

Complaint

IN THE MATTER OF

MANCO WATCH STRAP CO., INC., ET AL.

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

*Docket 7785. Complaint, Feb. 24, 1960—Decision, Mar. 13, 1962 **

Order requiring Jersey City, N.J., distributors of imported metal expansion watch bands to jobbers, chain stores, and other retailers under the trade name "Topps", to cease selling the watch bands so packaged that the words "Hong Kong" or "Japan", stamped on a link on the inner side, were concealed and could not be seen without damaging the containers, and requiring them to clearly disclose the place of origin in a conspicuous place on the packages.

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 Manco Watch Strap Co., Inc., and Topps Products Corp., corporations, and Samuel Mandel, Marvin Mandel, Morris Mandel and Eugene Mandel, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Manco Watch Strap Co., Inc., and Topps Products Corp., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their office and principal place of business located at 930 Newark Avenue, Postal Zone 6, in the city of Jersey City, State of New Jersey.

Respondents Samuel Mandel, Marvin Mandel, Morris Mandel and Eugene Mandel are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of metal expansion watch bands to jobbers, chain stores and other retail stores for resale to the public. Respondents' watch bands are sold under the trade name "Topps."

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product,

* Reported with modifying orders of July 26, 1962 and April 8, 1963.

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when sold, to be shipped from their place of business in the State of New Jersey to purchasers located in various other States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents import their watch bands from Japan and Hong Kong. After receipt of said watch bands they are packaged or mounted for retail sale by respondents. The packaging and mounting takes various forms depending upon the retail customer outlet. Some of the bands are mounted on individual cards and enclosed in separate cellophane envelopes. These are affixed to large counter display cards and are sold primarily to drugstores and other retailers who utilize this method of offering merchandise to the public. Other bands are packaged in individual containers for sale primarily through chain stores. Some are attached to cards and enclosed in boxes having a clear plastic "window"; others are enclosed in a clear plastic tube with a card inserted; while others are mounted on cards under a clear plastic "bubble". At no place on the packaging, container, or cards is the fact disclosed that respondents' bands are imported from Japan and Hong Kong. Stamped into the metal on a link on the inside of the bands is the word "Hong Kong" or "Japan" as the case may be. In many instances these words are so small, indistinct or made unnoticeable because of other impressions, that they do not constitute adequate notice that the bands are imported. Further, the manner of packaging conceals the inside of the band so that the words stamped thereon cannot be seen prior to purchase except by destroying or damaging the container or packaging.

PAR. 5. In the absence of an adequate disclosure that a product, including expansion watch bands, is of foreign origin, the public believes and understands that it is of domestic origin and there are among the members of the purchasing public a substantial number who have a preference for products originating in the United States over products originating in foreign countries or foreign places, including expansion watch bands originating in Japan and Hong Kong. Many domestic watch bands sell at higher prices than imported bands, including those originating in Japan and Hong Kong, and there are among the members of the purchasing public a substantial number who are willing to pay these higher prices to obtain such products of domestic origin.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce,

with corporations, firms and individuals in the sale of watch bands of the same general kind and nature as those sold by respondents.

PAR. 7. The failure of respondents to disclose on the individual packages containing their watch bands, or on the packaging, or cards, that their watch bands are of foreign origin, and to clearly disclose that fact upon the bands themselves, has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that their watch bands are wholly of domestic manufacture and into the purchase of substantial quantities of respondents' product 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. 8. 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. Charles W. O'Connell for the Commission.

Sperry, Weinberg & Cutler, of New York, N.Y., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on February 24, 1960, charging them with violating the provisions of the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in interstate commerce through the sale of watch bands not adequately marked in the packaging thereof or otherwise with the country of origin (i.e., Japan and Hong Kong). A copy of said complaint with notice of hearing was duly served on respondents. Respondents' answer is essentially a general denial and contains a further defense of *res judicata*. A motion was made by the respondents to dismiss the complaint premised upon this latter defense during the course of the hearing. Decision was reserved by the hearing examiner at that time pending a consideration of the evidence to be adduced.

Following a completion of the hearings in the above-entitled matter and pursuant to leave granted proposed findings, together with supporting briefs were thereafter filed by counsel for both sides. Counsel were also permitted to file replies to the proposals and briefs filed

by opposing counsel. The examiner has carefully reviewed and considered the aforesaid proposed findings and briefs. Those proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. Upon the entire record in the case the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondents Manco Watch Strap Co., Inc., and Topps Products Corp. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their office and principal place of business located at 930 Newark Avenue, Postal Zone 6, in the city of Jersey City, State of New Jersey.

Respondents Samuel Mandel, Marvin Mandel, Morris Mandel and Eugene Mandel are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of metal expansion watch bands to jobbers, chain stores and other retail stores for resale to the public. Respondents' watch bands are sold under the trade name "Topps."

3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of New Jersey to purchasers located in various other States of the United States and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Respondents import their watch bands from Japan and Hong Kong. After receipt of said watch bands they are packaged or mounted for retail sale by respondents. The packaging and mounting takes various forms depending upon the retail customer outlet. Some of the bands are mounted on individual cards and enclosed in separate cellophane envelopes. These are affixed to large counter display cards and are sold primarily to drug stores and other retailers who utilize this method of offering merchandise to the public. Other bands are packaged in individual containers for sale primarily through chain stores. Some are attached to cards and enclosed in boxes having a clear plastic "window"; others are enclosed in a clear plastic tube with a card inserted; while others are mounted on cards

under a clear plastic "bubble". At no place on the packaging, container, or cards is the fact disclosed that respondents' bands are imported from Japan and Hong Kong.

5. The manner of packaging conceals the inside of the band so that the words "Japan" or "Hong Kong," as the case may be, stamped thereon cannot be seen prior to purchase except by destroying or damaging the container or packaging.

6. Stamped into the metal on a link on the inside of respondents' bands is the word "Hong Kong" or "Japan" as the case may be. These words are distinct and constitute adequate notice that the bands are imported, when the bands are removed from the packages.

7. In the absence of an adequate disclosure that a product, including expansion watch bands, is of foreign origin, a substantial segment of the public believes and understands that it is of domestic origin.

8. There are, among the members of the purchasing public, a substantial number who have a preference for products originating in the United States over products originating in foreign countries or foreign places, including expansion watch bands originating in Japan and Hong Kong. There are among the members of the purchasing public substantial numbers of potential purchasers who are not concerned with the country of origin of low-priced watch bands.

9. A substantial number of the members of the purchasing public are willing to pay higher prices for metal expansion bands of domestic origin than for expansion bands made in Japan or Hong Kong. The preference of some consumers who are potential purchasers of respondents' watch bands is a preference as to price and appearance and not as to country of origin.

10. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of watch bands of the same general kind and nature as those sold by respondent.

11. The failure of respondents to disclose on the individual packages containing their watch bands, or on the packaging, or cards, that their watch bands are of foreign origin has had, and now has, the tendency and capacity to mislead a substantial segment of the purchasing public into the erroneous and mistaken belief that their watch bands are wholly of domestic manufacture and into the purchase of substantial quantities of respondents' product 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.

COMMENTS ON THE FINDINGS

The evidence has indicated considerable difference in public opinion as to the factors buyers take into consideration incident to purchase. A substantial segment of the public appears to prefer American goods over imports for patriotic reasons or because they expect better repair service or guaranties on American manufactured goods. Other substantial segments of the buying public have no preference as regards national origin. On the other hand, a substantial number have a preference as to national origin but would not make this a deciding factor alone if a foreign product had good appearance and quality plus a more favorable price than a product made in the United States. Still others, representative of a substantial segment of the public, would pay more for American products than a foreign product. This public concept indicates competition between low priced imported watch bands and higher priced domestic bands.

Each segment of the public with these varying views appears to be substantial, and it is reasonably conceivable that with economic changes and changes in world events the variability of opinion would be further revised. The importance of full disclosure of the national origin of a product is to enable a purchaser to make a choice premised upon his inclination at the time of purchase regardless of the validity of any reason he may have.

