

3. Misrepresents in any manner the savings available to purchasers of respondent's fur products.

It is further ordered, That the charge made in paragraph 5 of the complaint be, and it hereby is, dismissed.

It is further ordered, That respondent, Gimbel Brothers, 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.

By the Commission. Commissioner Elman dissenting.

IN THE MATTER OF

S. KLEIN DEPARTMENT STORES, INC.

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

Docket 7891. Complaint, May 16, 1960—Decision, Feb. 23, 1962

Order dismissing charges that a New York City department store made deceptive pricing and savings claims, misrepresented the fiber content of merchandise, and failed to disclose when products were irregular in newspaper advertising.

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 S. Klein Department Stores, Inc., a corporation, hereafter referred to as respondent, has 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 S. Klein Department Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business located at Union Square, New York, N.Y.

PAR. 2. Respondent is now, and at all times material hereto has been, engaged in the business of operating department stores selling merchandise to the public in competition with other corporations, firms and individuals also engaged in selling to the public merchandise of the same nature. Respondent owns and operates department stores located in the cities of New York, Westchester, and Hempstead, in the State of New York, and in Newark, in the State of New Jersey.

PAR. 3. In the course and conduct of its business respondent has been and is engaged in disseminating and in causing to be disseminated in newspapers of interstate circulation, and in radio and television broadcasts of interstate transmission, advertisements designed and intended to induce sales of its merchandise and that of its concessionaires. The amount expended by respondent upon such advertising is approximately one million dollars per year.

PAR. 4. Among and typical, but not all inclusive, of the statements appearing in the advertisements described in paragraph 3 are the following:

Save 50%
 Cuban Revolt Stops
 Mattress Export—Shipment
 * * *
 Made to retail at 39.50—19.99
 “ “ “ “ 59.50—29.99
 “ “ “ “ 79.50—39.99
 From one of the Nation's best known
 makers—save \$25.05
 Thomas Cotton Sport Coats
 Made to retail at \$35.00—9.95
 Roto-Broil Rotisseries
 Made to retail at \$69.95 29.99
 Callaway's "Profile"
 Cannon's "Checker" Bath Towels
 Made to retail at \$1.29—69¢
 Full 4½ to 5 ft. Aluminum and
 Frosted Glass Tub Enclosures
 \$89.95 Value—39.95
 Cultured Pearl Necklaces & Chokers
 All hand knotted!
 All with 14 Kt. white gold clasps.
 Guaranteed equal to \$15 necklaces
 and chokers 5.99
 Guaranteed equal to \$20 necklaces
 and chokers 8.99
 Guaranteed equal to \$30 necklaces
 and chokers 12.99
 Guaranteed equal to \$45 necklaces
 and chokers 19.99
 Cashmere Sweater Event!
 Precious mink on Cashmere Sweaters
 sold nationally at \$89 to \$139—\$50
 Long sleeve cardigans * * * nationally
 sold at \$22.95 to \$26.95—\$10.00
 2 to 15 cup Automatic Coffee Percolators
 List price \$24.95 7.99
 12 Automatic Skillets

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List price 19.95 7.99
 Natural Mink Stoles & Capes * * *
 Made to retail at \$299 to \$329 \$189 * * *
 Pure Silk Costumes
 Made to retail at 25 to 35.00 11.00

PAR. 5. Through the use of the amounts in connection with the words and terms "list", "sold nationally at", "value" and "equal to", the respondent represented that said amounts were the prices at which the merchandise referred to was usually and customarily sold at retail in its trade area, and through the use of said amounts and the lesser amounts that the differences between said amounts represented a saving to the purchaser from the price at which said merchandise was usually and customarily sold in said trade area.

Through the use of the amounts in connection with the words and terms "made to retail at" and "save" the respondent represented that said amounts were the prices at which it usually and customarily sold the merchandise referred to in the recent, regular course of business and through the use of the said amounts and the lesser amounts that the differences between said amounts and the lesser amounts represented savings from the prices at which the merchandise referred to had been sold by respondent in the recent, regular course of its business.

Through and by the use of the words "Pure Silk" in describing its costumes offered for sale respondent represented that said costumes were composed of 100% silk fibers.

PAR. 6. The aforesaid representations were false, misleading and deceptive.

In truth and in fact, the amounts set out in connection with the words "list", "nationally sold at", "value" and "equal to" were in excess of the prices at which the articles of merchandise referred to were usually and customarily sold at retail in respondent's trade area and the difference between such amounts and the lesser amounts did not represent savings from the prices at which the merchandise had been usually and customarily sold in respondent's trade area.

In truth and in fact, the amounts set out in connection with the words "made to retail at" and "save" were in excess of the prices at which the articles of merchandise referred to had been sold by respondent in the recent, regular course of its business and the difference between said amounts and the lesser amounts did not represent savings from the prices at which the merchandise had been sold by respondent in the recent, regular course of its business.

The costumes described as "Pure Silk" did not contain any silk fibers.

PAR. 7. Respondent advertises and sells merchandise which is known as "seconds" or "irregulars" without disclosing such fact in the advertising of such merchandise or in connection with the merchandise itself. Such merchandise is of less value than first class merchandise, and, in the absence of a disclosure that it is "seconds" or "irregulars", it is believed to be, and is accepted by the public as, first class merchandise.

PAR. 8. The use by respondent of the foregoing false, misleading and deceptive statements and representations had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of respondent's merchandise because of such mistaken and erroneous belief. The failure of respondent to disclose the facts as alleged in paragraph 7 had the tendency and capacity to lead the public into the erroneous and mistaken belief that the merchandise referred to therein was first class and into the purchase thereof because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has thereby been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and respondent's 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.

Mr. Frederick J. McManus and Mr. Garland S. Ferguson supporting the complaint.

Paul, Weiss, Rifkind, Wharton & Garrison, by *Mr. Jay H. Topkis* and *Mr. Peter M. Fishbein*, of New York, N.Y., for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on May 16, 1960, charging it 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 by (a) misrepresenting the prices of, and the savings to be realized on, certain merchandise advertised for sale by it, (b) misrepresenting the fiber content of certain of said merchandise, and (c) failing to reveal that certain of said merchandise was

irregular. After being served with said complaint respondent appeared by counsel and thereafter filed its answer denying, in substance, that it had engaged in the illegal conduct charged.

Prior to the holding of any hearings herein respondent moved to dismiss the complaint for failure to allege facts sufficient to sustain the jurisdiction of the Commission. After the hearing of oral argument on said motion on August 30, 1960, the examiner to whom this proceeding was then assigned denied such motion by order dated September 15, 1960. An interlocutory appeal to the Commission from said order of the hearing examiner was denied by order of the Commission issued November 18, 1960.

The undersigned was substituted as hearing examiner on October 10, 1960, after the hearing examiner theretofore assigned to hear this proceeding disqualified himself from further participation therein. Hearings on the complaint were held in abeyance pending the outcome of a suit by respondent for an injunction against the hearing examiner and the members of the Federal Trade Commission in the United States District Court for the District of Columbia. Hearings were thereafter held on various dates between April 5, 1961, and June 1, 1961, in Washington, D.C., and New York, N.Y. At such hearing testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. A motion by respondent at the end of the case-in-chief to dismiss the complaint, for insufficiency of proof and lack of jurisdiction, was denied by the undersigned examiner at the hearing held May 10, 1961. Proposed findings of fact and conclusions of law were filed by counsel supporting the complaint and by counsel for respondent on July 19, 1961, and a supporting memorandum of law was filed by respondent on said date.

After having carefully reviewed the entire record in this proceeding and the proposed findings and conclusions¹ and the supporting memorandum filed by respondent, the hearing examiner finds that this proceeding is in the interest of the public and, based on the entire record and his observation of the witnesses, makes the following:

¹ Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

FINDINGS OF FACT

I. The Business of Respondent

1. Respondent S. Klein Department Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its main office and principal place of business located at Union Square, New York, N.Y.

2. Respondent is now, and for a number of years has been, engaged in the business of operating department stores selling merchandise to the public in competition with other corporations, firms and individuals also engaged in selling to the public merchandise of the same nature. Respondent owns and operates department stores located in New York City, Westchester County and Hempstead in the State of New York, and in Newark, N.J. During the fiscal year 1958 respondent's sales were in excess of \$84,000,000.

3. In the course and conduct of its business respondent has been and is engaged in disseminating and in causing to be disseminated, in newspapers having a substantial interstate circulation, advertisements designed and intended to induce sales of its merchandise and that of the concessionaires who operate certain of its departments. The amount expended by respondent upon such newspaper advertising is approximately \$3,000,000 a year.

4. Respondent has questioned whether the mere solicitation of customers in newspapers of interstate circulation is a sufficient showing of interstate commerce, for purposes of sustaining the Commission's jurisdiction, in the absence of evidence of actual sales of merchandise in commerce pursuant to such solicitation. The Commission has already ruled that it has jurisdiction, under these circumstances, in its order denying respondent's interlocutory appeal in this proceeding. A similar ruling was subsequently made by it in its decision in *Bankers Securities Corp.*, Docket 7039, December 1, 1960. Aside from the fact that the examiner is bound by these rulings, he entertains no doubt as to the Commission's jurisdiction under the facts alleged.

It is well settled that the transmission of intelligence for commercial purposes across state lines is interstate commerce. *International Textbook Co. v. Pigg*, 217 U.S. 91. This has been held to include trade in news and the circulation of newspapers across state lines. *Associated Press v. U.S.*, 326 U.S. 1; *Mabee v. White Plains Publishing Co.*, 327 U.S. 178. It also includes the advertising of products for sale in publication which are circulated in commerce. *Lorain Jour-*

nal Co. v. U.S., 342 U.S. 143. The case relied upon by respondent, *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U.S. 436, is of doubtful application in view of the Supreme Court's subsequent holding in the *Lorain Journal* case. It may also be noted that *Blumenstock* was based on the line of cases which held that insurance policies were not articles of commerce, and that the making of contracts pertaining thereto was merely incidental to commerce. However, these cases have since been overruled in *U.S. v. Southeastern Underwriters Ass'n.*, 322 U.S. 533.

The fact that the Wheeler-Lea Amendment to the Federal Trade Commission Act specifically makes the interstate advertising of foods, drugs, devices and cosmetics illegal is not as suggested by respondent, indicative of a Congressional interpretation that the Commission did not previously have jurisdiction over the interstate advertising of these products. The legislative history of the amendment makes it clear that its sponsors regarded the Commission as already having jurisdiction under these circumstances, but that they wished to give it the additional power of injunctive relief in the case of products where there was imminent danger to life and limb. Aside from the legislative history, the fact that Congress considered it necessary to spell out advertising, in commerce, as being illegal may just as readily be ascribed to an overabundance of caution on its part, considering the then uncertainty in the state of the law (some of the cases cited above, including *Southeastern Underwriters* having not yet been decided), as to an intention to enlarge the Commission's jurisdiction. Certainly there is no affirmative evidence of any Congressional intent to limit the Commission's jurisdiction over the interstate advertising of other products.

