
IN THE MATTER OF
JAY KAY DISTRIBUTING CO. ET AL.

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

Docket 8033. Complaint, July 7, 1960—Decision, Nov. 10, 1960

Consent order requiring Detroit distributors of phonograph records to cease giving concealed "payola" to disc jockeys and other personnel of radio

Complaint

57 F.T.C.

and television programs to induce frequent playing of their records in order to increase sales.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jay Kay Distributing Co., a corporation, and John S. Kaplan, Marion Kaplan and Allen Kaplan, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jay Kay Distributing Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 3725 Woodward Avenue, in the City of Detroit, State of Michigan.

Respondents John S. Kaplan, Marion Kaplan and Allen Kaplan, are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the distribution, offering for sale, and sale, of phonograph records to various retail outlets.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said records, when sold, to be shipped from Michigan to purchasers thereof located in northwestern Ohio, and maintain, and at all times mentioned herein have maintained, a course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the

capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Arthur Wolter, Jr., for the Commission.

Katz and Victor, by *Mr. Norman D. Katz*, of Detroit, Mich., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale, and sale of phonograph records to various retail outlets, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director, Associate Director and Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that respondent Jay Kay Distributing Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and

1109

Order

principal place of business located at 3725 Woodward Avenue, Detroit, Michigan; that respondents John S. Kaplan, Marion Kaplan and Allen Kaplan are officers of the corporate respondent; that respondents John S. Kaplan and Marion Kaplan formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices set forth in the agreement; and that their address is the same as that of the corporate respondent.

The agreement further states that, according to an affidavit attached thereto and made a part thereof, it appears that Allen Kaplan has no part in formulating, directing or controlling the acts or practices of the corporate respondent, and that it is accordingly agreed that the complaint should be dismissed against him in his individual capacity.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That respondents Jay Kay Distributing Co., a corporation, and its officers, and John S. Kaplan and Marion Kaplan, individually and as officers of said corporation, and Allen Kaplan as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation or other device, in connection with phonograph records which have

been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

It is further ordered. That the complaint be, and the same hereby is, dismissed as to Allen Kaplan in his individual capacity.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the Hearing Examiner shall, on the 10th day of November, 1960, become the decision of the Commission; and, accordingly:

It is ordered. That respondents Jay Kay Distributing Co., a corporation, and John S. Kaplan and Marion Kaplan, individually and as officers of said corporation, and Allen Kaplan as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Complaint

IN THE MATTER OF

CARI COLETTE, INC., ET AL.

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

Docket 8040. Complaint, July 13, 1960—Decision, Nov. 10, 1960

Consent order requiring New York City manufacturers of fur and wool products to cease violating the Fur Products Labeling Act by setting forth on labels attached to fur products the names of animals other than those producing certain furs, and by failing to comply in other respects with labeling and invoicing requirements; and to cease violating the Wool Products Labeling Act by failing to identify on labels as required the constituent fibers contained in interlinings of wool garments.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cari Colette, Inc., a corporation, and Elliott Bass, Samuel Bort and Stanley Melcer, individually and as officers of said corporation, hereinafter referred to as respondents have violated the provisions of said Acts, and the Rules and Regulations promulgated under the Fur Products Labeling Act and the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issue its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cari Colette, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 512 7th Avenue, New York, New York.

Individual respondents Elliott Bass, Samuel Bort and Stanley Melcer are president, treasurer and secretary, respectively, of said corporate respondent. Said individual respondents formulate, direct and control the acts, practices, and policies of the corporate respondent. The office and principal place of business of the individual respondents are located at the same address as that of the corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act, on August 9, 1952, respondents have been, and are now, engaged in the introduction into commerce and in the manufacture for introduction into commerce and in the sale, advertising

and offering for sale in commerce and in the transportation and distribution in commerce, of fur products and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that respondents, on labels attached thereto, set forth the name of an animal other than the name of the animal that produced the fur, in violation of Section 4(3) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

a. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with non-required information, in violation of Rule 29(a) of said Rules and Regulations.

b. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels in violation of Rule 29(b) of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form required by the Rules and Regulations promulgated thereunder.