It appears without doubt that there is a very substantial segment of the public, as evidenced, who are desirous of knowing the national origin of a product before choosing to purchase even though they may consider numerous other factors before making their election as to the product they may buy. The mere fact that there is a substantial segment of the public who are disinterested in a product's national origin is inconsequential in determining the issues in this case. Of importance in resolving the issues herein is the fact there is also a substantial segment of the public that is desirous of knowing the national origin of a product as information upon which they predicate in whole, or in part, their election to purchase. It would appear therefore that injunctive relief is justified since, as evidenced, the public assumes a product to be of domestic origin if it is not identified as being of foreign origin. The Commission is not required to establish that the public without exception is desirous of knowing the national origin of the product so that if this information is withheld the practice is a deceptive one. It is sufficient that a substantial segment of the public may reasonably be deceived in the event the national origin of a product is withheld or obscured by packaging as in the instant case.

THE ISSUE OF RES JUDICATA

The respondents in their answer set forth as a defense that the issues herein have previously been adjudicated in their favor and the Commission has been foreclosed from bringing action against respondents on the same issue.

The previous action to which respondents refer was commenced by complaint dated February 23, 1951, against *Manco Watch Strap Co., Inc.*, F.T.C., Docket No. 5854. In that case documentary evidence and testimony were presented in support of and in opposition to the complaint. The hearing examiner found that the charges had been sustained by the evidence and granted a cease and desist order. Respondent appealed the decision of the hearing examiner to the Commission and by order dated December 21, 1953, the Commission dismissed the complaint stating its reason as follows: "The evidence in the record indicates that there are no domestic watch or wrist bands which were sold at prices comparable to the prices at which respondent's imported bands are sold. There is no evidence in the record showing a preference of a substantial number of members of the purchasing public for the higher-priced domestic bands over respondent's lower priced imported bands."

The first *Manco* complaint which was issued February 23, 1951, charged that respondent's failure to disclose the fact that its watch bands were of foreign origin had the tendency and capacity to mislead middlemen and the purchasing public into the mistaken belief that its watch bands were of domestic manufacture and into the purchase of a substantial quantity of said bands because of such mistaken belief.

The same substantive issue is involved in the present *Manco* complaint which was issued by the Commission on February 24, 1960, except as to the period of time contemplated by the charges.

Res judicata is a judicial doctrine which holds that where a reasonable opportunity is given the parties to litigate a claim before a competent court which decides the controversy, the interest of the State and of the parties requires that the validity of the claim and any issue actually tried in the action shall not be relitigated by the parties. See *Restatement of the Law of Judgments*, Secs. 41-70 (American Law Institute).

It is clear when we consider the respective functions of courts and of administrative agencies, that the doctrine of *res judicata* should not be applicable to decisions of administrative bodies.

Courts normally apply law to past facts which remain static whereas administrative bodies work with changing facts and shifting

policies. The traditional doctrine of *res judicata* makes a judgment binding so as to shut off further inquiry regardless of mistake of fact, misunderstanding of law, inadequacy of evidence or the unjustness of the consequences. 2 *Davis Adm. Law* 545.

In private law suits only the parties thereto are affected by the application of *res judicata* and the desirability of putting an end to the litigation of the issues is plain. However, when an order of a public regulatory agency such as the Federal Trade Commission is set aside and the Commission is estopped by reason of the prior adjudication in a second proceeding, the protection of the public interest, rather than the interest of the adversaries is affected. *NLRB v. Thompson Products*, 130 F. 2d 363, 366 (1942). It is in the interest of the public that the alleged unlawful practices be stopped so as to prevent injury to the public and competitors. It is the function of the Federal Trade Commission to prevent injury incident to unfair methods of competition and unfair acts and practices in commerce. The application of the principle of estoppel would prevent the full and proper exercise of that function. As stated in *NLRB v. T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304 (1944): "The doctrine of estoppel may not be invoked against the Board as long as it is acting in its administrative or judicial capacity. This is a fundamental conception of our law." In *NLRB v. Baltimore Transit Co.*, (1944) 140 F. 2d 51, 55, it was opinioned: "An administrative agency, charged with the protection of the public interest is certainly not precluded from taking appropriate action to that end because of mistaken action in the past Nor can the principle of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action on the part of public officials."

The courts have often shown this reluctance to hold that the public interest is estopped by *res judicata*. For example, in *Panhandle Eastern Pipeline Co. v. FCC*, 236 F. 2d 289, 292, (1956) the court said "the doctrine of *res judicata* can have no application to a proceeding . . . which involves a determination of the present or future public convenience or necessity with respect to the continuance or abandonment of natural gas service." And in *People ex rel. Watchtower Bible & Tract Soc., Inc. v. Haring*, 146 N.Y.S. 2d 151 (1955), involving a tax assessment the court said: "It would clearly be against the public interest to foreclose the relitigation of an issue . . . by the public authorities in subsequent years merely because it had once been adversely decided with respect to a particular year." Furthermore, "an administrative agency is always required to reach the conclusion which the evidence justifies, regardless of prior determination

between the same or different parties. Hence, an administrative agency is not estopped to determine an administrative question in a particular way, by a previous decision of the identical question to the contrary." Von Baur, *Administrative Law*, Vol. 1, page 162. It was also held in *Grandview Dairy Farm v. Jones*, 157 F. 2d 5, that *res judicata* does not apply to decisions of administrative agencies and boards. In *Wallace Corp. v. NLRB*, 141 F. 2d 87, 91, the court enunciates the concept that the principle of *res judicata* had no application to administrative orders and did not bar further action by the Board in respect to such orders.

Even assuming that the instant proceeding constitutes a relitigation of the same issue and that the doctrine of *res judicata* is applicable to Commission decisions the prior *Manco* decision is not a bar to this proceeding. In the case of the *Federal Trade Commission v. Raladam*, 316 U.S. 199 (1942), the Commission issued its complaint in 1929 and after hearings found that the company had employed unfair methods of competition in selling "Marmola", a fat reducing substance. An order to cease and desist was thereupon issued by the Commission. On appeal the Circuit Court of Appeals set aside the order and its judgment was affirmed by the Supreme Court on the ground that injury to competition had not been proved. In 1935, the Commission issued a new complaint on identical grounds and evidence of injury to competitors was established. Upon appeal to the Circuit Court respondent contended that the determination in the first proceeding that injury to competitors was not shown was *res judicata* on that point. The Supreme Court held that the Commission was not barred from instituting a new complaint stating: "... the reasons for refusing to enforce the Commission orders are grounded upon the inadequacy of the findings and proof as revealed in the particular record then before this Court. Hence, these reasons are not controlling in this case, arising as it does, out of different proceedings and presenting different facts and a different record for our consideration." The *Raladam* decision clearly implies that a proceeding by the Federal Trade Commission against respondents for the same practices is not barred if they relate to different periods of time.

The first *Manco* case was concerned with the acts and practices of the respondent prior to February 23, 1951. The instant proceeding relates to respondents' practices from approximately January 1, 1957, through February 24, 1960. On the reasoning of the *Raladam* decision, *supra*, the dismissal of the complaint by the Commission in the first proceeding would not preclude a valid filing of the present complaint even though it deals with a similar substantive issue. Since

the Federal Trade Commission is concerned with continuing practices it is reasonably conceivable that practices coming within the Commission's jurisdiction which are considered legal during one period of time may, because of revised economic conditions or public experience be considered illegal at a subsequent period.

CONCLUSIONS

1. The aforesaid acts and practices of respondents to the extent indicated by the findings 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.

2. The respondents' defense of *res judicata* is without merit for the reasons hereinbefore set forth.

3. Accordingly, since this proceeding is in the public interest the following order shall issue:

It is ordered, That respondents, Manco Watch Strap Co., Inc., Topps Products Corp., corporations, and their officers, and respondents Samuel Mandel, Marvin Mandel, Morris Mandel, and Eugene Mandel, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of imported merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products in packages or containers in such a manner that the name of the country or place of origin on the product is concealed without clearly disclosing the country or place of origin of the product in a conspicuous place on the package or container.

2. Offering for sale, selling or distributing said products mounted or affixed to cards in such manner as to conceal the name of the country or place of origin without disclosing on such cards the name of the country or place of origin.

It is further ordered, That the allegations of the complaint, insofar as they charge as a deceptive practice that the respondents' unpackaged watch bands fail to have adequately identified thereon the country or place of origin, are herein and hereby dismissed for lack of evidence.

OPINION OF THE COMMISSION

By ELMAN, *Commissioner*:

This is an appeal from the initial decision of the hearing examiner, ordering respondents to cease and desist from distributing imported merchandise packaged in such a way as to conceal from prospective purchasers the name of the country or place of origin of the merchandise, and requiring clear disclosure of such information in a conspicuous place on the package or container.

The specific products involved are metal expansion watch bands imported in bulk from Japan and Hong Kong. After arriving in the United States, the bands are packaged by respondents and sold under the trade name "Topps." The packaging takes various forms. Some bands are attached to cards and enclosed in boxes having a plastic "window"; others are enclosed in a plastic tube with a card inserted; while others are mounted on cards under a plastic "bubble".

The examiner found that, whatever the form of packaging used by respondents, at no place on the packages, containers, or cards is the fact disclosed that the watch bands were imported. To be sure, stamped into the metal on a link on the inner side of each band are the words "Hong Kong" or "Japan." As the examiner found, however, "The manner of packaging conceals the inside of the band so that the words 'Japan' or 'Hong Kong,' as the case may be, stamped thereon cannot be seen prior to purchase except by destroying or damaging the container or packaging."

The examiner also found that a substantial segment of the public prefers and is even willing to pay more for domestically-made metal expansion bands as compared with similar bands made in Japan or Hong Kong. Respondents' failure to disclose the foreign origin of their bands, in a clear manner and in a conspicuous place on the outside of the packages, containers or cards, has the tendency and capacity—the examiner found—"to mislead a substantial segment of the purchasing public into the erroneous and mistaken belief that their watch bands are wholly of domestic manufacture and into the purchase of substantial quantities of respondents' product 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."

Respondents' appeal embraces two main arguments. First, that the issues here are *res judicata*, having already been decided by the Commission in respondents' favor in a prior proceeding, thus necessitating

dismissal of this case. Second, that factual support for the order is lacking.

I

Respondents' *res judicata* argument is based on the disposition made in *Manco Watch Strap Co., Inc.*, 50 F.T.C. 553. There the Commission on December 21, 1953, dismissed a prior complaint containing substantially similar allegations against respondents, on the ground that the evidence in the record indicated that no domestic watch bands were sold at prices comparable to those of the imported bands, and that there was no evidence in the record of a substantial consumer preference for higher-priced domestic bands over respondents' lower-priced imported bands.

The principle of *res judicata*, properly applied, does not require dismissal of the present complaint. We are dealing here with new and different issues of fact and law. The complaint in the first *Manco* case involved acts and practices occurring prior to February 23, 1951; the present complaint covers the period from approximately January 1, 1957, to February 24, 1960. A failure of proof in the first proceeding does not establish a similar failure of proof in every subsequent proceeding based on like allegations.

The point is settled by the Supreme Court's decision in *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, which followed a prior decision between the same parties, 283 U.S. 643, denying enforcement of a Commission order because of "the inadequacy of the findings and proof, as revealed in the particular record. . . ." 316 U.S., at 150-151. The Court stated that "these reasons are not controlling in this case, arising, as it does, out of different proceedings and presenting different facts and a different record for our consideration." *Id.*, at 151. Raladam's plea of *res judicata* was rejected as "without merit." *Id.*, at 152.

Like the second *Raladam* case, this is a new proceeding presenting a new record and new facts. The Commission's authority to take such action as may be proper on the record here is not impaired by the failure of proof found in the earlier record. Were it otherwise, factual deficiencies in a prior proceeding, for whatever reason, would forever bar any later complaint based on new or different facts. Congress deliberately rejected any such limitation on the Commission's power. Section 5(b) of the Federal Trade Commission Act contains a comprehensive grant of authority to the Commission to accommodate its orders and proceedings to changed conditions of law, fact, or policy. It provides that the Commission may—except when

a proceeding is subject to the exclusive jurisdiction of a reviewing court—"at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require. . . ."

The substance and effect of Section 5(b) is, therefore, that the doctrine of finality ordinarily applicable to judicial proceedings is not applicable to Commission proceedings. No order, whether it dismisses or sustains allegations made in the complaint, can prejudice the statutory right and duty of the Commission to initiate any future action, whether by issuing a new complaint or by reopening and altering, modifying, or vacating an order based on an old complaint, where it finds such action to be required by changes of fact or law or by the public interest.¹

Beyond reliance on the doctrine of *res judicata* in its technical aspects, respondents may be suggesting that it constitutes oppressive harassment for the Commission to attack their sales practices again, having dismissed a similar charge against them seven years earlier. The contention rests on a supposition we must reject, viz., that in the exercise of its jurisdiction to prevent unfair trade practices, the Commission would itself act unfairly. The Commission is not, nor would it seek to be, free from effective restraints, both internal and external, which guard against irresponsible or arbitrary abuse of its powers.

II

We turn now to respondents' arguments as to the factual inadequacy of the initial decision.

We proceed initially to an examination of the record, to determine whether it substantiates the examiner's finding that a significant segment of the buying public has a preference for American-made bands, and also assumes or believes that watch bands sold in packages unmarked as to country of origin are made in the United States. Such a finding would amply support the conclusion that sale of imported watch bands in unmarked packages violates Section 5 of the Federal Trade Commission Act. 38 Stat. 719, as amended, 15 U.S.C. 45. See *Segal v. Federal Trade Commission*, 142 F.2d 255 (C.A.2).

The first contention is that disclosure of foreign origin on the watch bands themselves constitutes adequate notice to all potential purchasers who may be interested in this information, since they would take the

¹ See *American Chain and Cable Co. v. Federal Trade Commission*, 142 F.2d 909, 911-912 (C.A.4); *Rural Gas Service, Inc.*, Docket No. 7065, October 24, 1961, slip opinion, p. 6.

trouble to inspect the bands for origin markings before buying. The short answer is that the record shows that, while some would exercise the circumspection respondents claim, others would not. Further, there is a wealth of testimony here that, in the absence of any disclosure of the country of origin on the packages containing the watch bands, many purchasers will—if, indeed, they think about it at all—assume that the bands were manufactured in the United States. This being so, even a purchaser concerned over the national origin of the product is unlikely to open the package in search of origin markings if the package itself bears none.

Next, it is suggested that among the potential purchasers of respondents' watch bands, no preference exists for such bands originating in the United States rather than in Japan or Hong Kong. Once again, the answer must be that the evidence is to the contrary. Several witnesses testified that they would choose an American-made band over a Japanese band if they were offered at the same price. Others went much further. One witness testified that he would prefer a \$4.00 American band to a \$2.00 Japanese band, and at one point he said that he would not buy a Japanese band at any price. Another stated that he would be willing to pay 50% more for an American band than for an import. Still another testified that he would pay \$2.00 to \$3.00 more for a domestically produced band than for one made in the Orient.

In sum, respondents' argument as to origin preference suffers from the same fatal defect as their argument concerning adequacy of disclosure. So long as it appears that a substantial segment of the purchasing public prefers watch bands made in the United States, it is of no avail to show that another substantial segment does, or may, not. That would suffice only if proof of a uniform preference among all buyers were necessary. Protection of the public interest obviously need not wait upon a demonstration that every segment of the public is injured by the challenged practice.

Respondents next contend that their imported watch bands are not in competition with bands of domestic manufacture. The record requires rejection of this contention. Further, even if it were true, it would not alter the result.

Respondents draw principally upon testimony of suppliers of domestically made watch bands that they do not consider respondents' bands to be in competition with their own, because respondents' bands customarily retail for \$0.50 to \$1.00 while theirs are considerably more expensive. In the first place, this estimate misconceives the breadth of respondents' price range. The record shows that some of

their bands sold for \$1.50, and one store normally sold a line of respondents' bands at \$1.98. Second, American-made watch bands are by no means universally priced far above respondents'. One witness testified that some American-made bands could retail for \$1.00 or less. Others stated that they themselves distributed bands that sold at \$1.95 retail. Finally, there was testimony—directly opposed to that on which respondents rely—that competition against inexpensive American-made watch bands by their imported Japanese counterparts has been real and damaging.

The situation, then, is that there are American-made watch bands priced at or near the price level of respondents' imports. Moreover, the record more than justifies the inference that consumer preference for the American product widens considerably the price range within which domestic and imported bands compete. We conclude that respondents' imported watch bands do in fact compete with American-made bands selling at a higher price.

In any event, proof of competition is not essential to proof of violation of the Act. Unfair or deceptive acts and practices in commerce are forbidden in the interest of protecting the public whether they injure competitors or not. Where there exists a substantial danger that "purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin," *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 217, "the purchasing public is entitled to be protected against that species of deception. . . ." *Ibid.*

These conclusions are supported by the Commission's recent decision in *Oxwall Tool Company, Ltd.*, Docket No. 7491, December 26, 1961. In that proceeding, respondents argued that there was no showing of competition between their imported tools and tools produced in this country, and that, under the first Manco case, this was an essential element of proof. Rejecting this contention, the Commission stated:

[I]t should be pointed out that the fact that an imported article has no domestic competitors in its price class does not force the conclusion that consumers who purchase such an imported article unmarked as to foreign origin have no preference for domestic goods. To the extent that the holding in the *Manco* matter may be inconsistent with this statement, the *Manco* opinion does not reflect the present views of the Commission. *Oxwall Tool*, slip opinion, at p. 6.

For the reasons set forth above, respondents' appeal must be denied. The hearing examiner's findings adverse to respondents are amply justified by the detailed factual showing made in the record. Accordingly, the order contained in the initial decision, which we have care-

fully examined and find to be appropriate to prohibit the illegal practices found, will be adopted.²

III

In the exercise of our responsibility to furnish guidance to hearing examiners and counsel, we think it desirable and appropriate to make the following additional observations concerning the requirements of proof in cases of this type arising in the future.³

The requirement of clear and conspicuous disclosure of a product's national origin is only one example of the basic remedy, frequently used by the Commission in its orders, of compelling affirmative disclosures to protect the public from deception. Representations can be contrived to mislead not only by what they contain but by what they omit. In order to prevent this type of deception, the Commission is often obliged in its orders to go beyond conventional negative prohibitions and to require disclosure of material facts previously not disclosed to prospective purchasers. If affirmative disclosure is the effective antidote to deception, it is a remedy the Commission may—even must—prescribe.⁴

² Counsel for respondents contended, on oral argument, that a requirement of disclosure of the country of origin on the container of each watch band would be burdensome, since it would necessitate sorting and separating bands made in Hong Kong and Japan. But, as counsel admitted, this argument of hardship has no factual foundation in the record. In addition, the evidence shows that consumer preferences in this area are specific rather than undifferentiated. It is apparently important to many buyers to know exactly where their watch bands were made.

³ It is, of course, common practice for an appellate court having supervisory responsibility over the conduct of trials in lower courts to formulate principles relating to the nature of proof. *E.g.*, *United States v. Pink*, 315 U.S. 203 (judicial notice); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (burden of proof); *McNabb v. United States*, 318 U.S. 332 (illegally obtained admissions); *Elkins v. United States*, 364 U.S. 206 (admissibility of evidence unlawfully seized). Indeed, an appellate court, in writing opinions, almost inevitably lays down such rules when it states criteria of relevance. An administrative agency certainly owes it to its hearing examiners and counsel to furnish similar guidance. See *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203, and other cases cited *infra*, footnote 20.

⁴ See, *e.g.*, *New American Library of World Literature, Inc. v. Federal Trade Commission*, 213 F. 2d 143 (C.A. 2); *Bantam Books, Inc. v. Federal Trade Commission*, 275 F. 2d 680 (C.A. 2), *cert. denied*, 364 U.S. 819 (apparently new books must bear disclosure they are abridged or retitled); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165 (C.A. 7); *American Medicinal Products, Inc. v. Federal Trade Commission*, 136 F. 2d 426 (C.A. 9) (medicinal preparations must state they are harmful if administered improperly); *Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission*, 275 F. 2d 18 (C.A. 5); *Ward Laboratories, Inc. v. Federal Trade Commission*, 276 F. 2d 952 (C.A. 2), *cert. denied*, 364 U.S. 827 ("baldness cures" must reveal most baldness is at present incurable); *Hasklite Manufacturing Corp. v. Federal Trade Commission*, 127 F. 2d 765 (C.A. 7), (apparently all-wood trays must be labeled to disclose that their surfaces are paper); *Mohawk Refining Corp. v. Federal Trade Commission*, 263 F. 2d 818 (C.A. 3), *cert. denied*, 361 U.S. 814 (re-refined motor oil must be so specified).

The reversal in *Alberty v. Federal Trade Commission*, 182 F. 2d 36 (C.A.D.C.), *cert. denied*, 340 U.S. 818, rested solely on the lack of findings deemed necessary, on the particular record, to justify the disclosure order.

These considerations underlie the foreign-origin line of decisions. As the court explained in *Segal v. Federal Trade Commission*, 142 F. 2d 255 (C.A. 2), "If it is true that a substantial number of buyers suppose that unmarked goods are home made goods, and have a preference for such goods, the sale of unmarked foreign goods is a misrepresentation, which the Commission was authorized to stop."⁵ Thus, if a foreign-made product is shown not to be clearly so marked, only two additional findings—(1) a belief or assumption by a substantial segment of the buying public that the product, not being clearly marked otherwise, was made in America; and (2) a preference by such buyers for the American-made product—are necessary to justify an order for affirmative disclosure of the product's foreign origin.

Both these findings must be based on general factual inquiry into consumer buying habits and attitudes in relation to the product. The outcome of such general inquiry should be the same, regardless of the particular respondents or brands involved. Thus, to determine whether it is indeed true that a substantial number of American buyers suppose that unmarked watch bands are made in this country, and have a preference for such domestically-made bands, we look to consumer habits and attitudes towards watch bands in general. The facts in that regard obviously do not vary, depending on whether Seller *X* rather than *Y* happens to be the respondent.

If this were the first foreign-origin product case to come before the Commission, the conclusion that a substantial segment of the public assumes that unmarked watch bands are American-made and prefers such domestically-made bands would have to be based on specific evidence. But this is not a case of first impression; rather, it follows scores, if not hundreds, of others involving fundamentally the same general factual issues. This is an area of administration that has evolved to a point at which the accumulated experience and knowledge of the Commission may properly be invoked in exercising its fact-finding function. Over the course of years the Commission has been called upon to determine the adequacy of foreign origin markings on such widely varying products as gloves,⁶ flashlight bulbs,⁷ sunglass lenses,⁸ imitation pearls,⁹ mechanical pencils,¹⁰ sewing ma-

⁵ Accord, *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F. 2d 954 (C.A. 7); *American Tack Co. v. Federal Trade Commission*, 211 F. 2d 239 (C.A. 2).

⁶ *American Merchandise Co.*, 28 F.T.C. 1465.

⁷ *Vulcan Lamp Works, Inc.*, 32 F.T.C. 7.

⁸ *The Bolta Company*, 44 F.T.C. 17.

⁹ *L. Heller & Son, Inc.*, 47 F.T.C. 34, and related cases following.

¹⁰ *Atomic Products, Inc.*, 48 F.T.C. 289.

chine parts,¹¹ thumbtacks,¹² cutlery handles,¹³ stainless steel tableware,¹⁴ hand tools,¹⁵ and watch bands.¹⁶ This list is suggestive, not exhaustive.

Cases of this nature have produced many volumes of factual evidence, of the sort described in Part II of this opinion, showing that, generally speaking, many consumers prefer American goods and believe they are getting American goods unless informed to the contrary. For people who have such a general preference for American goods, what matters is whether the product was made in America, not whether it happens to be a pencil or a tool or a watch band. Of course, we neither approve nor disapprove the state of mind reflected by a consumer preference for American goods; we merely recognize that it exists. The grounds for such preference may vary. But whether it springs from patriotism or prejudice, reason or unreason, is not our concern. What is our concern is the existence of the preference as a material fact for a substantial number of buyers, who are entitled under the law to protection against deception. In view of the frequency and consistency with which proof of the existence of such preference has been shown in countless prior proceedings, the Commission may take official notice of that fact, and dispense with the need to re-prove it in each new proceeding that is brought.

Proof of general consumer attitudes and preferences in regard to the general class of products of foreign origin or manufacture would only prove again that which the Commission has already established to be the fact from its accumulated knowledge and experience. Further, the requirement that such proof be adduced anew in each case entails, as it did here, the introduction of an abundance of consumer testimony, needlessly delaying the progress of the proceedings and taxing the resources of respondents as well as the Commission. The Supreme Court stated in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 614, that "The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed . . . but to draw from its generalized experience." Accordingly, we may now properly generalize the facts established by the Commission in the long line of foreign-origin cases and relieve the parties in this type of case of the unnecessary

¹¹ Cases involving these products are almost countless. See, e.g., *State Sewing Machine Corp.*, 48 F.T.C. 941; *Royal Sewing Machine Corp.*, 49 F.T.C. 1351.

¹² *American Tack Co.*, 50 F.T.C. 202; *American Merchandise Co.*, note 6, *supra*.

¹³ *William Adams, Inc.*, 53 F.T.C. 1164.

¹⁴ *Utica Cutlery Co.*, Docket No. 7427, April 2, 1960.

¹⁵ *Oswall Tool Co.*, Docket No. 7491, December 26, 1961.

¹⁶ *Rene D. Lyon Co.*, 48 F.T.C. 313, 787.

burden of continuing to litigate, over and over again, the same general factual issues as to consumer attitudes and preferences.¹⁷

In the interest of clarity, it is worth restating that these conclusions rest not upon *a priori* theory but upon experience reflected in countless records and proceedings.¹⁸ Following established practice, reflected in the provisions of Section 7(d) of the Administrative Procedure Act and Section 4.12(c) of the Commission's Rules of Practice, we merely "take judicial notice of our own records." *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 217.¹⁹ To do so is in no way to deprive respondents of the benefits and protections of an adversary proceeding.²⁰ General presumptions of fact, officially noticed, may of course be rebutted by facts in a particular case.²¹ Just as the generalization

¹⁷ The Commission's authority to draw appropriate inferences in making its findings is well established. For example, in *Federal Trade Commission v. Raladam*, 316 U.S. 149, 152, the Court stated that, upon a determination that a commercial deception has been practiced in a field of active competition, the Commission is authorized to infer that there has been a diversion of trade.

¹⁸ For authoritative recognition of the desirability of allowing agencies to exercise their powers in varying ways, depending on the needs of the situation, see *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 201-203, which concludes that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." At p. 203. In *Chenery*, the Court sustained the agency's authority to formulate new general standards of conduct in an adjudicative proceeding, rather than through exercise of its rule-making powers. *A fortiori*, there can be no question—as Section 7(d) of the Administrative Procedure Act explicitly recognizes—of an agency's right to take official notice of material facts, though not appearing in evidence of record, within its expert knowledge derived from experience.

To insist that rules of proof in agency litigation should not be enunciated prospectively in agency opinions or decisions would be to stultify the administrative process, circumscribing it far more narrowly than the judicial. Judge-made rules, particularly relating to evidence, are as old as the common law. The suggestion that an agency must act "like a court," placing sole and undeviating reliance on a case-by-case process of "inclusion and exclusion," never deciding more than the circumstances require or undertaking to generalize from the particular, reflects more than an erroneously narrow view of the judicial process. If accepted, it would imply abdication rather than fulfillment of an agency's paramount responsibility to devise and administer a viable scheme for giving practical and concrete effect to the broad provisions of law entrusted to its administration. See Friendly, "A Look at the Federal Administrative Agencies," 60 Columbia L. Rev. 429, 436-37 (1960).

¹⁹ To the same effect, see, e.g., *National Fire Insurance Co. of Hartford v. Thompson*, 281 U.S. 331, 336; *United States v. Pink*, 315 U.S. 203, 216.

²⁰ The notion that an administrative agency may not rely on expert knowledge derived from experience has long been rejected where, as is true here, the issue involved is the correct appraisal of the "results which may flow from" facts already in evidence. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 800. A major purpose in creating administrative agencies was "to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Ibid.* *Republic Aviation* explicitly sustained reliance on rebuttable presumptions of fact based on agency experience. See pp. 804-805.

See also *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548, 559-561, which upholds the right of an administrative agency to rely on its own experience and expert judgment in drawing predictive inferences.

²¹ See Administrative Procedure Act, § 7(d), 5 U.S.C. 1006(d), 60 Stat. 241: "Where any agency action rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the

of fact we have stated is drawn from experience, so too must it be qualified by experience. It is not an absolute or dogma, expressing revealed truth. The Commission is well aware, for example, that a man who prefers an American-made watch band or hand tool may not prefer American cigars, perfume, caviar, or scotch. Indeed, we have frequently acted on the premise, again drawn from experience and observation, that some imported products are far more highly prized by the vast majority of Americans than their counterparts made in the United States. Where that is the case, a false implication of foreign origin is an actionable deception.²²

But we are not barred from taking official notice of a general fact merely because it is not a universal fact. By recognizing, as we do, that there will be exceptions to the general fact, we do not impair the essential validity or propriety of utilizing the doctrine of official notice. In cases where the foreign product involved and the circumstances of its sale are such that the Commission may not properly take official notice of a substantial consumer preference for its American counterpart, the Commission will not do so. Where failure to disclose the product's foreign origin is plainly not deceptive, the Commission will have no cause to issue a complaint.²³ However, in a case involving neither an exceptional product nor exceptional circumstances, where the Commission's complaint is predicated on the existence of a general consumer preference for American-made goods of which official notice is taken, the burden of showing that the particular case is exceptional and not within the general rule will rest on the respondent.²⁴ Specifically, once it is shown in such a case that the

contrary." Federal Trade Commission Rules of Practice, § 4.12(c): "When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."

²² See, e.g., *H. N. Heusner & Son v. Federal Trade Commission*, 106 F. 2d 596 (C.A. 3), and *El Moro Cigar Co. v. Federal Trade Commission*, 107 F. 2d 429 (C.A. 4) ("Havana" cigars); *Fioret Sales Co. v. Federal Trade Commission*, 100 F. 2d 858 (C.A. 2), and *Harsam Distributors, Inc. v. Federal Trade Commission*, 263 F. 2d 396 (C.A. 2) ("French" perfume); *Federal Trade Commission v. Bradley*, 31 F. 2d 569 (C.A. 2) ("English" soap); *E. Griffith Hughes, Inc. v. Federal Trade Commission*, 77 F. 2d 886 (C.A. 2), cert. denied, 296 U.S. 617 ("English" bath salts); *Edward P. Paul & Co. v. Federal Trade Commission*, 169 F. 2d 294 (C.A.D.C.) ("English" and "French" porcelain products).

²³ An obvious example would be a well-known brand of French perfume, where a statement on the package "Made in Paris" would help rather than hinder its sales appeal, and the omission of such statement could not be materially deceptive since no substantial segment of the buying public would be misled or prejudiced thereby.

²⁴ In such a case, in order that the respondent may have fair opportunity to disprove the noticed fact, in accordance with Section 7(d) of the Administrative Procedure Act and Section 4.12(c) of the Commission's Rules of Practice (quoted *supra*, footnote 21), the Commission will state in the complaint that it has taken official notice of the general consumer preference for American-made products. In addition, it would be a desirable practice, as has already been done in some instances, for the examiner to incorporate the taking of such official notice in his pre-hearing order. See *Lifetime Cutlery Corp.*, Docket.

product's foreign origin has not been clearly disclosed to prospective purchasers, the burden will shift to the respondent to come forward with evidence that in the particular circumstances no substantial segment of the buying public believes or assumes that his unmarked foreign-made product is of domestic origin or is prejudiced by the failure to disclose its foreign origin.²⁵

Commissioners Anderson and Kern dissent in part.

OPINION, DISSENTING IN PART

By KERN, *Commissioner*:

The majority opinion correctly states respondents' two main arguments on appeal, namely, (1) that the issues here are *res judicata* having already been decided by the Commission in respondents' favor in a prior proceeding, and (2) that factual support for the order is lacking. Part I of the Commission's opinion rejects respondents' contention of *res judicata*. With this conclusion I concur. Part II of the Commission's opinion rejects respondents' contention as to the factual inadequacy of the initial decision. It deals with and disposes of the contention of respondents that there is no domestic preference for American-made watch bands—and indeed the record is clear on this issue. With this conclusion I likewise concur.

However, the majority was not content to dispose of the only issues raised by the appeal and to affirm the hearing examiner's decision as fully supported by the record. In Part III of its opinion, perhaps the longest sustained example of dicta to come to my attention, it seeks to demonstrate that preference of the buying public for articles of domestic manufacture is properly the subject of official notice, which should be utilized in future cases. While dicta laying down techniques for use in future cases to shorten trial records may perform a useful function, yet a generalization founded upon dicta is at best of dubious value.¹

No. 7292, October 30, 1959; hearing examiner's notice of intention to take official notice, *Hilton Watch Co.*, Docket No. 8402, January 19, 1962; hearing examiner's denial of motion for clarification, *Savoy Watch Co., Inc.*, Docket No. 8080, CCH Trade Cases, Par. 15,677, January 22, 1962.

²⁵ One further caveat should be added. We deal here only with the question of origin markings on the products themselves and on their packaging. Advertising matter presents another question. Both the burden of requiring disclosures of foreign origin in all advertisements, and the extent of protection of the public to be derived from such a requirement, assuming adequate disclosure is made on the package and product, are significantly different.

¹ Cardozo, "The Nature of the Judicial Process", pp. 29-30: "Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside. Judges differ greatly in their reverence for the illustrations

In defense of the majority's action in going beyond the issues before the Commission for decision, it is contended that "it is, of course, common practice for an appellate court having supervisory responsibility over the conduct of trials in lower courts to formulate principles relating to the nature of proof." However, the cases cited by the majority to support this proposition lack conviction;² all of these cases deal with details of proof that were directly involved in the proceeding and were before the court for consideration and disposition. Indeed, an examination of the authorities cited reveals that the issue relating to the nature of proof constituted the crux of the cases.

I would not for one moment argue that there might not arise occasions when the enunciation of rules of proof in agency cases would be appropriate. Indeed, in the cases relied upon by the majority to sustain its position, it was necessary for the court to do so as the issue was squarely before the court for determination.² These cases sustain my position that it would be far more appropriate to lay down a rule of proof in a case where the issue is squarely presented. Indeed, there is raised a grave question of propriety in taking a firm position on a matter as important as the methodology of proof of key issues in this and future foreign origin cases where such action is uncalled for by the facts under review. The problem was neither briefed nor argued and properly so because it was not raised by the issues on appeal. In my view any decision involving something as important as removing from Commission counsel a vital element of proof, as the majority would do, and thrusting upon future respondents the burden of overcoming presumptions based on the Commission's experience in other cases, is a serious matter which should be arrived at only after countervailing arguments have been thoroughly considered in an adversary proceeding where such issues are squarely presented. Being promulgated for future guidance, it clearly takes on the stature of a substantive rule, yet it is accomplished by the majority in utter disregard

and comments and side-remarks of their predecessors, to make no mention of their own. All agree that there may be dissent when the opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. No one, of course, avows such a belief, and yet sometimes there is an approach to it in conduct. I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others. But dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent. . . ."

² Footnote 3, p. 510, Comm. Opin.

of the statutory safeguards applicable to administrative rule making.³

The majority attempts to justify the propriety of its action by pointing out the fact that there have been many previous cases involving various foreign products in which the Commission has decided the existence of a public preference for the domestic counterpart. It argues that Commission experience has evolved to a point where the Commission may officially notice the fact of a domestic preference for a domestic product generally. However, just because public preference has been demonstrated for domestic products A, B and C, it does not follow that this demonstrates a similar preference for domestic products D, E and F and finally for domestic products generally. Indeed, in this proceeding the hearing examiner, I believe, would have excluded evidence as to a domestic preference for gloves, flashlight bulbs, sunglass lenses, imitation pearls, mechanical pencils, sewing machine parts, thumbtacks, cutlery handles, stainless steel tableware and hand tools, as irrelevant. Yet the Commission now proposes to utilize its experience with respect to these widely varied products as a valid basis for laying down a principle that domestic preference for articles of domestic manufacture generally is so notorious that official notice of the fact should be adopted as a general rule of proof.

Based upon the experience the Commission has had in connection with foreign origin cases involving such unrelated products, can the Commission now claim that its taste has become so educated, so accurate, so refined that it can now (when we are in a period where public taste is constantly changing) undertake to lay down a rule generalizing the public taste and preference for articles of domestic manufacture and to require it to be the subject of official notice? I doubt it very much.⁴

A serious question of administrative policy is involved here. Indeed, we have recently been admonished that "the Federal Trade Commission is an administrative agency, not a court. * * * Congress did not contemplate that the Commission would function, like a court, as a passive arbiter of controversies. It was not created merely to apply specific legal standards to isolated commercial acts."⁵ Is it a sound technique of administrative enforcement to rigidify by administrative fiat the issue of public preference for articles of domestic manufacture,

³ Administrative Procedure Act, Sec. 4, 5 U.S.C. 1003, 60 Stat. 238.

⁴ "Happy is the man possessing

The superior holy blessing

Of a judgment and a taste

Accurate, refined and chaste"

Aristophanes, "The Frogs"

⁵ Commissioner Elman's Dissenting Opinion in the matter of *Gimbel Bros.*, Docket 7888.

or should it not more properly be left to determination on a case by case basis? Even the majority concedes that the dogma is not absolute and points to exceptions such as cigars, perfume, caviar and Scotch. Conveniently omitted are many other articles of foreign manufacture so famed for excellence that it might be difficult to justify the presumption of a preference for any domestic counterpart. In this connection I call to mind Japanese and Chinese lacquer ware, English saddlery, Waterford glass, Persian and Turkish Oriental rugs, French, Swiss and Italian cheeses, cashmere sweaters, English and Scotch tweeds, French wines, liqueurs and champagnes, camel's hair coats, Irish and Swiss linens, Belgian lace, Shetland sweaters, Sheffield and Damascus steel cutlery, German cameras and binoculars, French porcelains, tapestries, etc. Moreover the number of small foreign compact and sports cars on the American highways today serve as another example demonstrating the dubious wisdom of the generalization now made by the majority opinion. In this jet age when public preferences are constantly changing due to the broadening experience of travel, in this age when the trade markets of the world are coming closer and closer, in this age when trade barriers are falling, in this age when perhaps a free world common market is emerging, it seems a strange anachronism that the Commission now adopts a static viewpoint on this issue—and does so in a proceeding where the issue is not even raised. Sound administrative policy suggests instead that the Commission follow the grain of history. At the very least sound administrative policy suggests that the generalization reached by the majority be tested in a case bringing the issue into clear focus.

While the majority lays down a doctrine of taking official notice with respect to the public's preference for articles of domestic manufacture generally, nevertheless it hedges on this question and concedes that the dogma is not absolute. Therefore it states, "in cases where the foreign product involved and the circumstances of its sales are such that the Commission may not properly take official notice of a substantial consumer preference for its American counterpart, the Commission will not do so." The majority evidently is laying down some kind of a hybrid or hit-or-miss form of official notice which not only demonstrates the weakness of its position, but runs counter to the whole philosophy behind the doctrine of official notice.⁶

⁶ IX Wigmore on Evidence (3rd Ed.) Par. 2567: "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court *assumes* that the matter is so notorious that it will not be disputed."

Par. 2571: "Scope of Principle. The scope of facts that may be noticed includes: (1) Matters which are actually so notorious to all that the production of evidence would be unnecessary;"

One other major objection to the majority view remains for final consideration. Commissioner Elman, speaking for the majority, proposes a rule of proof not bottomed on the record before us, not placed in issue on appeal, not tested at the trial level where issues of this character should certainly be best resolved—a rule of proof by which domestic preference generally for articles of domestic manufacture is officially noted for all future cases. In addition to the objections to such Commission action heretofore pointed out, I wish to note a further objection, namely, that the majority opinion in connection with what is in effect the formulation of a substantive rule, provides that the Commission will state in its complaint that it has officially noted this vital element of proof when it issues its complaint. The administrative process has had a hard career. It has been misunderstood, abused and sometimes properly criticized. But up until the moment the majority opinion issues, it could not fairly be accused of prejudging cases in advance nor could it be accused of adopting a substantive rule in disregard of statutory requirements. Yet this is what the majority opinion accomplishes. No longer can the vital factual issue of domestic preference be tried out *ab initio* with all the procedural safeguards that the use of official notice envisages.⁷

Heretofore, when a case reached the Commission for final decision, it was in a position to decide all the issues in an atmosphere of perfect impartiality. No longer can this be said. The Commission not only has indicated its own position in advance, but in doing so in the complaint deprives the hearing examiner of complete independence and impartiality. I am perfectly willing to submit on the basis of this record the question as to whose views, the majority's or my own, "would be to stultify the administrative process," and would be engaging in "abdication rather than fulfillment of an agency's paramount responsibility".⁸

Finding myself out of touch with the majority in connection with its views as expressed in Part III of its opinion, I regretfully dissent therefrom for the reasons heretofore stated.

⁷ It would clearly be unobjectionable in the light of the Commission's experience with watch band foreign origin cases for the trial staff to request the hearing examiner in future watch band cases to take official notice of public preference for watch bands of domestic origin. Being a factual issue it should be considered by the hearing examiner and the respondent should have the opportunity to rebut it at the hearing examiner level—and certainly should have the opportunity to rebut it without having the hearing examiner influenced by statements placed in the complaint. Only in this way could respondents' rights be fully protected at the trial stage of the proceeding.

⁸ Footnote 18, p. 513, Comm. Opin.

OPINION JOINING COMMISSIONER KERN IN DISSENTING IN PART

By ANDERSON, *Commissioner*:

I subscribe to the majority opinion with reference to Part One and Part Two. In connection with Part Three of the opinion, I experience some difficulty. In attempting to steer a course between Scylla and the Charybdis of the majority and the dissenting opinions with respect to the preference of the buying public for articles of domestic manufacture or the reverse, for the preference of the buying public for certain articles of foreign manufacture, I find the buoys not altogether to my liking. A balancing of course prompts me, however, to join with Commissioner Kern in his dissenting opinion.

FINDINGS OF FACT

1. The Commission adopts the hearing examiner's Findings of Fact "1" through "6," and makes the following additional findings.

2. In the absence of adequate disclosure that a metal expansion watch band is of foreign origin, a substantial segment of the purchasing public believes and understands that it is of domestic origin.

3. A substantial segment of the purchasing public prefers domestically produced metal expansion watch bands to those originating in foreign countries.

4. A substantial segment of the purchasing public is willing to pay significantly more for metal expansion watch bands of domestic origin than for such bands made abroad.

5. In the course of their business, respondents are, and at all times relevant have been, in substantial competition, in commerce, with businesses selling metal expansion watch bands of both foreign and domestic origin. Because of substantial consumer preference for American-made bands, the range of competition for respondents' imported watch bands includes domestically produced bands priced not only at or very near the price levels of respondents' bands but also significantly higher.

6. Although some purchasers of low-priced metal expansion watch bands might examine the bands themselves for a disclosure of foreign origin, a substantial number would not, in part because of the widespread belief that metal expansion watch bands are American-made unless their packages contain information to the contrary. Thus, the failure of respondents to disclose on the various types of packages containing their watch bands that the bands are of foreign origin has a tendency and capacity to mislead a substantial segment of the purchasing public into the erroneous belief that their watch bands are wholly of domestic manufacture, and into the purchase of substantial

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quantities of respondents' watch bands as a result of this mistaken belief. As a consequence, substantial trade in commerce has been, and may be, unfairly diverted to respondents from their competitors, with attendant injury to competition in commerce.

7. The facts of record in this proceeding relate to the period from approximately January 1, 1957, through February 24, 1960. The practices at issue in *Manco Watch Strap Co., Inc.*, 50 F.T.C. 553, took place prior to February 23, 1951.

CONCLUSIONS

1. The Commission has jurisdiction of the respondents and of the subject matter of this proceeding.

2. The acts and practices of respondents enumerated in the Findings of Fact and discussed in the Opinion of the commission were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

3. For the reasons set forth in the opinion, respondents' defense of *res judicata* is rejected as without merit.

4. It is necessary, in the public interest, to require that respondents make clear, conspicuous, and specific affirmative disclosure of foreign origin on the packages or containers of their watch bands.

FINAL ORDER

It is ordered, That the order promulgated by the hearing examiner in this proceeding be, and it hereby is, adopted as the Final Order of the Commission.

It is further ordered, That respondents, Manco Watch Strap Co., Inc., Topps Products Corp., Samuel Mandel, Marvin Mandel, Morris Mandel, and Eugene Mandel 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, Commissioners Kern and Anderson dissenting in part.

ORDER MODIFYING ORDER TO CEASE AND DESIST*

The Commission having, on May 14, 1962, issued an order reopening this proceeding and granting leave to show cause why its order to cease and desist should not be modified; and

Respondents having replied with an Affidavit in Opposition to Modification of Cease and Desist Order and in Support of Motion to

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Postpone Effective Date of Order, asserting that modification of the order as proposed would unfairly prejudice respondents in competing with others not subject to similar prohibitions; and

The Commission having adopted Trade Practice Rules for the Metallic Watch Band Industry, effective on this date, establishing, *inter alia*, a uniform industry-wide trade practice rule concerning disclosure of foreign origin of imported watch bands on the bands themselves and on their containers; and

It appearing, therefore, that respondents will not be prejudiced by an order which is in conformity with the provisions of said trade practice rule; and

The Commission having found that modification of the order herein is required in the public interest:

It is ordered, That the order to cease and desist previously entered in this proceeding be, and it hereby is, modified in the manner set forth below:

It is ordered, That respondents, Manco Watch Strap Co., Inc., and Topps Products Corp., corporations, and their officers, and respondents Samuel Mandel, Marvin Mandel, Morris Mandel, and Eugene Mandel, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of imported merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale, selling, or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

It is further ordered, That the allegations of the complaint, insofar as they charge as a deceptive practice that the respondents' unpackaged watch bands fail to have adequately identified thereon the country or place of origin, are herein and hereby dismissed for lack of evidence;

It is further ordered, That respondents Manco Watch Strap Co., Inc., Topps Products Corp., Samuel Mandel, Marvin Mandel, Morris

Mandel, and Eugene Mandel 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.

ORDER MODIFYING ORDER TO CEASE AND DESIST*

Respondents having filed a motion pursuant to Section 5.7 of the Commission's Rules of Practice to reopen this proceeding and to modify the final order entered by the Commission on July 26, 1962, and the Commission having determined that the reopening of this matter is justified to clarify the meaning of its order and is in the public interest,

It is ordered, That this matter be, and it hereby is, reopened and the final order of the Commission is modified to read as follows:

It is ordered, That respondents, Manco Watch Strap Co., Inc., and Topps Products Corp., corporations, and their officers, and respondents Samuel Mandel, Marvin Mandel, Morris Mandel, and Eugene Mandel, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of metal expansion watch bands in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale, selling, or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

It is further ordered, That the allegations of the complaint insofar as they charge as a deceptive practice that the respondents' unpackaged watch bands fail to have adequately identified thereon the country or place of origin, are herein and hereby dismissed for lack of evidence.

*April 8, 1963.

Complaint

60 F.T.C.

IN THE MATTER OF
VENUS FUR CORPORATION ET AL.

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

Docket C-93. Complaint, Mar. 13, 1962—Decision, Mar. 13, 1962

Consent order requiring New York City furriers to cease violating the Fur Products Labeling Act by labeling and invoicing bleached fur products falsely to show that the fur contained therein was natural, failing to show on labels and invoices when fur was artificially colored, and furnishing false guarantees that fur products were not misbranded, falsely invoiced, or falsely advertised.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Venus Fur Corporation, a corporation, and Leon Lutzker, Nathan Kimmel, Morris Rosenshine, and George Perlman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and 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 Venus Fur Corporation 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 307 Seventh Avenue, New York, N.Y.

Respondents Leon Lutzker, Nathan Kimmel, Morris Rosenshine, and George Perlman are president, treasurer, vice president, and secretary, respectively, of the said corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent. Their office and principal place of business is the same as that of the said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which

have been made in whole or in part of fur which has been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded or otherwise falsely or deceptively labeled in that said fur products were labeled to show that the fur contained therein was natural when in fact such fur was bleached, dyed or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show that the fur contained in the fur products was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural when in fact such fur was bleached, dyed or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5(b)(1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed to disclose that the fur contained in the fur products was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 7. The respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised, when respondents in furnishing such guaranties had reason to believe that the fur products so falsely guaranteed would be introduced, sold, transported or distributed, in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

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

Order

60 F.T.C.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the agreement hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Venus Fur Corporation 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 307 Seventh Avenue, New York, N.Y.

Respondents Leon Lutzker, Nathan Kimmel, Morris Rosenshine, and George Perlman are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That Venus Fur Corporation, a corporation, and its officers, and Leon Lutzker, Nathan Kimmel, Morris Rosenshine, and George Perlman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale, in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution, of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce as

"commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

1. Misbranding fur products by:

A. Representing directly or by implication, on labels that the fur contained in fur products is natural, when such is not the fact.

B. Failing to affix labels to fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Falsely or deceptively invoicing fur products by:

A. Representing directly or by implication on invoices that the fur contained in fur products is natural, when such is not the fact.

B. Failing to furnish invoices to purchasers of fur products showing all the information required to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

3. Furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported or distributed in commerce.

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

IN THE MATTER OF

MIDWEST FROZEN FOODS, INC., ET AL.

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

Docket C-94. Complaint, Mar. 13, 1962—Decision, Mar. 13, 1962

Consent order requiring Gary, Ind., sellers of freezers and food by means of a "freezer-food plan" to cease representing falsely, by their salesmen and otherwise, savings realized by purchasers of their plan; failing to disclose that installment contracts would be sold to others, and failing to complete contracts at the time of a sale and later filling in different terms and conditions from those agreed to.

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 Midwest Frozen

Complaint

60 F.T.C.

Foods, Inc., a corporation, Midwest Wholesale Freezer Foods, Inc., a corporation, and Harriet B. Pearlstein, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Midwest Frozen Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 4001 West Ridge Road, Gary, Ind.

Respondent Midwest Wholesale Freezer Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 4001 West Ridge Road, Gary, Ind.

Respondent Harriet B. Pearlstein is an officer of said corporations. She participates in the formulation, direction and control of the policies, acts and practices of the said corporate respondents. Her address is the same as that of corporate respondents.

PAR. 2. Respondents are, and for more than one year last past have been, engaged in the offering for sale, sale and distribution of freezers and food by means of a so-called "freezer-food plan".

PAR. 3. Respondents cause the said freezer and food, when sold, to be transported from their places of business in the State of Indiana to purchasers thereof located in other states of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said freezers and food in commerce, as "commerce" is defined in the Federal Trade Commission Act. Their volume of business in such commerce is and has been substantial.

PAR. 4. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of freezers, food and freezer-food plans.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their "freezer-food plan" in commerce, respondents have represented directly or by implication by means of statements or representations made by their salesmen and otherwise:

1. That their salesmen are qualified, by virtue of training or experience, in the field of dietary control, and to determine the food requirements of customers;

2. That the food ordered with the help of their salesmen will be sufficient to last the purchaser for four months;

3. That because purchasers of their freezer-food plan can buy their food from respondents at wholesale prices, such purchasers can purchase their food requirements and a freezer for the same or less money than they have been paying for food alone;

4. That purchasers of respondents' freezer-food plan will save enough money on the purchase of food to pay for a freezer;

5. That installment contracts for the purchase of their freezer-food plan are financed or carried by respondents and will not be sold or discounted to others;

6. That the terms and conditions of the sale are as agreed upon and as disclosed at the time of sale.

PAR. 6. The aforesaid representations were and are false, misleading and deceptive. In truth and in fact:

1. Respondents' salesmen are not qualified in the field of dietary control or to determine the food requirements of customers;

2. The food ordered with the help of respondents' salesmen, at the time of the purchase of respondents' freezer-food plan is seldom sufficient to last the purchaser for four months;

3. The prices charged for food by respondents are not always wholesale prices, nor are respondents' prices so low that purchasers of their freezer-food plan can purchase their food requirements and a freezer for the same or less money than such purchasers have been paying for food alone;

4. Purchasers of respondents' freezer-food plan do not save enough money on the purchase of food to pay for a freezer;

5. Respondents have sold or discounted purchasers' installment contracts to others despite their representations to the contrary, both specifically, and inferentially by reason of their failure to disclose that such contracts will be sold or discounted to others;

6. All of the terms and conditions of sale are not always disclosed at the time of a sale, and in many instances contracts are not completely filled in at the time of a sale and when later filled in and sent to purchasers the terms or conditions thereof are not the same as previously agreed to by the purchasers.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive representations has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of respondents' freezer-food plan by reason of said erroneous and mistaken belief.

PAR. 8. 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 methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Midwest Frozen Foods, Inc., and Midwest Wholesale Freezer Foods, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Indiana, with their offices and principal places of business located at 4001 West Ridge Road, Gary, Ind.

Respondent Harriet B. Pearlstein is an officer of said corporations and her address is the same as that of said corporations.

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

ORDER

It is ordered, That respondents Midwest Frozen Foods, Inc., a corporation, Midwest Wholesale Freezer Foods, Inc., a corporation, and their officers, and Harriet B. Pearlstein, individually and as an officer of said corporations, and respondents' agents, representatives and

employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of freezers, food or freezer-food plans, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner that salesmen or saleswomen are experts in the field of dietary control or are qualified in planning or determining the food requirements of customers or purchasers;
 2. Representing that food ordered by a purchaser will be sufficient to last such purchaser any stated or specified period of time;
 3. Representing that they are wholesalers of food or sell food at wholesale prices;
 4. Representing that by purchasing their freezer-food plan purchasers can purchase their food requirements and a freezer for the same or less money than they have been paying for food alone;
 5. Representing that purchasers of their freezer-food plan can save enough money on the purchase of food to pay for a freezer;
 6. Misrepresenting in any manner the savings realized by respondents' customers;
 7. Representing, by failure to disclose or otherwise, that purchasers' installment contracts are financed or carried by respondents or that they will not be sold or discounted to others, when respondents themselves do not finance or carry such contracts, or when respondents sell or discount such contracts to others;
 8. Obtaining purchasers' signatures on sales contracts which contracts do not at that time contain all of the terms or conditions of sale.
- It is further ordered*, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

PARIS NECKWEAR COMPANY, INC., ET AL.