In the opinion of the examiner a showing that the goods advertised by respondent moved in commerce is not an essential element of the offense. The gravamen of the charge is the use of misrepresentation in the advertising of the product, not in the actual sale which occurs thereafter. The act, practice or method of competition charged to be unfair or deceptive is the use of false advertising claims in inducing sales, rather than the sales themselves. If the act or practice charged to be unfair occurs in commerce the Act has been violated, without a showing that the act or practice has resulted in a sale in commerce. It is concluded and found that, in disseminating and causing to be disseminated advertisements in newspapers which circulate in commerce, respondent is engaged in commerce, within the meaning of the Federal Trade Commission Act.

II. The Alleged Illegal Practices

The Issues

1. The principal issue involved in this proceeding is whether respondent has misrepresented the comparative prices of certain of the products which it advertised for sale, and the savings which would be realized on the basis of such prices. In advertising many of its products for sale respondent uses what is generally referred to as comparative price advertising, i.e., it compares its price with some supposedly more usual selling price. The comparison in most of the advertisements involved in this proceeding is between the price at which the merchandise was purportedly "Made to Retail" and the price at which it was actually offered for sale by respondent. In some of the advertisements the comparison is with the price at which the product purportedly was "sold nationally", or with the product's "list price" or its "value".

2. In connection with respondent's comparative price claims, there is raised a basic issue as to what certain of the comparative price statements used by respondent mean, particularly its reference to a "made to retail" and a "list" price. In addition, there is presented the issue whether such prices are, in fact, bona fide prices for purposes of reflecting the savings to be realized.

3. The complaint also charges respondent with two other forms of deceptive advertising, (a) misrepresenting the fiber content of certain garments and (b) failing to reveal that certain merchandise was irregular. There is no serious issue of fact in connection with these two advertisements, respondent's primary contention in this regard being that there is no public interest involved.

"Made To Retail At"

4. There is no dispute as to the fact that in a number of its advertisements respondent stated that the product in question was "made to retail at" a specified price, and then indicated the price at which it was actually being offered for sale. For example, it advertised that certain men's sport coats were "made to retail at \$35.00", followed by a statement of the actual price at which the coats were being offered, viz, "\$9.95". Counsel supporting the complaint and respondent are in sharp disagreement as to what is meant by the phrase "made to retail at". The complaint alleges that "made to retail at" means the price at which respondent itself "usually and customarily sold the merchandise referred to in the recent, regular course of business". Respondent contends, on the other hand, that this language means "either (a) that the manufacturer expected that the merchandise

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would retail at the 'made to retail price', or (b) that *other* retailers had actually sold the merchandise at the 'made to retail' price."

5. No evidence was offered by counsel supporting the complaint as to how the consuming public would interpret an advertisement by a retail store which stated that a product was "made to retail" at a particular price. To support their position as to the meaning of this phrase Government counsel rely entirely on the decision of the Commission in *American Broadloom Carpet Co.*, 53 FTC 239, in which the Commission purported to uphold the finding of its hearing examiner that—

* * * respondent's use of such terms as "original" and "woven to sell for" could reasonably be interpreted as representing that the prices represented in connection therewith were customary and usual with respondent.

It should be noted, in connection with the *American Broadloom Carpet* case, that the finding made there was based on the record in that case, which disclosed that respondent used the term "original", as well as "woven to sell for", in its advertisements. Furthermore, while the examiner (whose findings the Commission purported to uphold) did, on the one hand, suggest that "woven to sell for" amounted to a representation that the product was customarily sold at the indicated price by respondent, he also found (at 244):

Upon examination respondent was unable to produce any suggested retail price made by any manufacturer, mill or supplier with whom he dealt for the reason that none such were ever printed or communicated to him, nor did any supplier furnish respondent with any information which would justify the representation of "woven to sell for," which very language imports that the producer of the merchandise, at the time of production, intended, designed and produced it to "sell for" the figure quoted. [Emphasis supplied.]

Whether the Commission intended to hold that "woven to sell for" means the price "the producer of the merchandise at the time of production, intended, designed and produced it to 'sell for'", or the price the retail outlet advertising the product customarily and usually sold it for, is not clear from the decision. In any event, the finding in that case, based on the record there before the examiner and the Commission, cannot serve as the basis for a finding in this case concerning the meaning of the phrase "made to retail at".

6. The only evidence in the record concerning the meaning of the phrase "made to retail at" in connection with a comparative price claim, is that given by respondent's advertising manager, who testified that he interpreted it to mean the price suggested by the manufacturer of the product "where it is sold in other stores or destined to be sold in other stores at the historic markup" or, stated differently, that it is

"somewhat of a suggested retail price, with the addition that it is customarily sold at that price". It may be noted that while the complaint asserts, and counsel supporting the complaint contend, that the "made to retail" price refers to the price at which the product is customarily and regularly sold by the retailer so advertising it, counsel supporting the complaint in a number of instances have not seen fit to rely entirely on this theory to establish a case of price misrepresentation. Instead of showing merely that respondent had not customarily sold the product at the indicated "made to retail" price, counsel sought to establish in a number of instances that the price was not one which had been recommended by the manufacturer and that the product customarily did not sell at the indicated price in the trade area.

7. The examiner recognizes that the Commission is not required to sample public opinion in order to determine how the consuming public would interpret certain words in the English language. However, where the meaning contended for is not that which is implied by the normal usage of the word or phrase, such meaning must be established by substantial, reliable and probative evidence. In this case the examiner, based on a substantial number of years as a Federal Trade Commission hearing examiner, cannot ascribe to the phrase "made to retail at" any such meaning as that contended for by counsel supporting the complaint. Based on his own so-called expertise and ordinary common sense the examiner, in the absence of evidence to the contrary, finds that the phrase would imply to members of the purchasing public that it is a price at which the manufacturer contemplated the product would be sold to the public, taking into consideration the normal and customary markup in the industry. This implies, as respondent's advertising manager recognized, not merely a subjective element of what the manufacturer had in mind, but also the objective element that the product normally sells for that price in the market. The latter is a very necessary element in the meaning of the phrase since, by giving the public the "made to retail" price and the actual price of the advertiser, the advertiser is conveying to the consumer the impression that he will achieve an actual saving from a bona fide comparative price. The consumer is not interested in fictitious saving from some artificial "made to retail" price which has no meaningful relationship to the realities of the market.

8. Respondent suggests that if the examiner does not accept the meaning of the phrase "made to retail at" which is alleged in the complaint, viz, it means the price at which the advertiser customarily sells the product, the complaint must be dismissed as to the items so adver-

tised. This by no means follows. As above indicated, counsel supporting the complaint attempted to show, in a number of instances, that the products were not made to sell at the indicated prices and did not sell at such prices in respondent's trade area. Respondent attempted in a number of such instances to show to the contrary. The issue was thus clearly joined and litigated, even though the complaint incorrectly alleged the meaning of the term "made to retail at". Whether respondent's products were or were not "made to retail at" the indicated prices is reserved for later discussion, in connection with each of the various items of merchandise involved in the complaint.

"Sold Nationally At"

9. One of the advertisements challenged by the complaint refers to the merchandise in question as being "sold nationally at \$22.95 to \$26.95" and offers it for sale at \$10.00. The complaint alleges, and counsel supporting the complaint contend, that to advertise a product as being "sold nationally at" a certain figure is to represent that this is the price at which the merchandise usually and customarily is sold in the trade area where it is being offered for sale. In the opinion of the examiner the phrase in question means exactly what it says, viz, that this is the price at which the product is generally sold in the United States. This does not imply, however, that it necessarily sells at this price in each and every trade area of the United States or that it may not be sold at lower prices in a few trade areas.

"List Price"

10. Several of the advertisements used by respondent refer to a "list price" of the product in question and then give respondent's actual sale price. The complaint alleges and counsel supporting the complaint contend that, by referring to a "list price", respondent is implying that the product in question is usually and customarily sold at that price in the trade area where it is being offered for sale. Respondent, on the other hand, seeks to give the phrase a more restricted meaning, viz, that it "means only that the price named is that which appears on the manufacturer's price list."

11. In the opinion of the examiner, a reference to a "list price" in comparative advertising implies more than that the indicated price is a price appearing on a manufacturer's schedule of suggested prices. It also implies that the listed price bears a realistic relationship to the price at which the product normally sells. A list price schedule is not unlike the use of a pre-ticketing device by a manufacturer. If a price ticket contains an artificial price which does not reflect the price at which the article normally sells, it has been held that the

manufacturer is guilty of supplying an instrumentality for deception concerning the normal selling price of the product.² A manufacturer who uses and distributes price lists which he has reason to believe do not reflect bona fide retail selling prices is in no different position than a manufacturer who uses and distributes fictitious price tickets.³ A retailer who uses an artificial list price in comparative price advertising is in no better position than is the manufacturer.⁴

Respondent suggests that list prices are used in the New York area merely to help the consumer identify the product, in a manner similar to the use of a model number. While there is some testimony to this effect, principally by respondent's officials, the greater weight of the evidence is to the contrary. A retailer of appliances, to whose testimony respondent refers, actually testified that customers "very rarely" identified a product by reference to a list price. An official in respondent's appliance department testified that: "The list price, as I understand it, is the price that the manufacturer lists it and *also what some people sell it at*" (emphasis supplied). It is significant that, in advertising a rotisserie appliance, respondent used "list price" and "made to retail at" interchangeably. In connection with the phrase "made to retail" respondent has recognized, as discussed above, that there is involved an element of customary selling price, in addition to merely an indication of the price proposed by the manufacturer. It seems apparent that by using the terms "list price" and "made to retail" interchangeably respondent has indicated that it interprets both of these terms as having a similar meaning.

It is apparent from the whole context of the advertising in question that the reference to a "list price" implies that such price bears some reasonable relationship to the actual going price of the product. The whole purpose of the advertisement is to create the impression that the customer is going to make a substantial saving by buying from Klein. Respondent's basic *modus operandi* is to try to convince the consumer that he or she is going to get a "bargain". As respondent's advertising manager testified:

Very simply it is Klein's business to sell bargains. We have nothing else to offer outside of offering the fashions *at the lowest prices in town against other stores that sell at regular prices * * ** We have only bargains to offer. [Emphasis supplied.]

² *The Orloff Co., Inc.*, 52 FTC 709; *Kay Jewelry Stores, Inc.*, 53 FTC 548; and *The Baltimore Luggage Company*, Docket 7683, March 15, 1961.

