

July, 1959, become the decision of the Commission; and, accordingly:
It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
BASIC BOOKS, INC., ET AL.

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

Docket 7016. Complaint, Dec. 30, 1957—Decision, July 17, 1959

Order requiring Chicago distributors of sets of reference books designated "Universal World Reference Encyclopedia," yearly supplements thereof, and other books, through house-to-house canvassers, to cease representing falsely through their said agents that they were making surveys; that they were making an introductory offer for advertising purposes and giving a set of books free to specially selected persons; that the encyclopedia was given free with purchase of the yearly supplements; that certain other books, selected by the customer, were given free with purchase of the encyclopedia and supplements; and that the offering price for the combined books was reduced and for a limited time only.

Mr. William A. Somers for the Commission.

Mr. Herman A. Fischer and *Mr. Thomas O. Flack* of *Campbell, Clithero and Fischer*, of Chicago, Ill., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

In this proceeding respondent book sellers are charged, in substance, with having engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation

of the Federal Trade Commission Act. These acts and practices are alleged to have been performed by respondents' agents and salesmen by making false and misleading statements during house-to-house canvassing to obtain from members of the public contracts for the purchase of respondents' encyclopedias, yearly supplements thereto and other books.

In this initial decision the charges of the complaint are found to be sustained by the evidence as to all respondents other than Herman A. Fischer, and a cease and desist order appropriate to such findings is herewith issued. By reason of the dismissal as to him, however, such order does not imply that respondent Fischer or his successors in office are not bound by the general terms of the order against respondents' agents, representatives and employees in event of any violation of the order.

The material history of this proceeding is as follows: Complaint was filed herein on December 30, 1957, and after due service thereof had been had on all respondents, they joined in an answer filed on February 17, 1958. Thereafter hearings were held during 1958 at various places in several states, whereat evidence was adduced in support of the complaint. Such hearings were held in Chicago, Illinois, April 28; in Milwaukee and Green Bay, Wisconsin, April 29 and May 2, respectively; in Fort Wayne, Indiana, May 6; and in Minneapolis, Minnesota, June 9, at which last-mentioned time the Commission's case-in-chief was rested. Respondents thereafter presented their evidence in defense in Chicago on September 8. Both parties then in effect rested conditionally, dependent upon the outcome of a motion filed by respondents on June 2, 1958, before the Commission itself requesting access to certain alleged statements of the various consumer witnesses who had theretofore testified in this proceeding, which alleged statements were claimed to be in the Commission's confidential files. A similar motion had already been denied by the examiner on May 23. By its order dated September 15, 1958, the Commission denied said motion and remanded the matter to the hearing examiner for determination, and he then, by rulings dated October 17, 1958, made appropriate disposition thereof and ordered the case closed for taking evidence and the submission of the respective proposals of the parties by November 17, 1958. Such proposals were duly filed and have been considered.

It was stipulated in substance (R. 381) that the respondent Herman A. Fischer is the duly elected secretary of respondent corporation, Basic Books, Inc., his duties being merely those of taking minutes of the meetings of the Board of Directors and that if called as a witness he would testify that he had nothing to do with the

corporate policies and practices. Further, there is no evidence in the record to indicate that said respondent Fischer, who also appears as one of the counsel for all respondents in this proceeding has had anything to do with the policies of the corporation or the acts and practices complained of herein. The evidence does not sustain an order against him by name, either individually or officially, in this case in view of the well-established law on the subject. While this respondent made no special motion on the record to dismiss the complaint as to him, the examiner dismisses the complaint and proceeding as to respondent Fischer under the respondents' proposed general order of dismissal, which dismissal is formally set forth in the order herein. Accordingly any references to respondents in the subsequent portions of this decision do not include said respondent Fischer.

The methods and practices of door-to-door selling of books by agents of publishers is not a matter which is now presented to the Commission for the first time. See for example, *FTC v. Standard Education Society*, 302 U.S. 112. While each case must be determined upon its own factual merits, it is to be noted that several of the types of sales practices followed by respondents' salesmen herein are substantially identical with some of those found by the Supreme Court to be in violation of the Federal Trade Commission Act in said *Standard Education Society* case. See also, *Book-of-the-Month Club v. FTC* (C.A. 2, 1953), 202 F. 2d 486, 488-489, and *Standard Distributors v. FTC* (C.A. 2, 1954), 211 F. 2d 7.

The evidence presented in support of the complaint consists of the testimony of the respondent corporate officers Leonard Davidow and Nathan Landy with reference to the nature and extent of the corporate business, together with certain documentary evidence identified by them which relates to such matters, and the testimony of 15 consumer witnesses. Respondents' evidence consists of further testimony of respondent Landy and that of Emmett Cleveland, a salesmanager for the respondent corporation, and that of Aaron Huffines, one of its salesmen, together with a large number of sales contracts and other documentary exhibits. The real gist of the case is the evidence of the said consumer witnesses and that of respondents' said salesmen contradictory thereto with respect to the transactions had between such consumers and such salesmen. Repeatedly recognizing on the record the propriety of liberally allowing full cross-examination of consumer witnesses by respondents' counsel, the record clearly discloses that such counsel was permitted to indulge in very extensive and exhaustive cross-examination of all such witnesses over repeated objections.

The consumer witnesses were drawn in large part from segments of the population who were poor and who had but little education. Several were somewhat better educated, however; and were highly intelligent. Several of these consumer witnesses had little or no memory of the long-past transactions inquired about and one, Jose Tijerina, had such small knowledge of the English language that his business with respondents' agent had had to be transacted through his school-boy son. The hearing examiner has considered and evaluated very carefully the evidence of each of the consumer witnesses, and, either upon the basis of their contradictory, vague, uncertain or irresponsive testimony upon the matters which form the basis of the charges, or upon the utter failure of their evidence to sustain any of the charges, he has, in the findings he hereinafter makes, disregarded entirely the testimony of the following consumer witnesses: Helen Adams, Jose Tijerina, Carol Brunette, Vivian Hanson and Luella Jones. As to the remaining ten consumer witnesses, several were very clear and definite in all respects in their testimony, while others were able to give credible testimony on some one or more matters but were not clear or failed to testify as to others. Specific record reference is hereinafter made to that testimony, which upon mature deliberation the hearing examiner finds to have the weight and credibility to sustain each of the six separate charges of violation set forth in the complaint and in any view to outweigh the testimony of respondents' salesmen contradictory thereto.

Much of the evidence developed by respondents on the cross-examinations of the consumer witnesses and otherwise relates to the failure of some of them to comply with their contracts of purchase. Such matters are immaterial to this proceeding which is not to determine liability for, or to collect, private debts but is brought in the public interest to prevent in the future any type of unfair practices in commerce which are found to have occurred in the past. In this case the basic issues are whether or not respondents' agents made false and misleading representations to the public in the sale of books. Whether or not the consumer witnesses were in fact deceived or damaged thereby is not a controlling factor if such misrepresentations were in fact made.

The respondents' defenses were basically two. The first was that the salesmen selling books for Basic Books, Inc., never made such misrepresentations as were credited to them by the consumer witnesses. The second was that such salesmen were either independent contractors or subcontractors for whose acts in any event the respondents are in no manner legally responsible.

As to the second basic defense, it is now too well settled for extended discussion that technical rules of agency have no application to these false and misleading representation cases under the Federal Trade Commission Act. This whole subject has been recently most excellently and thoroughly reviewed by the Ninth Circuit in *Goodman v. FTC* (1957), 244 F. 2d 584, 587-593, 604, where the earlier cases are ably discussed and analyzed. In short, the Court pertinently held (*id.* p. 593): "So, regardless of the manner in which these salespersons may have been designated in contracts between them and the petitioner [respondent before the FTC] or were carried on his books so far as the public was concerned, they were his authorized agents and acted not only within the apparent but also within the actual scope of their authority. And the Commission was right in holding him responsible for their acts." It is true there is evidence that respondents here did subscribe to a certain code of sales ethics adopted by certain book publishers and sellers and that they endorsed its principles to their agents, but this is immaterial since in fact it is found that such agents did misrepresent many matters to the public in effecting or attempting to effect their sales. As the Seventh Circuit so aptly said in *International Art Co. v. F.T.C.* (1940), 109 F. 2d 393, 398: "We know no theory of law by which the company could hold out to the public these salesmen as their representatives, reap the fruits from their acts and doings without incurring such liabilities as attach thereto." The hearing examiner therefore rejects this second basic defense.

The case therefore turns, as hereinbefore essentially stated, upon the careful weighing of the relevant evidence of those consumer witnesses whose testimony has not been wholly rejected by the hearing examiner as against the testimony of respondents' salesmen where there is contradiction and in also fairly evaluating the uncontradicted testimony of a number of the consumer witnesses, which cross-examination did not destroy or weaken, but rather tended to materially strengthen.

The respondents' second defense is based upon the testimony of their salesmanager Cleveland and their book salesman Huffines, who worked under Cleveland. They were both mature men, experienced in the door-to-door book selling business, Cleveland since 1923 (R. 408) and Huffines since 1927 (R. 461). They had sold respondents' books since 1954 and 1955, respectively (R. 408, 447). Cleveland sold some 300 combination encyclopedia sets, such as those in question here, per year (R. 408) and Huffines, about 200 such sets in some 18 or 19 months (R. 449). Prior to testifying Cleveland had gone over the testimony of the consumer witnesses he had sold and

had revisited the places of sale to refresh his memory, which he claimed was not good as to names but practically infallible as to the places and events of his numerous sales, saying, "I have a phenomenal memory" (R. 425). Huffines, while not quite so positive, nevertheless recalled to mind and testified as to those witnesses with whom he had dealt. Both Cleveland and Huffines categorically denied making any of the misrepresentations accredited to them by the respective consumer witnesses. Cleveland also testified at great length as to his plan of sales approach and closing methods in book selling, denying any use of the false and misleading language testified to by those consumer witnesses whom he dealt with. Cleveland testified in detail also concerning his dealings with the consumer witnesses Harbor, Pazera, McVane and Mrs. Tebo. He also testified as to his transactions with the two witnesses, Tijerina and Mrs. Brunette, whose entire testimonies, however, have been rejected by the examiner. Huffines testified as to his transactions with the consumer witnesses, Mrs. Johnson, Mrs. Hanson and Mrs. Ninneman. The examiner has also rejected the testimony of Mrs. Hanson. The grounds of his rejection of such consumer witnesses' testimony, as already stated, was upon its own inherent weakness or irrelevancy. For reasons hereinafter set forth, after due consideration, he has also rejected *in toto* the testimony of both Cleveland and Huffines.

Several of the consumer witnesses were not contradicted by the salesmen of respondents with whom they dealt. They are Margaret Bird, Helen Adams, Delores Grey, Luella Jones, Howard D. Rasmussen, and Ernest B. Sens. The hearing examiner, however, has also rejected the testimony of two of these uncontradicted witnesses, Mrs. Adams and Mrs. Jones, as already stated because of its inherent weakness or irrelevancy.

In observing and weighing the testimony of all of the consumer witnesses, the hearing examiner has been greatly impressed with their honesty, although, of course, he has rejected the testimony of some for other good reasons. None of them evinced any desire to testify unfairly against respondents, in fact several appeared to be satisfied with the books they purchased. Within their respective natural limitations, each seemed to try to answer the questions of counsel for both sides fairly and to the best of his or her ability. Several of the witnesses were quite intelligent, and repeated and long cross-examinations failed to shake any of their testimony which was strongly adverse to respondents.

It would serve no useful purpose to extend in detail the evidence of any of such consumer witnesses or of respondents' two salesmen

Cleveland and Huffines. But the examiner's reason for doubting the veracity and credibility of these two salesmen does not lie entirely in the intangible elements of his personal observation of them during the time they testified. It is true they were book salesmen but that business is certainly not *per se* an illegal or improper business. Each of these two salesmen made a bad slip or two in the course of his otherwise smooth testimony which emphatically raises a disbelief in his veracity. Cleveland swore positively on cross-examination that he remembered his transaction with the witness Pazera so well because, "Mr. and Mrs. Pazera do not speak English and I sold that order through an interpreter who was the son, and he explained it to mother and dad, in Spanish or in Italian," etc. (R. 429). He emphatically repeated this again later on in his testimony saying Pazera's letter complaining to the book company that he was supposed to get certain books in the deal for nothing was "a misunderstanding on his part of not understanding the English language, or his interpreter not explaining fully, his son being the interpreter * * * an older son * * * 14 or 15 years old, a high school student * * *" (R. 439). In a vain effort to rehabilitate this witness with his self-styled "phenomenal memory," respondents' counsel asked "You spoke of one family speaking Spanish in or near Kenosha, one was Pazera and one with Tijerina. Do you remember if you had to have an interpreter both times or only once?" Cleveland answered, "I believe I had interpretation help on both occasions." (R. 442)

Of course, Jose Tijerina was unable to talk business to Cleveland because of his limited knowledge of English and his 13-year old son acted as interpreter (R. 159 *et seq.*, esp. 167). As already stated, the examiner has rejected Tijerina's testimony in so far as it has to do with establishing the charges. But as to the witness Stanley Pazera, Cleveland, to be most charitable, is as mistaken as it is possible for any witness to be. Pazera was on the witness stand before the examiner for about one-half hour. He had no interpreter and needed none. He was an excellent witness, intelligent and capable of using fairly good English and never using broken English. To read his testimony in full (R. 109-137) is certainly convincing that he was not a person who had no substantial working knowledge of English. He was clear and responsive in his answers. No question or suggestion of either examining counsel or any accent or expression of Pazera himself indicated or now indicates to the examiner that he was not competent to discuss matters in English. Pazera also withstood successfully a long and searching cross-examination. In fact the testimony of Cleveland on the point of Pazera's lan-

guage ignorance was as amazingly unbelievable to the examiner as it was to respondents' counsel. There is no evidence anywhere that Pazera had a son of high school age or that any one else acted as an interpreter in his business transaction with Cleveland. The only reference to any children in the Pazera home at the time of Cleveland's visit there was as to two small children "messing up his [Cleveland's] stuff all over the floor" and Mrs. Pazera "trying to get the kids out of his [Cleveland's] hair." (R. 133-34)

It is most obvious that there is no truth in Cleveland's testimony as to the Pazera incident and although there are other good reasons for so doing the examiner for that reason alone is justified in rejecting his testimony in its entirety on the "*falsus in uno*" doctrine. He does wholly reject Cleveland's evidence as to his methods of selling and his said specific transactions with the several consumer witnesses as wholly unworthy of belief.

The witness Aaron Huffines was somewhat less positive and assertive than Cleveland. But his testimony must also be rejected as to his said specific dealings with the witnesses Johnson, Hanson and Ninneman, all married women living in or near Marinette, Wisconsin. The examiner has rejected Mrs. Hanson's testimony for reasons already stated. Huffines had a rather contemptuous view of the worthiness of those with whom he dealt. As to the sales he made, Mrs. Hanson "was awfully easy to sell. She almost took the books away from me" (R. 453). And with respect to Mrs. Johnson and her husband, "These people just buy anything" (R. 459). "Mrs. Hanson was especially easily sold and Mrs. Johnson was not so hard; people just buy things and don't expect to pay for them." The hearing examiner at that point made inquiry: "There is a mystery about this book-selling * * * How can you make any money in this field if these people are so easily sold and won't pay for them?" Huffines then testified: "The policy of Basic Books, Inc. is very liberal. They have a set of books for poorer people * * * the poor people want these books and they want to buy these books. They will do anything for their children * * * Basic Books, I imagine, lose a lot of money; I don't know * * *." (R. 463-464). The examiner simply does not believe the testimony of a man who says he spends a great deal of time selling poor people books, which he knows they do not intend to pay for. If such sales are made merely to get the first sales commission, such a salesman is not honest with his employer and if he wantonly unloads books on people who are as eager, easy, and gullible as he indicates these buyers were, his standards of fair dealing do not measure up to the high ethical standards which his employer and he purport to live by. The

hearing examiner is not "easy to sell" on the idea that these housewives and working men, however humble and poor their lot in life may be, were in no way induced to buy books by some of the alluring statements that Mrs. Johnson and Mrs. Ninneman testified this salesman Huffines made to them. The testimony of Huffines is therefore rejected as not fair or credible. Books sold from door to door do not sell themselves almost automatically because people love their children or because book companies are eleemosynary institutions as Huffines suggests.

The salesmen who dealt with Mrs. Bird, Mrs. Grey and Messrs. Rasmussen and Sens were not called to controvert their testimony, and it therefore has been considered in each instance in its entirety for what it was worth. That of Rasmussen was very complete and credible, and, while the other three gave less detailed evidence, insofar as it covered the material issues it has been found fully credible. While also uncontradicted by any salesman, however, the testimony of Helen Adams and Luella Jones has been rejected for reasons hereinbefore stated.

The hearing examiner has given full, careful and impartial consideration to all the evidence presented and to the fair and reasonable inferences arising from all facts established by the evidence. He has carefully considered the pleadings and has found the facts to be true which are alleged in the complaint and admitted by the answer. But as to the material allegations of the complaint which are denied by the answer the burden of proof has always been on counsel supporting the complaint to establish such facts under §7(c) of the Administrative Procedure Act. Therefore, upon consideration of all the material issues of fact presented on the whole record and from his personal observation of the conduct and demeanor of the witnesses, the hearing examiner finds that the Commission's case under its complaint has been established both generally, and also specifically, as to the six particular charges of misrepresentation by respondents' salesmen and agents. All issues alleged in the complaint which are in dispute have been established by a preponderance of reliable, probative and substantial evidence. The specific findings of fact made by the hearing examiner on all issues in the case are as follows:

Respondent Basic Books, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its home office and principal place of business located at 153 North Michigan Avenue, Chicago, Illinois. Respondents Leonard Davidow, Nathan Landy and Herman A. Fischer are President, Executive Vice President and Treasurer, and Secretary, respectively,

of respondent corporation. Their address is the same as that of the respondent corporation. The individual respondents Leonard Davidow and Nathan Landy, at all times mentioned herein, promulgated, directed and controlled the policies, acts and practices of the respondent corporation. These facts are established by admission in the answer and by testimony of the respondents. Their contention that their salesmen are independent contractors for whose acts and statements respondents have no liability is contrary to law as stated earlier in this decision.

Respondent Basic Books, Inc., operating under the direct supervision and control of the individual respondents Davidow and Landy, is now, and has been for more than two years last past, engaged in the business of selling and distributing sets of reference books designated Universal World Reference Encyclopedia, yearly supplements thereof, research services and other books. The method used by respondents in selling said books is to employ agents, field supervisors and salesmen, on a commission basis, to make a house-to-house canvass and obtain purchase contracts. When contracts for the purchase of books are obtained they are sent to the home office of the respondent corporation and the books are shipped by it direct to the purchasers. Respondents admit these facts by their answer and evidence, contending, however, they are not bound by the acts and statements of independent contractor salesmen, which defense has no legal basis. The respondents advertise for and hire all salesmen and they alone can terminate their contracts. All dealings by the public are with respondents through salesmen. The purchase contracts and subsequent dealings with regard thereto are had by purchasers with Basic Books, Inc., and not with the salesmen as separate legal entities. The corporate respondent also controls the credit arrangements and holds the title to any unpaid for merchandise.

In the course and conduct of their business as above described, respondents cause their books, when sold, to be shipped and transported from their place of business in the State of Illinois to purchasers thereof at their locations in other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce in said books, as "commerce" is defined in the Federal Trade Commission Act. It is undisputed that the business done by Basic Books, Inc., in interstate commerce is very substantial. Respondent Landy testified that of some \$300,000 worth of annual business in 1957 and somewhat higher in prior years, about 80 percent thereof consisted of sales and deliveries in other states than Illinois. After sales have been made in the field

and are approved in Chicago, respondents ship the books to the purchaser. Business is so done in some ten or more states. It also appears that Davidow and Landy are officers in other book publishing or book sales companies, some 15 or more in number, doing an annual business of about 20 million dollars in sales.

In the course and conduct of their business and to induce the purchase of their said books, respondents, through their agents and salesmen, have made a number of statements concerning their business methods, the price of their books and other matters. Such statements are:

(1) That respondents were engaged in making surveys for various purposes. (See the testimony of Barbara Tebo, R. 232, 235-237 and 241; and that of Howard D. Rasmussen, R. 305, 307, 322-323, 357 and 359-360. The Better Business Bureau also received some 88 complaints during a part of 1955 and all of 1956 that respondents' salesmen were reported to have used the "survey" approach. This was respondents' own evidence, Respondents' Exhibits 27-A to 30-D, inclusive.)

(2) That they were making an introductory offer of said books for advertising purposes and that said books are given free to a selected number of persons. (See the testimony of Clifford D. Harbor, R. 73; of Stanley Pazera, R. 110 and 125; of Dorothy Johnson, R. 187; of Shirley Ninneman, R. 252 and 258; of Howard D. Rasmussen, R. 318-319; and of Ernest B. Sens, R. 370, 375 and 378. Respondents' Exhibits 27-A to 30-D, inclusive, show 201 complaints were received by the Better Business Bureau that respondents' salesmen had improperly claimed books were free in their sales approaches during part of 1955 and during 1956.)

(3) That the prospective customer had been specially selected to receive a set of said books. (See the testimony of Clifford D. Harbor, R. 73 and 75-76; of Dorothy Johnson, R. 183 and 187; of Howard D. Rasmussen, R. 307, 316, 322-323, and 359-360; and of Ernest B. Sens, R. 370. The "specially selected" customer approach was improperly used by respondents' salesmen in 1956. See Respondents' said Exhibits 27-A to 30-D, inclusive.)

(4) That the encyclopedia was given free with the purchase of the yearly supplements. (See the testimony of Clifford D. Harbor, R. 73 and 76-77; of Stanley Pazera, R. 110-111, 113, 118-119, 123, 125-126, 130 and 134; of Barbara Tebo, R. 233-234, 239, 246 and 250; of Shirley Ninneman, R. 252, 254 and 258; and of Howard D. Rasmussen, R. 308, 317-320, 343-344, 350, 357, and 359-360. Said Respondents' Exhibits 27-A to 30-D, inclusive, show

that misrepresenting "books as free" was reported to have occurred on the part of respondents' salesmen 201 times during 1956.)

Other evidence in the record indicates that a 10-year average cost of the books offered in combination was put forth by Cleveland to prospective purchasers and buyers thereof (see Commission's Exhibit 3A to -D), and the "pitch" of low-cost average over a 10-year period was stressed by respondents in their salesmen's manual, "Information for Dealers," Commission's Exhibit 1-B. These documents therefore tend to support the testimony of the consumer witnesses on the "free" encyclopedia and other books issue and that they thought it was the annual supplement for 10 years they were paying for.

(5) That certain other books, to be selected by the customer, were given free with the purchase of the encyclopedia and yearly supplement. (See the testimony of Stanley Pazera, R. 119, 126 and 130; of Delores Grey, R. 140, 156 and 158; of Shirley Ninneman, R. 261; and Howard D. Rasmussen, R. 320, 343, 357 and 359-360.) (See also Respondents' said Exhibits 27-A to 30-D, inclusive.)

(6) That the price at which the encyclopedia, supplements and other books were being offered was a reduced price from the regular price and was for a limited time only. (See the testimony of Margaret Bird, R. 50-53; of Delores Grey, R. 141-142 and 152-153; of Dorothy Johnson, R. 184; of William McVane, R. 211; and of Howard D. Rasmussen, R. 309-310. See also Respondents' said Exhibits 27-A to 30-D, inclusive.)

The foregoing statements made by the respondents, in the manner and by the means hereinbefore described, were and are false, misleading and deceptive. This is evidenced generally by respondents' repeated attempts to have the consumer witnesses admit that under their respective contracts they knew they were paying for all books in the combination offer. In paragraph 5 of their answer respondents also specially plead that the prices of their books were a combination price for all, but much less than the separate retail prices of such books would add up to. Respondents' price lists, Commission's Exhibits 2 and 3, also reveal that there were no free books in any combination book sale offered by respondents during the period covered by the testimony of the consumer witnesses and within the more than two-year period prior to January, 1958, covered by the complaint.

More specifically the said foregoing six types of statements of respondents' salesmen were false since the record herein establishes, and it is admitted frankly by respondent Landy, that the respondents do not engage in surveys, introductory advertising offers to se-

lected persons, the giving of free books or granting specially reduced prices to selected customers. It is therefore found that in truth and fact:

(1) Respondents, or any of them, are not now, and never have been, engaged in making surveys of any nature;

(2) The offer to sell their books was not an introductory offer nor for advertising purposes, nor were any of their books given free to selected persons, or to any other persons, as in introductory offer or for advertising purposes, or for any other reason;

(3) Prospective purchasers were not specially selected. On the contrary, respondents' books were and are available for purchase by anyone desiring to purchase them;

(4) The encyclopedia was not given free with the purchase of the yearly supplements, the price charged being for the combination;

(5) Books selected by the purchaser were not given free with the purchase of the encyclopedia and yearly supplements, as the price of these books was included in the price of those purchased;

(6) The price at which the encyclopedia, supplements and other books was offered for sale was not a reduced price but was the regular and usual selling price, and the offer was not for a limited time but was a continuous offer.

It is pleaded in paragraph 6 of the complaint that respondents, in the conduct of their business, were and are in competition, in commerce, with other corporations and with firms and individuals engaged in the sale of encyclopedias, yearly supplements and other books. Respondents in their answer, paragraph 6, admit these allegations and such facts are therefore found to be true.

From all the foregoing facts established on the record, it is necessarily inferred and found that the use by respondents of the foregoing false, misleading and deceptive statements and representations had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that such statements and representations were and are true and into the purchase of substantial quantities of their said books by reason thereof. As a result thereof, trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done to competition in commerce.

CONCLUSIONS OF LAW

Out of the foregoing findings of fact the following conclusions of law are drawn by the hearing examiner:

Order

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

2. This proceeding is to the interest of the public and such interest is specific and substantial;

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

ORDER

It is ordered, That respondent Basic Books, Inc., a corporation, and its officers, and Leonard Davidow and Nathan Landy, as officers of respondent corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books or other publications, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That respondents, or any of them, are engaged in making surveys for any purpose;

2. That the offer of sale of respondents' books is an introductory offer or is made for advertising purposes;

3. That any of respondents' books are given free to selected persons, or to any other persons, as an introductory offer or for advertising purposes or for any other reason;

4. That prospective purchasers of any books sold by respondents are specially selected;

5. That the Universal World Reference Encyclopedia or any similar publication sold by respondents is given free by respondents with the purchase of any yearly supplement or supplements thereto;

6. That books, or any other publications of respondents or other things of value selected by a purchaser in connection with the purchase of the said encyclopedia and its yearly supplements are given free to such purchasers;

7. That any price at which respondents' books or other publications are offered for sale is a reduced price, unless it is based upon and less than the price at which such books or other publications are regularly and usually sold by respondents;

8. That respondents' offer of books or other publications at a reduced price is limited as to time.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent Herman A. Fischer in his individual capacity but not in his capacity as an officer of respondent Basic Books, Inc., a corporation.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents (except for an individual respondent against whom the complaint was dismissed) to cease and desist from the practices found to be unlawful. Respondents have appealed from the initial decision and from certain rulings by the hearing examiner.

In substance, the complaint alleges that respondents, in connection with the sale and distribution of books, have falsely represented through their salesmen and agents:

- (1) That they were engaged in making surveys for various purposes;
- (2) That they were making an introductory offer of said books for advertising purposes and that said books are given free to a selected number of persons;
- (3) That the prospective customer had been specially selected to receive a set of said books;
- (4) That the encyclopedia was given free with the purchase of the yearly supplements;
- (5) That certain other books, to be selected by the customer, were given free with the purchase of the encyclopedia and yearly supplement; and
- (6) That the price at which the encyclopedia, supplements and other books were being offered was a reduced price from the regular price and was for a limited time only.

Respondents do not claim in their brief that the above representations are true. They argue, however, that there is insufficient evidence in the record to support the findings that such representations were in fact made by their salesmen and agents. This argument consists primarily of a broad, general attack on the hearing examiner's analysis of the testimony of various consumer witnesses called in support of the complaint. It also questions his

interpretations of certain documentary evidence adduced by respondents and his refusal to receive the evidence of certain purchasers who would testify that no misrepresentations had been made to them by respondents' salesmen.

In order to prove that respondents' salesmen had made the alleged misrepresentations, counsel supporting the complaint presented fifteen consumer witnesses who testified as to their conversations and transactions with these salesmen. The hearing examiner considered and evaluated the testimony of each of these witnesses in his opinion. He rejected the testimony of five of them, but concluded that the evidence given by the remaining ten had the weight and credibility to sustain each of the six charges of violation set forth in the complaint and to outweigh the testimony or respondents' salesmen contradictory thereto. A hearing examiner confronting witnesses is peculiarly qualified to determine credibility of witnesses and the weight to be given their testimony. We believe that the record supports his evaluation. For the same reason we disagree with respondents' claim that the hearing examiner erred in rejecting the testimony of two of respondents' salesmen witnesses, Cleveland and Huffines, as being unworthy of belief.

As evidence of their attempt to prevent misleading practices respondents introduced reports by the National Better Business Bureau of complaints made by members of the public against salesmen of some 54 companies, including respondents Basic Books, Inc., engaged in the sale of books. Respondents contend that the hearing examiner misinterpreted these documents, being of the opinion that all the complaints therein related to Basic Books, Inc. But the hearing examiner does not rely upon these reports as a major ground for justifying his findings, as contended by respondents. Respondents' argument in this respect is without merit. The findings as to deceptive practices are supported by the testimony of consumer witnesses. On page 6 of his initial decision the hearing examiner makes the following comment respecting the evidence.

The case therefore turns, as hereinbefore essentially stated, upon the careful weighing of the relevant evidence of those consumer witnesses whose testimony has not been wholly rejected by the hearing examiner as against the testimony of respondents' salesmen where there is contradicted testimony of a number of the consumer witnesses, which cross-examination did not destroy or weaken, but rather tended to materially strengthen.

Another point raised by respondents concerns the hearing examiner's refusal to admit the testimony of witnesses who would testify that they had not been deceived by respondents' salesmen. Contrary to respondents' contention, such testimony would not create any inference that false representations had not been made on

other occasions and would not tend to refute the direct evidence that such false representations had, in fact, been made. Since the evidence offered by respondents was wholly immaterial, the hearing examiner did not err in excluding it.

Respondents also contend that the hearing examiner erred in refusing to permit them to cross examine witnesses Johnson and Rasmussen as to conversations between these witnesses and the investigating attorney of the Federal Trade Commission. Examination of the record shows that a full and extensive cross examination of Rasmussen was had as to his conversation with the Commission's investigator. Neither Rasmussen nor any of the other witnesses who were cross examined on the same subject indicated that their testimony had been influenced in any manner by the questions asked by the investigating attorney. As to witness Johnson we think that any hope respondents may have had that she would repudiate her direct testimony by stating that it had been based on ideas planted in her mind by the investigator is too remote and improbable under the circumstances to constitute a basis for a claim that respondents had been prejudiced by the hearing examiner's ruling.

Respondents also argue that they should have been allowed to show that the witness Harbor was biased against them by reason of the fact that they had placed his account in the hands of a collection agency. The hearing examiner ruled that further testimony from the witness would be superfluous and counsel for respondents agreed with the examiner on this ruling. Under all the circumstances disclosed by the record no injury was done to the respondents by the hearing examiner's ruling.

Respecting another of respondents' objections the hearing examiner refused to order production of documents in the Commission's files on the ground that there was no evidence in the record of the existence of any written statements of the witnesses. We are of the opinion that this ruling likewise was correct. It was incumbent upon respondents to show that the written statements which they requested were in existence. *Communist Party of America v. Subversive Activities Control Board*, 254 F. 2d 314. There is nothing in the testimony of the various witnesses to indicate that they had furnished written or signed statements to the investigating attorney with the possible exception of witness Pazera. On this point, that witness' testimony appears extremely vague and indefinite regarding any statement whether oral or otherwise. Furthermore, respondents did not ask Pazera or any of the other witnesses whether they had executed a written statement.

Respondents also contend that even if Pazera's statement was oral and had been written by the investigator, it should still have been made available to them. We think that an answer to this argument can be found in our ruling in *Pure Oil Company*, Docket No. 6640. We stated in that case that a report by an attorney-examiner of a conversation with a witness could not be successfully used to impeach the testimony of that witness. A similar ruling was made in *Communist Party of America, supra*; and in recent decisions interpreting the so-called "Jencks" Act, 18 U.S.C. Sec. 3500, the Supreme Court held that an investigator's summary of an oral statement by a witness should not be produced for impeachment purposes. (*Rosenberg v. U.S.* No. 451, U.S. Sup. Ct., June 22, 1959; *Palermo v. U.S.*, No. 471, U.S. Sup. Ct., June 22, 1959.)

Respondents also argue that issuance of a cease and desist order is not in the public interest in view of the efforts of respondents to prevent misleading practices. The record discloses, however, that any efforts which respondents may have made to prevent misrepresentations by their agents were unsuccessful. Since the purpose of this proceeding is to stop practices found to be unlawful, we think that the public interest will best be served by issuance of an order to cease and desist.

Respondents further object to the form of the order. They argue that in view of the Commission's holding in *Kay Jewelry, Inc.*, Docket No. 6445, the respondents Landy and Davidow should not be included in the order in their individual capacities solely on the basis of a finding that as officers of Basic Books, Inc., they formulate, direct and control the policies, acts and practices of the corporate respondent. We are of the opinion that respondents are correct on this point. Since there has been no showing of circumstances which would necessitate the issuance of an order against Landy and Davidow in their individual capacities, the order should be modified to run against these respondents only in their capacities as officers of the corporation.

The order dismisses the complaint as to respondent Fischer, both individually and as an officer of respondent Basic Books, Inc. Although we believe the hearing examiner was correct in dismissing the complaint as to this respondent in his individual capacity, no showing has been made to justify the dismissal as to him in his official capacity. The order should therefore be modified to dismiss the complaint as to respondent Fischer as an individual but not as an officer of the corporation.

To the extent indicated herein, respondents' appeal is granted and in all other respects is denied. As modified in accordance with

this opinion, the initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

Chairman Kintner did not participate in the decision of this matter.

FINAL ORDER

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

The Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part the aforementioned appeal, and having modified the initial decision to the extent it is contrary to the views expressed in the said opinion:

It is ordered that, The order to cease and desist contained in the initial decision be modified by deleting from the preamble thereof the words "individually and" immediately following the names of respondents Leonard Davidow and Nathan Landy, and by striking therefrom the last paragraph and substituting therefor the paragraph:

"It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent Herman A. Fischer in his individual capacity but not in his capacity as an officer of respondent Basic Books, Inc., a corporation."

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

It is further ordered, That the respondents shall, within sixty (60) days after the 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 contained in the initial decision as modified.

Chairman Kintner not participating.