PAR. 6. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January 1, 1959, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

PAR. 7. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

a. By failing to separately set forth on the required stamp, tag, label or other mark of identification the character and amount of

1115

Decision

the constituent fibers contained in the interlinings of the said wool products, in violation of the aforesaid Rules and Regulations.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson for the Commission.

Phillips, Nizer, Benjamin, Krim and Ballon, of New York, N.Y., by *Mr. Jacob M. Usadi*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of the Fur Products Labeling Act and the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated under those Acts, and the Federal Trade Commission Act. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

Order

57 F.T.C.

1. Respondent Cari Colette, Inc., is a New York corporation with its principal place of business located at 512 7th Avenue, New York, New York. Individual respondents Elliott Bass, Samuel Bort and Stanley Melcer are officers of said corporation. They formulate, direct and control the acts, practices, and policies of the corporate respondent. Their address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Cari Colette, Inc., a corporation, and its officers, and Elliott Bass, Samuel Bort, and Stanley Melcer, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction into commerce, or the sale, advertising, offering for sale, transportation or distribution of fur products, in commerce, or in connection with manufacture for sale, sale, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by setting forth on labels attached to fur products:

1. The name or names of any animal or animals other than the name or names of the animal or animals producing the fur or furs contained in said fur product as set forth in the Fur Products Name Guide and prescribed under the Rules and Regulations.

2. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder mingled with nonrequired information.

3. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

B. Falsely or deceptively invoicing fur products by failing to furnish purchasers of fur products an invoice showing all of the information required to be disclosed by each of the sub-sections of Section 5(b)(1) of the Fur Products Labeling Act.

It is further ordered, That respondents Cari Colette, Inc., a corporation, and its officers, and Elliott Bass, Samuel Bort, and Stanley Melcer, individually and as officers of said corporation, and re-

1115

Decision

spondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of interlining or other "wool products" as such products are defined in and subject to said Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by failing to affix labels to such products showing each element of the information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 10th day of November, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That 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

MAIN STREET FURNITURE, INC., ET AL.

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

Docket 7786. Complaint, Feb. 24, 1960—Decision, Nov. 16, 1960

Order requiring a retail furniture dealer in Kansas City, Mo., to cease advertising fictitious retail prices and savings such as, typically, "wall to wall carpeting, reg. \$7.95, now only \$2.50 per yard * * *", and "* * * 3 piece foam rubber sectional regular \$219.95 white elephant sale price \$89.50 * * *" when he had, in fact, no regular retail prices but sold his articles for whatever the traffic would bear.

Mr. DeWitt T. Puckett for the Commission.

Mr. Kenneth E. Bigus, of Kansas City, Mo., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves violations of the Federal Trade Commission Act in the fictitious pricing of furniture, home appliances, and carpets offered for sale and sold by respondents in commerce.

As hereinafter stated, the proceedings are dismissed as to respondents Main Street Furniture, Inc., a corporation, and Donald Bennefeld individually and as an officer of said corporation for lack of proof. Therefore, where respondent is referred to herein, unless otherwise stated, reference is made only to the respondent Charles D. Edwards.

The complaint issued February 24, 1960, and in due course the joint answer of all respondents was filed. Hearings were held June 30, and July 1, 1960, at which time all parties rested. Pursuant to order, proposed findings of fact, conclusions of law and orders were duly submitted by the parties on September 22, 1960.

The complaint charges, in substance, that respondents engaged in using fictitious retail prices in connection with certain of their merchandise in radio broadcasts having sufficient power to carry across state lines. Respondents denied these allegations in their answer although a number of matters charged in the complaint were admitted in the answer, and, in substance, there is very little real dispute in the evidence as to the basic facts in the case. In this initial decision it is found that the respondent Edwards has violated the Federal Trade Commission Act as charged in the complaint, and the proceeding is dismissed as to the other respondents.