³ *Art Nat'l Manufacturers Distrib. Co.*, Docket 7286, May 10, 1961; *Goodyear Tire & Rubber Co.*, 33 FTC 298.

⁴ *Sears, Roebuck & Co.*, 33 FTC 334.

The customer obviously does not believe he is getting a bargain because respondent's price is below some theoretical "list price" appearing on a piece of paper issued by a manufacturer. To him the use of a list price, together with an advertised selling price, obviously implies that the difference between the two represents a realistic measure of the bargain he is being offered and the savings he can achieve. It is, accordingly, concluded and found that by the use of the term "list price" respondent represents that the amount indicated is the price at which the product usually and customarily sells in the trade area where it is being advertised, and that the difference between said amount and the amount at which the product is advertised for sale represents, substantially, the saving which will be realized by the customer over the customary selling price.

"Value" and "Equal To"

12. The other two terms used by respondent in comparative price advertising are "value" and "equal to" both of which, according to the complaint, constitute a representation that the product referred to usually and customarily sells at the indicated amount in the trade area where it is so advertised. Respondent apparently does not question that this is the normal meaning of these terms. It is, accordingly, concluded and found that by the use of amounts in connection with the terms "value" and "equal to" respondent represents that said amounts are the amounts at which the merchandise referred to is usually and customarily sold at retail in its trade area, and that through the use of such amounts and the lesser amounts at which the products are advertised for sale, it represents that the difference between such amounts represents, substantially, the savings to the customer from the prices at which said merchandise was usually and customarily sold in said trade area.

The Falsity of the Price and Savings Claims

"Made To Retail At"

(a) Mattresses

13. On January 1, 1959, and January 14, 1959, respondent advertised certain mattresses for sale in the New York Daily News and the New York Post, respectively. The advertisement in each case contained the statement: "Cuban Revolt Stops Mattress Export Shipment", and indicated that the mattresses, of which there were three grades, had been "*made to retail at*" prices from \$39.50 to \$79.50, respectively. They were advertised as being for sale by respondent at prices from \$19.99 to \$39.99, respectively. The only evidence offered to establish the falsity of respondent's "made to retail" price

claims is that respondent itself had never theretofore or did not thereafter, down to the date of the complaint, ever sell any of the mattresses at the so-called "made to retail" prices.

14. It is the opinion and finding of the examiner that counsel supporting the complaint have failed to establish the falsity of respondent's comparative price claims concerning the mattresses in question. As heretofore indicated, a representation that a product was "made to retail at" a certain price is not a representation that the retailer offering it actually ever sold it at that price, but rather that the manufacturer intended it to be sold at that price and that it did in fact generally retail at the indicated price. There is no evidence in the record as to what price the manufacturer intended to sell the mattresses for or that they did not generally sell at the specified "made to retail" prices.

(b) "Thomas" Cotton Sport Coats

15. On May 25, 1959, and May 26, 1959, respondent advertised certain "Thomas' Cotton Sport Coats" for sale in the New York Daily News and the New York Mirror, respectively. The advertisements stated that the coats had been "*made to retail at \$35.00*", and offered them for sale at \$9.95, indicating that the purchaser would "Save \$25.05". Counsel supporting the complaint did not limit his proof merely to the fact that Klein's had not previously sold the coats at \$35.00, but sought to establish that \$35.00 was not the then market price of the coats.

16. The record discloses that the coats in question had originally been advertised for sale by the manufacturer in 1956 and 1957 for \$35.00, and that they had generally been retailed at that price throughout the country. During this period the manufacturer had sold the coats to retailers at \$19.75. Based on a markup of 35% to 40%, which was stated to be normal in the retail trade, and taking into account the dealer's selling costs, the coats usually sold at \$35.00, although there is evidence that one retailer in New York sold them at \$27.50. By 1959 the manufacture of this particular design coat had been discontinued, and the manufacturer sold his remaining stock of about 390 coats, consisting of broken sizes and odd lots, to respondent for \$7.35 apiece.

17. It seems evident that by May 1959 the going retail price of "Thomas" cotton sport coats was no longer \$35.00, but considerably less than that amount. They had originally been made to retail at \$35.00, but that was no longer the current "made to retail" price. There can be no question but that a statement that a product is "made to retail at" \$35.00, implies that it is the current price, otherwise the claim that the consumer will save \$25.05 is meaningless. Clearly,

in the absence of a statement to the contrary, a prospective purchaser would assume that this is the current price and that he is buying a current model.

18. Respondent's apparent justification for using the \$35.00 "made to retail" price in its advertising is that the manufacturer had given it a copy of an advertisement in which the coat was advertised as being for sale at "about \$35.00", and had advised it that that was what the coats "originally sold for". Respondent contends that it did not then know that the coats were not currently being sold for \$35.00. However, the manufacturer's representative testified that he told respondent's official that the advertisement in question had been run in 1956 and 1957. There can be no question from all the circumstances surrounding the transaction that respondent was aware it was dealing in a discontinued model, which was not then selling for \$35.00. Even if it was not actually aware of this fact, it was under an affirmative obligation to ascertain the true facts if it wished to make a representation to the public in its advertising matter, as to the comparative price and savings on the product. This obligation to the public could not be fulfilled merely by obtaining a copy of a manufacturer's advertisement, for the record so to speak, and disregarding the facts as to whether this was actually the price at which the product was then being sold in the market.

19. It is concluded and found that respondent's representations in connection with advertising "Thomas" cotton sport coats were false, misleading and deceptive in that the price which said advertisement stated was the price at which said coats were "made to retail" did not represent the price at which such coats were then usually and customarily selling at retail in respondent's trade area, and in that the difference between said price and the price at which said coats were advertised for sale by respondent did not represent an actual saving from the price at which such coats were usually and customarily being sold in respondent's trade area.

(c) Roto-Broil Rotisseries

20. In an advertisement appearing in the New York Daily News of January 12, 1959, respondent advertised "Roto-Broil '400' Rotisseries" as being "made to retail at \$69.95", and offered said product for sale at \$29.99. The same rotisseries were offered for sale in a series of advertisements appearing in the Newark Evening News, the New York Mirror and The Newark Star-Ledger dated, respectively, March 31, 1959, and April 3, 1959. In all of the latter ads the product was stated to have a "list price" of \$69.95, rather than a "made to retail" price, and it was offered for sale at \$28.99.

21. The record discloses that the roto-broiler in question, was the manufacturer's "Golden Capri" model and that the manufacturer's list price was \$69.95 at the time it was so advertised. According to the credited testimony of the merchandise manager of respondent's hard goods division, at the time the product was advertised as being "made to retail at" and as having a "list price" of \$69.95 he had seen the manufacturer's price list and had actually priced the product at several stores in the area at \$69.95.

22. The only evidence to show that the roto-broiler was not "made to retail at" or did not have a \$69.95 "list price" is the testimony of a New York retailer, called by counsel supporting the complaint, to the effect that he had sold the product for about \$40.00. However, the same witness also indicated that he tried to get and did sometimes get \$69.95 for the broiler, and that he usually sold it for between \$47.00 to \$48.00.

23. In the opinion of the examiner the testimony of the single retailer called by counsel supporting the complaint does not destroy the effectiveness of the evidence which discloses that the product did actually list at \$69.95 and that it was being sold at that price in various stores in the New York area. It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the roto-broil rotisseries advertised by respondent for \$29.99 and \$28.99 were not "made to retail at" or did not have a "list price" of \$69.95.

(d) Mink Stoles and Capes

24. In an advertisement in the New York Mirror of March 4, 1959, respondent advertised "Natural Mink Stoles & Capes" as having been "*made to retail at \$299 to \$329*", and offered them for sale at \$189. Respondent's fur department is actually operated by a concessionaire, but the advertisement is in the name of respondent. No question has been raised as to respondent's responsibility for the advertisement of products sold by its concessionaires.

25. The only evidence cited by counsel supporting the complaint as establishing that the furs had not been "made to retail at \$299 to \$329" is the testimony of respondent's fur concessionaire that the particular furs advertised had never previously been sold by him for any price other than for the sale price of \$189. However, the testimony of the same witness indicates that the furs in question had been purchased specially for this particular sale, and that he had sold comparable furs prior thereto at prices ranging from \$249 to \$299. He further testified that the furs in question had been purchased at

a price of \$167.50, and that he had been advised by the manufacturer that similar furs were being sold to others at \$195.00 to \$225.00 and that at the normal retail markup such furs would sell at from \$299 to \$329. The concessionaire also shopped a number of his competitors, including Macy's, Arnold Constable and Abraham & Straus, to ascertain that comparable furs were selling at the prices indicated by the manufacturer. There is no evidence in the record to contradict the testimony of respondent's concessionaire and it is, accordingly, credited.

26. It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the mink stoles and capes advertised by respondent, as above indicated, were not made to retail at \$299 to \$329.

(e) Pure Silk Costumes

27. In advertisements appearing in the New York Post and the New York World-Telegram on April 13, 1959, respondent advertised certain "Pure Silk Costumes" as having been "*made to retail at \$25.00 to \$35.00*", and offered them for sale at \$11.00. Counsel supporting the complaint assert that respondent never sold the advertised costumes at any price other than \$11.00. However, the record fails to establish this as a fact. Furthermore, as heretofore discussed, the fact that respondent never sold the product at the indicated price does not establish that the representation as to a "made to retail" price is false, misleading and deceptive.

28. The only evidence in the record as to what the dresses in question actually sold for in the market is the uncontradicted and credited testimony of the head buyer in respondent's dress department that dresses of the type advertised were being sold for \$25.00 to \$35.00 in "the Fifth Avenue stores and all the fine shops around the country". It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the representation made by respondent as to the "made to retail" price of the silk garments in question is false, misleading and deceptive.

(f) Cannon Towels

29. Respondent advertised Cannon bath towels in the New York Daily News of April 27, 1958, as being "*made to retail at \$1.29*", and offered such towels for sale at 69¢. The same advertisement is the subject of a separate charge in the complaint, in which it is alleged that respondent failed to reveal that the towels were seconds or irregulars.

30. There is no evidence in the record whatsoever as to what the "made to retail" price of the advertised towels were, either as first

goods or as seconds. The gravamen of this charge actually is the failure to reveal the irregular nature of the towels, rather than any misrepresentation as to the price thereof. This charge will be separately dealt with hereinafter. It is concluded and found that counsel supporting the complaint have failed to sustain the burden of proving that the representation made by respondent as to the "made to retail" price of the Cannon towels advertised by it is false, misleading and deceptive.

