

Initial Decision

IN THE MATTER OF
CARROLL F. CHATHAM TRADING AS
CHATHAM RESEARCH LABORATORIES ET AL.

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

Docket 7609. Complaint, Oct. 13, 1959—Decision, Feb. 28, 1964

Order reinstating consent order of Apr. 4, 1960 (56 F.T.C. 1196)—vacated April 5, 1962—requiring a San Francisco manufacturer of man-made stones having the appearance of emeralds, and the New York City wholesalers of the stones, to cease representing falsely that said stones were cultured or natural or identical to natural stones, and using the word “emerald” as descriptive thereof unless preceded by the word “synthetic” or some other word which would clearly disclose that the product was not natural; and adding the provision that the charges of the complaint be dismissed in so far as they might be construed to allege that the term “Chatham-Created Emeralds” was deceptive.

Mr. Berryman Davis and *Mr. Paul F. Helfer* for the Commission.
Mr. Caesar L. Pitassy, New York, N.Y., for respondents *Mr. Carroll L. Chatham*, trading as Chatham Research Laboratories, Anglomex, Inc., and *Mr. Dan E. Mayers*.

Mr. Peter W. Quinn, New York, N.Y., for respondents *Ipekjdian, Inc.*, *Mr. Adom Ipekjdian*, *Mr. Georges Ipekjdian*, and *Cultured Gem Stones, Inc.*

Hollabaugh & Jacobs, Washington, D.C., for all respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

SEPTEMBER 4, 1963

The Federal Trade Commission issued a complaint herein on October 13, 1959, charging in effect that respondents' advertising was misrepresentative. The complaint alleged that respondents variously referred to their product as “Chatham Emeralds” and “Chatham Cultured Emeralds”, and claimed their stones are identical to natural emeralds in all their properties; that these statements were exaggerated, false, misleading and deceptive because the stones were not identical to emeralds, but were synthetic.

Soon after the complaint was issued, the parties entered into discussions for the purpose of working out a consent order. The chronology of events at that time is hereinafter set forth.

On December 28, 1959, counsel for respondents wrote the Com-

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mission's Compliance Division, referring to the discussions and to a proposed consent order submitted by the Commission. In this letter¹ counsel stated:

As we understand it, your position is that the use by respondents, in connection with their advertising, of the phrase "Chatham-Created Emeralds" would not violate the proposed order, and that the Compliance Division would so recommend to the Commission in the event the question, whether or not that phrase violates the proposed order, is ever raised by or before the Commission.

Would you be kind enough to confirm by letter that the foregoing accurately sets forth the substance of our conferences.

The reply of the Compliance Division dated January 11, 1960, states:²

In response to your letter of December 28, 1959, it is my personal opinion that "Chatham-Created Emeralds" would comply with the terms of the proposed consent order forwarded by you.

You are again reminded, however, that this opinion is not binding on our Bureau of Consultation or the Commission.

After receiving these assurances, the respondents and counsel for the Commission signed an Agreement for a Consent Order, dated February 3, 1960.³ This was accepted by Hearing Examiner Walter R. Johnson whose Initial Decision of February 29, 1960, contained an order requiring respondents to cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;
2. Using the word "emerald" or the name of any other precious or semi-precious stone as descriptive of such stones unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic" or by some other word or phrase of such meaning as clearly to disclose the nature of such product and the fact that it is not a natural stone; provided, however, that this prohibition shall not be construed as requiring respondents, or any of them, to disclose the method or process, or any part thereof, used by respondent Chatham in the manufacture of his stones.

The hearing examiner's Initial Decision became the decision of the Commission on April 4, 1960 [56 F.T.C. 1196], and in an order issued April 8, 1960, respondents were directed to submit a compliance re-

¹ RX 1.

² RX 2.

³ RX 3.

port. They claim they have complied.⁴ In this connection, they adopted the name "Chatham-Created Emeralds", having previously received the Compliance Division's qualified assurance concerning the use of the term.

On July 27, 1960 (RX-6), the Compliance Division advised the respondents that on July 25, 1960, the Commission itself decided that the term "Chatham-Created Emeralds" does not violate the order, unless used ambiguously. It has to be made clear "that it is only the 'emerald' which has been created by Chatham." "Great care should be taken to see to it that the words 'Chatham-Created' are adjectives to and modify the word 'emeralds' and nothing else", the Commission directed.