Full and careful consideration has been given to the entire record and to all proposed findings of facts, conclusions of law and the orders presented by the respective counsel and insofar as they have been adopted they are incorporated in this initial decision. Those not specifically found or adopted, either verbatim or in substance and effect, have been rejected. In determining the facts in this proceeding upon the whole record as required by law, the examiner has given full, careful and impartial consideration to all the evidence properly presented on the record, including stipulations, and other fair and reasonable inferences arising from such matters. He has carefully examined the pleadings and found as true those facts alleged in the complaint which are admitted by the answer. From these matters and his observation of the conduct and demeanor of the witnesses at the hearing, and upon consideration of the whole record, the examiner makes the following:

FINDINGS OF FACT

The respondent Charles D. Edwards has been in the furniture business for some ten years. From about October 1956 until September 18, 1959, he conducted a retail furniture business under the trade name Main Street Furniture, located at 3230 Main Street, Kansas City, Missouri. On the latter date he incorporated this

1119

Findings

business as Main Street Furniture, Inc., with himself as its president. During the operations he also maintained several other furniture stores in that city. At the time of the incorporation, said respondent registered it under the laws of the State of Missouri as such but was not required to list the name of the officers until the corporation's first annual statement should be filed, upon March 1, 1960. While respondent Donald Bennefeld was tentatively considered as a vice president, he actually never assumed that office and had nothing to do with the advertising and other business policies of the respondent Edwards or his said corporation. Under these circumstances, the complaint is dismissed as to respondent Bennefeld. Since the corporation itself was not in existence at the time of the advertising in question in evidence in this case, that is, during February, 1959, the proceeding is also dismissed as to said corporation. On motions made on behalf of the said two respondents, counsel supporting the complaint offered no resistance. And it may well be noted that as to the corporation, the order hereinafter issued covers respondent Charles D. Edwards, among other things, "through any corporate or other device." Hence it seems quite appropriate as well as legally proper to dismiss as to said corporation. The order, of course, will cover his operations through any of the other furniture enterprises he may now or hereafter engage in, whether corporate or otherwise.

The advertising practices complained of occurred during February, 1959, when respondent Edwards was solely responsible for the preparation and broadcasting of the advertising claims and representations set out or referred to in the complaint. While he contends that these spot announcements, which are in evidence as Exhibits 1 to 4, inclusive, passed through several hands and that errors might have occurred, it is basic that management cannot escape liability in a Federal Trade Commission proceeding for advertising which is false, misleading and deceptive to the public. While the evidence discloses he also advertised in the *Kansas City Star*, and in view of the widespread character of his business throughout many of the States of the United States, it is possible some of this business was the result of other types of advertising than through radio broadcasting. This is immaterial since the complaint is premised entirely upon that specific type of advertising, and there is no evidence of just how he advertised by other media.

Respondent Edwards also engaged as a sole trader from October, 1956 until the incorporation of his business on September 18, 1959, as hereinabove found, and that business has been the advertising, offering for sale, sale and distribution of furniture, home appliances, and carpets at retail to the public in Kansas City, Missouri. The

Findings

57 F.T.C.

evidence in this case primarily concerns only his operations and advertising connected with the 3230 Main Street business, although reference is made in the record to his having sold or transferred at wholesale some of his merchandise to one or more of his other enterprises. In the course and conduct of his business the respondent has caused, and now causes, his merchandise when sold, including some of the articles advertised in the radio broadcasts hereinabove referred to, to be shipped from his place of business in the State of Missouri to purchasers located not only in that State and the neighboring States of Kansas and Iowa but also in more distant States such as Florida, Oklahoma, and Colorado. Originally 70 percent of his business was in States other than Missouri but more recently this has been reduced to only 30 percent in such interstate commerce.