(g) Tub Enclosures

31. In a series of advertisements in the New York Sunday and Daily News appearing on various dates between November 16, 1958, and May 31, 1959, respondent advertised certain "Aluminum and Frosted Glass Tub Enclosures" as being "made to retail at \$89.95", and offered such tub enclosures for sale at \$39.95 (except in the advertisement of May 31, 1959, in which sale price the tub enclosure was stated to be \$29.95). Respondent also advertised the same tub enclosures in the New York Times of November 9, 1958, for \$39.95 but instead of using the phrase "made to retail at \$89.95" it used the expression "\$89.95 value".

32. The evidence discloses that the tub enclosures in question were purchased by respondent's concessionaire directly from the manufacturer, Anoroc Products, Inc., of Corona, New York. Anoroc's price list of February 9, 1959 (which antedates a number of the advertisements in evidence), discloses that the two models sold to respondent, the "Champion" and the "De Luxe", had a retail "list price" of \$59.95 and \$69.95, respectively. While the February 1959 price list may have been somewhat lower than the previous price list, neither of the tub enclosures in question had ever been listed for \$89.95.

33. The testimony of a representative of Buildcraft Products, a major distributor of Anoroc tub enclosures in the New York metropolitan area, discloses that he sold the De Luxe tub enclosure in 1959 for \$70.00, which included an installation fee of approximately \$10.00. The price of the door advertised by respondent, it may be noted, did not include installation, the advertisement indicating that this was available for a separate charge of \$10.00.

34. The testimony of a competing manufacturer of tub enclosures reveals that his enclosures, which are of a heavier and better quality than Anoroc's De Luxe enclosure, sell for \$85.00, including an installation fee of approximately \$10.00, and had sold for that price for approximately three years, including 1959. The same manufacturer testified that the Anoroc tub enclosures were midway in price between

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his more expensive enclosures and certain lower-priced enclosures sold by a group of Florida manufacturers, it being his testimony that the highest price for which the De Luxe Anoroc tub enclosure had sold was \$70.00.

35. Respondent's justification for using an \$89.95 "made to retail" price is based partly on a self-serving letter dated June 30, 1959 (subsequent to the insertion of all but one of the advertisements in question), written by respondent's own concessionaire to respondent, stating that four named retailers were selling the Anoroc tub enclosure (models not identified) "at \$89.95 and higher". One of the dealers mentioned in the letter is Buildcraft Products, whose representative testified that he sold the De Luxe tub enclosure for \$70.00, including a \$10.00 installation charge. Respondent's concessionaire also testified vaguely that he had been told by the manufacturer's salesman that the enclosure sold "anywhere from \$50.00 to \$125.00, but it averaged up somewhere around \$80.00 or \$90.00", and that he had also checked with a representative of his competitor, Korvette, who, while he did not sell the door for \$89.95, "knew of people selling it for that".

36. The examiner is satisfied from the record as a whole that the maximum retail price on the De Luxe enclosure was \$70.00, including installation, and at least \$10.00 less on the Champion tub enclosure. The examiner is also satisfied that respondent made no bona fide effort to ascertain the going price on the tub enclosures when it advertised them. It could readily have obtained a price list which would have disclosed that the De Luxe enclosure listed for \$69.95 and the Champion for \$59.95. It was not until November 1959, when a Commission investigator showed respondent's concessionaire the manufacturer's price list, that respondent changed its advertised "made to retail price" to \$69.95. Even this price was excessive since it was the list price of the De Luxe tub enclosure and, according to the testimony of respondent's concessionaire, it was the less expensive Champion enclosure which was being advertised and sold. The \$69.95 price was even excessive as to the De Luxe enclosure, which was being sold for that price installed.

37. It is concluded and found that respondent made false, misleading and deceptive statements concerning the Anoroc tub enclosures advertised by it, in that the amount set out in connection with the words "made to retail at" and "value" was in excess of the price at which such tub enclosures were intended to sell by the manufacturer, and did usually and customarily sell, in the New York metropolitan area, and in that the difference between such amount and the lesser amounts at which they were advertised for sale did not repre-

sent the actual savings from the prices at which such merchandise had usually and customarily sold in respondent's trade area.

List Prices

(a) Percolators and Skillets

38. Respondent caused to be disseminated in the New York Daily News of February 18, 1959, an advertisement in which it offered for sale at \$7.99 automatic coffee percolators having a purported "*list price*" of \$24.95, and automatic skillets having a purported "*list price*" of \$19.95. The evidence discloses that in 1959 when these items were being advertised, Merit Enterprises, Inc., the manufacturer from which respondent purchased them, had no list prices. The bulk of the manufacturer's sales (about 75%) was to discount-type operations such as respondent, including Davega, Korvette, and Master's, which sold these items at retail at from \$8.00 to \$11.95. A smaller percentage of the manufacturer's sales was to house-to-house canvassers, who sold the percolators at a maximum price of \$19.95. Another indeterminate percentage of the manufacturer's sales was to catalog houses, which sold these items to industrial accounts for use as prizes.

39. As partial justification for the use of the list prices referred to above, respondent relies on a letter from the manufacturer's sales representative stating that the automatic coffee percolator "is selling around the country for \$25.95" and, further, that a named distributor in Brooklyn had been selling it "for over a year for \$25.95". This letter, it may be noted, is dated July 9, 1959, approximately five months after the percolators had been advertised by respondent, and does not refer to the price of the skillets. The distributor mentioned in the letter is a house-to-house selling organization, not a regular retail outlet, a fact concerning which respondent was informed by the manufacturer's sales representative. Respondent relies further on the fact that the prices indicated in its ads as the list prices were stamped on the cartons in which the articles were enclosed.

40. As has heretofore been found, when a "list price" is used in comparative advertising, it means more than a price appearing on some document issued by a manufacturer. It is partially that, but it also represents, as far as the consumer is concerned, a price which bears some reasonable relationship to the going price in the market. It seems clear from the record as a whole that respondent made no real effort to ascertain what the percolators and skillets were selling for in the market and, at best, was merely trying to take advantage of some technical price appearing on a carton, which price was substantially above the normal selling price of the products advertised.

The manufacturer itself had already abandoned the use of price lists, and approximately three-fourths of its products was being sold by establishments like respondent's for substantially below the represented list prices.

41. It is concluded and found that respondent made false, misleading and deceptive statements concerning the percolators and skillets advertised by it in that the amounts set out in connection with the words "list price" were not contained in any current price list of the manufacturer and were in excess of the prices at which these articles of merchandise were usually and customarily sold at retail in respondent's trade area, and in that the difference between such amounts and the lesser amounts for which the articles were advertised did not represent the actual savings which would be realized from the prices at which the merchandise had been usually and customarily sold in respondent's trade area.

"Equal To" and "Value"

(a) Pearl Necklaces and Chokers

42. In the New York Times issues of August 23, 1959 and November 15, 1959, respectively, respondent caused to be disseminated advertisements for "Cultured Pearl Necklaces & Chokers". In the issue of August 23, 1959, said pearls and chokers were offered for sale in four different price brackets, viz, \$5.99, \$8.99, \$12.99 and \$19.99, and were represented as being "guaranteed equal to" necklaces of \$15.00, \$20.00, \$30.00 and \$45.00, respectively. In the issue of November 15, 1959, cultured pearls and chokers were offered for sale in six different price brackets and were represented as being "guaranteed equal to" necklaces selling at substantially higher specified prices.

43. Counsel supporting the complaint offered evidence with respect to a single strand of pearls which had purportedly been purchased for \$12.99 pursuant to respondent's advertisement of August 23, 1959, and which was allegedly represented as being "guaranteed equal to" pearls selling at \$30.00. Before considering the evidence relating to the issue of whether the pearls in question were or were not equal to \$30 pearls, there is presented a threshold question as to whether the record contains sufficient reliable evidence that the pearls were actually purchased from respondent pursuant to the advertisement in question. This preliminary issue arises from the fact that the person who had purportedly purchased the pearls was deceased at the time of the hearing, and the circumstances of the purchase were testified to by a Commission attorney-investigator, to whom they had been related by the deceased.

44. According to the Commission's attorney-investigator, the pearls were turned over to him on August 25, 1959, together with a copy of the advertisement by respondent in the New York Times of August 23, 1959, by one Benjamin Richter, a retail jeweler. Richter advised the Commission representative that he had purchased the pearls from respondent's establishment pursuant to the advertisement in question. Affixed to the pearls, by a metal clasp, is a tag bearing the name "S. Klein" and a price of "\$12.99 + Tax". Included in the box in which the pearls were enclosed is a guarantee certificate containing the printed signature "GEMMARIUS" and stating that the "certificate is your guarantee that each pearl in this necklace is a *cultured pearl*." Sometime between the date when he turned over the exhibit to the Commission representative and the date of the hearing, Richter died.

Respondent contends that the testimony of the Commission representative is hearsay, both as to the fact that Richter purchased the pearls from it and the fact that he did so pursuant to its advertisement of August 23, 1959. Accordingly, it contends that the testimony offered by other witnesses called by counsel supporting the complaint to establish that the pearls were not "equal to" \$30.00 is immaterial since it relates to a string of pearls which is not properly in the record.

Respondent is, undoubtedly, correct that the testimony of the Commission investigator, based on what Richter reported to him, is hearsay. It does not follow, however, that such testimony may not properly be made the basis of a finding in this proceeding. Hearsay evidence may be received in evidence under the more liberal rules which apply in administrative proceedings and, where the circumstances vouch for its reliability, may be made the basis for a finding. In this case the surrounding circumstances are such, in the opinion of the examiner, as to vouchsafe the reliability of the hearsay testimony.

The pearls bear respondent's price tag thereon, and the amount on the tag, \$12.99, conforms with the price in respondent's advertisement in the New York Times of August 23, 1959. The pearls, together with the advertisement, were turned over to the Commission investigator only two days after the advertisement had appeared. Although the concessionaire who operates respondent's jewelry department was called as a witness, as well as the buyer assisting him in his operation, and both testified at the instance of respondent concerning the value of the pearls in question, neither denied that the pearls were theirs or that they were not the pearls which had been offered in the adver-

tisement in question. No claim was made by either witness that the price tag was not theirs, or that the metal clasp by which it was attached to the pearls had been tampered with, or that the guarantee certificate was different from the one that accompanied their pearls. In view of Richter's death these two witnesses were in the best position to question the authenticity of the pearls and whether they had been offered pursuant to the advertisement in question. It is concluded and found that the pearls in evidence were purchased by Richter for \$12.99, pursuant to an advertisement which represented that they were "guaranteed equal to \$30.00".

45. The next question presented is whether the pearls were equal in value to \$30.00 pearls. According to the testimony of two importers of pearls who were called as witnesses by counsel supporting the complaint, the pearls would have sold for between \$5.00 and \$6.00 at wholesale in 1959. The same two witnesses indicated that the usual retail markup in the industry is 100 per cent, so that the pearls would have sold at retail for between \$10.00 and \$12.00, with \$15.00 being the outside limit of their retail value at that time. This testimony, if accepted, would mean that the \$30.00 "guaranteed equal" price advertised by respondent was grossly in excess of the price at which pearls of this quality would sell in the market.

