

Complaint

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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

TOP FORM MILLS, INC., ALSO TRADING AS
LADY RUSSEL LINGERIE ET AL.

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

Docket 8454. Complaint, Dec. 1, 1961—Decision, Sept. 23, 1963

Order requiring New York City manufacturers of ladies' lingerie and sleepwear to cease representing falsely—through such practices as use of the words "Paris", "Cannes" and "Biarritz" and the name "Jacques Heim" on labels and in advertisements and advertising mats supplied to retailers, and by instructions for washing in French and English on attached tags—that their said products were made in France and designed by a great Paris couturier.

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 Top Form Mills, Inc., a corporation, also trading as Lady Russel Lingerie, and Manuel Kitrosser and Eleanor Topping,* individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Top Form Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 16 East 34th Street, in the city of New York, State of New York. Top Form Mills, Inc., a corporation, also trades as Lady Russel Lingerie.

Individual respondents Manuel Kitrosser and Eleanor Topping are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The addresses of all respondents herein are the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribu-

*The correct name of this respondent is Elinore Topping.

tion of ladies' lingerie and sleepwear to retailers for resale to the public. Included in said ladies' lingerie and sleepwear were those designated as "Top Form" and "Top Form Tailored Lady", "Spring Fling", "Lady Russel", "Opaque Panel" and "Jacques Heim".

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, 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. In the course and conduct of their said business and for the purpose of inducing the sale of their said ladies' lingerie and sleepwear, respondents have made many statements and representations with respect to the origin, nature and source of said products through labels, tags and advertisements, in advertising mats supplied to retailers and through circulars, letters, announcements and invitations.

In connection with the labels and tags respondents have attached, or caused to be attached, to said products are the following:

1. JACQUES
HEIM

PARIS

2. JACQUES HEIM
PARIS

CANNES BIARRITZ

[Printed on the folded back part of this label
are instructions in English for washing fol-
lowed by instructions in French for Washing.]

LADY RUSSEL'S LINGERIE
NEW YORK CITY

In connection with their advertising appearing in newspapers of general circulation, in advertising mats supplied retailers, and in circulars, letters, announcements and in invitations, the following are typical:

3.

Lady Russel Announces Lingerie by
JACQUES HEIM

(Picturization of lady in nightwear with wording printed interspersed
from above knees down to feet)

pert, flirty; surely the sauciest * * * by the Couturier who began the Bikini
Pink champagne showing Lady Russel's own designs
plus the Jacques Heim delights throughout

June Market Season
LADY RUSSEL LINGERIE
38 East 30th St., New York
Murray Hill 6-6427

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4.

LINGERIE

JACQUES HEIM

(Picture of model in nightwear)

Great Paris Couturier gives French accent to lingerie by Lady Russel
now peep-showing * * * 38 East 30th St., N.Y.

5.

JACQUES HEIM

(Picture of model in nightwear or in slips)

Great Paris Couturier gives French accent to lingerie by Lady Russel
Here's to the charming Frenchman, Jacques Heim, who says
"pretty lingerie is a woman's secret weapon!"

* * *

(Store Name)

6.

Lady Russel presents her new Paris-appeal specialty

LINGERIE BY JACQUES HEIM

You are invited to attend the pink champagne showing
of Lady Russel's New Lingerie

* * *

PAR. 5. Through the use of the aforesaid labels, tags and statements, respondents represented, directly or by implication, that their "Jacques Heim" ladies' lingerie and sleepwear was made in France and by a great Paris couturier Jacques Heim who designed the same.

PAR. 6. Said statements and representations were false, misleading and deceptive. In truth and in fact, said products were mislabeled and were not made in France nor by Jacques Heim. Further, the use of the word "Paris" on the label sewn on to the product in connection with the name of Jacques Heim and the use of the additional French city names of "CANNES" and "BIARRITZ" along with that of "PARIS", and the name "JACQUES HEIM" and the instructions for washing or laundering in both English and French on the tag attached to the product served to further emphasize and accentuate the representations as to the country of origin, the manufacturer and the designer of same. In truth and in fact, said products were made in the United States of America and are of domestic origin and design.

PAR. 7. Respondents' said acts and practices further serve to place in the hands of uninformed or unscrupulous dealers the means and the instrumentality whereby such persons may mislead the purchasing public as to the nature, origin, creation and manufacture of said products.

PAR. 8. There are those of the purchasing public who have a preference for goods, wares and merchandise which are manufac-

tured or produced in foreign countries and more especially ladies' lingerie and sleepwear made in France by Parisian couturiers.

PAR. 9. Respondents, through the use of the word "Mills" as part of the corporate name of respondent Top Form Mills, Inc., on letterheads, invoices and statements, and through the use of the further legend "FACTORY: ST. PAUL, VA." and "FACTORY: ROUTE #1, LEBANON, VA.", and like or similar statements on letterheads, invoices and statements, have thereby represented that they owned, operated or controlled a mill, or mills, in which some or all the various products sold by them were, and are, manufactured, and that the same were at the locations listed.

PAR. 10. In truth and in fact, said representations were, and are, false, misleading and deceptive. Respondents, at all times mentioned herein, did not, and do not now, own, operate or control a mill in which any of the products sold by them are manufactured. Respondents did not, and do not now, own, operate or control a mill or factory at any of the addresses listed.

PAR. 11. A substantial portion of the purchasing public have a marked preference for dealing directly with a mill in the belief that savings and other advantages may accrue to them.

PAR. 12. 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 products of the same general kind and nature as those sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 14. 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.

Mr. Charles S. Cox supporting the complaint.

Ostrow, Golman & Sklaire, New York, N.Y., by *Mr. Harold Sacks* for respondents.

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INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

JUNE 19, 1962

STATEMENT OF PROCEEDINGS

The complaint in this proceeding was issued by the Federal Trade Commission December 1, 1961, and was duly served on all respondents. The complaint charges respondents with misrepresenting that lingerie and sleepwear designed and made in the United States was designed and made in France, and with misrepresenting that they owned, operated or controlled one or more mills that manufactured the merchandise they sold. The practices of the respondents are alleged to constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.

After being served with the complaint, respondents appeared by counsel and filed answer denying generally any violation of law, but admitting certain of the factual allegations, and also advancing certain "affirmative defenses".

A prehearing conference was held January 31, 1962, in New York, New York, at which respondents, through their counsel, made certain admissions, and there was an exchange of information between counsel. Thereafter, pursuant to notice, hearings were held March 19-21, 1962, in New York, New York, before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding. At those hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and evidence were duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues.

Before the hearing, the hearing examiner, by notice dated March 14, 1962, took official notice that "There are those of the purchasing public who have a preference for goods, wares and merchandise which are manufactured or produced in foreign countries and more especially ladies' lingerie and sleepwear made in France by Parisian couturiers." Official notice was likewise taken that "A substantial portion of the purchasing public have a marked preference for dealing directly with a mill in the belief that savings and other advantages may accrue to them." Respondents were advised that they

would be given an opportunity at the hearings to show the contrary of the matters proposed to be officially noticed.

At the close of the evidence in support of the complaint, counsel for respondents moved to dismiss the complaint as to all respondents for failure of proof. That motion was taken under advisement and decision deferred until the filing of this initial decision. The motion is now denied except as otherwise indicated herein.

Proposed findings of fact and conclusions of law and a proposed form of order, together with supporting briefs, were filed at the conclusion of all the evidence by counsel supporting the complaint and counsel for respondents. Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, and the proposed findings, conclusions and order filed by the parties, together with the supporting briefs, the hearing examiner finds that this proceeding is in the interest of the public, and based on the entire record and his observation of the witnesses, makes the following findings of fact and conclusions drawn therefrom, and issues the following order.

FINDINGS OF FACT

1. Respondent Top Form Mills, Inc.,¹ 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 16 East 34th Street, in the city of New York, State of New York. Respondent Top Form also trades as Lady Russel Lingerie.

Respondent Manuel Kitrosser is an officer of the corporate respondent, and respondent Elinore Topping (incorrectly spelled in the complaint as Eleanor Topping) was an officer of the corporate respondent until January 5, 1962. Respondent Manuel Kitrosser formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of respondent Manuel Kitrosser is the same as that of the corporate respondent.

2. Respondent Top Form and respondent Manuel Kitrosser are now, and for some time have been, engaged in the advertising, offering for sale, sale and distribution of ladies' lingerie and sleepwear to retailers for resale to the public. Such lingerie and sleepwear included garments designated as "Top Form", "Top Form Tailored Lady", "Spring Fling", "Lady Russel", "Opaque Panel" and

¹ Sometimes referred to hereafter as Top Form or corporate respondent.

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"Jacques Heim". The use of the designation "Jacques Heim" was discontinued by respondents in December 1959 or January 1960.² The contractual right of Top Form to use the "Jacques Heim" designation expired April 30, 1960.