From the examiner's observation of respondent as a witness during the two days of hearings, he appeared to be an exceedingly active and energetic businessman; also the revelations as to the manner in which he kept records in his business indicate either weakness in accounting procedures and other business records or an operation intended to avoid implications charged in the complaint. The manner in which the sales were made in his store by an almost continuous course of advertised sales and a finance company official standing by to finance the transaction then and there indicate the rapidity with which sales were made when customers came in response to the radio advertisements of such sales. That the respondent has built a fairly large business and a substantial course of trade in his said merchandise in commerce between and among various states of the United States is evidenced by his testimony that the annual dollar volume of sales grew from \$125,000 in 1957 to \$250,000 in 1958, \$550,000 in 1959, and between \$650,000 to \$750,000 estimated for 1960, the witness having testified in June, 1960. This great expansion of business, it may be inferred, is in large part premised upon not only his capabilities and energies but also his more or less continuous advertisement of sales throughout the various media he employs, including radio. Certainly the public interest is involved where there is any reasonable inference, as in this case, that such a large business is developed in any way by what is found herein to be fictitious pricing in advertising.

In the course and conduct of his said business respondent Edwards, during February, 1959, advertised certain of his merchandise over radio station KCKN, located in Kansas City, Kansas, which the evidence shows is a station having sufficient power to, and in fact does, carry its broadcasts across state lines and into the channels of commerce. It is charged in the complaint that among and typical of the statements made in said broadcasts are the following:

1119

Findings

Wall to wall carpeting, reg. \$7.95, now only \$2.50 per yard * * *

* * * 3 piece foam rubber sectional regular \$219.95 white elephant sale price \$89.50 * * *

Divan and chairs regular \$199.95 white elephant sale price \$89.50 * * *

It is admitted in the answer and by the evidence of respondent that these broadcasts (Commission's Exhibits 1 to 4, inclusive) were made and in fact respondent offered, and there was received in evidence a substantial number of other broadcasts made prior thereto which, upon careful examination, appear not to involve the matters complained of in this proceeding.

Most of the record in this case involves the alleged differences between respondent Edwards and the witness John L. Holland, an investigator for the Commission, over what took place at a transaction between them on October 28, 1959. In substance, Holland testified that various exhibits in evidence (Commission's Exhibits 5A to E, inclusive and G to I, inclusive and 5F) were submitted to him by respondent Edwards as sales slips evidencing at least as typical of the regular prices of the merchandise sold by Edwards in the regular course of his business prior to the sale of February, 1959, involved in the broadcasts hereinbefore referred to. It appears from the evidence of both that Edwards had to fill in the prices on the sales slips as they had not been placed there in the regular course of the sales with respect to the particular items of carpet, sectional sofas, divans and chairs referred to in the foregoing quoted statements in the said broadcasts. Edwards contends that he had to recall these from memory and, upon close cross-examination with reference to such matters, evinced an altogether evasive attitude exemplified repeatedly in the record (see, for example, the uncertain and ambiguous answers given on pages 32 to 35, inclusive). From this evidence, as has already been indicated, the examiner finds that the respondent had no regular prices but that they were established from time to time to meet the exigencies of a particular time to sell the merchandise when the customers came in. It follows that it would, therefore, be false and misleading for him to advertise regular prices. Certainly a merchant keeping appropriate records could immediately refer to his price lists and the like and tell the price of any given article which he advertised for sale at a reduced price. This is pointed up by said respondent's testimony (R. 126) where he says with reference to whether he makes a practice of following a manufacturer's suggested retail price: "The manufacturer's price means nothing. I throw the piece of paper away." No other inference can be drawn than that respondent feels it unnecessary to keep adequate records

Findings

57 F.T.C.

and is unable to give his regular prices at any particular given time or period because he does not have any regular prices.