46. Respondent questions the expert judgment of the two witnesses called in support of the complaint because of an alleged discrepancy between the amounts which they testified certain other pearls shown to them by respondent on cross-examination were worth, in comparison with the actual retail prices at which such pearls were allegedly purchased by a witness acting on behalf of respondent. In the opinion of the examiner the facts relied upon by respondent are not a sufficient justification for concluding that the two importers called by counsel supporting the complaint were not qualified experts as to the value of the pearls at issue, and for disregarding their testimony concerning the retail value of such pearls. Both of the witnesses appeared to have a good grasp as to what it is that contributes to the value of a cultured pearl necklace and what makes one necklace more expensive than another. Neither one had heard the testimony of the other or discussed his testimony with the other; yet their estimates as to the wholesale and retail value of the pearls at issue were substantially in line with one another. The mere fact that several other strings of pearls shown to them on cross-examination were purchased by one of respondent's witnesses at retail for prices above those estimated by the two expert witnesses does not destroy the efficacy of their testimony.

It may be noted in this connection, that they were actually shown six strands of pearls on cross-examination. None of these pearls were actually strung in the same manner as they would be when offered for sale at retail, with a clasp affixed thereto. Each of the experts gave an estimate as to the wholesale value or price of each strand. Their estimates as to the price of each were, with one exception, substantially close to one another. Respondent's contention that their estimates are not valid is based on the fact that in three out of the six instances the estimates were substantially below those at which the pearls in question were actually purchased by its representative in department stores in the New York midtown area. In the opinion of the examiner, it is just as logical to attribute these variances to an above average markup in the three stores in question, as it is to conclude that the differences point to a lack of familiarity with prices and values by the experts. It is significant, in this connection, that in the case of the fourth strand of pearls purchased in a smaller jewelry establishment, the estimate of one of the experts was almost exactly the same as the actual retail purchase price.

In any event, the primary issue is the going value or price of the strand of pearls which is the subject of the charge in this proceeding. On this score, the testimony of both experts, as above found, is in substantial accord. It is also worthy of note that respondent produced no reliable countervailing evidence with respect to the value of these pearls.⁵ Even the testimony of the two witnesses whom respondent called with respect to the value of the pearls establishes that the pearls were somewhat overvalued by respondent in its representation that they were "guaranteed equal to \$30.00". The testimony of the buyer for respondent's concessionaire was to the effect that the pearls would have sold for \$25.00 in 1959. While the concessionaire himself testified that the pearls would sell for \$30.00 on the present market, the testimony of respondent's other witness and that of the two witnesses called in support of the complaint indicates that as a result of a scarcity

⁵ Respondent sought to introduce in evidence a written estimate of the "approximate retail replacement cost" of the pearls in question at the present time. According to this proposed evidence, \$30.00 would represent the approximate retail replacement cost of the pearls. Such evidence was obtained by one of respondent's attorneys, who had exhibited the pearls to an appraiser of pearls. The evidence was excluded by the undersigned as being hearsay. It may be noted, in this connection, that the situation is substantially dissimilar to that discussed above with respect to the hearsay evidence pertaining to the purchase of the pearls in question by Richter. No justification was given by respondent for not producing the person who had actually appraised the pearls, other than the alleged expense that would be involved in his testifying. Since the hearsay evidence involved the very fact at issue, viz, the retail price or value of the pearls, and there was no legal justification for the non-production of the alleged expert, and there were no circumstances vouchsafing its reliability, the examiner considered it improper to receive such evidence, particularly in the light of the fact that counsel supporting the complaint had already produced "live" evidence as to their value.

in the availability of cultured pearls the market price today is anywhere from 20% to 40% above that of 1959.

47. In justification of its use of the "guaranteed equal to" prices advertised by it, respondent cites the testimony of the operator of its jewelry concession to the effect that before fixing the prices in question, he had shopped four midtown Manhattan department stores and two jewelry stores.⁶ This, in the opinion of the examiner, does not justify the use of comparative prices which the record establishes were in excess of the usual and customary prices throughout the area. When respondent seeks to make a representation as to comparative prices and savings, it cannot take refuge behind a mere sampling of prices in a few other establishments, particularly where it represents that the prices which it is using for comparative purposes are "guaranteed" to be equal to such usual and customary prices.

48. It is concluded and found that respondent made false, misleading and deceptive statements concerning certain of the cultured pearls and chokers advertised by it, in that the amount of \$30.00 set out in connection with the words "guaranteed equal to" was in excess of the price at which certain of such pearls and chokers usually and customarily sold at retail in the New York City trade area, and the difference between such amount and the price at which such pearls and chokers were advertised for sale did not represent the actual savings which would be realized by the consumer.

(b) Tub Enclosures

49. As above found, respondent advertised certain aluminum and frosted glass tub enclosures as being "made to retail at \$89.95", and offered such tub enclosures for sale at \$39.95. In one advertisement that appeared in the New York Times of November 9, 1958, it represented that such tubs were an "\$89.95 value", and offered them for sale at \$39.95. It has already been found that \$89.95 was considerably in excess of the price at which such tubs customarily and regularly sold in the New York trade area. As previously found, by advertising said tub enclosures as having an "\$89.95 value" respondent misrepresented the usual and customary price of such tub enclosures in the New York trade area and the savings to be realized by the consumer in the purchase thereof.

"Nationally Sold At"

50. In the New York Times of June 28, 1959, respondent caused to be disseminated an advertisement for cashmere sweaters containing

⁶In the case of the department stores, the witness apparently examined what he considered to be comparable pearls in the establishments. However, in the case of the two jewelry stores he merely "window-shopped" the pearls.

the statement that such sweaters were "nationally sold at \$22.95 to \$26.95", and offering the sweaters for sale at \$10.00. Immediately below the price the advertisement contained the following statement: "(marked 'irregular' only because of this famous maker's extremely high standards of perfection)".

51. The evidence offered by counsel supporting the complaint establishes that the sweaters of the manufacturer in question normally do retail for between \$22.95 and \$27.95. The basis of the claim by counsel supporting the complaint that the sweaters do not customarily sell for \$22.95 to \$26.95, as represented, is not based on the falsity of the price claims, as such, but on the fact that the price claims were applicable to perfect sweaters, and that the advertisement does not sufficiently reveal that the advertised sweaters are imperfect.

52. The gravamen of the charge concerning the sweaters is the failure to make a conspicuous disclosure of the imperfect nature thereof, rather than any falsity in the price claims. This failure to disclose is the subject of a separate charge, which will hereinafter be separately discussed. In the opinion of the examiner the question of whether the fictitious price charge has been sustained depends on the outcome of the charge of failure to disclose. It may also be noted, however, that there is no evidence as to the nature of the alleged irregularity of the sweaters or as to the fact that such alleged irregularity would materially affect the normal selling price of such sweaters.

The Failure To Reveal Irregularity of Merchandise

(a) Cannon Towels

53. As heretofore found, respondent in the New York Daily News of April 27, 1959, caused to be disseminated an advertisement for Cannon bath towels. Said towels were, in fact, seconds or irregulars. This fact was in no way disclosed in the advertisement. The price tags affixed by respondent do contain a legend which respondent states is the abbreviation of irregular, viz, "IRR". Actually, this abbreviation looks more like the figure one with the additional letters RR slightly above the figure, so that it is by no means clear that it is the abbreviation of irregular. In any event, the failure to reveal in the advertisement itself the fact that the towels offered were irregular, is misleading and deceptive since, in the absence of such revelation, the public would ordinarily assume that it is first-class merchandise. "The law is violated if the first contact * * * is secured by deception * * * even though the true facts are made known to the buyer before he enters into the contract of purchase" (*Carter Products, Inc. v. FTC*, 186 F. 2d 821, 824, CA7, 1951).

(b) Cashmere Sweaters

54. As above found, in the New York Times of June 28, 1959, respondent caused to be disseminated an advertisement for cashmere sweaters, in which there appears a statement that such sweaters are "irregular". Counsel supporting the complaint contend that the fact that such sweaters were irregular is not adequately disclosed in the advertisement. Such contention is apparently based on the fact that the words, "(marked 'irregular' only because of this famous maker's extremely high standards of perfection)", do not appear in letters sufficiently large to be noticeable by the consuming public.

55. The complaint, in paragraph 7 thereof, charges respondent with advertising merchandise "which is known as 'seconds' or 'irregular' without disclosing such fact in the advertising of such merchandise". In paragraph 3 of the bill of particulars served and filed by counsel supporting the complaint, pursuant to order of the undersigned, counsel supporting the complaint identified the merchandise involved in this charge as follows:

The merchandise referred to in paragraph 7 of the complaint consisted of "Cannon" towels.

At no time did counsel supporting the complaint request leave to broaden the charge, as specified in the bill of particulars, so as to include the failure to conspicuously reveal the irregular nature of the cashmere sweaters. This charge as alleged in the complaint and specified in the bill of particulars is limited to Cannon towels, and involves a failure to disclose rather than an inadequate disclosure. It may also be noted that while the complaint quotes from the advertisement in question, it refers only to that portion dealing with price and makes no mention of the portion dealing with irregularity.

56. As above indicated, the advertisement does contain a reference to the irregular nature of the cashmere sweaters. This appears immediately below the statement of the price at which the sweaters are offered. While it is true that the reference to the irregular nature of the sweaters appears in letters much smaller than other portions of the advertisement, it does appear in a conspicuous place, and the examiner cannot find on this record that it is so unclear and inconspicuous that it would not generally be observed by the purchasing public. Under all the circumstances, it is the conclusion of the examiner that no finding may appropriately be made that respondent falsely and deceptively advertised its cashmere sweaters by failing to conspicuously reveal the irregularity thereof, particularly in view of the failure of the pleadings, as amplified, to clearly challenge this advertisement.

Misrepresentation as to Pure Silk Costumes

57. Respondent caused to be disseminated in the New York Post and in the New York World-Telegram of April 13, 1959, advertisements for "Pure Silk Costumes" at \$11.00. These advertisements have already been discussed above, in connection with the misleading price claims allegedly made in such advertisements. The complaint also charges such advertisements to have been deceptive by reason of the fact that the costumes described as "Pure Silk" contained some nonsilk garments.

58. The record establishes that between 20% to 30% of the dresses advertised as being "Pure Silk" were, in fact, made of other fibers. One of the nonsilk garments was purchased, in response to the advertisement, by a witness called in support of the complaint. The garment in question was found, on inspection by the purchaser, to contain a label indicating that it was 80% dacron and 20% flax. It is the position of respondent that the advertisements were not misleading because (a) they revealed the fact that there were nonsilk costumes in the group and (b) the garments themselves were all plainly marked as to fiber content and the racks on which they were sold in the store made no claim as to fiber.