Respondents gave assurances that such care would be observed⁵ and on September 21, 1960, submitted a further compliance report.⁶ Thereafter, respondents received a letter dated November 18, 1960, from the Acting Assistant General Counsel for Compliance,⁷ which stated:

On November 15, 1960, the Commission rescinded its action of July 25, 1960, wherein it accepted your use of the term "Chatham-Created Emerald" when not used ambiguously.

The Commission directed that you be required to modify the term in conformity with the order to cease and desist.

No reasons were stated in the letter for the action taken by the Commission on November 15, 1960. Respondents requested the Commission to reconsider its action of November 15, which request was denied by the Commission on January 24, 1961.

On January 19, 1962, the Commission issued an Order to Show Cause Why Order to Cease and Desist Should Not be Vacated, Complaint Amended, and Further Proceedings Conducted. On March 26, 1962, respondents filed a Memorandum Showing Cause in which they requested a hearing prior to a reopening of the case in reliance upon the provisions of Section 5(b) of the Federal Trade Commission Act and Section 4.29 of the Commission Rules of Practice. On April 5, 1962 [60 F.T.C. 1889], the Commission issued an Order Reopening

⁴ RX 5.

⁵ RX 7.

⁶ RX 8.

⁷ RX 9.

Matter, Vacating Order, Amending Complaint and Remanding for Further Proceedings. This order amended Paragraphs Four, Five and Six of the original complaint. In amended Paragraph Four the respondents were charged again with calling their product "Chatham Emeralds" and "Chatham Cultured Emeralds", and also with calling their product "Chatham-Created Emeralds", even though the use of this name had been previously approved by the Commission. The amended complaint was accompanied by a proposed new order which would require respondents to cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;

2. Using the word "emerald" or the name of any other precious or semi-precious stone as descriptive of such stones, unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic".

The matter was assigned to the hearing examiner for further proceedings. Thereafter, on April 23, 1962, respondents filed a Motion to Reconsider and to Rescind, Vacate or Set Aside the Order Issued April 5, 1962, contending the Commission acted without authority in issuing the reopening order, in that respondents were not granted a hearing as was requested in their Memorandum Showing Cause dated March 26, 1962. The Commission denied the motion on May 29, 1962 [60 F.T.C. 1891].

Thereafter, on July 11, 1962, the respondents filed their answer, two prehearing conferences were held, prehearing briefs were filed, hearings before the undersigned hearing examiner commencing on May 13, 1963, in New York City, extended over a period of approximately four weeks, and an order was entered closing testimony as of June 20, 1963.

The history of the proceedings reflects that from the initial stages, respondents have adopted a cooperative attitude. The initial order was agreed to without undue delay, and after assurances were obtained that what respondents proposed to call their product would be in compliance with the order.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by counsel in support of the complaint and counsel for the respondents, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following findings of facts and conclusions:

FINDINGS OF FACT

1. Respondent Carroll F. Chatham is an individual trading as Chatham Research Laboratories, with his principal office and place of business located at 70 - 14th Street, in the city of San Francisco, State of California.⁸

2. Respondent Anglomex, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 214 East 18th Street, in the city of New York, State of New York. Respondent Dan E. Mayers is president and principal owner of this corporate respondent. He formulates, directs and controls the acts and practices of this said corporate respondent, including the acts and practices hereinafter set out. The address of this individual respondent is the same as that of the said corporate respondent.⁹

3. Respondent Ipekdjian, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of New York, with its principal office and place of business located at 580 Fifth Avenue, in the city of New York, State of New York. Respondent Georges Ipekdjian is the president and respondent Adom Ipekdjian the vice president of this said corporate respondent. These individuals formulate, direct and control the policies, acts and practices of this corporate respondent, including the acts and practices hereinafter set out. The address of these individual respondents is the same as that of the said corporate respondent.¹⁰

4. Respondent Cultured Gem Stones, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 580 Fifth Avenue, in the city of New York, State of New York. This corporate respondent is a whollyowned subsidiary of corporate respondents Ipekdjian, Inc. Respondent Georges Ipekdjian is the president and respondent Adom Ipekdjian the vice president and treasurer of this said corporate respondent. These individuals formulate, direct and control the policies, acts and practices of this corporate respondent, including the acts and practices hereinafter set out. The address of these individual respondents is the same as that of the said corporate respondent.¹¹

⁸ See complaint and answer.

