

Decision

IN THE MATTER OF
M. RUBIN & SONS, INC., ET AL.

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

Docket 6318. Complaint, Mar. 23, 1955—Decision, Jan. 13, 1956

Consent order requiring sellers in New York City to cease representing through use of the color, pattern, and style of garments issued to members of the United States Armed Forces, and through markings, insignia, labels, and tags substantially the same as those used by the Armed Forces on similar garments, that the jackets and outer coats it sold were manufactured for the Armed Forces and in accordance with Armed Forces specifications; and Order requiring the same sellers to cease representing falsely through use of the word "Manufacturers" on letterheads and invoices and in advertising that it owned a factory where it made the products it sold, when actually all of its rainwear and 60% of its jackets were purchased from other firms and the remaining 40% of the latter were produced according to its specifications, by independent companies.

Mr. Terral A. Jordan, counsel supporting the complaint.

Chambers & Chambers, by *Mr. Gerald H. Chambers*, of New York, N. Y., counsel for respondents.

INITIAL DECISION OF HEARING EXAMINER JOHN LEWIS

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on March 23, 1955, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges respondents with two separate illegal practices in the operation of their business: (1) Selling and distributing jackets and outer coats which were made to simulate garments manufactured for the United States Armed Forces, and (2) representing themselves to be the manufacturers of the garments sold by them. Respondents appeared by counsel and filed their joint answer in which they admitted that in that portion of their business in which they acted as distributors and jobbers for merchandise manufactured by others, they had sold garments which in some instances contained labels of the kind and character alleged in the complaint, but that such practice had been discontinued in 1954, and otherwise denied any violation of the Act.

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Pursuant to notice, a hearing was thereafter held on May 17, 1955, in New York, New York, before the undersigned hearing examiner, theretofore duly designated to hear this proceeding. At said hearing counsel for the parties advised the hearing examiner that they had reached agreement on a consent order disposing of that portion of the complaint charging respondents with the simulation of Armed Forces jackets, and that a formal document embodying such agreement would be submitted to the examiner in due course. The hearing thereafter continued with respect to the remaining portion of the complaint alleging that respondents had misrepresented their status as a manufacturer. Testimony and other evidence were offered in support of, and in opposition to the allegations of the complaint pertaining to said issue, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the evidence in support of and in opposition to the allegations of the complaint, the record was kept open so as to afford counsel supporting the complaint an opportunity to submit rebuttal evidence. Counsel thereafter advised the examiner that he did not desire to offer any rebuttal evidence, and the proceeding was thereupon closed for the submission of evidence by order of the examiner dated June 15, 1955. Proposed findings of fact and conclusions of law were subsequently filed by counsel for both sides, including a supporting memorandum by counsel for respondents. No request for oral argument was made.

On June 21, 1955, there was also submitted to the hearing examiner by counsel supporting the complaint an agreement for consent order covering that portion of the complaint which relates to the simulation of United States Armed Forces style jackets and outer coats. The said agreement, which is dated June 20, 1955, and is signed by counsel supporting the complaint, counsel for respondents and all the respondents and approved by the Director of the Bureau of Litigation of the Commission, contains an admission by respondents of the jurisdictional allegations of the complaint and an agreement that the record may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. The said agreement further withdrawn insofar as it relates to the issue covered by said agreement, and that the parties expressly waive a hearing before the hearing examiner or the Commission with respect to said issue and all further and other procedure to which respondents may be entitled under the Federal Trade Commission Act

or the Rules of Practice of the Commission. Respondents have agreed that the order to cease and desist issued in accordance with said agreement for consent order shall have the same force and effect as if made after a full hearing and that they specifically waive any and all right, power or privilege to challenge or contest the validity of said order. It has been further agreed that said agreement for consent order, together with the complaint, insofar as it relates to the simulation of Armed Forces jackets, shall constitute the entire record herein and 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.

It appearing that the order provided for in said agreement conforms in all respects to the proposed order in the notice portion of the complaint and that said agreement provides for an appropriate disposition of that portion of the complaint which involves the charge of simulation of Armed Forces jackets, and it appearing that with respect to such issue this proceeding is in the public interest, the said agreement is hereby accepted and, in accordance therewith, paragraph 1 is included in the order hereinafter made. With respect to the balance of the proceeding, based on the entire record pertaining thereto and from his observation of the witnesses, the undersigned finds that this proceeding is in the interest of the public and makes the following:

FINDINGS OF FACT

I. The Parties and the Interstate Commerce

Respondent M. Rubin & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 688 Broadway, New York, New York. Respondents Milton Rubin, Donald Rubin, and Robert Rubin are, respectively, President, Vice President and Treasurer, and Secretary of said corporate respondent. These individuals acting in cooperation with each other formulate, direct and control all of the policies, acts and practices of said corporation. Their address is the same as that of the corporate respondent.

Respondents are now, and have been for more than two years last past, engaged in the sale and distribution of jackets and outer coats to retailers in commerce among and between the various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a

substantial course of trade in said garments, in commerce, among and between the various States of the United States.

II. The Alleged Illegal Practices

A. *The Issue*

As has been stated above, the only issue which was litigated in this proceeding involves that portion of the complaint in which respondents are charged with having falsely represented themselves to be manufacturers of the garments sold and distributed by them. This charge arises out of the fact that respondents use the word "Manufacturers" on their letterheads and invoices, and also in some of their advertising in trade journals. The complaint alleges that by using the word "manufacturers" respondents have represented that they own, operate or control a factory where they manufacture the merchandise sold by them and that such representation is false. Respondents deny that their use of the term "manufacturer" amounts to a representation that they own, operate or control a plant where their merchandise is manufactured, but nevertheless contend that they are considered to be manufacturers under the generally accepted meaning of the term. The question for decision on this issue, therefore, is whether respondents may properly call themselves manufacturers.

B. *Respondents' Status as a Manufacturer*

There is no basic dispute concerning respondents' method of operation. Respondents are engaged in the sale of outdoor jackets and rainwear, mainly to retail stores.¹ All of the rainwear which they sell is purchased from other firms. Of the outdoor jackets which they sell, approximately 60 percent is purchased, ready-made, from other firms. Their only basis for contending that they are manufacturers is with respect to the balance of their outdoor jackets which are produced, according to respondents' specifications, by independent contractors in the following fashion.

Respondents originate a style for a particular garment and have an independent pattern-maker prepare a pattern to meet respondents' specifications. Respondents purchase from the primary sources, such as mills, the materials which go into the making of the garment. This includes the cloth for the outer shell, material for the inner lining, and trimmings such as zippers, buttons and drawstrings.

¹ While the complaint alleges and the answer admits that respondents also sell their garments to wholesalers, the testimony of the respondent Donald Rubin indicates that respondents' merchandise is sold primarily to retail establishments.

The lining cloth for the heavy jackets is sent out to independent contractors for quilting. Then respondents cut both the outer shell and the lining, in accordance with their pattern. This is usually performed in respondents' own loft where they have a long cutting table and cutting machines, except during the busy season when some cutting is done in the place of business of some of respondents' contractors.² Most of the cutting is done by respondent Donald Rubin, except during the busy season when another cutter is sometimes hired.

After the materials are cut, they are tied in bundles and sent to the factory of independent contractors for sewing. Respondents pay these contractors on a per piece basis for sewing the garments. The contractors have no exclusive arrangement with respondents but work for other firms as well. A representative of respondents regularly visits the plant of the contractor who does the major part of their work in order to see that the garments are properly made. When the garments have been sewn they are returned to respondents' premises where they are tagged, folded and placed in boxes for shipment to customers. No further fabricating operations are performed on the jackets after they are returned from the contractors, except that respondents place several snaps or hooks on certain of the heavy winter garments in order to permit the fastening of a hood which comes with the jacket.

It is evident that with respect to the rainwear sold by them and the majority of the outer jackets which they purchase ready-made, respondents cannot be considered a manufacturer.³ The only question presented is whether they can be considered as manufacturers with respect to that portion of their garments which are designed and cut by them but which are sewn by independent contractors.

The case of counsel supporting the complaint rests primarily on four retailer-witnesses, operating in the New York City area, who testified with respect to their understanding of the term "manufacturer."⁴ These witnesses testified in substance that it was their understanding that a manufacturer was a person who produced a substantially complete garment in his own plant, with his own employees and machinery, and that they preferred to deal directly with a manufacturer because they believed they would be afforded

² It was estimated that 90 percent of the cutting was done in respondents' own plant.

³ Respondents in their answer admit that with respect to that portion of the business where they buy merchandise from others, "they act as distributors and jobbers."

⁴ Three of such witnesses actually testified and the testimony of the fourth was stipulated.

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a better price and other advantages, such as better quality and selection of merchandise. While some of these witnesses recognized that manufacturers sometimes had contractors make up some of their garments during the busy season, it was their understanding that a manufacturer ordinarily produced most or at least a substantial portion, of the garments in his own plant. Respondents relied mainly on two industry witnesses who testified as to their understanding of the term "manufacturer" in the industry. One of these was a sales representative for two manufacturers, who was himself formerly associated with a manufacturing firm, and the other was a salesman selling quilting services and woolens to firms in the industry. According to the testimony of these witnesses any firm which designs a garment, buys the raw materials and arranges for its manufacture, is considered to be a manufacturer in the industry, even though it performs no fabricating operations whatsoever and has merely an office and showroom.

C. Contentions and Conclusions

Counsel for respondents contends that the testimony of the witnesses called in support of the complaint is of no value since as retailers they are not experts in the industry and were merely expressing their individual opinions. Counsel argues that his own industry witnesses were, on the other hand, more experienced in the manufacturing end of the industry and that their opinions are therefore entitled to greater weight. The examiner cannot agree with this argument.

Counsel's argument overlooks the real issue in this case which is not what the people such as respondents call themselves or understand themselves to be, but rather what the people with whom they deal understand by the term or designation used. Where a firm makes certain representations about itself or its product, the question of whether such statements are misleading is not determined by what the "experts" understand them to mean but by the understanding of those for whose benefit the representations are made, which may include "the ignorant, the unthinking and the credulous."⁵ The fact that a form of misdescription has become so common in an industry that sophisticated members of the industry are not deceived by it and possibly use it themselves, does not prevent it from being

⁵ *Positive Products Co. v. FTC*, 132 F. 2d 165, 167 (C.A. 7, 1942). See also *Gulf Oil Corp. v. FTC*, 150 F. 2d 106, 109 (C.A. 5, 1945); *Chas. of the Ritz Dist. Corp. v. FTC*, 143 F. 2d 676, 679 (C.A. 2, 1944).

misleading and deceptive to those with whom the industry deals, many of whom may not be familiar with the fact that the term is not being used in its ordinarily accepted sense.⁶ The question therefore is what the class of persons with whom respondents deal understand by the term "manufacturer" in the industry. Since respondents sell their merchandise mainly to retailers, the question is what retailers in the industry understand by the designation "manufacturer."

As has already been stated, the retailers who were called in support of the complaint testified it was their understanding of the term "manufacturer" that it referred to someone who had a factory where he employed labor and machinery to produce a substantially completed garment. This testimony is clearly relevant, not simply as an expression of opinion, as counsel for respondents argues, but as evidence of a material fact in issue, viz., the understanding of the class of persons for whom respondents' representation was intended. Such fact may be properly established by the testimony of such persons as to their understanding or impression of the statement used by respondents.⁷

Counsel for respondents argues that the number of retailers who testified in support of the complaint was not significant. However, the testimony of those who did so testify was sufficient to support a finding based on the understanding stated in their testimony, absent substantial countervailing evidence. At the close of the evidence in support of the complaint counsel for respondents stated that he did not propose to call any retailer-witnesses to establish their understanding of the term "manufacturer." However, counsel did subsequently call a retailer who had been subpoenaed by counsel supporting the complaint, but who was excused from testifying by the latter. While some of this witness' testimony does tend to support the understanding of respondents' industry witnesses, his testimony as a whole was characterized by such uncertainty, and was so obviously influenced by the testimony of one of respondents'

⁶ See, in this connection, *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493, where the Supreme Court stated:

"The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived."

⁷ *Stanley Laboratories, Inc. v. FTC*, 138 F. 2d 388 (C.A. 9, 1943); *Koch v. FTC*, 206 F. 2d 311, (C.A. 6, 1953).

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industry witnesses who had testified in his presence, that it can be given little weight.⁸

In any event, even accepting the testimony of respondents' single retailer-witness, as indicating that some retailers have an understanding similar to that expressed by respondents' industry witness, there is nevertheless sufficient evidence in the record to establish the existence of a contrary understanding among a significant portion of the class of persons with whom respondents deal. In order to establish a violation of the Act, it is not necessary to show that all persons may be deceived. It is sufficient if there exists a reasonable probability of deception among a significant portion of the public.⁹ It may also be noted, in this connection, that it is not necessary to show actual deception, as counsel for respondents argues; since the tendency or capacity of a representation to mislead or deceive is sufficient to establish a violation of the Act.¹⁰

While counsel supporting the complaint did not call a large number of witnesses, it may be inferred that the understanding of those who did testify fairly reflects the understanding of many other retailers throughout the United States. That such an understanding is widely held may be inferred from the ordinary dictionary meaning of the term used. Under this definition a "manufacturer" is: "One who manufactures, an employer of operatives in manufacturing"; and "manufacture" means: "To make (wares) by hand, by machinery, or by other agency; to produce by labor, esp., now, by division of labor, and usually with machinery."¹¹

The understanding of the witnesses who testified in support of the complaint comports with the finding of the Commission in a number of cases, involving a variety of industries. Under these decisions one who merely arranges for the manufacture of a product but does not perform the basic manufacturing operations is not considered a manufacturer. Thus, the Commission in a number of cases involving the handkerchief industry has held that firms which design the product, purchase the cloth, and package it for shipment but who have the actual manufacturing operations performed by independent contractors are not themselves manufacturers since they

⁸ This witness testified that he had never given much thought to what constituted a manufacturer, but that after listening to one of respondent's witnesses he had become convinced that anyone who could compete with a manufacturer was entitled to be called one (R. 113). Under this concept a wholesaler who could meet a manufacturer's price would be entitled to call himself a manufacturer. However, when asked to define the word manufacturer in his own words, the witness gave the generally accepted definition: "A man who takes a piece of material and makes a garment out of it" (R. 118).

⁹ *Prima Products, Inc. v. FTC*, 209 F. 2d 405, 409 (C.A. 2, 1954).

¹⁰ *Parker Pen Co. v. FTC*, 159 F. 2d 509 (C.A. 7, 1946); *Charles of the Ritz Dist. Co. v. FTC*, 143 F. 2d, 676 (C.A. 2, 1944).

¹¹ Webster's New Collegiate Dictionary.

do not own or operate or control a factory for the production of the products sold by them.¹² The same ruling has been made in other industries and has been sustained, in a number of instances, by the courts. These include knitted wear, textiles, floor coverings, men's clothing and blankets.¹³ The impropriety of calling oneself a manufacturer has been held to exist though the firm making such representation has performed certain incidental operations in the manufacturing process.¹⁴ Finally, the Commission has found that the precise operations which are being performed by respondents do not constitute one a manufacturer. In *Ralph Cohn Underwear*, 31 F. T. C. 1077, respondents represented themselves as manufacturers of ladies' undergarments. They designed and patterned the garments, bought the piece goods and trimming, cut them up with their own employees on their own premises, and sent them out for sewing by independent contractors, after which the garments were returned to respondents for packing and distribution. The Commission held on these facts that this method did not constitute respondents a manufacturer.

Counsel for respondents argues that the evidence here is deficient in that it fails to show "what constitutes control of a factory." It is clear from the record that respondents neither own nor operate a factory. The evidence offered concerning their method of operation also indicates an absence of control over the manufacturing operations of such a nature as to entitle them to use the designation of manufacturer. The Commission has indicated in several cases that a mere incidental relationship to the manufacturing process does not constitute control sufficient to justify use of the designation "manufacturer."¹⁵ While the cases have not spelled out precisely what degree of control it is which entitles one to be called a manufacturer, certain it is that the right to use some term cannot be bottomed on the casual inspection by respondents over the plant of their contractors or their right to reject unsatisfactory garments.

¹² *Berkshire Manufacturing Co.*, 47 F.T.C. 1048; *Julian S. Cohn*, 32 F.T.C. 952; *Universal Handkerchief Mfg. Co., Inc.*, 26 F.T.C. 193; *Standard Handkerchief Manufacturing Co.*, 20 F.T.C. 182.

¹³ *Beacon Knitting Mills, Inc.*, 10 F.T.C. 70; *Bear Mill Mfg. Co.*, 98 F. 2d 67 (C.A. 2, 1938); *Herzfeld v. FTC*, 149 F. 2d 207 (C.A. 2, 1944); *Interstate Clothing Co.*, 20 F.T.C. 412; *Lawrence Blanket Mills*, 24 F.T.C. 615; *Columbia Pants Manufacturing Co.*, 13 F.T.C. 61; *Knit-Firm, Inc.*, 13 F.T.C. 302.

¹⁴ See *FTC v. Royal Milling Co.*, 288 U.S. 212, where respondents blended flour but did not grind it; *Bilt-Rite Box Corp.*, 33 F.T.C. 1487, where respondents bought boxes in knockdown form and assembled them by stitching and stapling them together; *Columbia Pencil Company*, 33 F.T.C. 617, where respondents purchased lead pencils, and then painted them and attached a ferrule and eraser.

¹⁵ See *Progress Tailoring Co. v. FTC*, 153 F. 2d 103 (C.A. 7, 1948), where respondents' clothing was sewn by a subsidiary corporation; *FTC v. Pure Silk Hosiery Mills, Inc.*, 3 F. 2d 105 (C.A. 7, 1925), where respondents' hosiery was made by a mill in which it owned one-sixth of the stock and had one director; *Primfit Textile Co.*, 31 FTC 1423, where respondents had an exclusive contract with the firm which made their product.

Based on the evidence as a whole and in the light of the precedent above cited, it is concluded and found that respondents are not manufacturers since they do not own, operate or control any factory or manufacturing establishment and since a significant portion of the class of persons with whom they deal understand that a manufacturer is someone who owns, operates or controls a factory where the goods sold by him are manufactured. Moreover, since a substantial portion of the products sold by respondents are purchased by them from others, ready-made, they have no right to call themselves a manufacturer with respect to such products in any event.¹⁶

D. Preference for Dealing With a Manufacturer

The basis of the claim of public interest in this case rests on allegation of the complaint that retailers prefer to buy from manufacturers because of their belief that they will obtain better prices and other advantages. This allegation is sustained by the testimony of the witnesses called in support of the complaint previously alluded to. It may be that the expectation of retailers is not always realized, as is indicated by the testimony of the one retailer-witness called by respondents, who testified that he was able to purchase from respondents as cheaply as from a bona fide manufacturer from whom he made most of his purchases. However, this does not gainsay the fact that there exists a general preference among retailers for dealing directly with those whom they consider manufacturers.

The fact that respondents may have, as they contend, largely eliminated the middleman's profit (despite the fact that they pay a contractor for the sewing of their jackets) does not justify ignoring the preference on the part of retailers for dealing with those whom they regard as bona fide manufacturers and as to whom they would ordinarily entertain no doubt concerning the elimination of the middleman's profit. Counsel for respondents urges that there is no likelihood of any damage here since the prices which respondents charge must generally be competitive to that of manufacturers. However, this argument overlooks the fact that retailers have a right to be correctly advised concerning the status of those with whom they deal and to deal with the type of firm for whom they have a preference, even though such preference may sometimes be based on ignorance or caprice.¹⁷ It cannot be denied that the failure to

¹⁶ *Brown Fence & Wire Co. v. FTC*, 64 F. 2d 934 (C.A. 6, 1933). Respondents allege in their answer that the merchandise manufactured by others was sold under a different label from that made up under their supervision. No evidence was offered to support this allegation. Moreover, there is nothing to show that this label indicates respondents are not the manufacturer of such merchandise.

¹⁷ *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80; *Benton Announcements Inc. v. FTC*, 130 F. 2d 254 (C.A. 2, 1942).

correctly advise retailers concerning the status of a prospective vendor may result in their purchasing from such firm, thereby causing damage to competitors, some of whom may be wholesalers who make no claim to being a manufacturer and some of whom may be bona fide manufacturers. The position which respondents take in this regard is similar to that which was answered by the Court of Appeals in *Bear Mill M'fg. Co. v. FTC*, 98 F. 2d 67, 68, as follows:

"Indeed, the line between manufacturing itself and supervising the finishing of the product as to color, style, and workmanship where, as here, the orders are given to an independent contractor is so tenuous that, upon the record, we regard the damage, if any, to customers or competitors as highly speculative. *Yet accuracy of representations implicit in a trade-name indicating whether a concern is a manufacturer, converter or jobber is in general important and it cannot be denied that a misleading name may lead to injurious misapprehensions on the part of customers, actual or prospective, and damage to competitors.*" [Emphasis supplied.]

It is accordingly concluded and found that there exists a preference on the part of retailers for dealing directly with manufacturers of products rather than with distributors, jobbers and other intermediaries, such preference being due in part to a belief that by dealing with the manufacturer lower prices and other advantages may be obtained.

III. Effect of the Unfair Practices Found

The use by respondents of the word "Manufacturers" on their letterheads, invoices and advertising, as above found, has had and now has the tendency and capacity to mislead dealers into the erroneous and mistaken belief that respondents are the manufacturers of said merchandise and that they own, operate or control a plant or plants where such merchandise is manufactured and into the purchase of substantial quantities of respondents' merchandise in commerce because of such erroneous and mistaken belief.

Respondents in the course and conduct of their business are in direct and substantial competition with other corporations, firms and individuals engaged in the sale in commerce of jackets and outer coats. As a result of the unfair practices found, it may fairly be inferred that substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

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CONCLUSION OF LAW

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

ORDER

It is ordered, That respondents M. Rubin & Sons, Inc., a corporation, and its officers, and Milton Rubin, Donald Rubin and Robert Rubin, individually and as officers of said corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of wearing apparel, or of any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by marking, branding, labeling, tagging, or in any other manner, that such merchandise was manufactured for the Armed Forces of the United States or in accordance with specifications of said Armed Forces.
2. Representing through the use of the word "manufacturers" or any other word or words of similar import or meaning on letterheads or invoices or in any other manner, that they or any of them, manufacture the merchandise sold by them.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The Commission on March 23, 1955, issued its complaint, charging the respondents with having falsely, misleadingly and deceptively represented (1) that jackets and outer coats sold and distributed by them were manufactured for, and according to specifications of, the United States Armed Forces, and (2) that respondents were the manufacturers of the garments sold by them.

With respect to the first charge, respondents and counsel supporting the complaint entered into an agreement for a consent order which was tendered to, and accepted by, the hearing examiner. The initial decision adequately and appropriately disposes of this charge. After hearings at which evidence in support of and in opposition to the remaining charge was received, the hearing examiner issued his initial decision in which he found that the respondents had misrepresented that they were the manufacturers of the garments they sold, and ordered that the practice be discontinued. Respondents

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have appealed from this portion of the hearing examiner's findings and order.

There is no dispute as to the facts surrounding the issue as to whether or not respondents have misrepresented that they are manufacturers of the garments they sell. The hearing examiner's findings as to the respondents' method of operation are adopted by respondents as a "fair factual statement," except for his failure to mention the 2500 square feet of area in respondents' cutting room and the fact that respondents' sales of garments designed and cut by them and sewed by individual contractors have increased steadily each year in proportion to the total volume of their sales. We do not consider the omitted statements as materially changing the factual situation.

Respondents sell rainwear and outdoor jackets, mainly to the retail trade. All of the rainwear and 60% of the outdoor jackets they sell are purchased, ready-made, from other firms. The remaining 40% of the outdoor jackets sold are produced, according to respondents' specifications, by independent contractors, and respondents' relation to the manufacturing process is incidental. Respondents do not own, operate, or control any factory or manufacturing establishment where the garments they sell are manufactured. In our opinion, the hearing examiner's conclusion that the respondents are not manufacturers is correct.

There is substantial testimony in the record to support the finding that respondents' use of the word "Manufacturers" on its letterheads, on invoices, and in some of its advertising in trade journals has the tendency and capacity to mislead dealers into the erroneous belief that respondents own, operate or control a plant or plants where the garments they sell are manufactured, and to induce the purchase of substantial quantities of respondents' merchandise in commerce because of such belief. The Federal Trade Commission Act is violated if there exists a reasonable probability that a substantial portion of the purchasing public may be deceived. The law is well settled that a finding of tendency and capacity to mislead is sufficient and that actual deception need not be shown. *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Vacu-Matic Carburetor Co. v. F.T.C.*, 152 F. 2d 711, 713 (7th Cir. 1946); *Charles of the Ritz Dist. Corp. v. F.T.C.*, 143 F. 2d 676, 680, and cases there cited (2nd Cir. 1944). We think the hearing examiner properly held that the testimony of the four retailers fairly reflected the understanding of many other retailers throughout the United States, particularly in view of the dictionary definition of the word "manufacturer" and the scant evidence offered by respondents to the con-

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trary. The courts have repeatedly affirmed similar Commission orders. *Progress Tailoring Co. v. F.T.C.*, 153 F. 2d 103 (7th Cir. 1946); *Bear Mill Mfg. Co. v. F.T.C.*, 98 F. 2d 67 (2nd Cir. 1938); *F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933); *Brown Fence and Wire Co. v. F.T.C.*, 64 F. 2d 934 (6th Cir. 1933); *F.T.C. v. Pure Silk Hosiery Mills, Inc.*, 3 F. 2d 105 (7th Cir. 1924).

The hearing examiner found that the use by the respondents of the word "Manufacturers" on their letterheads, on invoices, and in advertising, not only has the tendency and capacity to, but also does mislead dealers. Since the evidence does not show actual deception, the hearing examiner's findings of fact, first paragraph, Section III, will be modified by eliminating all reference to the existence of actual deception on the part of those dealing with respondents. The capacity and tendency to mislead is sufficient to warrant an order. The findings as modified, conclusions and order of the hearing examiner are adopted as the findings, conclusions, and order of the Commission.

Respondents' appeal is denied, and it is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and briefs of counsel in support thereof and in opposition thereto, oral argument not having been requested; and

The Commission having determined, for the reasons appearing in the accompanying opinion of the Commission, that the initial decision of the hearing examiner should be modified and thereafter adopted as the Commission's decision, and that respondents' appeal should be denied:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, modified by eliminating the words "and does" from the first paragraph, Section III, of the findings of fact in the initial decision.

It is further ordered, That the findings as modified, conclusions, and order in the initial decision be, and they hereby are, adopted as the findings, conclusions, and order of the Commission.

It is further ordered, That respondents' appeal from the hearing examiner's initial decision be, and it hereby is, denied.

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

Complaint

IN THE MATTER OF

DRUGGISTS' SUPPLY CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (c) OF THE CLAYTON ACT*Docket 6420. Complaint, Sept. 22, 1955—Decision, Jan. 17, 1956*

Consent order requiring over 100 wholesale druggists to cease violating Sec. 2 (c) of the Clayton Act, as amended, through receiving brokerage from sellers (1) based upon percentage of sales, (2) in lump sums, and (3) as "functional discounts" on purchases made for them by their own corporate agent.

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

Mr. Rice E. Schrimsher for the Commission.

Appel, Austin & Gay, of New York City, for respondents, generally.

Weaver & Glassie, of Washington, D. C., and *Ballard, Spahr, Andrews & Ingersoll*, of Philadelphia, Pa., for Smith, Kline & French Laboratories and Smith, Kline & French, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named and referred to in the caption hereof, and more specifically described hereinafter, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Druggists' Supply Corporation, hereinafter referred to as respondent D.S.C., is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 26 West 40th Street, New York, N. Y.

PAR. 2. Respondent Brunswick Drug Company is a corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business located at 4701 South Santa Fe Avenue, Los Angeles, California. It maintains branch offices in San Francisco, San Jose, San Diego, Sacramento and San Bernardino, California, Phoenix and Tucson, Arizona, and Salt Lake City, Utah.

Respondent Durr Drug Company is a corporation organized, existing and doing business under the laws of the State of Alabama, with