59. In the opinion of the examiner the facts referred to by respondent do not constitute a proper defense. While the advertisement does contain the statement that the selection "also includes cotton hopsacking dresses with lined embroidered jackets, pure silk polka-dot bouffants and other born-to-be-praised original designs", this reference appears in small print in an inconspicuous position in the advertisement where it would be apt to be overlooked by many prospective purchasers. It may be noted, in this connection, that the advertisement in the New York Post not only includes the words "Pure Silk Costumes" in large bold type, but under this phrase there also appears in type almost as large a reference to "Pure Silk Linen-Type Textures", "Pure Silk Shantungs" and "Pure Silk Prints". In this context, the reference to other fabrics is clearly inconspicuous. Furthermore, the only other nonsilk fabric referred to in the advertisement is "cotton hopsacking". There is no reference to dacron and flax fabrics, which is the composition of the garment in evidence. The fact that the garments themselves are properly labeled or that the racks on which they were being displayed contained no reference to "pure silk" is immaterial since, as above indicated, it is the initial impression created by the advertisement which controls (*Carter Products v. FTC, supra*).

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60. It is concluded and found that the representation made by respondent, in advertising which it disseminated or caused to be disseminated, that certain garments were "Pure Silk" was false, misleading and deceptive in that a certain number of said garments were not, in truth and in fact, silk or made entirely from silk.

CONCLUSIONS

1. The use by respondent of the false, misleading and deceptive statements and representations hereinabove found to have been made by it had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and into the purchase of substantial quantities of respondent's merchandise because of such mistaken and erroneous belief. The failure of respondent to disclose the fact that certain of the merchandise advertised and sold by it was what is known as "seconds" or "irregulars" had the tendency and capacity to lead the public into the erroneous and mistaken belief that the merchandise referred to therein was first class and into the purchase thereof because of such erroneous and mistaken belief. As a result thereof, it may be inferred that substantial trade in commerce has been unfairly diverted to respondent from its competitors, and substantial injury has thereby been done to competition, in commerce.

2. The acts and practices of respondent, as hereinabove found, were, and are, all to the prejudice and injury of the public and of respondent's 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 REMEDY

1. Respondent contends that even if the record does establish some instances in which certain products were falsely advertised by it, it is not in the public interest to issue a cease and desist order in this proceeding. It relies, in this connection, on the fact that out of 75,000 to 100,000 items which it advertises per year, the Commission challenged only 40 to 50 items during the course of investigating it and that the complaint itself challenges a lesser number of items, with evidence being offered only as to some of the items challenged in the complaint. It relies further on the fact that it seeks to check carefully its advertising claims, particularly those as to comparative prices, and that its basic advertising policy is "to be as near absolute truth as we can get", recognizing that philosophically "there is no absolute truth".

2. The fact that evidence was offered only as to a relatively small proportion of the items advertised by respondent and that the charges in the complaint have been sustained as to an even smaller number of the items is, in the opinion of the examiner, wholly immaterial. The Commission is not required to sample respondent's advertising claims *in extenso* or to challenge any specific number of advertisements. The law does not require respondent to advertise its products, nor does it require it to make any claims, comparative or otherwise, with respect thereto. If respondent elects to do so, as indeed it has a right to, it is, in effect, a guarantor that the claims it makes are truthful. It has not fulfilled its duty to the public merely because the greater proportion of its advertisements are truthful or, indeed, because 99.9% of its advertisements are truthful. It can comply with the law only when its representations are 100% truthful.

3. Respondent's contention that it seeks through its advertising procedures to "be as near the absolute truth as we can get", is no defense. In the first place, the evidence discloses that its purported efforts to check its advertising claims, particularly as to comparative prices, are somewhat exaggerated, lacking in thoroughness and not necessarily calculated to insure complete truthfulness in its pricing claims. Secondly, as above indicated, it is not enough as far as the Federal Trade Commission Act is concerned "to be as near the absolute truth" as one can get. While it may be that in matters of philosophical disputation one can never be assured of "absolute truth" a commercial establishment which seeks to make comparative pricing and other claims must be sure that its claims are 100% truthful. It must undertake whatever procedures are necessary to insure that the claims it makes are fully sustained. Only thus can it fulfill its obligation to the public.

4. While it is true that the complaint has been sustained as to only a small portion of the items advertised by respondent, the pattern of misrepresentation is such as to indicate that it is more than sporadic or *de minimis*. Furthermore, there is no assurance from the evidence in this record that such violations as have been revealed will not reoccur. It is the conclusion and finding of the examiner that the public interest requires the issuance of an order to cease and desist to prevent a reoccurrence of the activities herein found to be illegal.

ORDER

It is ordered, That respondent S. Klein Department Stores, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise, do forth-

with cease and desist from disseminating, or causing to be disseminated, directly or indirectly, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which:

1. Represents, directly or by implication, that:

(a) Any amount is the price of merchandise in respondent's trade area when it is in excess of the price at which said merchandise has been usually and customarily sold in said trade area.

(b) Any saving is afforded in the purchase of merchandise from the usual and customary price in a trade area unless the price at which it is offered constitutes a reduction from the price at which said merchandise has been usually and customarily sold in said trade area.

(c) Merchandise is composed of 100% silk fibers, when such is not the fact, or misrepresenting, in any manner, the fiber content of merchandise. Provided, however, that nothing in (c), above, shall relieve the respondent from the obligation to comply with the Textile Fiber Products Identification Act or forbid the respondent from labeling and offering products subject to that Act in the manner prescribed thereby and the Rules and Regulations promulgated thereunder by the Commission.

2. Misrepresents, in any manner, the amount of savings available to purchasers of respondent's merchandise, or the amount by which the price of merchandise has been reduced from the price at which it is usually and customarily sold in the trade area where the representation is made.

3. Uses the words or terms "made to retail at" and "save", "list", "value", "equal to", or any other words or terms of the same import, to refer to prices of merchandise unless such amounts are the prices at which the merchandise has been usually and customarily sold in the trade area where the representation is made.

4. Offers for sale merchandise which is composed of irregulars or seconds unless such fact is clearly disclosed in the advertising and in connection with said merchandise.

It is further ordered, That the complaint be, and the same hereby is, dismissed insofar as it alleges that the respondent made false, misleading and deceptive representations through the use of the words "nationally sold at" and the setting out of amounts in connection therewith, and insofar as it alleges that respondent made false, misleading and deceptive representations as to the prices at which it had sold certain merchandise in the recent, regular course of business and as to the savings which would be afforded from such prices.

ORDER DISMISSING THE COMPLAINT

This matter having been heard by the Commission upon the appeal of the respondent from the hearing examiner's initial decision, and the Commission having considered the briefs and oral argument:

It is ordered, That the complaint be, and it hereby is, dismissed.
By the Commission, Commissioners Kern and MacIntyre dissenting.

IN THE MATTER OF

OHMLAC PAINT & REFINING CO., INC., ET AL.

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

Docket 8081. Complaint, Aug. 19, 1960—Decision, Feb. 24, 1962

Order requiring a seller of paint products in Long Island City, N.Y., to cease misrepresenting its prices in newspaper advertising by such statements as "2 for 1 Sale—Buy one gallon or quart—Get One Free", "Quality Paint at Factory Prices", etc., when the customary retail prices were substantially lower than the amounts listed, two gallons were always sold for \$6.98, the price specified for one, and the advertised prices were two to four times as much as factory prices.

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 Ohmlac Paint & Refining Co., Inc., a corporation and Charles A. Jacobs, individually and as an officer of Ohmlac Paint & Refining Co., Inc., and Betty Jordan Paint Factories, Inc., a corporation, and Irving Rubin, Sidney Jacobs and Charles A. Jacobs, individually and as officers of Betty Jordan Paint Factories, Inc., 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 as follows:

PARAGRAPH 1. Respondent Ohmlac Paint & Refining Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 41-40 Crescent Street, Long Island City, N.Y. Individual respondent Charles A. Jacobs is an officer of Ohmlac Paint & Refining Co., Inc., and his address is the same as that of said corporate respondent. Respondent Betty Jordan Paint Factories, Inc., is a corporation organized, existing and doing

ORDER DISMISSING THE COMPLAINT

This matter having been heard by the Commission upon the appeal of the respondent from the hearing examiner's initial decision, and the Commission having considered the briefs and oral argument:

It is ordered, That the complaint be, and it hereby is, dismissed.
By the Commission, Commissioners Kern and MacIntyre dissenting.

IN THE MATTER OF

OHMLAC PAINT & REFINING CO., INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
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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 Ohmlac Paint & Refining Co., Inc., a corporation and Charles A. Jacobs, individually and as an officer of Ohmlac Paint & Refining Co., Inc., and Betty Jordan Paint Factories, Inc., a corporation, and Irving Rubin, Sidney Jacobs and Charles A. Jacobs, individually and as officers of Betty Jordan Paint Factories, Inc., 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 as follows:

PARAGRAPH 1. Respondent Ohmlac Paint & Refining Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 41-40 Crescent Street, Long Island City, N.Y. Individual respondent Charles A. Jacobs is an officer of Ohmlac Paint & Refining Co., Inc., and his address is the same as that of said corporate respondent. Respondent Betty Jordan Paint Factories, Inc., is a corporation organized, existing and doing

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business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 24-13 Bridge Plaza North, Long Island City, N.Y. Individual respondents Irving Rubin, Sidney Jacobs, and Charles A. Jacobs are officers of Betty Jordan Paint Factories, Inc., and their addresses are the same as that of said corporate respondent.

Respondent Betty Jordan Paint Factories, Inc., is a wholly owned subsidiary of respondent Ohmlac Paint & Refining Co., Inc., and the individual respondents, Charles A. Jacobs, Irving Rubin, and Sidney Jacobs, cooperate in formulating, directing and controlling the policies, acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for more than two years last past have, engaged in the business of selling and distributing paint and related products to the public under the label or trade name of "Betty Jordan" through retail outlets located in the States of Connecticut and New York.

PAR. 3. In the course and conduct of their business respondent Ohmlac Paint & Refining Co., Inc., manufactures Betty Jordan Paint in a factory owned and operated by it in Newark, New Jersey, and upon order by respondent Betty Jordan Paint Factories, Inc., the parent corporation ships or causes such paint products to be shipped from the State of New Jersey to the Betty Jordan paint stores in the States of Connecticut and New York, where said products are sold at retail, and respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in said paint products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents advertise their paints in various newspapers. Among and typical, but not all inclusive, of the statements contained in such advertisements are the following:

for the Gal with Home Decorating on Her Mind

NOW . . . PAINT TWO ROOMS

FOR THE PRICE OF ONE!