⁹ See complaint and answer.

¹⁰ See complaint and answer.

¹¹ See complaint and answer.

5. Respondent Carroll F. Chatham is now, and for some time past has been, engaged in the manufacture of synthetic stones which have the appearance of emeralds, advertising the same, and the sale thereof to respondents Anglomex, Inc., and Dan E. Mayers. In the course and conduct of his business, respondent Carroll F. Chatham causes his said synthetic stones to be moved from his place of business in San Francisco to a receiver located in New York City who acts in the capacity of a grader of such merchandise on behalf of respondents Anglomex, Inc., Dan E. Mayers, Ipekdjian, Inc., Cultured Gem Stones, Inc., Adom Ipekdjian and Georges Ipekdjian.¹²

6. Respondents Anglomex, Inc., and Dan E. Mayers are now, and for some time last past have been, engaged in the sale to respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian of synthetic stones manufactured by, and purchased from, respondent Carroll F. Chatham, and delivered by said Carroll F. Chatham to the aforementioned grader. Thereafter, respondents Anglomex, Inc., and Dan E. Mayers require the grader to deliver such synthetic stones to respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian. Respondents Anglomex, Inc., and Dan E. Mayers oversee, direct and control advertising which is disseminated by respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian in their promotion and sale of such synthetic stones to retailers of jewelry and to the purchasing public.¹³

7. Advertising disseminated by respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian in their promotion of synthetic stones manufactured by respondent Carroll F. Chatham is approved by respondents Carroll F. Chatham, Anglomex, Inc., and Dan E. Mayers.¹⁴

¹² Partially admitted by answer. That respondent Chatham is now, and for some time has been, engaged in advertising synthetic stones manufactured by him is reflected by the record. See Tr. 116 and 223, also 134-136 showing that this respondent participated in the preparation of CX 4B-D, copy containing claims basic to all subsequent copy. See CX's 3, 13, 14, and 15A.

That the stones in question are synthetic was conceded by Chatham who makes them. Tr. 166-167.

That the stones are those stones advertised and sold by the other respondents as Chatham Cultured Emeralds or Chatham-Created Emeralds is thoroughly demonstrated by the evidence. See Tr. 114, 121, 200, 201.

See Tr. 160, 161 to the effect that the stones are not cultured.

¹³ Partially admitted by answer. To the effect that respondent Anglomex, Inc., and respondent Dan E. Mayers oversee, direct and control the advertising in question which respondents Ipekdjian, Inc., Cultured Gem Stones, Inc., and Adom and Georges Ipekdjian have disseminated and are disseminating in the promotion of the synthetic stones simulating the appearance of emeralds manufactured by respondent Carroll F. Chatham is established by testimony, see Tr. 208 and 209, and related CX's 12, 13, 14, 15, and 16.

¹⁴ CX's 4, 5, 10, 12, 13, 14, and 15.

8. Respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of natural and synthetic stones, including synthetic stones manufactured by respondent Carroll F. Chatham, which said synthetic stones are those synthetic stones that have been sold by respondent Carroll F. Chatham as aforesaid to respondents Anglomex, Inc., and Dan E. Mayers, and thereafter purchased by respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian from respondents Anglomex, Inc., and Dan E. Mayers.¹⁵

9. Respondents Cultured Gem Stones, Inc., Adom Ipekdjian and Georges Ipekdjian are now, and for some time last past have been, engaged in the sale and distribution in interstate commerce of synthetic stones, which said synthetic stones are those same synthetic stones that have been manufactured by respondent Carroll F. Chatham, purchased therefrom by respondents Anglomex, Inc., and Dan E. Mayers, and sold by the latter to respondent Ipekdjian, Inc., the corporate parent of corporate respondent Cultured Gem Stones, Inc.¹⁶