Respondent Elinore Topping was vice president of respondent Top Form until January 1962, but there is no evidence of the extent of her participation in the policies, acts and practices of the corporation. Until January 1962, she was the beneficial owner of 50 percent of the stock of respondent Top Form. (The complaint is being dismissed as to her, and the term "respondents," as used hereafter, will not include Elinore Topping.)

3. In the course and conduct of their business, respondents now cause, and for some time have caused, their products, when sold, to be shipped from their place of business in the State of New York, or from the places of business of various subsidiary or affiliated corporations, to purchasers located in various other States of the United States and in the District of Columbia, and maintain, and have maintained, a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the conduct of their business, respondents are now, and for some time have been, in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

5. In the course and conduct of their business and for the purpose of inducing the purchase of their lingerie and sleepwear, respondents have made many statements and representations with respect to the origin, nature and source of such products. These statements and representations have been made on labels and tags, in advertisements and in advertising mats supplied to retailers, and circulars, letters, announcements and invitations.

6. Among the labels and tags respondents have attached or caused to be attached, to their products are the following:

(a) JACQUES HEIM—PARIS (CX 1 and 25)

(b) JACQUES HEIM—PARIS—CANNES—BIARRITZ

The hang-tag (CX 2) on which the above appeared also included instructions in English for washing, followed by instructions in French for washing.

It also bore the legend,

"LADY RUSSEL LINGERIE NEW YORK CITY".

² The record does not indicate whether discontinuance took place before or after respondents were aware of the Commission's investigation.

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7. Among respondents' advertising representations appearing in newspapers of general circulation, in advertising mats supplied to retailers, and in circulars, letters, announcements and invitations, the following are typical:

(a)

Lady Russel Announces Lingerie by
JACQUES HEIM
pert, flirty, surely the sauciest * * * by the couturier
who began the Bikini
Pink Champagne Showing—Lady Russel's own designs plus the
Jacques Heim delights—throughout June Market Season
LADY RUSSEL LINGERIE
38 East 30th St., New York
Murray Hill 6-6427 (CX 5 and 6)

(b)

LINGERIE
JACQUES HEIM
great Paris Couturier gives French accent to lingerie by
Lady Russel
now peep-showing * * * 38 East 30th St., N.Y. (CX 7)

(c)

JACQUES HEIM
great Paris Couturier gives French accent to lingerie by
Lady Russel
Here's to the charming Frenchman, Jacques Heim, who says
"pretty lingerie is a woman's secret weapon!" (CX 27-b)

(d)

Lady Russel presents her new Paris-appeal specialty
LINGERIE by JACQUES HEIM
You are invited to attend the Pink Champagne Showing
of Lady Russel's New Lingerie (CX 4)

8. Through the use of the labels, tags, advertisements, circulars, letters, announcements and invitations referred to in Paragraph 5, and as typified by the excerpts set forth in Paragraphs 6 and 7, respondents represented, directly or by implication, that their "Jacques Heim" lingerie and sleepwear were designed and made in France by a great Paris couturier, Jacques Heim. The fact that the representations were sometimes accompanied by the name "Lady Russel," with a New York address, does not overcome the basic representation of French origin.

9. To the extent that the statements and representations set forth above represent that respondents' lingerie and sleepwear were made in France by Jacques Heim—and the examiner finds that they so represent—they are admittedly false, misleading and deceptive. It is admitted by respondents that the garments advertised and labeled as set forth above were made in the United States, not by Jacques

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Heim, but by a mill in New Britain, Connecticut (Respondents' Answer, Paragraph 5; Tr. 34, 82, 179). The dispute as to this phase of the case revolves around the allegation of the complaint that the Jacques Heim products were "of domestic origin and design".

While admitting the products were not made in France, but were of domestic manufacture, respondent Manuel Kitrosser insisted, however, that they were "not of domestic origin". According to Kitrosser, "The product was of Parisian origin, manufactured in the United States," and the style and pattern were designed in Paris (Tr. 82).

10. Certain of the facts concerning the relationship between respondents and Jacques Heim are not disputed by the parties. It appears that Jacques Heim is a French couturier of some standing, with salons in Paris, Biarritz, Cannes and Deauville (RX's 2, 41-a, b).

Respondent Top Form was granted the exclusive use of the trademark "Jacques Heim" for ladies' slips, sleepwear and panties for the period from May 1, 1959, to April 30, 1960 (RX 1-a, b).

Sketches of lingerie and sleepwear were received by respondent Top Form from Jacques Heim, together with two "muslins". A "muslin" was described as "an actual garment made out of a muslin fabric which, in the fashion world, is what you usually use in designing a garment, a fashion garment, and from that you adapt the pattern and the style * * *." (Tr. 73). The muslins received were slip patterns.

Jacques Heim participated in the advance publicity for the launching of the Jacques Heim line by respondent Top Form.

Samples of Top Form lingerie were sent to and acknowledged by Jacques Heim, and they were approved by him, at least implicitly (RX 36, Tr. 178).

11. The garments labeled and advertised under the Jacques Heim name included six garments in the sleepwear line and at least two, possibly four, different styles of slips. There were two lines of sleepwear. One, known as the "Lili" set, comprised "baby doll" pajamas, a shift gown, a waltz gown and a peignoir. The other set, identified as "Gigi," consisted of a button-front sleepcoat and Capri pajamas. (Tr. 67-68, 151-156.)

12. Referring to garments pictured in a Macy's advertisement in the New York Times (CX 26), illustrative of both the "Lili" and "Gigi" line, the witness Frederic E. Freedgood, merchandise manager for the Sleepwear Division of Top Form, testified that the ideas and the design of the merchandise pictured were taken from sketches submitted by Jacques Heim (CX 16-22 and RX 3-21). He added:

They had to be modified to fit an American consumer market. What the French woman will wear or what Mr. Heim wanted the American woman to

wear, as against what the American woman would wear, were two things, two different things. (Tr. 160-61.)

In explaining the adaptation, he pointed out, for example, that the tassels or fringe seen on some of the Jacques Heim sketches (e.g., CX 18) were not sellable on the American market at that time. Top Form, however, achieved the same "soft frilly effect" through the use of lace (Tr. 161).

Thus, although the fringe in the Jacques Heim sketches was not adopted as such, Freedgood's testimony was that "We adopted the style line of it." He continued:

When you speak of style line in fashion industry, you speak of an area where you put an effect of either lace or trim, or it could be ribbon, it could be a fold, it could be buttons, it could be many, many things. But the purpose of a designer is to give you a look, and that is what Mr. Heim gave us. (Tr. 163)

13. According to Freedgood (Tr. 166), the "Gigi" line was adapted from two Jacques Heim sketches (CX 18 and RX 21), and the Jacques Heim sketches were also the basis for the look and the style line of the "Lili" items.

Freedgood referred to a Jacques Heim sketch (CX 16) as illustrative of the "Empire look" used in the "Lili" set, and the shift gown, the baby doll pajamas and the peignoir depicted on CX 26 as illustrative of Top Form's adaptation (Tr. 168). The waltz gown, however, was modeled after the Jacques Heim sketch in the record as RX 7, again with the substitution of lace in place of tassels (Tr. 170).

14. Summarizing, Freedgood stated that Top Form got the two major style lines of its sleepwear from Jacques Heim. He said:

What we are interested in, and what every designer is interested in, and what many manufacturers and the whole fashion industry are interested in, is to get a design or fashion line, a look. This is the primary thing.

* * * * *

But [what] we, as manufacturers, and I as a merchandise person, would be interested in, would we be getting the Jacques Heim look, which is distinguished from any other designer's look. That's what we were interested in.

* * * Mr. Heim gave us that look. That's how we got the look. We took it directly from his designs. * * * We took his look and made it "sellable" on the American market. (Tr. 171-72.)

15. Counsel supporting the complaint emphasizes, in his proposed findings, that in referring to the "equal common denominator" characterizing the "Lili" line, Freedgood stated: "I designed them. I worked with the designers on them" (Tr. 166). In the examiner's opinion, however, these statements are not inconsistent with his overall testimony that Top Form used the Jacques Heim designs in adaptations for the American market.

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16. The testimony of respondent Manuel Kitrosser was along similar lines. After the execution of the agreement between Glamour Gams, Inc., and Top Form (RX 1-AB), whereby Top Form was authorized to use the name Jacques Heim, Kitrosser met with the American representatives of Jacques Heim "and asked them to have Mr. Heim design a line of slips and sleepwear for us." Thereafter, the sketches were submitted, together with the muslin patterns. (Tr. 88.)

17. According to Kitrosser, the Jacques Heim sketches provided styles or motifs or models that Top Form tried to capture to present to the American market—certain ideas of style that were translated into lingerie produced by Top Form Mills (Tr. 90).

Kitrosser testified that respondents had a design from Jacques Heim covering sleepwear (Tr. 64-65); the baby doll sleepwear was designed by Jacques Heim "and adapted to our own use" (Tr. 77-78). He explained in detail (Tr. 66, 78-79) how the baby doll pajamas pictured on CX 5 and 6 "were born from" the Jacques Heim sketches, CX 18 and 19. The "adaptation" was using lace instead of fringe (Tr. 78). He identified a slip bearing the Jacques Heim label (CX 1) as "originally adapted from a design by Jacques Heim" (Tr. 61) and pointed to "two sketches (CX 16 and 17) that went into the adaptation of this garment" (Tr. 62).

The testimony of Kitrosser was that the "muslins" (CX's 23 and 24) submitted by Jacques Heim "were reproduced almost in identity in the Jacques Heim line" (Tr. 74).

Referring to these muslins, Kitrosser continued:

From these we will make a pattern to adapt to our American standards of fit. Our women apparently are built slightly differently from the French women, and their preferences are a little different. So, we take the general cut of this garment and make them with our specifications in the States. (Tr. 75.)

Respondents did not receive muslins for all the Jacques Heim sketches. The two muslins in evidence are the only two received by respondents (Tr. 75).

18. Kitrosser found in the Top Form catalog for the spring and summer of 1962 (RX 22) a variety of styles in slips and sleepwear that he said were based on the Jacques Heim sketches or muslins. Counsel supporting the complaint, in his proposed findings, scoffs at the asserted relationships. However, although Kitrosser's testimony in this respect may be of some assistance in assessing the claims regarding the utilization of the Jacques Heim designs, it has no direct bearing here, since there is no suggestion that the garments pictured and listed in the catalog (RX 22) were in any way represented as originating from Jacques Heim.

19. A partial explanation of the apparent lack of identity between the Jacques Heim sketches and the actual garments or advertising sketches is found at Tr. 71-72. Kitrosser stated:

For example, assuming that any one of these sketches were adopted—any one; it doesn't matter which it is—we would not make just this one piece. This, for example, is a long gown [CX 22]. When we took this style and presented it to our customers, we would take the same general style up at this area [indicating bodice area] and make all the four different types of garments that I mentioned before.

20. The adaptation of the Jacques Heim styles was done by designers on the staff of respondent Top Form (Tr. 64), and the patterns used for the manufacture of the garments in the Jacques Heim line were made by Top Form employees (Tr. 76). Top Form took ideas from several of the Jacques Heim drawings and combined them together on a particular item (Tr. 174).

21. Thus, in summary, there is at least a colorable basis for the claim that Jacques Heim designed the lingerie and sleepwear that respondents marketed under that name. Admittedly, his sketches were not adopted exactly or in their entirety, but the testimony is clear and specific that they were used to provide the "Jacques Heim look" in the creation of adaptations for the American market. Even discounting this testimony as self-serving, it stands in the record uncontradicted.

Aside from the fact that Top Form employees in this country "adapted" the Jacques Heim designs and made the actual patterns, the only ground advanced by counsel supporting the complaint in support of his contention that the garments are "of domestic origin³ and design" is his own comparison of the physical exhibits and depictions in advertisements, on the one hand, and the Jacques Heim sketches, on the other, leading to his conclusion that there is no discernible relationship between them.

22. Like counsel supporting the complaint, the hearing examiner has some difficulty—at least in some instances—in detecting the relationships claimed between the sketches and the garments. But in the esoteric realm of fashion design, neither counsel's opinion, nor that of the examiner, is sufficient to overcome the evidence of record. The examiner cannot, on this record, find that the merchandise was not "designed" by Jacques Heim. This is not to say that respondents have proved that their garments were so designed. But that burden was not theirs. The burden was on counsel supporting the complaint to prove that Jacques Heim did not design the garments—

³ The word "origin" is broad enough to cover both design and manufacture.

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that they were of domestic origin and design. That burden has not been met.

23. There may be a suspicion⁴ that this case is analogous to that of *Sidney J. Kreiss, Inc.*, Docket 7264, (order to cease and desist, May 19, 1960 [56 F.T.C. 1421]; order denying modification, July 10, 1961) [59 F.T.C. 1479] where,

Although respondents were granted the right to use the names of two fashion designers, Jeanne Lanvin and Oleg Cassini, in their sale of hosiery, the record fully establishes that neither of these at any time created, designed or styled the hosiery carrying their names.

But suspicion cannot substitute for evidence, and there is no basis for a finding here that the arrangement was simply the licensing of the Jacques Heim name without any participation by Heim in the designing of the garments bearing his name. It is true that the contractual arrangement (RX 1 A-B) is limited to licensing Top Form to use the trade name and trademark "Jacques Heim." Nevertheless, there is in the record also testimony and other evidence indicating participation by Jacques Heim in the creation of the garments bearing his name.

24. This case is obviously distinguishable from *John Gray the Fur Designer, Inc.*, Docket 3658, 29 F.T.C. 543 (1939). In that case, respondent represented that patterns for fur coats had been manufactured in Paris from designs produced by famous Parisian designers whereas the patterns admittedly were manufactured in New York from designs produced by respondent's employees; the named designers had no connection whatever with them; and purported telegrams or cablegrams from such designers quoted in respondent's advertisements were "wholly fictitious and false."

25. There is no evidence in this record that the word "design" has any specialized meaning, so that the representation that Jacques Heim "designed" the garments involved in this proceeding must be assessed against the ordinary meaning of the word, or against such specialized meanings as may be appropriate in the circumstances.

We turn first to Webster's New International Dictionary (Second Ed., 1950). The pertinent definition of the transitive verb "design" is as follows: "To fashion according to a plan; * * * To sketch as a pattern or model; To delineate; * * *. To execute as an integral or artistic whole; * * *." For the noun "design", we find this definition, with particular reference to art: "A preliminary sketch; an

⁴ See Respondents' Answer, Paragraphs 12-14 and Tr. 42-43 of the prehearing conference, January 31, 1962 (subsequently "corrected" at the hearing of March 19, 1962, Tr. 5-6) to the effect that respondents simply had a right, pursuant to a license agreement, to use the Jacques Heim name.

outline or pattern of the main features of something to be executed, as of a picture, a building, or a decoration * * *."

Similarly, the Encyclopaedia Britannica (14th Edition, 1929), Volume 7, pages 259-60, defines "design" as "the arrangement of lines or forms which make up the plan of a work of art with especial regard to the proportion, structure, movement and beauty of line of the whole."

Words and Phrases, Volume 12, furnishes some guidance concerning "design in copyright and patent law." Two of the definitions appear to be applicable here:

A "design," in the view of the patent law, is that characteristic of a physical substance which by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. The essence of a design resides, not in the elements individually, nor in their method of arrangement, but in the tout ensemble—in that indefinable whole that awakens some sensation in the observer's mind. Impressions thus imparted may be complex or simple; in one a mingled impression of gracefulness and strength, in another the impression of strength alone. But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character. *Pelouze Scale & Mfg. Co. v. American Cutlery Co.*, 102 F. 916, 918, 43 C.C.A. 52.

"Designs", within meaning of design patent statute, consist of combinations and are to be tested for their over-all esthetic effect. *Amerock Corp. v. Aubrey Hardware Mfg., Inc.*, C.A. Ill., 275 F. 2d 346, 348.

26. When respondents' evidence of their achievement of a "Jacques Heim look" is assessed in the light of the emphasis in the quoted definitions on "design" as involving the "*tout ensemble*," "an integral or artistic whole," the differences in detail relied on by counsel supporting the complaint do not provide convincing proof that respondents' representations regarding design by Heim were false and misleading.

27. Accordingly, in the opinion of the examiner, the allegation in the complaint that the products are of domestic origin and design is not sustained by the greater weight of the evidence, except, as already indicated, that the goods were admittedly made in the United States and thus were of domestic origin as far as manufacture is concerned. The order, therefore, runs only against representations that the products were made in France or manufactured by Jacques Heim. There is insufficient basis in this record for a prohibition against representations that the products were designed in Paris by Jacques Heim.

28. Specifically, the representations that the goods were made in France by Jacques Heim stem from the use, on labels or in advertising, of the name Jacques Heim, either alone or with any or all of the

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words, Paris, Biarritz or Cannes. The representation of French origin or manufacture likewise results from the use of those same terms, or others similar thereto, and also from the use, on tags attached to garments, of washing instructions in the French language. The use of terms denoting French origin, in the absence of disclosure of American manufacture, has the capacity and tendency to mislead and deceive.

29. The acts and practices of the respondents, as found above, served to place in the hands of uninformed or unscrupulous dealers the means and the instrumentality whereby such persons might mislead the purchasing public, as to the place of manufacture of respondents' products.

Not only is this a reasonable inference to be drawn from the representations themselves, but there is evidence of the manner in which retailers followed up on the representations made by respondents. For example, a half-page advertisement in the Sunday New York Times of September 13, 1959 (CX 26), is devoted to the depiction of Jacques Heim lingerie under the heading "Macy's International Exposition Brings a World of Fashion Dreams to Your Door". The text accompanying the sketches of the products is as follows:

DREAMS FROM PARIS

In Paris the great couturier Jacques Heim dreams up a world of angelic night dresses and captivating pajamas for Lady Russell to bring to you. French as only the French can be * * *.

Another advertisement (RX 50) bears the heading:

Jacques Heim designed it, Lady Russell made it * * * lingerie with the excitement of Paris.

The advertisement further states:

Designed with all the fashion allure of Parisian lingerie * * *.

Still another store ad refers to:

Dreams From Paris Translated By JACQUES HEIM * * *.

plus a further statement:

Lacy Nylon Tricot Gowns, Pajamas with Paris Tags! Created Especially for LADY RUSSELL. (RX 54.)

30. The fact that some advertisements may indicate domestic manufacture (*e.g.*, RX 51) does not detract from the general conclusion that retailers were provided the means and instrumentality to mislead the purchasing public into the erroneous belief that the goods were made in Paris or France by Jacques Heim.

31. The hearing examiner has taken official notice of the fact that "There are those of the purchasing public who have a preference for goods, wares and merchandise which are manufactured or produced in foreign countries and more especially ladies' lingerie and sleepwear made in France by Parisian couturiers." Nothing to the contrary having been shown by respondents, and in fact, the record herein reinforcing that conclusion, the examiner hereby makes such a finding of fact.

32. Respondents, through the use of the word "Mills" as part of the corporate name of respondent Top Form Mills, Inc., have represented that they owned, operated, or controlled a mill or mills in which some or all of the various products sold by them were and are manufactured.

The complaint refers to such representations as having been made "on letterheads, invoices and statements," but the only evidence in this record relates to invoices (CX 14-15 F). The advertisements utilize the trade name "Lady Russel" or "Lady Russel Lingerie", and the only letterhead in the record (RX 45 ab) is that of "Lady Russel". The current catalog (RX 22) bears the words "Top Form", but no reference is made to "Mills".

On invoices there was a further legend "Factory: St. Paul, Va." and "Factory: Route #1, Lebanon, Va.". Such statements constituted representations that respondents owned, operated or controlled at the locations listed a mill or mills in which some or all of the various products sold by them were and are manufactured.

33. Neither the corporate respondent, as such, nor the individual respondents, as such, have owned or operated mills or factories in which their products were manufactured. However, it is found that the corporate respondent and respondent Manuel Kitrosser, jointly or severally, control mills or factories for the manufacture of their products through stock ownership in other corporations. It is further found that Kitrosser, Top Form and Seymour Topping formerly controlled, jointly or severally, manufacturing facilities through such stock ownership. After the death of Seymour Topping in 1959, his interests passed to his widow, respondent Elinore Topping. Also, Top Form has been the sole stockholder in Russell Manufacturing Co., Lebanon, Virginia, since its incorporation in 1957. Russell manufactures lingerie for Top Form. (See Par. 36b, *infra*.)

34. It would unduly and unnecessarily prolong this initial decision to recite in detail the various corporate relationships that have existed in the past. It is sufficient to state generally that Top Form was originally organized in 1952 as Top Form Lingerie, Inc. Its name

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was changed to Top Form Mills, Inc., in August 1953. The stock was held in equal shares by Seymour Topping and respondent Manuel Kitrosser. On the death of Seymour Topping in 1959, ownership of his stock devolved to his widow, Elinore Topping, who was appointed executrix and trustee of the estate. Subsequent to the issuance of the complaint in this proceeding, Elinore Topping transferred her stock to Top Form.

35. According to respondent Kitrosser, Top Form "is basically in the business of manufacturing and distributing of lingerie," with sales in excess of \$9 million in 1961. He testified that Top Form "actually does all its manufacturing" (Tr. 122). "It owns, operates and controls all its own plants." This is "Through stock ownership through the other plants" (Tr. 123). These plants include Southerland Mills, Inc., Graham, North Carolina, which supplies fabric for the manufacture of lingerie. Lingerie is manufactured by Russell Manufacturing Corporation, Lebanon, Virginia; Rockwell Manufacturing Company, Inc., St. Paul, Virginia; Manuela Manufacturing Corp., Naranjito Needlework Corporation and Island Needlework, Inc., all of Puerto Rico.

36. The facts of record regarding these corporations are as follows:

(a) SOUTHERLAND MILLS, INC.—Business started as North Carolina corporation, Southerland Fabrics, Inc., April 8, 1946; capital stock acquired by Kitrosser and Seymour Topping in 1952. New corporation formed 1952, Softex Mills, Inc.; name changed to Southerland Fabrics, Inc., and later (1956) to present name (CX 33b). Engaged in manufacturing textile fabrics, including nylon, acetate and dacron tricot, used in the manufacture of ladies' lingerie and sleepwear. This firm had sales in 1961 of \$2.5 million, of which \$1 million is attributable to sales to Top Form. Southerland has a mill in Graham, North Carolina, and maintains its selling office at the New York offices of Top Form. It appears that the stock of Southerland formerly was held in approximately equal shares by Kitrosser and Seymour Topping (Tr. 13-14). Although respondents propose a finding that Top Form and Kitrosser now own equal shares, the record (Tr. 13-14) is not clear as to this, and Kitrosser referred to himself as the "sole stockholder" (Tr. 124; CF RX 29 A-B). In any event, the ownership interest is in one or both of the respondents.

(b) RUSSELL MANUFACTURING CO., INC.—Maintains a plant at Route 1, Lebanon, Virginia; incorporated February 27, 1957. Engaged in the manufacture of ladies' lingerie and sleepwear consisting of slips, sleepwear, panties and various undergarments, exclusively for Top Form Mills, Inc., and Yolande Corporation. All the textile fabrics used in the production of such products are supplied by Top Form Mills, Inc. This firm shares New York City office space with Top Form Mills. The sole stockholder of this corporation is and has been Top Form.

(c) ROCKWELL MANUFACTURING CO., INC.—A Virginia corporation incorporated in 1949, maintains a plant at St. Paul, Virginia, for manufacturing ladies' slips, half slips, panties and sleepwear, exclusively for Top Form Mills.

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Weekly production amounts to 3,000 dozen. All the textile fabrics used in the manufacture of these garments are supplied by Top Form. Shares New York City office space with Top Form.

(d) MANUELA MANUFACTURING CO., INC.—Operates a plant in Puerto Rico for the manufacture of ladies' lingerie exclusively for Top Form Mills, Inc., and Yolande Corporation. Incorporated March 4, 1959, in Puerto Rico. Weekly production, 1500 dozen. The sole stockholder of this corporation is Russell Manufacturing Co. Top Form Mills supplies all the textile piece goods used by Manuela in the production of ladies' lingerie.

(e) NARANJITO NEEDLEWORK CORPORATION—Operates a plant in Puerto Rico for the manufacture of needlework products used in the manufacture of ladies' lingerie by Manuela Manufacturing Co., Inc. Stockholders are and have been Top Form Mills, Inc., and Manuel Kitrosser, holding equal shares.

(f) YOLANDE CORPORATION—A New York corporation incorporated on December 18, 1928, under the corporate name of Lande & Miskend, Inc.; name changed August 21, 1946, to Yolande Corporation. This corporation maintains its own factory at 49-53 East 21st Street, New York, New York, and is engaged in manufacturing and selling children's dresses and ladies' lingerie. Shares New York City office space with Top Form Mills, Inc. Ninety percent of the voting stock of Yolande Corporation is owned by Safonie Corporation, which in turn is owned equally by Top Form Mills, Inc. and Manuel Kitrosser.

(g) ISLAND NEEDLEWORK, INC.—Operates a factory in Puerto Rico, and manufactures children's dresses exclusively for Yolande Corporation. The production is 600 dozen per week. The sole stockholder of this corporation is Yolande Corporation, ownership as above.

37. In 1960 and 1961, respondent Elinore Topping entered into agreements with Top Form Mills, Inc., and Manuel Kitrosser, wherein she agreed to sell them all of the stock owned by her late husband in Top Form Mills, Inc., Southerland Mills, Inc., Manuela Manufacturing Co., Inc., Rockwell Manufacturing Co., Inc., Russell Manufacturing Co., Inc., Naranjito Needlework Corporation and Safonie Corporation (RX 25, 26). Such transfer of stock was effected about January 5, 1962. She is no longer an officer of Top Form or any of the other corporations, but is retained as a "consultant" (RX 26k).

38. The present officers and directors of Top Form Mills, Inc., Southerland Mills, Inc., Manuela Manufacturing Co., Inc., Russell Manufacturing Co., Inc., Rockwell Manufacturing Co., Inc., Naranjito Needlework Corporation, Yolande Corporation, Safonie Corporation and Island Needlework, Inc. are as follows:

Manuel Kitrosser—President and Director

Esther Kitrosser—Secretary and Director

Sanford Kitrosser—Director

Al Gabe—Assistant Secretary

39. The uncontradicted testimony of respondent Manuel Kitrosser was to the effect that he alone formulates, directs and controls the policies and practices not only of respondent Top Form, but of the

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other corporations listed above (Tr. 124-131). This extends to production and financial operations and general control of day-to-day activities.

40. Thus, the picture that emerges is of a constellation or cluster of closely held and closely affiliated corporations constituting in economics, if not in law, a single enterprise, apparently dominated and controlled by respondent Manuel Kitrosser since 1959 (and apparently previously dominated and controlled by Kitrosser and Seymour Topping until the latter's death in 1959).

41. To all intents and purposes, the corporation Top Form and respondent Kitrosser are one and the same. As such they constitute a parent corporation that exercises domination and control of each "subsidiary" so complete that the latter may be said to have no real mind or existence of its own and to be operated as a mere department of the business of Top Form.

RX 27-34, for example, show that respondent Kitrosser, acting for himself and/or as proxy for Top Form, in a single evening, held stockholders' and directors' meetings of the various affiliated corporations, as well as Top Form, revised their bylaws, elected new officers, ratified a complex agreement and had the corporations guarantee indebtedness and execute deeds of trust or mortgages for the benefit of respondent Top Form. His testimony (Tr. 124-131) also reinforces this conclusion.

42. As a matter of fact, "the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities."⁵ The affairs of the group are "so intermingled that no distinct corporate lines are maintained," and the separate corporations "are but divisions or departments of a 'single enterprise.'"⁵

Here "dominion" is "so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent."⁶

43. The manufacturing corporations in this proceeding are and have been merely the instrumentalities, conduits or adjuncts of their stockholders and the business conduits and alter ego of one another. In the opinion of the hearing examiner, to insist on looking narrowly at the legal fiction of corporate separateness so as to deny that the respondents here own, operate or control mills leads to manifest absurdity and produces inequitable consequences.

This appears to be a proper case for the application of the rule that "A subsidiary or auxiliary corporation which is created by a

⁵ *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-403 (1960).

⁶ *Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61.

parent corporation merely as an agency for the latter may sometimes be regarded as identical with the parent corporation, especially if the stockholders or officers of the two corporations are substantially the same or their systems of operation unified.”⁷

Although subsidiary corporations of a common parent are ordinarily independent of each other, “The rule, however, that ownership alone of capital stock in one corporation by another does not create an identity of corporate interest between the two companies, render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two is not applicable where stock ownership has been resorted to not for the purpose of participating in the affairs of the corporation in the normal and usual manner, but for the purpose of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies.”⁸

44. The examiner recognizes that in most cases where courts have disregarded corporate entities, or “pierced the corporate veil,” the fiction of corporate separateness has been used as a cloak or cover for fraud or illegality, and that as a general principle, the concept of the legal entity will not be ignored to favor the corporation.

However, the authorities also teach that courts will disregard the corporate entity whenever its retention would produce injustice or inequitable consequences. Where it leads to manifest absurdity, the fiction of a separate corporate entity should not be recognized.

Each case involving disregard of the corporate entity must rest upon its special facts. The conditions under which a corporate entity may be disregarded vary according to the circumstances in each case, the two principal requirements being (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that if the acts are treated as those of the corporation alone an inequitable result will follow.⁹

45. There also are other considerations impelling a holding that there has been no improper use of the term “mills.” As far as this record shows, respondents did not undertake to capitalize on or emphasize the corporate name *Top Form Mills*. As already noted, the only evidence of its use is on invoices, and greater use appears to have been made of the trade name “Lady Russel”.

Thus, it appears that the “mills” representation was made primarily, if not exclusively, to the trade rather than to the general

⁷ 13 Amer. Jur., *Corporations* § 8.

⁸ *Id.*, § 1382.

⁹ 13 Amer. Jur., *Corporations* § 7 (1961 Cum. Supp.).

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consuming public. There is no evidence of deception on the part of any wholesaler, jobber or retailer. The hearing examiner recognizes that proof of deception is not necessary; that capacity and tendency to deceive are sufficient. If control of the various manufacturing corporations is not sufficient to justify the use of the word "mills" in the name of the corporate respondent, the finding would be that the corporate name has the capacity and tendency to deceive.

However, the two circumstances taken together convince the hearing examiner that excision of the word "mills" from the corporate name is not required in the public interest.

46. Unlike many of the cases in which the Commission has proceeded against misrepresentation of trade status as a manufacturer, there is here no evidence of any related representations such as "factory to you," "no middle man" or similar expressions concerning cost savings or other advantages stemming from dealing with a manufacturer.

47. Furthermore, there is no evidence in this record as to the nature of the transactions or dealings between respondent Top Form and the various manufacturing subsidiaries or affiliates, as was the case in *Progress Tailoring Company*, Docket No. 3747, 37 F.T.C. 277 (1943), affirmed, 153 F. 2d 103 (7th Cir., 1946).

As a matter of fact, were it not for the *Progress Tailoring* case, the examiner would be free from doubt, (if not free from error) in holding that this record does not warrant a cease and desist order against misrepresentation of the respondents as mills or manufacturers.

Progress Tailoring Company and several wholly owned subsidiaries sold wearing apparel directly to the consuming public. They represented that purchases made from the respondent were at manufacturer's prices, saving the purchaser the usual retailer's or middleman's cost and profit.

The wearing apparel was manufactured by another wholly owned subsidiary of Progress from cloth furnished to it by Progress. It was found that Progress, as the parent corporation, directed and controlled the policies and practices of all its wholly owned subsidiaries. The manufacturing subsidiary charged Progress for its services in cutting, trimming and tailoring the cloth furnished to it by Progress, and Progress in turn, passed the charges on to its selling subsidiaries, so that the price paid by purchasers included a substantial amount to cover the service charges of the manufacturing subsidiary.

In affirming the Commission's order, the Court of Appeals stated: Now the contention is made that membership in that family of corporations should entitle any of the petitioners to advertise that it manufactures the gar-

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ments itself, and they argue that since Progress does directly and absolutely control a clothing manufacturing plant * * *, the Commission erred in entering the order. Suffice it to say that corporate entity will be disregarded only when there are controlling reasons for doing so. 18 CJS § 6, page 378. Here the deception of the public is in no way affected by the corporate relationship, nor will disregarding the relationship correct the evil. Hence we agree with counsel for the Commission that there is no reason for disregarding the actual corporate entities and treating them as one.

In the instant case, however, it appears that the circumstances are sufficiently different so as to warrant treating the various corporate entities as a single enterprise.

In *Progress*, the record indicated that despite the ownership of stock in, and the interlocking control of, the corporations, the corporations conducted their business affairs, so far as those affairs affected the purchasing public, exactly as though there were no inter-corporate relationship. In other words, on that record, the inter-corporate relationship did not affect the price paid by the consumer despite representations to that effect.

No such considerations are presented on this record.

48. This case is also distinguishable from *FTC v. Pure Silk Hosiery Mills, Inc.*, 3 F. 2d 105 (7th Cir., 1924). There it was held that the acquisition by a corporation of less than one-sixth of the outstanding stock of a hosiery mill was not compliance with an order requiring it to stop using the word "mills" until it actually owned, operated or controlled a factory or a mill.

49. Similarly, the facts in this case serve to distinguish it from the *Herzfeld* case 34 F.T.C. 958 (1942), affirmed, 140 F. 2d 207 (2d Cir. 1944). There a partnership trading as Stephen Rug Mills "controlled" through contractual arrangements the mills where the rugs it sold were manufactured. It dictated size, quality, structure and quantity of the rugs produced and had the exclusive disposition of the entire output of certain mills in Europe and in China. The partners had a similar arrangement with an American mill, and as to it, they also had a mortgage on all the looms, machinery, equipment and raw materials, as well as on the lease of the mill premises. They owned "a substantial minority portion" of the capital stock of a corporation manufacturing rug cushions and related articles. The Commission found:

While these facts disclose that the respondents have exercised and are now exercising a measure of control over certain mills which supply them with rugs, the Commission is of the opinion and finds that these facts do not constitute respondents manufacturers or warrant the use by respondents of the word "Mills" in their trade name. Respondents have never owned any rug mill, nor have they operated any mill within the real meaning of the term.

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The Court of Appeals affirmed the Commission's order prohibiting use of the word mills in the respondents' trade name or any other representation that they manufactured the rugs they sold. The court commented, however, that "the petitioners are near enough to being manufacturers to justify their use of the title as it stands, provided all chance of deception were removed." Under controlling Supreme Court decisions, however, the Court held that it was powerless to disturb the corrective measures found necessary by the Commission.

The distinction between the type of control exercised in the *Herzfeld* case and that shown to be exercised in the instant case is obvious.

50. The leading case in this field is *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933). In that case, mixers and blenders of flour called themselves mills or milling companies and otherwise presented themselves as grinders of wheat. There were present none of the factors of actual control of the manufacturing facilities that we have in the instant matter. It may be noted in passing, however, that the court found it unnecessary to order excision of the deceptive words in the corporate or trade names but allowed a qualification to the effect that respondents were "not grinders of wheat". See also *Bear Mill Mfg. Co., Inc. v. FTC*, 98 F. 2d 67 (2d Cir. 1938) and *FTC v. Mid West Mills Inc.*, 90 F. 2d 723 (7th Cir. 1937); cf. *Charles Deer and Jack Deer, trading as Savoy Manufacturing Company*, D. 4763, 39 F.T.C. 417 (1944), affirmed, 152 F. 2d 65 (2d Cir. 1945).

51. Counsel supporting the complaint concedes—or almost concedes—in his proposed findings that respondent Top Form may now properly use the term "mills" in view of its ownership since 1957 of all the stock of Russell Manufacturing Corporation. But in urging an order, he retreats to the contention that respondent Top Form had improperly used the word "mills" as part of its corporate name from 1953 to 1957.

With this proceeding having been instituted in December 1961, and with decision being rendered in 1962, this argument provides an insubstantial basis for an order to cease and desist, particularly since respondent Top Form and respondent Kitrosser, jointly or severally, now clearly own, operate or control mills through stock ownership in other corporations.

The phrasing of the complaint poses in some problems here in that *all* respondents—Top Form, Kitrosser and Elinore Topping—are charged with representing "that *they* owned, operated or con-

trolled a mill or mills," whereas, it is alleged, "Respondents * * * did not, and do not now, own, operate or control a mill * * *."

If the corporate entities may properly be disregarded—and the examiner so holds—then it is apparent that respondents individually or collectively did own, operate and control mills and that respondents Top Form and Kitrosser do so now.

52. Before ordering the drastic remedy of excising a trade name in use for nearly a decade, with consequent loss of good will, etc., consideration should be given to the economic realities as well as to other surrounding circumstances, such as the lack of evidence of corollary activities and representations furthering the deception that, on the basis of strict construction, may be said to be inherent in using the word "mills" in the name of a corporation that does not itself own mills.

Under all the circumstances recited, it is the conclusion of the examiner that no useful purpose would be served by an order directing respondents to cease representing themselves as mills or manufacturers, and the allegations in the complaint in that regard are being dismissed.

53. For completion of the record, the examiner finds that a substantial portion of the purchasing public have a marked preference for dealing directly with a mill in the belief that savings and other advantages may accrue to them. This finding is predicated on official notice and the absence of any evidence to the contrary.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The complaint herein states a cause of action, and this proceeding is in the public interest.
3. The acts and practices of respondents Top Form Mills, Inc., and Manuel Kitrosser, as found herein, have had, and may have, the capacity and tendency to mislead and deceive members of the purchasing public with respect to the origin or place of manufacture of their products, and into the purchase of substantial quantities of such products as a result. As a consequence, trade has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done to competition in commerce.
4. By their acts and practices respondents placed in the hands of retailers and others means and instrumentalities by and through which they might deceive and mislead the purchasing public as to the origin or place of manufacture of respondents' products.

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5. The acts and practices of respondents, as found herein, 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.

6. The evidence does not support a finding that Elinore Topping participated in the acts and practices herein found unlawful. She is no longer an officer of the corporate respondent, and an order to cease and desist as to her is not warranted.

7. The evidence does not support the allegations (1) that respondents misrepresented that their Jacques Heim line of merchandise was designed in Paris by Jacques Heim and (2) that they misrepresented themselves as manufacturers or mills or as having factories or mills where their products were and are produced.

ORDER ¹⁰

It is ordered, That respondents Top Form Mills, Inc., a corporation, also trading as Lady Russel Lingerie, and its officers, Manuel Kitrosser, individually and as an officer of such corporation, 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 ladies' lingerie and sleepwear in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. Through the use of the word or words "Paris", "Cannes", "Biarritz" on labels or otherwise, whether singularly or in connection with any other word or words, that products made in the United States were made in France;

2. That any products were made or produced in any specified country when such is not the fact;

3. That any of their products were manufactured or created by Jacques Heim, or by any other French couturier or designer, or by any other French person, firm or corporation;

4. That products made or produced in the United States are made in or imported from countries other than the United States.

Provided, however, That this order shall not be construed to prohibit truthful representations concerning the fashioning or design-

¹⁰ With respect to the practices found by the hearing examiner to be unlawful, the order issued here is substantially that proposed in the complaint, with minor editorial changes and such other changes as were required by the findings and conclusions.

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ing of such products when disclosure is made of the country of manufacture.

It is further ordered, That the complaint be, and it hereby is, dismissed as to Elinore Topping, except to the extent she may be bound by the order herein as an agent, representative or employee of respondent Top Form Mills, Inc., or of respondent Manuel Kitrosser.

It is further ordered, That the charges in the complaint relating to the design of the Jacques Heim merchandise and the representations as to mill or factory ownership, operation or control be, and they hereby are dismissed.

OPINION OF THE COMMISSION

MAY 10, 1963

By HIGGINBOTHAM, *Commissioner*:

The complaint in this matter charges respondents with violating Section 5 of the Federal Trade Commission Act by falsely and deceptively representing that certain lingerie and sleepwear were designed and made in France by a Parisian couturier, Jacques Heim, and with misrepresenting that they owned, operated or controlled one or more mills in which some or all of the various products sold by them were manufactured. The hearing examiner held that respondents had misrepresented in advertising and labeling the country of origin of such products and included in his initial decision an order prohibiting this practice.¹ He further held that the charges in the complaint relating to the design of the "Jacques Heim" merchandise and the representations as to mill or factory ownership, operation or control had not been sustained by the evidence and ordered that they be dismissed. Counsel supporting the complaint has appealed from this decision, assigning as error the findings and conclusions on which the order of dismissal is based.

Since the instant matter is one of first impression for this Commission,² a detailed discussion of the facts and the applicable principles of law is appropriate—both to clarify the basis for our deci-

¹ The complaint was dismissed as to respondent Elinore Topping (erroneously named in the complaint as Eleanor Topping) in both her individual and official capacities. No appeal has been taken from this ruling.

² The Commission has previously issued cease and desist orders to protect the consuming public where respondents *admitted* that the alleged designer had in fact no "connection with the designing or manufacturing of such patterns." *John Grey The Fur Designer, Inc.*, 29 F.T.C., 543, 548 (1939); cf. *Sidney J. Kreiss, Inc., et al.*, 56 F.T.C. 1421, 1430 (1960), involving the alleged designs of Oleg Cassini and Jeanne Lanvin, (Modification denied July 10, 1961.)

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sion here and also as a guide for the fashion industry in future matters.

I

The first issue raised by the exceptions to the initial decision is whether certain lingerie and sleepwear, which respondents claimed were designed by Jacques Heim, were, in fact, designed or created by him.³ The following facts bearing on this question have been found by the hearing examiner and are not in dispute: Jacques Heim is a French couturier, with salons in Paris, Biarritz, Cannes and Deauville. On February 25, 1959, respondent Top Form Mills, Inc., hereinafter referred to as Top Form, entered into an agreement with Glamour Gams, Inc., Heim's representative in this country, whereby Top Form was granted the exclusive use of the trade name and trademark "Jacques Heim" for certain articles of ladies' sleepwear and lingerie for the period May 1, 1959, to April 30, 1960.⁴ Sketches of various items of lingerie and sleepwear were received by Top Form from Jacques Heim together with two slips referred to as "muslins". According to respondent Kitrosser a "muslin" is "an actual garment made out of a muslin fabric which, in the fashion world, is what you usually use in designing a garment, a fashion garment, and from that you adapt the pattern and the style * * *." The garments labeled, advertised and sold to the retail trade by Top Form under the Jacques Heim name included one line of sleepwear known as the "lili" set, consisting of "baby doll" pajamas, a shift gown, a waltz gown and a peignoir, and another, identified as "Gigi", which consisted of a button-front sleepcoat and Capri pajamas.

The record is clear that the garments sold by respondents under the name "Jacques Heim" were not exact reproductions of the garments depicted in the Heim sketches nor of the muslins furnished by Heim. To the untrained eye or to one unversed in the art of fashion designing, there is no apparent similarity between respondents' garments and those conceived by Jacques Heim; however, respondents claim they took ideas from several of the Jacques Heim drawings and combined them together in a particular item.

Respondents have admitted that they did not adopt *in toto* any of the designs in the sketches submitted by Heim. Moreover, they

³ We adopt the hearing examiner's Finding No. 8 that * * * "respondents represented, directly or by implication, that their 'Jacques Heim' lingerie and sleepwear were designed and made in France by a great couturier, Jacques Heim." No exception was taken to that finding.

⁴ This agreement contained certain restrictions with respect to the use of the name "Jacques Heim" in advertising and labeling, but made no reference whatever to the design or style of the lingerie and sleepwear which could be so designated.

have admitted that they made basic changes in the designs he did submit. In this connection, Mr. Freedgood testified that Heim's designs "had to be modified to fit an American consumer market", that they "would never have sold" in this country, and that "what the French woman will wear or what Mr. Heim wanted the American woman to wear, as against what the American woman would wear, were two things, two different things."

This "adaptation" of the Jacques Heim styles was made by designers of the staff of Top Form, and their employees made the patterns used for the manufacture of the garments sold to the public as the "Jacques Heim" line.

That respondents did depart radically from the Heim designs is apparent from the testimony of Freedgood and Kitrosser concerning the nature of the changes and from our own examination of the garments and sketches. For example, Kitrosser identified one of Heim's sketches (CX 18) as the prototype of respondents' adapted "Gigi" sleepwear (CX 5 and 6). The garment depicted in the Heim sketch has long pants and long sleeves, a sash or belt at the waist, fringe at the hip area, and a plain collar. Respondents' garment, on the other hand, has short pants and short sleeves, is loose fitting with no sash or belt, has lace instead of fringe at the hip area, and lace at the collar. It appears, therefore, that the closest point of similarity between the two is that one has lace at the same place that the other has fringe.

II

On issues involving visual disparities, and thus possible deception of the consumer, neither the Commission nor hearing examiners should abdicate or surrender their judicial obligations for the serenity of conclusions proffered by "expert witnesses." Despite this principle, the hearing examiner in the instant case unwittingly abdicated his obligation to make an appropriate finding on the basis of the disparities manifest before his eyes. He admitted that he had difficulty "in detecting the relationship" claimed between the original sketches of Jacques Heim and the garments actually sold to the public as a Jacques Heim design.⁵ He categorized the problem as one "in the esoteric realm of fashion design" and concluded that "neither counsel's opinion nor that of the examiner is sufficient to overcome the evidence of record." Apparently, to the examiner the decisive "evidence of record" was respondents' expert testimony and not the manifest disparity between the original design and the garments sold.

⁵ Finding 22, I.D. p. 841.

We must view the garments and designs *de novo*. The hearing examiner's inability to make a finding on design is neither binding on us nor does it have the "probative force" of findings dealing with the credibility of a witness. See *Universal Camera v. NLRB*, 340 U.S. 477, 497 (1951). We, just as he, have had an equal opportunity to compare the original Jacques Heim designs and the garments sold to the public.

Even in litigation pertaining to infringement of designs, the courts have not required expert testimony, supplemental evidence, or consumer witnesses as a prerequisite for judicial interpretation of a design. And we can find no reason why the Commission must require such testimony as a prerequisite for appropriate proof.

In *Illinois Watch Co. v. Hingeco Mfg. Co.*, 81 F. 2d 41, 43, 45 (1st Cir., 1936), the Court of Appeals noted the obligation of a judge to use "his own eyes" in a design infringement case:

The outline and ornamentation of both designs in controversy were before the Court and he was at liberty to use *his own eyes and his own common sense* in comparing the two designs.

* * * * *

The test of infringement of a design is whether the two designs have substantially the same effect on the *eye of the ordinary observer* giving such attention to the matter as purchasers usually give.⁶ (Emphasis added.)

In exercising our administrative expertise, "the important criterion is the net impression which the advertisement is likely to make upon the general populace". *Charles of the Ritz Dist. Corp. v. F.T.C.*, 143 F. 2d 676, 679 (2d Cir., 1944).

Respondents did not advertise their garments as "substantial modifications", "alterations", or "adaptations" of Jacques Heim's original designs; instead, blatantly and without warning of the modifications, the public was told that the garments were designed by Jacques Heim; the public is entitled to get what is represented to it, *F.T.C. v. Algoma Lumber Co., et al.*, 291 U.S. 67, 78 (1934). Here they were entitled to obtain garments manufactured according to Heim's designs as pictured in his sketches—and we so hold. Finally, with all due deference to the hearing examiner, this Commission has always "had a right to look at the advertisement in question, consider the *relevant* evidence in the record that would aid it in inter-

⁶ Similarly, in another design infringement case, *American Fabrics v. Richmond Lace Works*, 24 F. 2d 365, 367 (2d Cir., 1928), the Court refused to wear judicial blinders and as a basis for its judgment the Court noted: "From our own inspection, we should say that the general appearance of the two patterns is sufficiently different, so that no reasonable observer, giving such attention as purchasers usually do, would be deceived; * * *". (Emphasis added.)

preting the advertisement, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive * * *." *Zenith Radio Corporation v. F.T.C.*, 143 F. 2d 29, 31 (1944). (Emphasis added.) To be sure, there was testimony in the record on what "designed" meant. However, the entire thrust of such evidence was its meaning to respondents and inferentially to the trade. This is not evidence relevant to the issue of deception of the consuming public. The function of this Commission in this case is to inform and protect "the ignorant, the unthinking and the credulous."⁷ The expert has the more wherewithal to fend for himself.

In order to protect the public to what standard should we hold respondents? It is obvious that the fashion field is a volatile one. Fashions change from year to year. Fortunes are made and lost in short periods of time. Respondents knew the alluring appeal of the Jacques Heim name; in their advertisements they repeatedly emphasized his artistry in designing the Bikini and other famous styles.⁸ There are thousands of firms competing for the business of American women, and we hold that the use of the name of a famous French couturier is a strong magnet in drawing women into stores. The possibility of confusion of the public and diversion of trade is enormous. Under the circumstances, the public is entitled to the highest standard of protection.

The design infringement cases raise the basic issue of whether trade may be diverted and goodwill lost by the deceit or confusion

⁷ *Charles of the Ritz*, *supra*, citing and quoting with approval from *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 F. 73, 75 (2d Cir., 1910).

⁸ As an example, see CX 5 and CX 6; these are advertisements showing a model wearing "Gigi" lingerie captioned the "pert, flirty, surely the sauciest * * * by the couturier who began the Bikini * * *"; see also RX 50—another advertisement containing the following language "Jacques Heim designed it, Lady Russel made it * * * lingerie with the excitement of Paris, designed with all the fashion allure of Parisian lingerie, lavish tucks, trims and flutings: made in the original of practical fabrics"; also see RX 53—"Heim designs for New York firm, Big Sleeves, Defined Bosoms."

The scope of respondents' advertising campaign and their reliance on "designed by Jacques Heim" as a "sales come on" is shown by the composite promotional flyer—RX 54—containing advertisements from the Los Angeles Times, October 13, 1959: "Jacques Heim of Paris designs for Lady Russel lingerie"; The New York Times, Sunday, September 13, 1959: "Dreams from Paris. In Paris the great couturier, Jacques Heim dreams up a world of angelic nightdresses and captivating pajamas for Lady Russel to bring to you"; The Hartford Times, November 10, 1959: "Dreams from Paris translated by Jacques Heim"; Milwaukee Journal (undated): "Jacques Heim designed it, Lady Russel made it * * * lingerie with excitement of Paris"; Chicago Daily News, September 23, 1959: "Jacques Heim designed this lacy nylon tricot lingerie for Lady Russel * * *"; The Miami News, September 24, 1959: "Dreams from Paris designed by Jacques Heim"; Philadelphia Inquirer, November 8, 1959: "Sweetest dreams from Paris, Jacques Heim's designs in luxurious nylon tricot"; The Bridgeport Post, September 28, 1959: "From Paris, Jacques Heim, the great designer, sends Lady Russel the dreamiest, Frenchiest, sauciest nightwear ever."

of the public. And, the rules in the fashion design cases are similar to those which we expound today.

In infringement cases the patentee or copyright design holder is held to a strict burden of proof. In *Mary Muffett, Inc. v. Loma Dress Co., Inc.*, 39 F. Supp. 415, 416 (S.D., N.Y., 1941), the standard announced was whether there was "such a similarity that it amounts to identity". Similarly, in *Peter Pan Fabrics, Inc. and Henry Glass & Company v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D., N.Y., 1959), where it was held that there was a basis for copyright infringement, the Court noted that "defendant's design is *substantially identical in form* * * * substantially identical in color. The differences in the design are only those which would result from free-hand rather than photographic copying." Ibid. at 142. (Emphasis added.)

From our consideration of all the evidence and the applicable law, we find that the garments advertised and sold by respondents under the Heim name were designed by persons on respondents' staff and not by Heim. We may add that we would arrive at this conclusion solely on the basis of respondents' admission that they had changed, transposed, or rearranged dominant features of Heim's designs. By materially changing the outline, pattern or arrangement of the features embodied in the Heim designs, respondents created their own designs. Even if the garments produced bore a superficial resemblance to something Heim had done, that slight similarity would not meet the standard of Section 5.

We also regard as irrelevant the evidence adduced by respondents for the purpose of showing that samples of the garments in question had been approved by Jacques Heim. The issue is whether Heim designed the garments, not whether he approved what respondents had done. Moreover, the evidence on this point, a letter from Heim dated May 28, 1959, shows only that Heim had received from respondents samples of lingerie which "you wanted me to see" and thought they were "very pretty". There is nothing to indicate he approved the garments as his own design or that he considered such approval necessary. The fact that respondents supplied finished garments rather than patterns, and the further fact that Heim's letter was sent only a few days before the scheduled showing of the garments in New York show that respondents did not need Heim's approval.

As to the use of the word "mills" in the corporate name and respondents' invoices implying ownership of factories located at St. Paul and Lebanon, Virginia, we have considered the exceptions taken

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by counsel supporting the complaint. While adopting neither the examiner's reasoning nor his analysis of the earlier precedents, on the present state of the record, we are not inclined to reverse his dismissal of this aspect of the case.

To the extent indicated herein, the exceptions of counsel supporting the complaint are granted; in all other respects they are denied. The initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

FINAL ORDER

SEPTEMBER 23, 1963

On May 10, 1963, the Commission rendered its decision herein modifying the order contained in the initial decision and granted respondents, pursuant to Sec. 4.22(c) of the Commission's Rules of Practice dated June 1962, twenty days in which to file objections to the proposed final order.* Counsel supporting the complaint was granted by order of the same date ten days in which to file a statement in reply to respondents' objections.

On June 6, 1963, respondents filed a "Motion of Respondents, TOP FORM MILLS, INC. and MANUEL KITROSSER, for Reargument or, in the Alternative, the Filing of Objections to the Proposed Final Order of the Federal Trade Commission, dated May 10, 1963." Said motion asserts that the Commission's decision incorrectly rejected the hearing examiner's findings with respect to the meaning of the word "design" and requests leave to reargue this aspect of the case. Respondents include in their motion certain objections and request, in the alternative, that they be considered as objections to the Proposed Final Order. Counsel supporting the complaint filed his statement in reply on June 18, 1963.

Respondents' motion contains no arguments not previously considered by the Commission in reaching its decision in this matter. As pointed out in the Commission's opinion, the public's understanding of the word "design", is the important criterion; the testimony of respondent Kitrosser and respondents' employee Freedgood as to their understanding of the term's meaning in the trade is not binding on the Commission. We believe that the Commission, just as a court, is competent to determine whether or not a design has been faithfully reproduced. *Cf. Mohr. et al. v. Federal Trade Commission*, 272 F. 2d 401, 405 (9th Cir. 1959), *Cert. den.* 362 U.S. 920

*Proposed Final Order is omitted since it was entered as the Final Order of the Commission.

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(1960) and cases cited in Commission's opinion, pp. 858-860. Thus, counsel supporting the complaint was not bound to produce experts, consumer witnesses or other testimony to explain what were disparities manifest to the eyes of the examiner and of this Commission.

Respondents' protestations that use of such designations as "Designed by Jacques Heim" merely suggests that the individual named has contributed a "theme", "presentation" or an "idea" to the manufacturer and that Jacques Heim had "approved" samples sent him, once more raise issues already considered by the Commission and on which the Commission has ruled.

We do not regard Paragraph (4) of the Proposed Final Order as either "ludicrous" or a vehicle for establishing the Commission as an arbiter of fashion design. In addition to protecting the public and competitors from deceptive and other illegal practices, a cease and desist order should afford guidance to respondents in terms as precise as possible. Rather than simply enjoining respondents from misrepresenting that any of their garments have been designed by Jacques Heim or any other French couturier, Paragraph (4) was included in an effort to inform respondents in some detail as to what is expected of them in making claims of this nature in the future. We think the public was entitled to believe that the so-called Jacques Heim garments manufactured by respondents were similar enough in form, shape and other detail so as to at least give the total appearance of designs executed by Jacques Heim. This is the concept incorporated in Paragraph (4) of the Proposed Final Order.

The Commission, for the reasons thus stated, having determined that respondents' motion and objections are without merit and that the Proposed Final Order should be entered as the final order of the Commission:

It is ordered, That the initial decision be modified by striking therefrom the last sentence of paragraph 10 of the Findings of Fact and substituting in lieu thereof the following: "Some samples of Top Form lingerie were sent to and acknowledged by Jacques Heim.";

It is further ordered, That paragraphs 15 through 27 and 32 through 53 be stricken;

It is further ordered, That paragraphs 28 through 31 be renumbered 16 through 19, and that the following be inserted after paragraph 14 as paragraph 15:

15. Respondents did not duplicate Jacques Heim's design for any particular garment, but attempted only to obtain from

Heim's designs a "look" for the garments which they proposed to sell. Respondents allege that they took ideas from several of the Heim drawings and combined them together on a particular item. This alleged "adaptation" of the Heim styles was made by designers on the staff of respondent Top Form, and the patterns used for the manufacture of the garments in the "Jacques Heim" line were made by Top Form employees. The testimony given by respondent Manuel Kitrosser and by the merchandise manager of Top Form's Sleepwear Division, Fred Freedgood, and our own comparison of Heim's sketches and respondents' garments disclose that respondents made material changes in the Heim designs by altering, transposing or rearranging the principal or distinctive features thereof. The garments sold by respondents were designed by persons on respondents' staff and not by Jacques Heim. The statements and representations made by respondents in advertising and labeling to the effect that the garments in question were designed by Jacques Heim are false, misleading and deceptive.

It is further ordered, That the conclusions of law contained in the initial decision be modified to read as follows:

1. The use by respondents of the representations herein found to be false and misleading have had, and may have, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to induce the purchasing public to purchase substantial quantities of respondents' products because of such erroneous and mistaken belief.
2. The acts and practices of respondents, as found herein, 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. The proceeding is in the public interest.
3. By their acts and practices respondents placed in the hands of retailers and others the means and instrumentalities whereby the purchasing public may be misled as to the origin and design of respondents' products.
4. The evidence does not support a finding that Elinore Topping participated in the acts and practices herein found unlawful. She is no longer an officer of the corporate respondent, and an order to cease and desist as to her is not warranted.

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It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondents Top Form Mills, Inc., a corporation, also trading as Lady Russel Lingerie, and its officers and Manuel Kitrosser, individually and as an officer of such corporation, 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 ladies' lingerie, sleepwear or any other clothing, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Paris", "Cannes", "Biarritz" on labels or otherwise, whether singularly or in connection with any other word or words, to describe or refer to products made in the United States, or representing by any other means that any products made in the United States were made in France or in any other foreign country;

2. Misrepresenting in any manner the country of origin of any of their products;

3. Representing, directly or indirectly, that any of their products were manufactured, or designed, styled or created by Jacques Heim, or by any other French couturier or designer, or by any other French person, firm or corporation; and

4. Using the words "designed", "styled", or "created", or any word or words of similar import, together with the name of any person, to describe or refer to any of their products unless such products are identical as to configuration, combination of lines and patterns executed by such person and are so similar in form, size, shape, ornamentation and other detail as to give the total appearance to the purchasing public of being a precise copy thereof.

It is further ordered, That the complaint be, and it hereby is, dismissed as to Elinore Topping.

It is further ordered, That the charge in the complaint relating to use of representations as to mill or factory ownership, operation or control, be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That since the Commission's "Proposed Final Order" was issued under the Commission's Rules dated June, 1962, which provided for Proposed Final Orders, respondents herein shall, pursuant to Rule 5.6 of the Commission's Rules dated June,

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1962 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. (The topic dealt with in Rule 5.6 is now in Rule 3.26(a) of the Commission's new rules which are now in effect.)

IN THE MATTER OF

MONTALDO'S FURS, INC., ET AL.

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

Docket C-599. Complaint, Sept. 23, 1963—Decision, Sept. 23, 1963

Consent order requiring retail furriers in New York City, to cease violating the Fur Products Labeling Act by advertising in newspapers which failed to show the true animal name of fur and when fur was artificially colored, and to use the term "Dyed Broadtail-processed Lamb" as required, representing furs improperly as "Broadtail", and falsely advertising "* * * Savings of 25% to 50% * * *"; and by failing to keep adequate records as a basis for pricing claims.

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 Montaldo's Furs, Inc., a corporation, and Sidney Weiner, individually and as the principal stockholder of the 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 the respect as follows:

PARAGRAPH 1. Respondent Montaldo's Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondent Sidney Weiner is the principal stockholder in the said corporation and formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 512 Seventh Avenue, New York, New York.

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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 sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have 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 falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the St. Louis Post-Dispatch, a newspaper published in the city of St. Louis, State of Missouri.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 4. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that certain of said fur products were falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

Among such falsely and deceptively advertised fur products, but not limited thereto, were fur products advertised as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 5. In advertising fur products for sale as aforesaid respondents represented through such statements as "Final Clearance of Furs Bringing You Savings of 25% to 50% Off" that prices of fur

products were reduced in direct proportion to the percentages stated and that the amount of said reduction afforded savings to the purchasers of respondents' products when in fact such prices were not reduced in direct proportion to the percentages stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 6. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respect, the term "Dyed Broadtail-processed Lamb" was not set forth in the manner required, in violation of Rule 10 of the said Rules and Regulations.

PAR. 7. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under 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 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 Montaldo's Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 512 Seventh Avenue, New York, New York.

Respondent Sidney Weiner is the principal stockholder in the said corporation and his 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 respondents Montaldo's Furs, Inc., a corporation, and its officers and Sidney Weiner, individually and as the principal stockholder of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the 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, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Represents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondents' fur products the percentage of savings stated when the prices of such products

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are not reduced to afford to purchasers the percentage of savings stated.

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

4. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

5. Falsely or deceptively identifies any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

6. Fails to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

B. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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 the respondents have complied with the