(picture of
a girl
pointing a
pencil at
certain
words in the
advertisement)

during BETTY JORDAN'S

2 for 1 SALE

BUY ONE
GALLON
or quart
GET ONE
FREE

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There's no time to lose while the 2-for-1 Sale is on.

* * * Only Betty Jordan can make this offer because

only Betty Jordan sells direct-to-you through

factory branches. There are no middlemen

profits * * * no fancy stores or selling

fixtures * * * PLUS TREMENDOUS SAVINGS during

the 2-for-1 Sale. So make your selections now. . .

BUY ONE gallon or quart. GET ONE FREE!

SATISFACTION GUARANTEED

Your Money Back On Unused Portion of Your Paint

Purchase If You Are Not Completely Satisfied

QUALITY PAINT AT FACTORY PRICES (And NOW the Second

Gal. or Qt. is FREE)

(Picture of
can of
paint)

ALKYD FLAT ENAMEL FREE TINTING SERVICE! NOW 2-For-The-Price- Of-1! \$5.98 * * * * *	Exterior House Paint FREE TINTING SERVICE NOW 2-For-The-Price- Of-1! \$5.98 * * * * *	Decor-Tex LATEX FLAT NOW 2-For-The-Price- Of-1! In-colors Slightly Higher. \$6.98
Cement and Stucco Paint FREE TINTING SERVICE NOW 2-For-The-Price- Of-1! \$6.98 * * * * *	SEMI-GLOSS ENAMEL FREE TINTING SERVICE! NOW 2-For-The-Price- Of-1! \$6.98	Floor and Deck Enamel NOW 2-For-The-Price- Of-1! \$6.98 * * * * *

SOLD ONLY IN FACTORY BRANCHES

BETTY JORDAN

PAINT FACTORY

(Picture of
can of paint)

PAR. 5. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondents represented, directly or by implication, that the usual and customary retail price of each can of Betty Jordan paint is the price designated in the advertisement; that this advertised price is a factory price; and that if one can of Betty Jordan paint is purchased at the advertised price, a second can will be given "free", that is, as a gift or gratuity without cost to the retail purchaser.

PAR. 6. The aforesaid advertisements referred to in paragraph 4 were false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each can of Betty Jordan paint was not the price designated in the advertisements but was substantially less than such price. The advertised prices were not the prices charged by the factory for said paints, but were substan-

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tially in excess thereof. The second can of paint was not "free", that is, was not a gift or gratuity, and was not given without cost to the retail purchaser since the purchaser paid the advertised price which was the usual and regular retail selling price for two cans of Betty Jordan paint.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead 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 respondents' products 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.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice 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.

Mr. Arthur B. Edgeworth for the Commission.

Mr. Murray Glantz, of New York, N.Y., for the respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

By complaint issued August 22, 1960, the respondents in this proceeding were charged with violation of Section 5 of the Federal Trade Commission Act in the sale and distribution of paint and related products under the label or trade name of "Betty Jordan." By answer filed December 27, 1960, respondents admitted certain of the allegations of the complaint, but denied that any of their actions constituted violations of the Act and asked that the complaint be dismissed. Hearings were held and all parties given an opportunity to file proposed findings and briefs. Counsel supporting the complaint has filed such findings and brief, but none of the respondents has done so.

FINDINGS OF FACT

1. Respondent Ohmlac Paint & Refining Co., Inc., hereinafter referred to as Ohmlac, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 41-40 Crescent Street, Long Island City, N.Y. Individual respondent Charles A. Jacobs is the president of Ohmlac, and his address is the same as that of the corporation.

2. Respondent Betty Jordan Paint Factories, Inc., hereinafter referred to as Betty Jordan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 24-13 Bridge Plaza North, Long Island City, N.Y. Individual respondents Irving Rubin, Sidney Jacobs, and Charles A. Jacobs are officers of Betty Jordan, and their addresses are the same as that of said corporation.

3. Betty Jordan is a wholly-owned subsidiary of Ohmlac, and the individual respondents, Charles A. Jacobs, Irving Rubin, and Sidney Jacobs, formulated, directed and controlled the business activities of Betty Jordan from the date of its incorporation until October 1960; thereafter, respondent Irving Rubin ceased to be an employee of Betty Jordan, while continuing as an officer.

4. Respondent Betty Jordan and the individual respondents are, and since September 1957 have been, engaged in the business of selling and distributing paint and related products to the public under the label or trade name of "Betty Jordan" through retail distribution outlets located in the States of Connecticut and New York.

5. Respondent Ohmlac manufactures paints and upon order by Betty Jordan ships or causes paints to be shipped from the Ohmlac factories in New Jersey to the Betty Jordan Paint stores in the States of Connecticut and New York, where such products are sold at retail and respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in such trade products in commerce as "commerce" is defined in the Federal Trade Commission Act.

6. Respondent Irving Rubin, as president and store supervisor of Betty Jordan, visited all the Betty Jordan retail stores to check on their operations and placed some of the advertising in question for Betty Jordan in various local newspapers. In his work at Betty Jordan between 1957 and 1960, he was supervised by the other individual respondents, Sidney Jacobs and Charles A. Jacobs. Mr. Rubin

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was also plant manager of Ohmlac at one time, but not while employed by Betty Jordan.

7. Respondent Charles A. Jacobs is the president and principal operator of Ohmlac, as well as an officer of Betty Jordan who supervised, among other things, the advertising activities of respondent Rubin as store supervisor of Betty Jordan.

8. Respondent Sidney Jacobs is an officer of Betty Jordan who at times also supervised the activities of respondent Rubin while employed at Betty Jordan.

9. Respondents Ohmlac and Betty Jordan utilized the same office space. Betty Jordan, however, has its own bookkeeper and sales force. Ohmlac also has its own clerical staff, although Ohmlac's invoices for paint shipped to Betty Jordan stores are prepared by Betty Jordan's bookkeeper.

10. Betty Jordan and the individual respondents have advertised Betty Jordan paints in various newspapers and over television and radio. Among and typical of the statements contained in newspaper advertising are the following:

for the Gal with Home Decorating on Her Mind

NOW . . . PAINT TWO ROOMS

FOR THE PRICE OF ONE!

during BETTY JORDAN'S

(picture of a girl
pointing a pencil at certain words in the advertisement)

2 for 1 SALE

BUY ONE

GALLON

or quart

GET ONE

FREE

There's no time to lose while the 2-for-1 Sale is on. * * * Only Betty Jordan can make this offer because only Betty Jordan sells direct-to-you through factory branches. There are no middlemen profits . . . no fancy stores or selling fixtures * * * PLUS TREMENDOUS SAVINGS during the 2-for-1 Sale. So make your selections now . . . BUY ONE gallon or quart. GET ONE FREE! (Picture of can of paint)

SATISFACTION GUARANTEED

Your Money Back on Unused Portion of Your Paint
Purchase If You Are Not Completely Satisfied

QUALITY PAINT AT FACTORY PRICES (And NOW the
Second
Gal. or Qt. is FREE).

ALKYD FLAT ENAMEL FREE TINTING SERVICE NOW 2-for-The Price-of-1. \$5.98 * * * * *	Exterior House Paint FREE TINTING SERV- ICE NOW 2-For-The Price-Of-1! \$5.98 * * * * *	Decor-Tex LATEX FLAT NOW 2-For-The Price-of-1! In—Colors Slightly Higher \$6.98 * * * * *
Cement and Stucco Paint FREE TINTING SERVICE! NOW 2-For-The Price-Of-1! \$6.98 * * * * *	SEMI-GLOSS ENAMEL FREE TINTING SERV- ICE! NOW 2-For-The Price-Of-1! \$6.98 * * * * *	Floor and Deck Enamel Now 2-For-The Price-Of-1! \$6.98 * * * * *

SOLD ONLY IN FACTORY BRANCHES

(Picture of
can of paint)

BETTY JORDAN
PAINT FACTORY

11. Through the use of said advertisements Betty Jordan and the individual respondents represented, directly or by implication, that the usual and customary retail price of one can of Betty Jordan paint is the price designated in the advertisement; that this advertised price is a factory price; and that if one can of Betty Jordan paint is purchased at the advertised price, a second can will be given free to the purchaser.

12. The advertisements referred to were false, misleading and deceptive. In truth and in fact the usual, customary retail price of one can of Betty Jordan paint was not the price designated in the advertisement but was substantially less than such price. Nor was the second can of paint "free." Whereas the advertisements specified a price for one gallon of paint (e.g. \$6.98 for semi-gloss), in fact it was sold for half that price, inasmuch as *two* gallons were always sold for \$6.98. Moreover, the use of such words in the advertisement as "sale" "buy now" "now two for the price of one" confirmed the impression that the \$6.98 price for one gallon was the usual and regular price, whereas the \$6.98 price was really the customary price for two gallons.

13. The advertised prices were not factory prices. Despite the corporate name of Betty Jordan (Betty Jordan Paint Factories,

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Inc.), the only factory involved in this proceeding is the factory of Ohmlac, the manufacturer. Betty Jordan's advertised price for one can of paint was, however, not the same as Ohmlac's factory price, but about four times as much. Even Betty Jordan's actual sales price for two cans of paint was about twice Ohmlac's factory price. Betty Jordan's claim "there are no middlemen profits" is patently false.

14. In the course of their business at all times mentioned herein respondents have been, and are now, in substantial competition in commerce with corporations, individuals, and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

15. The use by Betty Jordan and the individual respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead 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 Betty Jordan paint by reason of said erroneous and mistaken belief.

DISCUSSION

During the course of the hearings, counsel for the respondents urged that the complaint should be dismissed inasmuch as the company had always sold two cans "for the price of one" and that, therefore, the advertisements referred to represented the actual and truthful state of affairs. The test, however, is not the language used or the exact meaning properly attributable to that language, but the "net impression which the advertisement is likely to make upon the general populace." *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676 (2d Cir. 1944). Here the advertisements certainly conveyed the impression that a special sale was being conducted by Betty Jordan (see finding 11 above). Some of the advertisements spoke of "no time to lose while the two for one sale is on." Actually, however, this was not a special sale. The advertised prices were the usual and regular prices for two cans of paint. The customer was not getting two for the price of one. Company records do not indicate that any one can of paint was ever sold for the advertised price of one can. The situation here is quite similar to that found in *In the Matter of Louis Shapiro trading as Puro Company*, Federal Trade Commission Docket 5710, where the Commission issued a cease and desist order (50 F.T.C. 454, November 19, 1953).

Respondents also argue that the customer is actually getting a factory price. They claim that the price paid by the customer was the price charged by a factory to a retailer on comparable products. Counsel for the respondents, however, freely admitted that such evidence was not in the record and could not be used and that the only paint prices in the record were those for the Betty Jordan line. The only factory whose price may be considered from this record is the Ohmlac factory which manufactures the paint. Its prices, however, are approximately half those charged by Betty Jordan for two cans and one-fourth those advertised by Betty Jordan as the regular price of one can.

I have concluded, however, that the complaint must be dismissed as to respondent Ohmlac. Ordinarily the acts of one corporation cannot be charged to a parent corporation absent unusual circumstances. In *National Lead Company v. Federal Trade Commission* 227 F. 2d 825 (7th Cir. 1955), reversed on other grounds 352 U.S. 419 (1957), the court held:

... there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

Supporting the possibility that Betty Jordan is a mere tool of Ohmlac are the facts that both corporations used the same office space, individual respondent Charles A. Jacobs was an officer and leading figure in both firms, and that the Betty Jordan bookkeeper prepared the Ohmlac invoices for paints bought by Betty Jordan. On the other hand, however, the record is silent as to the identity of the other officers of Ohmlac and their functions, the identity of the directors of the two corporations and their functions, the identity of the stockholders of Ohmlac, the behavior of the two companies vis-a-vis each other, or any direction of Betty Jordan by officers or employees of Ohmlac who hold no official position with Betty Jordan.

In the *Matter of American News Company, et al.*, Federal Trade Commission Docket No. 7396, the decision of the Commission dated January 10, 1961, found that the American News Company dominated and controlled its wholly-owned subsidiary, Union News Company. The opinion recited:

Its president, secretary and treasurer hold the same positions in Union and the directors of American for the most part serve as directors of Union. The two corporations have the same address. American appears to consider Union as one of its integral parts for its 1958 annual report to stockholders refers to Union as a "division" and to Union's activities as the acts of "your company." But more important than these considerations is the substantial evidence that

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officers of American, some of whom hold no official position with Union, actually participate in the management and conduct of the affairs of Union.

None of these criteria, with the exception of the same address, are to be found here. The advertising was placed by an employee of Betty Jordan. There is nothing to indicate that Ohmlac controlled the nature of such advertising or dictated it in any way. Although this employee worked principally under the supervision of Charles A. Jacobs, who was also president of Ohmlac, he was subject to the instructions of Sidney Jacobs who was not shown to have any connection with Ohmlac. Under the circumstances, insufficient evidence has been introduced to justify a conclusion that the Betty Jordan corporation was a mere tool of the Ohmlac corporation in that its activities were completely dominated by its parent.

CONCLUSION OF LAW

The above-said acts and practices of the respondents were and are all to the prejudice 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.

ORDER

It is ordered, That respondent Betty Jordan Paint Factories, Inc., a corporation, and its officers and Irving Rubin, Sidney Jacobs, and Charles A. Jacobs, individually and as officers of Betty Jordan Paint Factories, Inc., and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of paint, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

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

(b) That any merchandise is sold or offered for sale at factory prices, when such is not the fact;

(c) That any article of merchandise is being given free or as a gift or without cost or charge, when such is not the fact.

It is further ordered, That the complaint be dismissed as to respondents Ohmlac Paint & Refining Co., Inc., a corporation, and Charles A. Jacobs as an officer of said corporation.

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DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective July 21, 1961, the initial decision of the hearing examiner shall on the 24th day of February 1962, become the decision of the Commission; and, accordingly:

It is orderd, That respondents Betty Jordan Paint Factories, Inc., a corporation, and its officers, and Irving Rubin, Sidney Jacobs, and Charles A. Jacobs, individually and as officers of Betty Jordan Paint Factories, Inc., 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.

By the Commission, Commissioner MacIntyre not concurring.

IN THE MATTER OF

AMERICAN STRATIGRAPHIC COMPANY ET AL.

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

Docket 8417. Complaint, June 1, 1961—Decision, Feb. 24, 1962

Consent order requiring a Denver corporation engaged in the sale, on a subscription basis, of lithologic logs used in planning oil drilling exploration activities, to cease discriminating in price among competing customers in violation of Sec. 2(a) of the Clayton Act by giving to customers who increased their subscription coverage for the same sized log to additional areas among the four they covered, a lower subscription price for each area, while continuing to charge other customers the higher price.

COMPLAINT

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

PARAGRAPH 1. Respondent American Stratigraphic Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 1820 Broadway, Denver, Colo.

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PAR. 2. Respondents James G. Mitchell and C. E. Brehm are the principal 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. The address of respondent James G. Mitchell is the same as that of the corporate respondent. The address of respondent C. E. Brehm is Mount Vernon, Ill.

PAR. 3. Said respondent corporation is now and has been extensively engaged primarily in the sale of lithologic logs which products are used by oil companies and others to evaluate rock conditions favorable to the accumulation of oil as an aid in their further oil drilling exploration activities. These logs provide a geologic interpretation of the earth stratum as penetrated by particular well drillings in different locations. Respondent sells said products in both a narrow (3 inch) and wide (6 inch) log, primarily on a monthly subscription basis, for such product use. The sale of its products is divided by said corporate respondent generally into, and cover, four different operational areas, which include: (1) the Montana-Dakota area; (2) the Wyoming-Idaho area; (3) the Southern Rocky Mountain area, covering Nevada, the northwest part of Colorado, the Panhandle of Nebraska and the northern half of Utah; and (4) the area commonly described as the "Four Corners area", consisting of Arizona, the southwest corner of Colorado, the northwest part of New Mexico and the southern half of Utah.

Said corporate respondent is the leader in sales of said logs in the aforementioned areas where it operates, with its total sales volume exceeding \$250,000 for its fiscal year ending May 31, 1959, and \$290,000 for its fiscal year ending May 31, 1960.

PAR. 4. Said corporate respondent is now, and for many years past has been, selling said logs from the states of location of its various places of business to the purchasers thereof located in states other than the states wherein said sales originated, and it causes such products to be shipped and transported from its various places of business to purchasers located in other states, and respondent corporation, in the sale of its products, has at all times relevant herein been and now is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 5. In the course and conduct of its aforesaid business in commerce, respondent corporation has been and now is discriminating in price between different purchasers of its logs of like grade and quality, by selling said products at higher and less favorable prices to some purchasers than the same are sold to other purchasers.

Included among said corporate respondent's customers are various oil companies and others, operating in one or more of the various aforementioned areas where respondent sells its said products, who purchase the same on a subscription basis for one or more of the said areas for which respondent corporation prepares its said logs. Prior to 1960 respondent sold its narrow and wide logs for each of the said areas to all customers at the basic subscription price for each size, regardless of whether the customer purchased said logs for one or more of said areas.

Commencing in 1960 and pursuant to a sliding price scale plan applicable to both sizes, customers who increased their subscription coverage for the same sized log to additional areas received a lower subscription price for such size in each area covered, while at the same time customers who did not so increase their subscription coverage continued to pay the higher subscription price for the size and area purchased.

For example, respondent's sliding price scale covering its narrow log size, includes additional discounts from the basic subscription price for all customers increasing their area coverage, as follows:

- 1 subscription—50,000 ft. of log per mo.—\$185.00/monthly
- 2 subscriptions—50,000 ft. of log per mo.—180.00/ea. monthly
- 3 subscriptions—50,000 ft. of log per mo.—170.00/ea. monthly
- 4 subscriptions—50,000 ft. of log per mo.—160.00/ea. monthly

The granting of these additional discounts, by respondent, to those customers increasing their area subscription purchases of said products, results in the charging of lower and more favorable prices to said customers than the higher and less favorable prices charged other customers who did not increase their area subscription coverage purchase of said products. In the offering for sale and sale of said products as aforestated, respondent was and is in competition with other sellers.

PAR. 6. The effect of respondents' aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality, sold in manner and method and for purposes as aforestated, has been or may be substantially to lessen competition, or tend to create a monopoly, or to injure, destroy or prevent competition between respondent and its competitors in the sale and distribution of such products.

PAR. 7. The aforesaid acts and practices of respondents constitute violations of subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Mr. Herbert I. Rothbart for the Commission.

Ely, Duncan & Bennett, by *Mr. Elmer F. Bennett* for the respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

In a complaint issued June 1, 1961, the Federal Trade Commission charged respondents, American Stratigraphic Company, a corporation, and James G. Mitchell and C. E. Brehm, individually and as officers of said corporation, with having violated Section 2(a) of the Clayton Act, as amended, by unlawfully discriminating in price between different purchasers of informational material known as lithologic logs sold by them in commerce. The corporation is organized under the laws of the State of Colorado and its business is conducted under the direction of James G. Mitchell at 1820 Broadway, Denver, Colo.

After the issuance of the complaint, respondents with the advice and agreement of their attorneys, and counsel supporting the complaint entered into an agreement providing (a) for the issuance of a consent order to cease and desist and (b) for the dismissal, without prejudice, of the complaint against C. E. Brehm as an individual, on the basis of an affidavit of James G. Mitchell, submitted in connection with and incorporated by reference into the agreement, thus disposing of all the issues in this proceeding.

In the agreement it is expressly provided that the signing thereof is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as in the complaint alleged.

By the terms of the agreement, the respondents admit all the jurisdictional facts alleged in the complaint and agree that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

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

Respondents further agree that the order to cease and desist, to be issued in accordance with the agreement, shall have the same force and effect as if made after a full hearing.

It is further provided in said agreement that the same, together with the complaint, shall constitute the entire record herein and that the complaint herein may be used in construing the terms of the order

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Decision and Order

to be issued pursuant to said agreement and that such order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered the agreement, the affidavit submitted therewith, and the order therein contained, and, it appearing that said agreement (as supplemented by the affidavit) and order provide for an appropriate disposition of this proceeding, the same are hereby accepted and shall be filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice applicable to this case.

Now, in consonance with the terms thereof, the Hearing Examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondent, American Stratigraphic Company, a corporation, and respondent James G. Mitchell, individually and as an officer of respondent American Stratigraphic Company, and any of respondents' officers, representatives, agents and employees, directly or through any corporate, partnership, sole proprietorship, or any other device, in, or in connection with, the sale of lithologic logs and related products of like grade and quality, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating directly or indirectly in price, between different purchasers of said products:

By selling such products to any purchaser who purchases for one, or more than one, area at lower net prices than those granted for the same area or areas to any other purchaser, where, in the sale of said products, respondent is in competition with any other seller in one or more of the areas for which the said purchasers have purchased said products.

It is further ordered, That the complaint be, and it hereby is, dismissed, as to C. E. Brehm, individually, without prejudice to the right of the Commission to take any further action in the matter in the future which may be warranted by the then existing circumstances.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the Hearing Examiner shall, on the 24th day of February 1962, become the decision of the Commission; and, accordingly:

