed by the Commission on the use of the date upon which Exhibit 62 was based.

Many of the cases already cited have also considered this question. In *Powhatan Mining Company, et al. v. Ickes*, the Director did not allow an inspection of the invoices on which the tabulations were based, because he considered them confidential. The court pointed out that the information secured under Section 4, II (a) was not confidential in this type of proceeding, and that the disclosure should have been made, in the interest of a fair hearing. *Northern Pacific Railway Company v. Keys*, 91 Fed. 47, was a suit involving the fixing of railway rates by a State board of railway commissioners. A large number of tables were prepared in the accounting departments of several railroads affected showing the amount of business done for a certain period. The work was done by 40 or 50 clerks under the direction of the heads of the departments who were called as witnesses. The court held that it was not necessary to call the clerks to testify as to the correctness of the tables as each clerk made but a part of them, but it was sufficient if the records from which the computations were made were placed at the disposal of the opposing party for examination. *Augustine v. Bowles*, 1945, 149, F. 2d 93, was an action by the Administrator of the OPA for treble damages for violation of the Emergency Price Control Act. Exhibit 11 was a compilation showing overcharges made by Augustine in the sale of meats to wholesale grocers. An OPA investigator, Ortland, obtained the original invoices of sales from Augustine, had another investigator prepare the tabulation listing customers sales, prices, etc. Ortland, alone, was called and testified he only "spot checked" a certain number of invoices. All the invoices, however, were made available at the trial for examination by Augustine and the tabulation was held admissible.

The general purport of these decisions is that cross-examination is a valuable right and should not be restricted beyond the actual necessities of a particular case. We believe that the order of the Commission of January 18, 1955, was unnecessarily restrictive. It is ordered that the said order be withdrawn and the following is adopted in lieu thereof:

1105

Order

For the purposes of this litigation the basic information collected by the Bureau of Economics pursuant to Commission resolution of May 6, 1954, and the work papers used in compiling the Survey of Western Converters and Jobbers of Certain Coarse Paper and Paper Products shall be made available to respondent and its counsel, at such reasonable times and places as may be determined by the hearing examiner. No information secured on FTC forms EE-1 or EE-2 that can be identified with reporting companies shall be admitted into the public record for any purpose.

The case is remanded to the Hearing Examiner for further proceedings in accordance with this opinion.

ORDER RULING ON INTERLOCUTORY APPEAL

Counsel supporting the complaint having filed an interlocutory appeal from the hearing examiner's order of February 14, 1955, sustaining the respondent's objections to the receipt into evidence of Commission's Exhibit 62 for identification; and

The Commission having heard the appeal on briefs and oral arguments, and having rendered its decision recognizing that the restrictions upon the use of the basic information and work papers used in compiling the exhibit, imposed by the Commission's order of January 18, 1955, were unduly restrictive, and directing that said basic information and work papers be made available to the respondent and its counsel under the terms and conditions set forth in said decision, and having remanded the case to the hearing examiner for further proceedings in accordance with the decision:

It is ordered, That the appeal of counsel supporting the complaint be and it hereby is, otherwise denied.

IN THE MATTER OF
C. E. NIEHOFF & CO.

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

Docket 5768. Complaint, May 1, 1950—Decision, May 17, 1955

Order requiring a manufacturer in Chicago, Ill., of automotive products and supplies, to cease selling its products of like grade and quality at higher and less favorable prices to numerous small businessmen purchasers than it sold them to various larger purchasers competing with those less favored, in violation of sec. 2 (a) of the Clayton Act as amended.

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

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Taylor, Miller, Busch & Magner, of Chicago, Ill., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

The complaint in this proceeding charges respondent with violation of Section 2 (a) of the Clayton Act (15 U. S. C. 13) by selling in commerce its automotive products at different prices to purchasers who compete with each other in the resale thereof, so that the effect may be to substantially lessen competition and tend to create a monopoly in both the seller's and buyer's lines of commerce, or to injure, destroy or prevent competition with the respondent, with those of its purchasers buying at respondent's lower prices or with the customers of either.

Respondent's amended answer admits its corporate status, that it is engaged in interstate commerce and in competition with others selling comparable automotive products, that it charges different customers different prices for the same products based on the quantity thereof purchased. It denies that many of its customers compete in the resale of products sold them by it; denies that it discriminates in the price between customers; alleges that most of its customers resell wholly in intrastate commerce; alleges that its price differentials make only due allowances for differences in the cost of sale or delivery resulting from the differing methods or quantities in which its products are sold or delivered; and finally alleges that any such price differentials were granted in good faith to meet an equally low price of a competitor, or the equally low prices of various of its competitors.

The pleadings therefore raise the following issues: