

IN THE MATTER OF
COLUMBUS COATED FABRICS CORPORATION, ET AL.

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

Docket 6677. Complaint, Nov. 8, 1956—Decision, Mar. 23, 1959

Order requiring a manufacturer in Columbus, Ohio, and two of its distributors in the New York City area, to cease conspiring to prevent a New Jersey concern, which had been cutting prices on its "Wall-Tex" washable fabric wall covering, from obtaining supplies, and to threaten to boycott suppliers of the price cutter.

Mr. Brockman Horne and *Mr. Jerome Garfinkel* for the Commission.

Geary & Rankin, of Chester, Pa., and *Mr. Richard V. Willcox*, of Columbus, Ohio, for Columbus Coated Fabrics Corporation.

Howrey & Simon, of Washington, D.C., for Philan, Inc.

Mr. Milton Handler, of New York, N.Y., and *Wilentz, Goldman, Spitzer & Sills*, of Perth Amboy, N.J., for Zins Wallpaper Company.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Statement of the Case

Complaint in this proceeding, issued November 8, 1956, charged the three named corporate respondents with entering into and carrying out a planned common course of action and conspiracy among themselves and with and through other distributors and dealers in Wall-Tex, a wall covering, to hinder and restrain competition in commerce in the sale and resale thereof by establishing and maintaining uniform fixed resale prices, exclusive sales territories, boycotting and threatening boycott of dealers who ignored either or both, or dealers who supplied the latter, and enforcing such boycotts by hiring detectives for surveillance of those boycotted and bribing their employees, and finally delaying deliveries to such boycotters.

Answers filed in due course by all three respondents generally admitted corporate existence, commercial activity and relationships as alleged in the complaint, competition and commerce, except that Philan, Inc. denied it was engaged therein. All other allegations were, of course, denied. Motions to dismiss at the

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close of the case-in-chief were made, argued, and denied but no appeal was requested.

Fifteen hearings for the reception of evidence were held in New York City, except one in Washington, the testimony being completed on March 26, 1958, accounting for 1,660 pages of transcript, some 71 exhibits received for the complaint and 19 contra. Shortly after hearings commenced counsel for respondent Zins Wallpaper Company entered into an oral stipulation, spread upon the record, with counsel supporting the complaint that this respondent would take the same order which may be entered against the respondent Philan, Inc., and that counsel in support of the complaint would not call as witnesses any officer or employee of the respondent Zins Wallpaper Company. Thereafter, counsel for the latter did not attend any hearings nor further appear in the proceedings.

Counsel for the remaining respondents and counsel supporting the complaint having filed their respective proposed findings of fact, conclusions of law and briefs, upon consideration of the same, together with the entire record in this proceeding, and his observation of the witnesses, the undersigned hearing examiner makes the following findings of fact and conclusions of law. All findings and conclusions proposed, not hereafter specifically found or made, are herewith refused, as are all motions made after the close of the evidence.

FINDINGS OF FACT

The Parties

1. Respondent Columbus Coated Fabrics Corporation (hereinafter referred to as Columbus) is a corporation organized, existing and doing business under the laws of the State of Ohio, with its principal office and place of business located on Seventh and Grant Avenues, Columbus, Ohio. This respondent started in 1900 as the Columbus Elastic Waterproofing Company and was incorporated under the laws of Ohio in 1902 as the Columbus Oil Cloth Company, its name later, in 1929, being changed to its present name. It manufactures and distributes a number of products including a wall covering made by coating a cotton sheeting with several layers of an oil compound to make a durable, scrubbable, decorative wall covering sold under the brand name of Wall-Tex. Total gross sales of this respondent in 1956, exceeded \$30 million and sales of Wall-Tex exceeded \$5 million.

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2. Respondent Philan, Inc. (hereinafter referred to as respondent Philan) is a corporation, organized and existing and doing business under the laws of the State of New York, with its principal office and place of business located at 390 Rockaway Avenue, Brooklyn, N.Y., and is engaged in the wholesale distribution of Wall-Tex. It was formed in 1933 as the Philan Corporation with Philip S. Tashman as its president and directing head. Subsequently, its name was changed to Philan, Inc., and respondent Columbus became a majority stockholder therein, owning currently 147 of the 250 shares, the remainder of 103 shares being held by Philip S. Tashman who is still its president and directing head. Respondent Columbus has two of its officers or representatives on Philan's board of five directors, but exercises no direction or control over its day to day operations. It receives only financial reports from Philan—the officers of which decide independently to whom to sell and on what terms.

3. Respondent Zins Wallpaper Company (hereinafter referred to as Zins) is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 165 Washington Street, Newark, N.J., and is engaged, like Philan, in the wholesale distribution of Wall-Tex. This respondent was owned and operated from the 1920's by two brothers, Jake and Sam Zins, until 1954 when it was sold by them to B. Morton Gittlin who, however, hired the Zins brothers as employees.

Interstate Commerce

4. All of the respondents are engaged in interstate commerce, as "commerce" is defined in the Federal Trade Commission Act, in the conduct of their respective businesses as described above.

Competition

5. All of the respondents in the course and conduct of their respective businesses, in commerce, are, and at all times have been, in competition with other similarly engaged corporations, individuals and firms in the sale of similar and competitive products.

The Product and Its Competition

6. As a washable fabric wall covering Wall-Tex competes directly with other similar coverings—Sanitas, Velvetex, Fabron, Wiggins and perhaps others. Price range of all is narrow and

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five cents a roll will switch business. In a larger sense, Wall-Tex competes with all wall coverings—wall paper and paint. Wall-Tex is manufactured in single rolls of 24" width, six yards in length, or double rolls 12 yards in length—it is also made in 48" widths in single rolls of 3 yards length. In the late summer or early fall of odd numbered years, a new line of about 200 patterns is introduced, with new pattern or sample books. In the even numbered years, a matching fabric line of about 65 patterns is placed on the market. Wall-Tex is packed for shipment in 8" x 11" x 25" cartons, each containing 24 single rolls or 12 double rolls to a carton and weighing 60 lbs., each carton bearing the brand name Wall-Tex. Each carton on one end bears the style number (pattern) and the lot number. On the other end of the carton is a white shipping label with Columbus' name and address, carton contents, name and address of purchaser, and the order number as it appears on Columbus' records. Respondent Columbus ships Wall-Tex f.o.b. factory in most instances, although it also ships c.o.d. Full freight is allowed on carloads. In less than carloads, freight is paid by consignee with an allowance on the face of the invoice for the number of pounds at the carload rate. Columbus also drop-ships direct to dealers, at a distributor's request.

Exclusive Sales Territories

7. Respondent Columbus sells its Wall-Tex to 63 distributors who resell to dealers, institutions, decorators, jobbers and consumers. In addition, Columbus employs traveling salesmen known as territory men and two known as promotion men. These 63 distributors are located in 54 cities, nine of which have two distributors. Eight of these distributors have "specified sales areas" or "closed territories." One is in Chicago, the other seven are along the Eastern Seaboard from Portland, Maine, to Philadelphia, Pa. Those without "specified sales areas" compete freely with each other as well as with other wall covering dealers handling competitive products such as Sanitas.

8. These "specified sales areas" or "exclusive territories" have been designated by the vice president in charge of marketing coordination of the respondent Columbus who asks the distributors contiguous thereto not to sell in the area designated to a given distributor, but, on the contrary, to regard that as exclusive. There is no written agreement and respondents all insist that there is no understanding.

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Population-wise these exclusive sales areas constitute dense and potentially profitable markets.

9. When such a distributor receives an order from outside his designated sales area the common practice is to send it to Columbus, which then forwards it to the appropriately located distributor for acceptance and shipment. Also, there is in the record considerable correspondence indicating a dispute over the correct boundary line between Zins having the northern half of New Jersey and Schultz in Philadelphia having that city plus the southern half of New Jersey. This was a three-way dispute with Columbus acting as umpire trying to negotiate a settlement between the two distributors. It is not shown how, or when, or if, it was settled.

10. On the other hand, there is no substantial evidence in the record to show that Columbus exercised espionage, policing, enforcement or threats thereof to keep distributors from poaching. The record is also clear that Wall-Tex competed freely and vigorously in all these areas with other competitive fabric wall coverings, principally Sanitas; in fact, Wall-Tex dealers below the distributor level almost always bought and resold Sanitas as well. There is no evidence of any lessening of competition at any level between Wall-Tex and competing wall coverings, nor at the retail level in Wall-Tex. In fact, what competition was shown was fierce.

11. Under these facts, there is no illegality. Assuming the understanding alleged, tacit; at the most, horizontally; and express, vertically; the law is clear that exclusive dealership contracts are virtually per se legal, absent monopolization, or absent effective competition at the buyer and seller levels. Neither is present here. *Schwing Motor Co. v. Hudson Sales Corporation*, 138 F. Supp. 899, 903, 239 F. 2d 176; *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418; *General Cigar Co., Inc.*, 16 F.T.C. 537. The *Soft-Lite Lens Co., Inc.* case, 321 U.S. 707, relied on by counsel supporting the complaint, indicates restrictions at all levels, both price-wise and otherwise, far in excess of the facts here. Resale was restricted as to retailer; it is absent here. Resale by retailer was restricted to consumers; such is absent here. Contract termination was imposed for deviation; there is no such evidence here. It follows that the factual picture here is not in violation of law and the fact is so found.

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Resale Price Maintenance

12. Whenever respondent Columbus comes out with a new or revamped line of patterns it, of course, issues new pattern books to its distributors and those to whom they resell. With these, respondent Columbus issues suggested resale prices for all levels, including the consumer. Mostly, these are issued on cards—a different color for each level, headed “Jobber,” “Dealer,” “Decorator,” “Retail,” as well as a mill list for distributors, all of whom pay the same price to Columbus.

13. The record shows that 33 $\frac{1}{3}$ percent to 50 percent of the Wall-Tex is resold by these distributor-customers of Columbus at these suggested resale prices, but these sales are in unrestricted or “open” sales areas. There is no evidence of any horizontal agreement—that is, between distributors—to resell at these suggested prices. Where there are exclusive distributorships areawise the distributors themselves frequently issue their own suggested resale prices to the dealers to whom they resell, which often vary greatly from those of Columbus. But the record is clear that there is no horizontal understanding or agreement between distributors to maintain or enforce Columbus’ suggested resale prices. In fact, the record is clear, that, because of competition they are not in fact followed. The record is also clear that the suggested resale prices issued by the distributors, whether those of Columbus, or their own, are not followed by the dealers to whom they resell, nor is there any substantial evidence that there is, or ever was, at the dealer level any agreement or understanding to adhere to either set. It is abundantly clear also that there has been no attempt at any level, from Columbus down, to police or enforce adherence. This charge of the case has not been established by the evidence submitted, by any standard, and the conclusory fact is so found.

Boycott

14. This is the nub and bitter core of this proceeding. It revolves around the commercial relationships between the respondents and a Jersey City, N.J., wall paper dealer. Some background is necessary.

15. Philan, Inc., the largest distributor of Wall-Tex, has for many years pushed inventory stocking among its customers by selling at a substantially lower price (\$2.03 vs. \$2.47 per roll) where the purchaser takes 50 cartons or more of assorted pat-

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terns. These dealers are called stocking dealers and account for about 95 percent of Philan's volume. Nonstocking dealers buy from hand to mouth, a roll or two at a time, as needed. Obviously, a dealer who has his own money invested in a stock will make more aggressive efforts to sell it, than the nonstocking dealer, and the encouragement of stocking is to the mutual advantage of both Columbus and Philan. Of the 3,000 or so Wall-Tex dealers in Philan's area, 500 purchase directly from Philan, 100 as stocking dealers, 400 as nonstocking dealers, the remainder as customers of Philan's stocking dealers. Sixty percent of the Wall-Tex sold in this territory is sold by nonstocking dealers. Philan's "area" for many years was, and is, metropolitan New York, except Staten Island, Hudson County, N.J., and several counties in Connecticut.

16. Several decades ago, about the time Wall-Tex began to be marketed, a wall paper concern, subsequently incorporated in 1954 as N. Siperstein, Inc., was formed in Jersey City, Hudson County, N.J., and began buying Wall-Tex for resale, from Philan. The founder Nathan had four sons, Oscar, Morris, Herbert, and Harry. Oscar succeeded his father as directing head with Herbert and Morris as subordinate officers and Harry as a sometime stock boy, order clerk for old patterns, and subsequently, for a time, a vice president of a subsequently acquired store in Linden, N.J.

17. Apparently, almost from the start, N. Siperstein, Inc., hereinafter referred to as Siperstein, was a price cutter because sometime in the 1930's Philan cut off its supplies and refused to sell. The same thing again happened in 1946 or 1947. Each time though, Philan resumed selling him because the cutoff did not accomplish anything—supplies were still obtained through agents and resold at cut prices. By 1954, Siperstein had become Philan's largest New Jersey customer and in early 1955 was buying at the rate of \$50,000 a year. It operated a wholesale business under the name of Montgomery Wallpaper Company, at Jersey City, N.J.

18. Early in 1955, Siperstein began selling in substantial quantities at wholesale—at an average of \$2.25 per roll, and sometimes as low as \$2.13, in Essex, Bergen and Passaic counties, which were in Zins' "area" and in direct competition with Zins, whose dealer price at this time was \$2.47 per roll. Siperstein at this time was buying from Philan as a stocking dealer 200 cartons, every number, at \$2.03 per roll in carton lots.

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19. Columbus' officials were aware of this, except they had no specific price, but did know that Siperstein was price cutting and that it had been cut off in previous years for it. This price cutting was, of course, obviously hurting Philan also, since its wholesale price was substantially the same as Zins' and dealers could buy from Siperstein at 22 cents per roll cheaper than from Philan.

20. Early in March 1955, Philip S. Tashman, president of respondent Philan, called Oscar Siperstein on the telephone saying he would like to have a chat with him, although he had not visited him for quite a few years, but during the last half of 1954 had received many complaints from Hudson County, New Jersey dealers about Siperstein's "vicious" price cutting. The next day Tashman visited Siperstein.

21. There are several versions of what was said—those of Oscar Siperstein, Tashman's first and second versions and the version of Richard Tashman, Philip's son and executive vice president of respondent Philan. Richard was not present, but discussed the call of his father on his return. Sifting the wheat from the chaff from these divergent versions, it appears that Philip asked Oscar why he was selling at an unprofitable price, to which Oscar replied he was satisfied with his profit. Tashman then said Oscar was driving Philan's other stocking dealers out of business and asked Oscar to bring his price up from \$2.14 to at least \$2.23, or preferably to \$2.45 or \$2.47. Oscar refused. Tashman further complained about the price cutting by Siperstein in Zins' area—Essex, Bergen, and Passaic counties, that it was deteriorating the market there. All other statements by these three witnesses in reference to this call are rejected.

22. About a week or so later, Sam Zins and Morton Gittlin, of respondent Zins, came to Jersey City and met Oscar Siperstein at a corner luncheonette (none of them would meet at the other's store). Zins wanted to know if Oscar was selling in Essex, Bergen, and Passaic counties. Oscar admitted he was competing with another Hudson county dealer selling in those counties, and if some of Zins' business was taken away it did not make much difference to Oscar. Zins offered to stop this other dealer saying he had ways. Oscar refused to quit selling and Zins became angry, threatening to open a "border" store and sell at \$2.03 and "murder" Siperstein, who replied it was up to him. This is Oscar Siperstein's version of this meeting—there is no other. It is accepted and found as fact because cross-examination produced

neither falsification nor serious discrepancy and because respondents did not produce either of the other two participants to contradict or modify.

23. A week or ten days later Richard Tashman and Lillian Friedman, manager of the order department in Philan's and having an interest in the business, took Oscar Siperstein to dinner in Jersey City. She was brought along as oil on troubled waters, being the only one in Philan with whom Oscar was friendly. The personal animosity between Oscar and the Tashmans was not only testified to as of long standing, but was obvious in the court room. Here again we have four versions of what took place—a first and second version by Richard Tashman, and one by each of the others.

24. The acceptable gist is that Richard Tashman complained to Oscar about the prices at which the latter was selling saying that stocking dealers were buying from him instead of from Philan and that stocking dealers also were losing business because non-stockung dealers could buy from Oscar at less than from Philan's stocking dealers. He asked that Oscar raise his prices, not to Columbus' or Philan's suggested resale prices, but "higher" to "make it more interesting for everyone." Apparently sales area was not discussed. Other details, highly conflicting and confusing, of this conversation as related by the participants are rejected either as incredible, immaterial, unsubstantiated, or contradicted by other evidence in the record.

25. In 1954, Philan's sales in Hudson County decreased some \$45,000 over the previous year, although its volume in New York increased.

26. Sometime before the end of March, Philan sought and obtained oral legal advice from its counsel that it could cut off Siperstein so long as it did so independently. This opinion was later formalized in writing April 18, 1955, and Philan on or about March 31, 1955, cut off any further sales to Siperstein. There is no substantial, reliable, probative, or credible evidence that respondent Columbus directed this decision although it was aware of the situation in general and, of course, was directly affected.

27. On or about March 21, 1955, before the cutoff, Philan employed the Pinkerton Detective Agency to find out who was supplying Siperstein with Wall-Tex. The information given Pinkerton, as well as its *modus operandi*, are set forth in full herewith:

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JOURNAL-GENERAL

N.Y. Ex.	R.M.	D.M.	Mgr.	Newark
JOC	ERK	CJG		Rate
WBB				

New York Journal No. L-980

Account of: Philan, Inc.

Operation: Inv. Montgomery Wallpaper Co.

Bills and

Reports to: Mr. A. Albert Cooper,
390 Rockaway Avenue,

Address: Brooklyn, N. Y.

Service	Day	Hour	Month
Inv.	24.00	3.00	
	24.00	3.00	
Surv.			
Sec.			
Test			

Plus Expenses (x) Special Rate ()

Confirmed (x) Retainer ()

Financial responsibility established by Reputation

REMARKS: How business received: DATE ORDER RECEIVED: Mar.
Client telephoned 21, 1955POSITION: Advertising &
Sales Mgr.

CLIENT: BUSINESS Wall coverings

Regular (); New (x); Understands: Rate (x); Overtime (x); Expense
charges (x); Including auto hire (x)

REPORTS: Daily (x); Consolidated (); By initials (x); By number ()

Plain paper (); Form No. 82

Number client's copies (2); Tissue copies to: N.Y. & Newark

ADDITIONAL REMARKS:

CLIENT'S PROBLEM: City New York Date March 21, 1955.

Interview was had with Mr. Philip S. Tashman, President, and Mr. A.
Albert Cooper, Advertising & Sales Manager, who submitted the following:

Client company is the Metropolitan Distributor for Wal-Tex, a waterproof wall covering, and supplies what is called "Stocking Dealers," who sell direct to the retail stores. Montgomery Wallpaper Company, owned and operated by N. Sipperstein & Sons, 369 Montgomery St., Jersey City, N.J., is a "Stocking Dealer" for client company, and has recently been selling Wal-Tex below the established price (which is not fair-traded) to certain of its customers, causing complaints from other retailers who cannot meet the ensuing competition. Client company has cut down on the amount of merchandise shipped to Montgomery Wallpaper Company, saying they are out of or short on the styles ordered, but Montgomery is still delivering Wal-Tex at a reduced price, indicating that they are receiving the merchandise from other distributors. The business of the Montgomery Wallpaper Co. is conducted by four brothers, Oscar Sipperstein, Pres., and Herbert, Harry and Sam Sipperstein. Nathan

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Sipperstein, father of the four brothers, is frequently about the plant, but is not supposed to be active in the management.

CLIENT DESIRES TO ESTABLISH:

Who is supplying Wal-Tex to the Montgomery Paper Company.

PLAN: Refer this matter to the Newark Office who will first detail an investigator to attempt to obtain a job with the Montgomery Paper Company, preferably in their shipping and receiving department. From his knowledge of the Montgomery Company client believes the only opportunity of obtaining a job will be as a loader or laborer of some sort, and such a job would enable the investigator to observe incoming shipments and develop who is making the deliveries. Wal-Tex is shipped in tan cardboard cartons size 8"x11"x25", each carton containing 12 rolls. Along one side of the carton, starting at one end, is a solid red block about 4"x10" with the name Wal-Tex printed in white letters thereon. The carton is distinctive and cannot be confused with any other. At one end of the carton is printed in red the words "Style No." and underneath this, "Lot No." These numbers are of no use for identification purposes and are to be disregarded. A white shipping label about 6" square is pasted on one end of the carton and bears the heading "From COLUMBUS COATED FABRICS CORP., COLUMBUS, OHIO. PACKAGE CONTENTS." (This is the firm which manufactures the product.) At the bottom of the label are two lines which will disclose the information desired. At the beginning of the first line appears the word "For," after which is filled in the location of the Distributor, such as Phil., Newark, New York, Bridgeport, etc., in pencil. At the beginning of the second line appears the words "Our Order No." after which is filled in the order number in pencil. At the middle of the second line is printed in red ink the number of the label, such as "5743." Client desires if possible we obtain several of these labels from cartons received, or if not the whole label the bottom section described above. If it is not possible to obtain the label or significant part thereof the information is to be copied and rendered in report. The investigator will also endeavor to obtain the information by roping other employees if necessary.

Should an investigator, who should be between 20 and 30 years of age and capable of handling 50 lb. cartons, not be able to obtain a job surveillance of the plant at 369 Montgomery Street, Jersey City, covering the receiving department, which may be located on the street at the rear end of the plant, is authorized. One investigator with car for cover allowed. Client is not sure of the hours plant is open, but believes it may be from 8:00 a.m. to possibly 8:00 or 9:00 p.m. and desires surveillance be maintained during working hours. It is believed any significant delivery will contain 10, 15 or more cartons, and will be unloaded from delivery vehicle onto a conveyor which leads into the plant. Should the surveillance investigator observe cartons as described above being unloaded he could leave his car and possibly obtain the necessary information from the label on the cartons; also obtain the name and address from the truck making the delivery, or license from a private car or station wagon.

The operation will continue until discontinuance is ordered by client, probably one or two weeks, dependent upon developments.

Sample of the end of a carton, with shipping label attached, is being forwarded to the Newark Office.

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CAUTIONS TO BE OBSERVED: That the identity of the Agency or our client is not divulged.

WORK TO BE DONE IN ACCORDANCE WITH: 0.113. and 0.139.

Referred to: Newark Office

B. BERGER

Handled at NY by:
Ast. Mgr. E. J. Payson

W. A. Solversen

25-B

3-21-55

28. It will be noted the careful directions to get Columbus' order number, which, by contacting Columbus, would reveal the distributor who resold to Siperstein. Columbus sells only to distributors and it alone could translate. It is also noted that Philan was uninterested in any markings or labels which it itself placed on the cartons, hence its customers were not suspect. This dispels completely the subsequently asserted excuse that Philan suspected some of its own employees of pilfering from its inventory and delivering directly or indirectly to Siperstein.

29. There is credible evidence from Columbus' vice president that in 1952, when Philan and Zins were shipping back and forth and not staying in their own areas, Columbus used markings of P and Z in order to ascertain the origin of the Wall-Tex "if we ran into them in odd places." This official further testified that he would give Philan the identity of the distributor if requested.

30. Philan's officials testifying at various times have given various reasons for this cutoff: the unsavory (criminal) reputation of the Siperstein brothers in the trade, the criminal record of Harry Siperstein, beginning 1935 and running down to 1952, fraudulent returns of allegedly imperfect rolls of Wall-Tex to Philan for credit by Siperstein and price cutting. Only the latter is found to be the true one. Criminal reputation or record was twice waived by resumption of selling. The deliberate defacement of Wall-Tex rolls by Siperstein is not sustained by the preponderance of the required proof, asserted quite late, and subsequently waived.

31. The Pinkerton effort to place an agent on Siperstein's staff was never successful nor were any of the latter's employees successfully "roped." For more than two months Siperstein was under constant surveillance at a cost of more than \$2,000. Even Siperstein's trash was poked through. The license numbers of all trucks in and out of Siperstein's were reported. However, since the sleuths could not get into the Siperstein store room or

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delivery entrance, the desired labels apparently could not be obtained although some of them were seen. According to the Tashmans the results overall were negative.

32. The clear purpose of this surveillance obviously was not only to ascertain from whom Siperstein was still obtaining Wall-Tex but to stop any such flow. This could only be done with the cooperation of respondent Columbus. Zins also cooperated as will later appear.

33. Early in April, Philip Tashman informed Columbus by telephone of the Siperstein cutoff and of his counsel's legal opinion thereon. A copy was sent Columbus by Philan, without covering letter sometime before April 18, 1955. It was read and referred to Columbus' legal counsel. Columbus also knew of the hiring of Pinkerton detectives by Philan about this time—when the first batch of daily reports by the sleuths were received. Zins must also have been apprised or become aware of developments since he asked Richard Tashman at Columbus, "How are you making out on this thing?" "Naturally he knew what we had done," according to Richard Tashman.

34. In addition to the Pinkerton surveillance, Philan and Zins, through salesmen and by inquiry, attempted to find out if any of their customers were reselling or trading Wall-Tex to Siperstein. Thus one, I. Willensky, a stocking dealer in Wall-Tex and buying it from Philan for his Bayonne (Hudson County, N.J.) store, ordered three cartons. He was switched to the telephone of Philan's sales manager, who had previously directed the order department to refer to him any orders that appeared to them to be in excess of their normal purchases. He thought the excess was going to Siperstein and accused Willensky of this, whereupon, the latter hung up, which ended their commercial relations. Willensky's version of this conversation is rejected as unreliable because of contradictions in the testimony, not because Willensky is the father-in-law of Herbert Siperstein.

35. The Pittston Wallpaper Company at Pittston, Pa., is a distributor of Wall-Tex of Columbus. Oscar Siperstein heard of this source of supply sometime in 1955, telephoned to the owner Mrs. Wilner, who said she would sell him if he came down, which he did, in a rented truck. She sold him several thousand dollars worth, including old patterns, which he took to get the new patterns, from stock but refused to give him an invoice. He paid in cash. Oscar brought the Wall-Tex back to New Jersey, removing all markings from the cartons. Subsequent efforts to obtain

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additional supplies were unavailing. This version of this transaction by Oscar Siperstein is accepted because there is no other. Mrs. Wilner was not produced by respondents to contradict or explain.

36. The president of the Clifton Paint & Wallpaper Supply Company, buying and reselling Wall-Tex for 26 years, as a stocking dealer, from Zins, increased his purchases in the spring of 1955 in order to trade Wall-Tex to Siperstein for Sanitas in return. In September of 1955, "One of the representatives of Zins came to see us and he informed us that there was a certain 'case of material' that was manufactured by Columbus Coated. In fact, it was the only case of material that went into this area and it was traced through us to Mr. Siperstein and he asked us not to sell him." No threats were made. Witness could not remember which of two or three salesmen calling on him it was. He quit selling or trading Wall-Tex with Siperstein thereafter. This testimony was likewise uncontradicted.

37. Next is the Katz incident. This wholesale and retail dealer for 19 years in Linden, N.J., had been buying from Zins and reselling 25 rolls a month to Siperstein in 1955. In September that year, Gittlin and salesman Taylor, of Zins, visited him and inquired if he were selling to Siperstein. After affirmative reply, they told him Siperstein was a cutthroat (cutting prices) and told the witness not to sell him or he would be cut off from a Wall-Tex supply. The witness promised not to supply Siperstein, and thereafter did not. In January 1956, this witness sold his business—the St. George Paint & Wallpaper Supply—to Siperstein and has since worked for them as an employee about 50 hours a year. Opportunity to contradict this testimony was not availed of.

38. Lastly, there is the Boston cloak and dagger transaction. Columbus' distributor there is Northeastern Wallpaper Corporation, owned by one Karofsky and one Dulman as coowners, who also operate a subsidiary dealership in the same premises as the B. & D. Wallpaper Company. Through a friend, Oscar Siperstein learned he could obtain Wall-Tex from this distributor in Boston. On April 18, 1955, they flew to Boston, met one Kolikoff, a wall paper manufacturer's representative, who knew Alvin Dulman. All three took a cab to the latter's place of business. From here, the testimony becomes confusing, conflicting and disconnected. The versions of Karofsky, who was not present, but who testified much later, and Kolikoff are given little weight. Both were evasive, unwilling and less than frank, as witnesses. Dulman was

never produced. Sifting fact from fiction and relying on that which is believed credible and particularly the *ante motan litem* documents produced, it is found that through Kolikoff, Oscar Siperstein bought 127 cartons of Wall-Tex from the B. & D. Wallpaper Company, giving his check to Kolikoff for \$5,669.28, who in turn paid B. & D. in cash, that Oscar and friend then returned to New York, that on April 29, 1955, Kolikoff wrote him. "I got them to ship whatever they had—(65 cartons). They still did not get their shipment from Columbus. Please remove goods from cartons, flatten them out, tie up and ship them back express collect to B. & D. As a favor to me, please take care of this at once so that my connection here will still be good. B. & D. wants it that way. * * *" On May 5, Kolikoff again wrote Oscar Siperstein. "Enclosed is B/L for 62 cartons of cloth. This makes the order complete * * * please make sure all markings are taken off." Later Kolikoff again wrote Oscar Siperstein: "Received your letter and contents carefully noted. Have contacted my party and he tells me it may take several weeks before he can fill the order. Just as soon as I have a favorable reply, I will call you." No call ever came. Kolikoff was unable to obtain any more Wall-Tex for Siperstein. Columbus' salesman Chatellier apparently visited Northeastern Wallpaper Corporation shortly after the sale. Columbus did know Northeastern had stopped deliveries to Siperstein. The first shipment came to Siperstein's where Oscar removed the markings from the cartons; the second was halted by him in transit in New York City, where he drove in a rented truck and picked them up. Siperstein during this period always removed markings from cartons "being that every time we tried to buy it somewhere our source of supply would stop."

39. Complaint herein was not filed until November 8, 1956, but investigation began in January of that year. It was at this time that Siperstein bought the St. George Paint and Wallpaper Supply in Linden, N.J., which, under its former owner, Katz, had for many years been a stocking dealer in Wall-Tex buying from Zins. In spite of this, Zins refused to fill an order for Wall-Tex, according to Oscar Siperstein, although they accepted an order for wall paper. This was in January 1956. On February 7, 1956, Oscar and Herbert Siperstein had dinner with Jake Zins and Bob Taylor, a Zins salesman, the purpose of which was to arrange for buying Wall-Tex from Zins by the St. George store. Siperstein reminded Zins he was having trouble with Philan. Zins replied

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he would not discuss Philan. Zins asked if Siperstein was cutting prices at the St. George store, to which Siperstein replied he was not—that sales there were practically all at retail, also saying that if he bought he was going to resell it wherever he pleased, to which Zins agreed. Siperstein gave them a small order that night and Taylor was to come by the next day for a stock order of 35 to 50 cartons, but did not. However, at 5 p.m. that night Zins calls Siperstein and told him he would have to order 15 cartons for the Jersey City store from Philan, that this requirement came from higher up than Tashman. Siperstein refused and was told by Zins that he could not supply the St. George store with Wall-Tex unless Siperstein ordered the 15 cartons from Philan. That night Siperstein mailed an order for 15 cartons of Wall-Tex to Zins retaining the carbon and registered return receipt. The next day Taylor again told him Zins could not supply unless the Philan order was given. The same thing happened again three days later. It was not until around March 5, 1956, that the 15 carton order from Philan demand was dropped and Zins filled Siperstein's order for Wall-Tex. In the meantime, significantly, a Federal Trade Commission investigator had twice called on Philan for several days of interview and interrogation with the two Tashmans and their counsel, and also on Zins. This is Siperstein's testimony, but respondents did not call Jake Zins or Bob Taylor to refute it, hence it is accepted. Furthermore, it is partially corroborated by retained documents and by notes made contemporaneous with the events.

40. These repeated instances of both Philan and Zins attempting, and apparently, upon occasion, succeeding in shutting off supplies of Wall-Tex to Siperstein are too much of a pattern to reasonably infer what respondents contend, that each was going his separate way. The contrary inference that this was a planned and cooperative course of action with a common aim, especially whereas here, knowledge of what was going on was fully known, is compelling, and so found.

41. How does all this implicate Columbus? It has been pointed out that the cutoff was relayed to Columbus, that the legal opinion was sent to it, that the Pinkerton activities and their purpose was also made known to it in April 1955, that the progress of the boycott was discussed by Zins with Philan at its office and that any distributor supplying Siperstein could not have been identified by Philan except with Columbus' cooperation. It is this latter fact, and a carbon of a letter addressed to Columbus

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found among Philan's retained records which convinces this hearing examiner that Columbus was cooperating in this attempted boycott.

42. This letter reads as follows:

June 23, 1955

Columbus Coated Fabrics Corp.
Columbus, Ohio

Mr. Luther Lalendorf

Dear Mr. Lalendorf:

Mr. Tashman has asked me to write you about an incident which occurred this week.

On Monday we received an order from one of the smaller Hudson County dealers for the following:

6 singles each 3648 and 3694

24 singles 3268

1 Curtain Noel White

As we suspected that he might be buying the merchandise for Siperstein, we wrote and told him that we were temporarily out of stock on all the numbers. However, we had our Jersey salesman go in there on Tuesday, to try to find out whether the order was for him or Siperstein. He showed Bob that he had the merchandise. He had picked it up from Siperstein. We have tracked down the shower curtain. Turns out that Hygiene had sold Siperstein direct . . . shower sets in March and he probably has a good stock of them. By the way Al has asked Hygiene not to sell them in the future.

I called Zins to see if we could track down the Wall-Tex. Since the Zins brothers are both away this week spoke to Harvy Zins. He told me that he hadn't sold these quantities to anyone in the past month.

Incidentally when Bob visited the account in Jersey he told him that he wanted to be sure he wasn't getting merchandise for Siperstein. Our account told Bob that Siperstein had told him that he was getting whatever he needed in Wall-Tex but that this time he was making sure that none of it came out of Philan territory since he didn't want us to make the profit on the sale. It is quite apparent that he has made contacts who are able to feed him whenever and whatever he requires.

I am also enclosing a card that Siperstein sent out to accounts in New York.

Yours very truly,
PHILAN, INC.

43. The attempted explanations of this episode strain credulity past belief. Lillian Friedman, who wrote the letter for Philip Tashman, testified she had discussed the matter with him and he suggested "I write Mr. Lalendorf about the incident." The letter was sent to the mailing department. However, the sales manager reads all mail sent out by the sales and orders department. He read the letter and, according to him, "felt this was no concern to Columbus"—so he tore the letter up. This official works at will—having no contract. When asked, he admitted he had no

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authority to intercept or tear up letters of the president, that he had never before or since done so, that he was subsequently reprimanded for it. He had no satisfactory explanation for retaining the carbon such a length of time. His testimony is that in place of the president's letter he wrote the following:

PHILAN INCORPORATED

390 Rockaway Ave.,
B'klyn 12, N.Y.
HYacinth 8-7000

Exclusive Distributors

Wall Tex
Canvas Wall
Covering

Bontex
Shade Cloth

Durable-Artistic Pyroxylin Impregnated
Washable

June 23, 1955

Columbus Coated Fabrics Corp.
Columbus 16, Ohio

Mr. Phil M. Bidiack, V. P.

Dear Phil:

Yesterday I learned that "Hygiene" had sold a dealer to whom we had recently discontinued service on Wall-Tex.

When I first contacted Noel Levine I brought up the subject of direct sales to dealers, carefully explaining the type of people we sell and the territory we cover. When I phoned Mr. Levine he wasn't there and I spoke to Rashbaum, who is his office manager. Rashbaum seemed to know nothing about the situation but promised that he would carefully watch all orders to prevent a recurrence.

It doesn't seem to me that "Hygiene" is too anxious to cooperate with us in taking this attitude. It seems to us that a good deal of additional business has resulted from a co-ordination with his shower curtains that he wouldn't normally have. Some protection for your distributors is indicated.

Yours very truly,
PHILAN, INC.
/s/ Al
A. Albert Cooper

AAC:ah

44. The latter letter Columbus acknowledges receiving but not the former, and its official denies all knowledge thereof.

45. It is incredible to this hearing examiner that the sales manager did what he said, and it is also incredible that Friedman, one of the top four employees who had been with Philan for many years and had an interest in the business, would write such a letter unless she knew that Columbus was interested in all

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details of the boycott and deemed it her duty to keep them advised. Philip Tashman was unable to give any satisfactory explanation.

46. One of respondent Philan's insistent defenses is that this proceeding is essentially a private fight between it and Siperstein. This insistence would have substance if Philan had merely quit selling Siperstein and stopped there, but the public interest in stopping a concerted boycott by several relatively strong economic units of a price cutter from obtaining supplies from anywhere is too apparent to warrant argument.

47. Corollary to the above is Philan's argument that the entire case hangs on the testimony of Oscar Siperstein, that he is unworthy of belief on any score because of several misstatements, discrepancies, or claimed falsifications in his testimony. There are such, and as a consequence no reliance is placed thereon. But where his testimony is corroborated by admitted facts in the record, by documents or records made long prior to the controversy, or in a day-by-day routine manner, where his testimony is corroborated by others, and where respondents had available to them refutation thereof through the testimony of others, whom they did not call as witnesses, it has been accepted.

48. Counsel for Philan then attempted to discredit all other witnesses by relationship—either that the witness is a father-in-law, brother, tenant, creditor or employee of Oscar Siperstein and that, therefore, every witness appearing against respondents is a liar, or at least his testimony is unreliable. I do not find it so. As yet, we do not incriminate in this country by ties of either blood or marriage—whether Harry Siperstein has a long criminal record or not cannot affect the credibility of his brother about business transactions. Nor are mere arrests without proof of conviction accepted as affecting credibility. This negative defense is rejected and credibility has been assessed on all the record facts, the demeanor and attitude of the witness and any bias he may have displayed or is apparent from other facts in the record.

49. Complaint in this proceeding was filed November 8, 1956. Mailed for service on November 15, 1956. On November 17, 1956, respondent Philan offered to sell Siperstein again which fact, in and of itself, destroys whatever validity Philan's various excuses for the 1955 cutoff may have had. Buying was resumed for a while but then discontinued as Siperstein currently buys from Zins through his St. George store and then transfers the

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Wall-Tex thus purchased to its Jersey City store, where it is resold. Zins has, however, refused to deliver Wall-Tex to Siperstein's Jersey City store.

50. The conclusory finding on this boycott activity, as specifically found above, is that all three respondents, acting in cooperation with each other entered into a conspiracy, agreement, understanding or planned common course of action to boycott Siperstein to prevent him from obtaining supplies of Wall-Tex for resale and have threatened to boycott any such source of supply.

Delivery Showdown

51. This charge is not substantiated by reliable probative or substantial evidence. Only one instance appears in the record, that of Landy Bros., Inc., a Wall-Tex dealer in Newark, N.J., buying from Zins and trading with Siperstein at acquisition cost, his Wall-Tex for Siperstein's Sanitas. He testified he had ordered 25 patterns from Zins for about \$1,400 in August of 1955, but the order was not delivered as promptly as usual. However, when he threatened to cancel, the salesman came around and the matter was ironed out and the delivery made. There is some evidence that he was delinquent in payment. There is no satisfactory evidence to connect respondents Columbus or Philan with this. Furthermore, counsel in support of the complaint requests no affirmative finding on this issue and his proposed order ignores it.

CONCLUSIONS OF LAW

1. A vendor may independently and unilaterally refuse to sell or cease selling a given customer for any reason whatsoever or no reason at all. *U.S. v. Colgate & Co.* 250 U.S. 300; *F.T.C. v. Raymond Brothers-Clark Co.* 263 U.S. 565.

2. However, the right stops there. Such vendor may not legally combine, conspire, agree or cooperate, with others to prevent such customer from buying the same product from others. *F.T.C. v. Beech-Nut Packing Company* 257 U.S. 441; *Fashion Originators Guild v. F.T.C.* 312 U.S. 457.

3. Acquiescence or assistance in effectuating the purpose of the boycott hereinabove found is sufficient to implicate. *Soft-Lite Lens Co., Inc. v. U.S.* 321 U.S. 707, at 723. No overt act beyond conspiring, agreeing or understanding is necessary and may be

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wholly nascent, or abortive, or successful. *U.S. v. Socony-Vacuum Oil Co.* 310 U.S. 150, 224.

4. This proceeding is in the public interest.

5. The planned common course of action, conspiracy, agreement and understanding and the acts and practices of the respondents as hereinabove found, are all to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Columbus Coated Fabrics Corporation, Philan, Inc., and Zins Wallpaper Company, all corporations, and their respective officers, agents, representatives and employees, directly, or through any corporate or other device, in connection with the offering for sale, sale, and distribution of wall-covering products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy with each other, or with persons not parties hereto, to threaten to boycott, attempt to boycott, or to boycott any corporation, partnership, association or individual who wishes to purchase such products.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, so far as involved in these appeals, charges respondents, under Section 5 of the Federal Trade Commission Act, with carrying out a conspiracy among themselves and with others, in the sale and distribution of Wall-Tex to restrain competition by:

1. Establishing and maintaining uniform fixed suggested dealer resale prices;
2. Establishing and maintaining exclusive sales territories for distributors;
3. Threatening to, and boycotting certain dealers.

Early in the hearings, Zins Wallpaper Company (Zins) stipulated with counsel supporting the complaint that Zins would take the same order which might be entered against Philan, Inc. (Philan) and that counsel supporting the complaint would not

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call as witnesses any officer or employee of Zins. Thereafter, Zins took no further part in the hearings.

After the hearings, the hearing examiner dismissed the charges based on 1 and 2 above, and entered an order against all respondents on 3. Counsel supporting the complaint, Columbus Coated Fabrics Corporation (Columbus), and Philan appealed and filed briefs and presented oral argument on all issues involved. Zins filed a written brief as to charges 1 and 2.

APPEAL OF COUNCIL SUPPORTING COMPLAINT

Columbus, of Columbus, Ohio, manufactures and distributes a number of products, including a washable cloth wall covering known as Wall-Tex. It competes with at least four other similar coverings, of which Sanitas is most frequently mentioned. Price range of all is narrow and a small difference in price will switch business. To some extent, also, Wall-Tex competes with all wall coverings, such as paint and wallpaper.

Columbus sells Wall-Tex to 63 distributors in 54 cities. Eight of the distributors have designated sales areas, of which seven are located along the Atlantic Seaboard from Portland, Maine, to Philadelphia, Pa. The choice of the locations of distributors and the designated areas (where they exist) are made by Columbus. Distributors outside, but contiguous to a designated area, are requested not to sell in such area.

There is no evidence of any agreement, either written or oral, as to these allocations. Nor is there any substantial evidence that Columbus made efforts to require observance or to police the unilateral arrangements it made. In practice, a dealer receiving an order from outside his designated area sends it to Columbus which, in turn, forwards it to the appropriately located dealer. It appears also that any distributor or dealer may sell Wall-Tex anywhere he wishes. He can also choose his own customers and is free to handle competing products. In fact, many do handle such products.

Among the reasons given by Columbus for these designated sales areas or exclusive dealerships within such areas are: first, to encourage promotional work (including shows and advertising) by assuring the distributor that he will reap the benefit; second, to insure efficient handling of complaints.

There is no evidence of any threat to monopolize, or of injury to competition. The legality of the arrangement presented here is indicated by cases such as *Schwing Motor Company v. Hudson*

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Sales Corporation, 137 F. Supp. 899; *Packard Motor Car Company v. Webster Motor Car Company*, 243 F. 2d 418, et seq.

Other cases are cited in the brief. Many of them involve factual situations not involved here. We agree with the hearing examiner that "the factual picture here is not in violation of the law."

The same may be said of the charge of establishing and maintaining uniform fixed dealer resale prices. The facts show that Columbus, from time to time, suggests resale prices, usually in connection with its regular issuance of new patterns. The distributors who have a designated sales area frequently suggest resale prices to their dealers, and such prices often vary from those suggested by Columbus. There is no evidence of any agreement between distributors to enforce Columbus' suggested prices or to enforce their own. Nor is there evidence of agreement among dealers to agree to or to enforce either. While the price range of competing products is a narrow one, the record indicates that prices are a result of the competitive situation at the time of a particular sale rather than of any agreement or of any attempt to enforce a suggested price.

The appeal of counsel supporting the complaint is accordingly denied.

APPEAL OF RESPONDENTS COLUMBUS AND PHILAN

This has to do with the charge that respondents conspired to prevent a dealer, N. Siperstein, Inc. (Siperstein), from securing Wall-Tex.

Philan, whose principal place of business is 390 Rockaway Avenue, Brooklyn, N.Y., is the largest wholesale distributor of Wall-Tex. Its designated territory includes metropolitan New York (except Staten Island) and Hudson County, N.J. Zins, with its principal place of business in Newark, N.J., ranks third as a distributor. Siperstein operated in Jersey City, Hudson County, N.J. Its directing head was Oscar Siperstein. Associated with him were three brothers and, to some extent, his father.

Ninety-five percent of Philan's sales are to "stocking" dealers, that is, dealers who maintain an inventory and therefore buy in large quantities than "nonstocking" dealers, who buy in smaller quantities as needed. Philan's area contains 3,000 dealers, of whom 500 buy direct from Philan, 100 as stocking dealers and 400 as nonstocking dealers. The remaining dealers buy from stocking dealers. Such purchases account for 60% of the Wall-

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Tex sold in the area. Philan sells to stocking dealers at a substantial reduction in price.

Although Philan had previous troubles with Siperstein, the present difficulty was precipitated about April 1, 1955 when Philan cut off Siperstein as a customer. It is the claim of respondents that in so doing, Philan was acting independently and his conduct was therefore lawful. *U. S. v. Colgate Company*, 250 U.S. 300. It is also urged that others who may have been involved were acting independently.

On the question of whether this was done independently or as part of a conspiracy, a great deal of evidence was taken. It falls into several categories:

1. Evidence as to Philan's reasons and possible motives.

It is pointed out that Siperstein had a bad reputation and a record of arrests. Nevertheless, the evidence establishes that the real reason was Siperstein's price cutting activities. Philan had cut off Siperstein in 1930 and again in 1946 or 1947. Each time Siperstein was able to secure supplies through others and kept up his price cutting and Philan eventually resumed selling to him. That price cutting was the real reason is also indicated by evidence of two meetings held between Oscar Siperstein and officials of Philan, and one meeting between Oscar Siperstein and officials of Zins. Although accounts of what happened differ somewhat, the hearing examiner concluded that complaint was made of Siperstein's price cutting and he was asked to raise his price but refused.

It appears also that Philan was selling at \$2.03 per roll to stocking dealers who bought 50 cartons or more while charging other dealers \$2.47 per roll. Siperstein was buying from Philan at \$2.03 and selling to other dealers in both Philan's and Zins' areas at prices less than those charged by either Philan or Zins.

Thus merely cutting off Siperstein as a customer would not entirely solve the difficulty. If Siperstein could make purchases from other distributors, he could still outsell Philan and Zins and cut substantially into their profits. In fact in 1954, Philan's sales in Hudson County (where Siperstein operated) fell off \$45,000 over the previous year, although its volume in New York increased. Therefore, it would seem important for Philan to learn who was supplying Siperstein as a necessary preliminary step to any further action that might be taken.

2. Philan's surveillance of Siperstein.

About March 21, 1955, Philan employed the Pinkerton De-

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tective Agency to keep under secret watch deliveries of Wall-Tex to the warehouse of Montgomery Wallpaper Company (Siperstein's wholesale warehouse in Newark). After an interview with the president and the advertising and sales manager of Philan, the Pinkerton agent reduced to writing his ideas of the purpose and the methods to be employed. This report contained the following:

CLIENT DESIRES TO ESTABLISH:

Who is supplying Wall-Tex to Montgomery Paper Company.

The report also contained directions to secure, if possible, from any Wall-Tex delivered to Siperstein, the name of the consignee and the order number on the carton. Having this number, upon application to Columbus, the identity of the consignee could be learned.

3. Siperstein's experience in buying Wall-Tex through others.

The president of the Clifton Paint and Wallpaper Supply Company testified he bought additional quantities of Wall-Tex from Zins in the spring of 1955 in order to trade it to Siperstein for Sanitas; that in September, 1955, a representative of Zins came to see Clifton and advised that a shipment had been delivered to Siperstein and he asked Clifton not to sell to Siperstein.

Harry Katz, who had for some time been buying from Zins and reselling to Siperstein, was told by Zins not to sell to Siperstein or he, Katz, would be cut off from his supply.

Oscar Siperstein testified that he bought several thousand dollar's worth of Wall-Tex from Mrs. Wilner, owner of the Pittston Wallpaper Company at Pittston, Pa.; that he paid cash; that Mrs. Wilner declined to give him an invoice; that Siperstein made delivery in his own truck and removed all markings from the cartons; that he tried to make subsequent purchases but was not able to do so.

In Finding 38, the initial decision sets out the dealings of Siperstein with the B & W Wallpaper Company, Boston, Mass., dealers in Wall-Tex. On about April 18, 1955, Siperstein bought 120 cartons of Wall-Tex from B & W. The deal seems to have been made through outside parties. The whole transaction was handled with a view to secrecy both in transportation and removal of markings from the cartons.

Various items of evidence are material on the question of the participation of Columbus in the boycott.

For some time prior to 1955, Columbus has been a majority

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stockholder in Philan and two of its officers or representatives are on the Board of Directors. This arrangement was for credit reasons. Although Columbus receives some financial reports from Philan, the latter decides independently on matters of selling and operating the business generally.

Columbus employed salesmen and promotion men who traveled about its trade areas and was also frequently in touch with Philan by telephone. Thus, Columbus was kept well informed of the situation existing among its distributors and dealers.

There is no evidence that Columbus took any part in the decision to cut off Siperstein. Its officials deny participation in the matters referred to herein and also deny knowledge of most of them until after they had happened. Its officers did know that Siperstein was a price cutter and had been previously cut off because of it. It also appears that Philan notified Columbus by telephone of the 1955 cutoff. Philan secured an opinion of its attorney concerning its right to quit selling to Siperstein and sent a copy thereof to Columbus. One of the items of information which Pinkerton planned to secure was the order number placed on the cartons by Columbus. Having this information, the consignee could be determined, but only with the assistance of Columbus. After the cutoff, Siperstein attempted and sometimes succeeded in buying Wall-Tex from Columbus distributors other than Philan and Zins. Certainly the direct way to learn the facts about that and to block it was through Columbus. Columbus was the logical ally for Philan and Zins in their war against Siperstein.

In Finding 42, the initial decision sets out a carbon copy of a letter found in Philan's files. It was dated June 23, 1955, addressed to Columbus, and was written by an important employee of Philan at the suggestion of Philip Tashman, an official, and concerned an "incident which occurred this week." The incident concerned an order received by Philan from a Hudson County dealer who was suspected of buying for Siperstein. Philan, for that reason, did not fill the order. The letter also indicated cooperation with Zins in tracking down transactions of this character and attempting to prevent supplies from reaching Siperstein.

Philan's officers and employees testified that the original of this letter was never sent to Columbus because the sales manager "felt this was no concern of Columbus," and that the letter was torn up, although the employee doing so exceeded his authority in so doing. Columbus denied receiving the letter.

It is not possible to set out all the evidence or to discuss the inferences which may properly be drawn therefrom. There is much contradictory testimony. Some of the witnesses were interested parties. Some displayed considerable bias or even hostility. The initial decision indicates that the hearing examiner made due allowance for this in determining the credibility of the various witnesses.

In Finding 50, of the initial decision, the hearing examiner said:

The conclusory finding on this boycott activity, as specifically found above, is that all three respondents, acting in cooperation with each other entered into a conspiracy, agreement, understanding or planned common course of action to boycott Siperstein to prevent him from obtaining supplies of Wall-Tex for resale and have threatened to boycott any such source of supply.

From an examination of the entire record, we conclude that the evidence supports this conclusion.

Claimed Procedural Errors

On July 16, 1957, and after the case-in-chief was concluded, Philan filed a motion asking:

1. That counsel supporting the complaint be required to produce for examination documents in his possession containing statements, or reports thereof, to any Commission investigator, made by eleven designated witnesses, including Oscar Siperstein.

2. That the hearings be reconvened to permit the recall of such witnesses for further cross-examination.

3. In the alternative, that the testimony of such witnesses be stricken.

The hearing examiner granted the motion in part and denied it in part. On an interlocutory appeal by Philan to the Commission, the rulings of the hearing examiner were upheld for reasons set out in the Commission's opinion.

On February 20, 1958, Oscar Siperstein was called as a witness by respondent Philan. He was examined as to various documents and records of his company, which he had brought into the hearing under a subpoena duces tecum. He was then asked:

Mr. Siperstein, prior to the time this proceeding began, did you at any time have correspondence with the Federal Trade Commission or any agent or employee thereof concerning activities of the respondents Philan, Inc., Columbus Coated Fabrics Corporation, or Zins Wallpaper Company about which you testified in this proceeding?

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Other questions amplifying the above were also asked. The hearing examiner did not permit answers on the ground that the questions were an attempt by Philan to impeach its own witness.

It is well settled that a party cannot ordinarily impeach his own witness. There are exceptions in cases of entrapment, hostility or surprise, resulting in the party seeking to impeach being misled by the witness and prejudiced thereby. In such circumstances, allowing a party to impeach his own witness is largely within the discretion of the trial court whose decision may be reversed only for abuse in its exercise. 98 C.J.S. *Witnesses*, Section 477, et seq.

This situation has not been changed by Section 3.16(c) of the Rules of Practice for Adjudicative Proceedings which provides:

Adverse Witnesses. An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive may be interrogated by leading questions and may also be contradicted and impeached by the party calling him.

This subparagraph simply calls attention to the fact that a hostile witness may be impeached by the party calling him in accordance with principles and procedures laid down by the courts. Among these principles are a requirement that the proper foundation must be laid and that the party calling the hostile witness has been misled by that witness and prejudiced thereby.

As bearing on the question of the discretion of the hearing examiner and also as to any possible prejudice, attention is called to other facts appearing in the record.

On September 9, 1957, at the beginning of respondents' case, Philan's motion, which had been filed July 16, 1957, was considered by the hearing examiner. The latter called attention to the testimony of Oscar Siperstein to the effect that a Federal Trade Commission investigator had called on him. From this, the examiner concluded that interview reports may have existed and he requested counsel supporting the complaint to produce them. The reports were turned over to the examiner who excised part of them as irrelevant and turned the balance over to respondents' counsel. The reports are not in evidence; nor does the record show that any use was made of them.

The controversy on the second appearance of Siperstein as a witness has to do with correspondence with the Commission rather than with interview reports. Whether this correspondence contains anything not in the reports, or how much, if any, was

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confidential under the law, does not appear. Nor is there any reason given why this material was not sought in respondents' motion of July 16, 1957.

Furthermore, it does not appear that the ruling of the hearing examiner was prejudicial in any event. There is considerable evidence in the record on the important issues other than that given by Oscar Siperstein. On this point, the hearing examiner said:

One of respondent Philan's insistent defenses is that this proceeding is essentially a private fight between it and Siperstein. This insistence would have substance if Philan had merely quit selling Siperstein and stopped there, but the public interest in stopping a concerted boycott by several relatively strong economic units of a price-cutter from obtaining supplies from anywhere is too apparent to warrant argument.

Corollary to the above is Philan's argument that the entire case hangs on the testimony of Oscar Siperstein, that he is unworthy of belief on any score because of several misstatements, discrepancies, or claimed falsifications in his testimony. There are such, and as a consequence no reliance is placed thereon. But where his testimony is corroborated by admitted facts in the record, by documents or records made long prior to the controversy, or in a day-by-day routine manner, where his testimony is corroborated by others, and where respondents had available to them refutation thereof through the testimony of others, whom they did not call as witnesses, it has been accepted.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Both appeals are denied. It is directed that an order issue accordingly.

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

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel in support of the complaint and the appeal of respondents, Columbus Coated Fabrics Corporation and Philan, Inc., from the hearing examiner's initial decision, and upon briefs and oral argument in support of and in opposition to each appeal, including a brief of respondent Zins Wallpaper Company; and the Commission having rendered its decision denying both appeals and adopting as its own the findings and order in the initial decision:

It is ordered, That the respondents, Columbus Coated Fabrics Corporation, Philan, Inc., and Zins Wallpaper Company, corporations, shall, within sixty (60) days after service upon them of

1500

Opinion

Other questions amplifying the above were also asked. The hearing examiner did not permit answers on the ground that the questions were an attempt by Philan to impeach its own witness.

It is well settled that a party cannot ordinarily impeach his own witness. There are exceptions in cases of entrapment, hostility or surprise, resulting in the party seeking to impeach being misled by the witness and prejudiced thereby. In such circumstances, allowing a party to impeach his own witness is largely within the discretion of the trial court whose decision may be reversed only for abuse in its exercise. 98 C.J.S. *Witnesses*, Section 477, et seq.

This situation has not been changed by Section 3.16(c) of the Rules of Practice for Adjudicative Proceedings which provides:

Adverse Witnesses. An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive may be interrogated by leading questions and may also be contradicted and impeached by the party calling him.

This subparagraph simply calls attention to the fact that a hostile witness may be impeached by the party calling him in accordance with principles and procedures laid down by the courts. Among these principles are a requirement that the proper foundation must be laid and that the party calling the hostile witness has been misled by that witness and prejudiced thereby.

As bearing on the question of the discretion of the hearing examiner and also as to any possible prejudice, attention is called to other facts appearing in the record.

On September 9, 1957, at the beginning of respondents' case, Philan's motion, which had been filed July 16, 1957, was considered by the hearing examiner. The latter called attention to the testimony of Oscar Siperstein to the effect that a Federal Trade Commission investigator had called on him. From this, the examiner concluded that interview reports may have existed and he requested counsel supporting the complaint to produce them. The reports were turned over to the examiner who excised part of them as irrelevant and turned the balance over to respondents' counsel. The reports are not in evidence; nor does the record show that any use was made of them.

The controversy on the second appearance of Siperstein as a witness has to do with correspondence with the Commission rather than with interview reports. Whether this correspondence contains anything not in the reports, or how much, if any, was

Order

55 F.T.C.

confidential under the law, does not appear. Nor is there any reason given why this material was not sought in respondents' motion of July 16, 1957.

Furthermore, it does not appear that the ruling of the hearing examiner was prejudicial in any event. There is considerable evidence in the record on the important issues other than that given by Oscar Siperstein. On this point, the hearing examiner said:

One of respondent Philan's insistent defenses is that this proceeding is essentially a private fight between it and Siperstein. This insistence would have substance if Philan had merely quit selling Siperstein and stopped there, but the public interest in stopping a concerted boycott by several relatively strong economic units of a price-cutter from obtaining supplies from anywhere is too apparent to warrant argument.

Corollary to the above is Philan's argument that the entire case hangs on the testimony of Oscar Siperstein, that he is unworthy of belief on any score because of several misstatements, discrepancies, or claimed falsifications in his testimony. There are such, and as a consequence no reliance is placed thereon. But where his testimony is corroborated by admitted facts in the record, by documents or records made long prior to the controversy, or in a day-by-day routine manner, where his testimony is corroborated by others, and where respondents had available to them refutation thereof through the testimony of others, whom they did not call as witnesses, it has been accepted.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Both appeals are denied. It is directed that an order issue accordingly.

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

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel in support of the complaint and the appeal of respondents, Columbus Coated Fabrics Corporation and Philan, Inc., from the hearing examiner's initial decision, and upon briefs and oral argument in support of and in opposition to each appeal, including a brief of respondent Zins Wallpaper Company; and the Commission having rendered its decision denying both appeals and adopting as its own the findings and order in the initial decision:

It is ordered, That the respondents, Columbus Coated Fabrics Corporation, Philan, Inc., and Zins Wallpaper Company, corporations, shall, within sixty (60) days after service upon them of

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Order

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 the aforesaid initial decision.

Commissioner Kern not participating.

IN THE MATTER OF
MILWAUKEE ALLIED MILLS, INC., ET AL.

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

Docket 7112. Complaint, Apr. 9, 1958—Decision, Mar. 23, 1959

Order requiring a manufacturer in Milwaukee, Wis., to cease violating the Wool Products Labeling Act by invoicing and labeling as 70 percent woolen and 30 percent non-woolen fibers, woolen waddings or interlining materials which contained substantially less than 70 percent wool, and by failing to label certain wool products as required.

Thomas A. Zebarth, Esq. for the Commission.

Wickham, Borgelt, Skogstad & Powell, by *John J. Ottusch, Esq.*, of Milwaukee, Wisc., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

On April 9, 1958, the Federal Trade Commission issued its complaint against Milwaukee Allied Mills, Inc., and Mark E. Atwood and William L. Armstrong, individually and as officers of said corporation (hereinafter collectively called respondents), charging them with misbranding and falsely and deceptively invoicing and representing certain wool products in violation of the provisions of the Wool Products Labeling Act of 1939 (hereinafter called the Wool Act), 15 U.S.C. 68, the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance that respondents misbranded certain of their wool products by not labeling them as required under the Wool Act and by falsely and deceptively labeling them with respect to the amount of the constituent fibers contained therein in violation of the Wool Act, and that respondents falsely and deceptively invoiced and represented the woolen content of their products in violation of the Act. Respondents appeared by counsel and filed an answer admitting the corporate, commerce, competition, and representation allegations of the complaint, as well as the misbranding by failure to label, stamp or tag their products as required under §4(a) (2) of the Wool Act, but denying that they falsely or deceptively labeled or tagged such prod-