10. All of the respondents have cooperated and acted together in the advertising and promotion, and sale to the public, of synthetic stones which they described and referred to as Chatham Cultured Emeralds, Chatham-Created Emeralds and Chatham Emeralds.¹⁷

11. In the course and conduct of their businesses, respondents Ipekdjian, Inc., Cultured Gem Stones, Inc., Adom Ipekdjian and Georges Ipekdjian now cause, and for some time last past have caused, their said synthetic stones, 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 synthetic stones in commerce, as "commerce" is defined in the Federal Trade Commission Act, in the maintenance of which said course of trade

¹⁵ Partially admitted by answer.

That respondents Ipekdjian, Inc., and the two Ipekdjians engaged, and now are engaged, in advertising and selling the synthetic stones in question is clearly established by the evidence. See Tr. 200, 215 and 237, and related CX's 19-23, 25-34.

¹⁶ Partially admitted by answer.

Also see footnote 12 as to evidence stones are synthetic. That sales and distribution of such synthetic stones have been made is also evidenced. See Tr. 215 and CX's 19-23 and 25-34.

¹⁷ The interrelationship of all respondents leading to the sale of the synthetic stones at issue manufactured by respondent Chatham is thoroughly evidenced despite claims to the contrary. See also footnotes 12-16.

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these said respondents were aided, assisted and abetted by respondents Carroll F. Chatham, Anglomex, Inc., and Dan E. Mayers.¹⁸

12. In the course and conduct of their businesses, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements with respect to the nature of the synthetic stones offered for sale and sold by them, in advertisements in magazines of national circulation and by other means, of which the following are typical:

Chatham Emeralds
Chatham-Created Emeralds
Chatham Cultured Emeralds

These stones are identical to natural emeralds in all of their properties: chemically, physically, optically, with the same crystal faces, atomic arrangement, and even the same inclusions and "gardens".¹⁹

13. Through the use of the aforesaid false representations (with the exception of the statement "Chatham-Created Emeralds" unaccompanied by other representations set forth in Finding No. 12, and also unaccompanied by the advertiser's name as "Cultured Gem Stones, Inc.")²⁰ respondents misrepresented that their said synthetic stones or synthetic emerald products had been cultured, were emeralds and were identical to emeralds, when in fact they were not natural, not cultured, and not identical in all respects.²¹

¹⁸ Partially admitted by answer.

That sales and distribution of such synthetic stones were to purchasers located in states outside the State of New York is also evidenced. See Tr. 215 (and CX's 19-23 and 25-34).

The course of trade was substantial (\$150,000-\$245,000 by the Ipekadjians through their two companies in 1961 [Tr. 242], and about \$317,000 in 1962 [Tr. 243]).

That respondents Chatham, Anglomex, Inc., and Mayers aided, assisted and abetted the maintenance of this course of trade is shown by CX's 3, 4, 5, 11, 12, 13, 14, 15, and 16. Respondent Mayers even insisted on the Ipekadjians' corporate reorganization at a time when "financial manipulations" of the Ipekadjians appeared to have brought discredit to respondent Chatham's product (CX 16) and Mayers paid for the reorganization (Tr. 241); and respondent Chatham considered his contribution to the preparation of advertising as being " * * * you might say for the whole cause". (Tr. 144.)

¹⁹ Substantially conceded by respondents' answer.

Typical advertisements containing one or more of the quoted references are CX's 6, 8, 17, 18, 35, 36, and 55.

²⁰ See advertisements RX 13-17 in which respondents identified their stones as "Chatham-Created Emeralds", as advertised by "Cultured Gem Stones, Inc.", thereby imputing that such stones are cultured, although this is unestablished by the evidence, since Chatham refused to testify as to the creative process on the ground that it was and is a trade secret. (Tr. 163.) Furthermore, in avoidance of divulging the trade secret, Mr. Chatham conceded the Commission's contention that the stones at issue were synthetic. (Tr. 166.) Although, in this connection, respondents adduced evidence to the effect that the Chatham-Created Emeralds are not the result of synthesis and are of better quality than stones loosely termed by the jewelry trade and the public as synthetic, this argument becomes academic in view of Mr. Chatham's concession that his stones are synthetic. (Tr. 900-912.) See also transcript pages and exhibits cited at pages 30-42 of the respondents' brief.

²¹ That they are not identical to emeralds was conceded by the manufacturer (Tr. 128, 129), confirmed by the expert witness Holmes (Tr. 445, 449, 450) and tests of the expert witness Crowningshield (Tr. 538, 539, 540, 542).

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14. The use of the term "Chatham-Created Emeralds" unassociated with other words or statements imputes, as established by the evidence, that this product is not a creation of nature, that it is man-made, and that it is artificial or synthetic.²² Such usage is, therefore, not deceptive.

15. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of emeralds.

16. The use by the respondents of the statements and practices, heretofore identified as deceptive, has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements were and are true, and to induce a substantial number thereof into the purchase of respondents' synthetic stones by reason of said erroneous and mistaken belief.

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

CONCLUSIONS

Under section 5 of the Federal Trade Commission Act, the Commission is empowered to act against misrepresentation if the advertising involved has a tendency to mislead or to deceive a substantial segment of the purchasing public. *Herzfeld v. FTC*, 140 F. 2d 207

²² The hearing examiner is aware of the Commission's possible position that the words "Chatham-Created" might infer that the stones in question are natural stones of Chatham design. However, the words "created" and "designed" are not in any sense synonymous as defined by any known dictionary. Furthermore, numerous witnesses queried on the subject, including experts, those in the trade, and others, all testified without contradiction that the terminology "created", prefixed by a name, would impute to them that the product created was synthetic. (Tr. 248, 258, 263, 278, 295, 307, 906-907, 792-793, 801, 270-273, 536-537, 414, 298-301.) Thus, the evidence clearly establishes that any reasonable interpretation of the statement "Chatham-Created Emeralds", regardless of the practice in the industry to the use of the word "synthetic" (Tr. 250-266, 280, 296, 297, 328, and 383) imputes such emeralds are synthetic and not real or natural emeralds of Chatham design. Nevertheless, it seems reasonable to assume that the advertising of "Chatham-Created Emeralds", supplemented by Cultured Gem Stones, Inc., as the advertiser, suggests that the "Chatham-Created Emeralds" are cultured. Since Mr. Chatham concedes, for the purpose of this proceeding, that his emeralds are synthetic, it must be assumed, in the absence of evidence to the contrary, that they are not cultured. Therefore, it would appear to be misrepresentative to suggest that the emerald created by Chatham is a cultured gem rather than a synthetic gem, which the use of the name "Cultured Gem Stones, Inc.", as advertiser, seems to suggest in contradiction to the reasonable inference, which is that "Chatham-Created Emeralds" are synthetic emeralds.

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(2d Cir. 1944); *S. Buchsbaum & Co. v. FTC*, 160 F. 2d 121 (7th Cir. 1947). The accepted test is whether the natural and probable result of the respondents' advertising makes the average purchaser unwittingly, under ordinary conditions, purchase that which he did not intend to buy. *Pep Boys-Manny, Moe & Jack v. FTC*, 122 F. 2d 158, 161 (3rd Cir. 1941); *Indiana Quartered Oak Co. v. FTC*, 26 F. 2d 340, 342 (2d Cir. 1928). The probability of deception must be a real one and not remote, and the finding of a probability of deception cannot be a result of some fanciful exercise of semantics. *Arnold Stone Co. v. FTC*, 49 F. 2d 1017 (5th Cir. 1931).

Nevertheless, the Commission and the courts have also held that an advertisement which is ambiguous is deceptive, and an advertisement which is capable of two meanings is likewise deceptive, and a totally false statement in an advertisement cannot be qualified or modified. It has also been held that the Commission may require advertisements to be so carefully worded that the most ignorant and unsuspecting purchaser will be protected.²³

Under the foregoing concept it is apparent that reference to respondents' product as "Chatham Emeralds" or "Chatham Cultured Emeralds" is deceptive. The former description imputes such emeralds may be natural, which admittedly they are not. The latter description specifically asserts the emeralds are cultured, which also admittedly they are not. It is of no consequence these admissions emanate from the desire of the respondent Chatham to keep a trade secret. The refusal of the respondents to produce evidence as to the procedures involved in making such stones requires that the inference be drawn that they are not natural or cultured, and that they are synthetic, which is also conceded.

Furthermore, respondents have ceased using these terminologies as descriptive of their product after the filing of the original complaint and agreement to a consent order precluding such use. They, therefore, apparently do not question the propriety of an order precluding the advertising of their product as "Chatham Emeralds" or "Chatham Cultured Emeralds". The fact that such a consent order has been vacated in order to permit the taking of evidence as regards all of the respondents' representations in selling their synthetic emeralds does not vitiate the need for the entry of an order to prevent a subsequent recontinuance of those representations that appear in accordance with the evidence to be false and deceptive.

Not only have the foregoing terminologies been misrepresentative of respondents' product, but the indication that the Chatham syn-

²³ *U.S. v. Ninety-Five Barrels of Vinegar*, 265 U.S. 438, 442, 443; *Progress Tailoring Co. v. F.T.C.*, 153 F. 2d 103, 105 (C.A. 7, 1946); 4 S. & D. 455, 459.

thetic stones are identical to natural stones is also deceptive and must be enjoined. The fact that there are many similarities between a natural emerald and a Chatham creation does not entitle respondents to represent they are identical. In fact, all of the experts, as indicated in the findings, found differences in the natural stone and Chatham's synthetic, particularly with regard to fluorescence under instrumentation.

As regards the use of the terminology "Chatham-Created Emeralds", this would not appear to be deceptive since any reasonable inference that may be drawn therefrom suggests only that such emeralds are Chatham created and must, therefore, be synthetic since they are not created by nature. Every witness, without exception, queried on this point was of the view that "Chatham-Created Emeralds" meant they were synthetic. Nor does this or other evidence suggest the slightest ambiguity in substituting "Chatham-Created" for Chatham synthetic in thus identifying respondents' product. However, the use of the name Cultured Gem Stones, Inc., as the advertiser of "Chatham-Created Emeralds" does create an ambiguity as to whether or not the Chatham creation is actually a cultured emerald. The use of the name of this advertiser, which incorporates the word "cultured" in its firm name, can and does destroy the reasonable inference that a "Chatham-Created Emerald" is a synthetic emerald. Obviously, therefore, the use of the advertiser's name, accompanied by the word "cultured" must be eliminated and enjoined if the terminology "Chatham-Created Emeralds" is to be used in substitution for "Chatham Synthetic Emeralds", otherwise the use of the terminology "Chatham-Created Emeralds" becomes ambiguous and therefore deceptive, as established by the cases hereinbefore cited.

The respondents argue that every effort must be made to preserve their trade name "Chatham-Created Emeralds". In this connection they cite *Jacob Seigel Co. v. FTC*, 327, U.S. 608, 613 (1946), and the Commission's *Country Tweeds, Inc.*, decision 50 FTC, 470, 474 (1953). In the latter decision it is pointed out by the Commission that "* * * every effort must be made to reach a solution which will be fair to all parties, which will afford the public and competitors reasonably adequate protection and which, at the same time, will avoid unnecessary hardship and loss to the owner of the tradename. Tradenames are valuable business assets, and should never be prohibited absolutely if less drastic measures will suffice."

Examination of the record in the case discloses that before respondents first used the trade name "Chatham-Created Emeralds", approximately three years ago, they received the approval of the

Commission provided the terminology was used unambiguously. According to respondents, large sums of money have been expended to promote the trade name "Chatham-Created Emeralds" in their advertising in reliance upon the Commission's ruling. Respondents, however, overlook the fact that they have not used the term unambiguously in that they have included in the advertising an advertiser whose name is Cultured Gem Stones, Inc., which imputes that the emeralds are possibly cultured rather than synthetic. This is an ambiguity which can hardly be overlooked in view of the fact that the evidence does not establish that "Chatham-Created Emeralds" are cultured. Quite to the contrary, the respondent Chatham admits they are synthetic. It would appear, therefore, that respondents have not complied with the Commission's original approval. Accordingly, there is no merit to respondents' contention that it would be inequitable to preclude them from using a trade name which the Commission has heretofore approved. There is merit, however, to their contention that their trade name should be preserved unless as used it is ambiguous or misrepresentative of their product.