This view of the examiner is confirmed by the fact that prior to the giving of the testimony of respondent Edwards it had been stipulated between his counsel and counsel supporting the complaint that Commission's Exhibits 6 to 12, inclusive, were "photo-stats of the original sales slips of the respondents covering the sale of merchandise advertised in Commission's Exhibits 1 to 4, inclusive," respondents' counsel stating, "We stipualte to the reception of these named exhibits in evidence for the purposes as stated except for the fact that some of these prices in these sales tickets were not filled in at the time of the sale but were filled in by Mr. Edwards at the time of the investigation. Of course, this exception created no disagreement between investigator Holland and respondent Edwards as they both testified that Edwards wrote in such prices on such exhibits at the time Holland visited Edwards on October 28, 1959.

Through the use of the aforesaid statements and representations, respondent Edwards represented, directly or by implication, that the higher stated prices were the usual and customary retail prices charged by him for said merchandise in his recent regular course of business and that he had reduced said prices from the stated higher prices to the stated lower sale prices and that purchasers of the merchandise so advertised realized a saving of the differences between the said higher and lower prices.

The said statements and representations set forth and referred to in the finding hereof and broadcast at respondent Edwards' direction were false, misleading, and deceptive. The higher prices appearing in said respondent's advertisements were fictitious. Said respondent had no regular or customary retail prices at which his articles of merchandise were sold in the usual course of his business. He sold said articles for whatever the traffic would bear. The purchasers of the articles so advertised as above described and referred to did not realize a saving of the difference between the said higher and lower prices. The evidence supporting these findings is that respondent advertised "... 3 piece foam rubber sectional regular \$219.95 white elephant sale price \$89.50 . . ." (Commission's Exhibit 2), while Commission's Exhibits 5-A to 5-I show that said merchandise was sold by respondents on 7-12-58 at \$229.95; on 7-13-58 at \$199.95; on 11-7-58 at \$199.95; on 12-2-58 at \$220.00; on 12-6-58 at \$175.00; on 12-23-58 at \$290.00; on 2-23-59 at \$249.95; on 2-26-59 at \$199.50.

Also, in Commission's Exhibit 2 respondent Edwards advertised "... living room group, 7 pieces 2 piece sectional, corner table, step

1119

Conclusions

and coffee table & 2 lamps \$199.50 value white elephant sale price \$69.50 . . ." Commission's Exhibits 6 and 7 show that said group sold on 8-14-58 for \$129.95 and on 8-9-58 for \$119.95 (some items substituted, making a total of \$131.20).

In Commission's Exhibit 2, respondent Edwards also advertised ". . . divan and chairs regular \$199.95 white elephant sale price \$89.50 . . ." Commission's Exhibit 8 shows the sale of said merchandise on 12-16-58 for \$193.00.

As shown by Commission's Exhibit 1 the respondent Edwards advertised ". . . wall to wall carpeting, reg. \$7.95, now only \$2.50 per yard . . ." Commission's Exhibits 9 to 12 show that said carpeting sold on 2-16-59 at \$5.65 per yd.; on 2-18-59 at \$9.00 per yd.; on 2-18-59 at \$6.25 per yd.; and on 2-24-59 at \$5.50 per yd.

While respondent denies that he has any real competition, nevertheless, there can be no question but what such furniture and equipment as respondent admittedly sells are competitive items and that the furniture business is highly competitive. It must be found, therefore, that in the course and conduct of his business the respondent was, and is now, in direct and substantial competition with corporations and with firms and individuals in the sale of furniture, household appliances and carpets of the same general kind and nature as that sold by respondents.

The use by the respondent Edwards of the foregoing false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's merchandise by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

CONCLUSIONS OF LAW

The evidence having sustained the material allegations of the complaint, upon such evidence as hereinabove found the examiner draws the following conclusions of law:

1. The Commission has jurisdiction of the subject-matter of this proceeding and of the person of the respondents.
2. There is substantial and specific public interest in this proceeding.
3. The aforesaid acts and practices of respondents as alleged in the complaint and herein found, were, and are, all to the prejudice

Decision

57 F.T.C.

and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

The following order is therefore entered:

It is ordered, That respondent, Charles D. Edwards, an individual, his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale or sale of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That any amount is the usual and customary retail price of respondent's merchandise when such amount is in excess of the price at which said merchandise is usually and customarily sold at retail by respondent in the recent, regular course of his business;

(b) That any saving from respondent's retail price is afforded to the purchasers of respondent's merchandise unless the price at which it is offered constitutes a reduction from the price at which said merchandise has been usually and customarily sold by respondent in the recent regular course of his business.

2. Using the words "regular" or "reg." or any other word or term of the same import, to describe or refer to prices of merchandise unless respondent has sold said merchandise at such prices in the recent regular course of business.

3. Misrepresenting in any manner the amount of savings available to purchasers of respondent's merchandise, or the amounts by which the prices of said merchandise are reduced from the prices at which said merchandise is usually and customarily sold by respondent in the recent, regular course of his business.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondents Main Street Furniture, Inc., a corporation, and Donald Bennefeld, individually and as an officer of the said corporation.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 16th day of November 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent, Charles D. Edwards, an individual, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

Complaint

IN THE MATTER OF

BURLINGTON INDUSTRIES, INC.

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

Docket 7865. Complaint, Apr. 18, 1960—Decision, Nov. 16, 1960

Consent order requiring important manufacturers of textile products to cease violating the Wool Products Labeling Act by labeling as "100% Alpaca", woolen fabrics manufactured by their Peerless Woolen Mills Division in Rossville, Ga., which contained substantially less than 100% alpaca, and by failing in other respects to comply with labeling requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Burlington Industries, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under said Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Burlington Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business in Greensboro, North Carolina.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since January 1, 1958, respondent, through its Peerless Woolen Mills Division, Rossville, Georgia, has manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

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

Among such misbranded wool products were fabrics tagged and labeled as "100% Alpaca", whereas, in truth and in fact, said fabrics contain substantially less than 100% alpaca.

Decision

57 F.T.C.

PAR. 4. Said wool products consisting of fabrics were further misbranded by respondent in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 5. The respondent in the course and conduct of its business was, and is, in competition in commerce with other corporations and with firms and individuals in the sale of wool products, including fabrics of the same nature as those sold by respondent.

PAR. 6. The aforesaid acts and practices of respondent were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Ames W. Williams for the Commission.

Corcoran, Youngman and Rowe, by *Mr. James H. Rowe, Jr.*, for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondent with violation of the Federal Trade Commission Act and of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, by misbranding certain of its wool products.

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Acting Director, Associate Director and Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that respondent Burlington Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business in Greensboro, North Carolina.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the

terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That the respondent Burlington Industries, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool products, as "wool products" are defined in and subject to the Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein; and
2. Failing to affix labels to such products showing each element of information required to be disclosed by § 4(a)(2) of the Wool Products Labeling Act of 1939.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 16th day of November, 1960, become the decision of the Commission; and, accordingly:

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

Complaint

57 F.T.C.

IN THE MATTER OF

FOREIGN TEXTILE PRODUCTS, INCORPORATED, ET AL.

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

Docket 7920. Complaint, June 3, 1959—Decision, Nov. 16, 1960

Consent order requiring New York City distributors of woolen fabrics to cease violating the Wool Products Labeling Act by labeling as "95% wool, 5% Nylon", woolen fabrics which contained substantially more non-woolen fibers than indicated by such tags, and by failing to conform in other respects to requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Foreign Textile Products, Incorporated, a corporation, and Bela Gyenes, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Foreign Textile Products, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondent Bela Gyenes is president and treasurer of the corporate respondent. Said individual respondent formulates, directs and controls the acts, practices and policies of said corporate respondent. Respondents' office and principal place of business is located at 303 Fifth Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January 1, 1959, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool products" are defined therein.

PAR. 3. Certain of said wool products, namely woolen fabrics, were misbranded by respondents within the intent and meaning of Section 4(a)(1) of said Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that they were falsely