There is also some merit to respondents' position that the Commission should not exercise its questionable power to require positive disclosures to the point of indicating the semantics to be used in making such disclosures.²⁴ The Commission in issuing a cease and desist order based upon available evidence may properly foreclose the possibility of misrepresentation or deception by negative restraining provisions. On the other hand, they are hardly in a position to look into a crystal ball to ascertain specifically what appropriate terminology should be used in describing a product, particularly without a formula upon which such description may be based. In the instant case, there is no evidence concerning the formula of the "Chatham-Created Emerald" since Chatham has refused to divulge the composition or the process in making their product which is herein at issue. Obviously, the Commission should not exercise its power of requiring positive disclosure categorically in a vacuum, even assuming that respondents admit their product is synthetic, in the absence of evidence of the product's chemical or inorganic composition and process formula. To do so in issuing an order applicable to the future conduct of the respondents might well lead to the condonement of a deceptive practice. This could clearly be the case if Chatham decided to make what is recognized in the industry as an imitation stone rather than a synthetic stone. In this same connection, it is also observed that the use of the terminology "Chatham-Created Emeralds" is more protective in the public interest than a required terminology of "Chatham Synthetic Emeralds" since the former

²⁴ See *Alberty v. FTC*, 182 F. 2d 36 (D.C. Cir. 1950) cert. denied 340 U.S. 818 (1950).

merely imputes that the emeralds are man-made and not natural. This being the case, the public is put on notice that it should ascertain exactly what sort of a product they are purchasing.²⁵ However, the term "synthetic" may ambiguously impute respondents' product under a strict construction of the word "synthetic" is the result of synthesis, which expert testimony indicates it is not.

Contrary to the position taken by respondents, it would appear that all respondents should be made subject to the order, in view of the "pattern and framework of the whole enterprise" as evidenced, which suggests an interlocking relationship in which all respondents were participants in the resulting deception to the extent heretofore indicated herein in the findings of fact.²⁶ Accordingly, the following order shall issue:

ORDER

It is ordered, That respondents Carroll F. Chatham, an individual, trading as Chatham Research Laboratories, or under any other name; Anglomex, Inc., a corporation, and its officers, and Dan E. Mayers, individually and as an officer of said corporation; Ipekjdjian, Inc., a corporation, and its officers, and Cultured Gem Stones, Inc., a corporation, and its officers, and Adom Ipekjdjian and Georges Ipekjdjian, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for sale, offering for sale, sale and distribution of stones now known as "Chatham Emeralds" or "Chatham-Cultured Emeralds", or any other manufactured stone having essentially the same optical, physical and chemical properties, as a natural stone, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;
2. Using the word "emerald" or the name of any other precious or semi-precious stone as descriptive of such stones unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic" or by some other word or phrase of such meaning as clearly to disclose the nature of such product and the fact that it is not a natural stone; provided,

²⁵ See *Keele Hair & Scalp Conditioners, Inc. v. FTC*, 275 F. 2d 18 (5th Cir. 1960); *Ward Laboratories v. FTC*, 276 F. 2d 952, 954 (2d Cir. 1960) cert. denied 364 U.S. 827 (1960); and *Lanolin Plus, Inc.*, Docket No. 8150.

²⁶ Where the businesses of several are interwoven, all are responsible for the acts and practices charged. See the Opinion of the Commission, per Chairman Dixon, in the Matter of *Delaware Watch Co., Inc., et al.*, Docket No. 8411, Aug. 15, 1963 [63 F.T.C. 491], citing *Lifetime, Inc., et al.*, Docket No. 7616.

however, that this prohibition shall not be construed as requiring respondents, or any of them, to disclose the method or process, or any part thereof, used by respondent Chatham in the manufacture of his stones.

and it is

Further ordered, That the charges of the complaint insofar as they may be construed to allege that the statement "Chatham-Created Emeralds" is deceptive when used exclusively and unaccompanied by the name of an advertiser whose corporate or firm name suggests it markets cultured gems is herein and hereby dismissed.

OPINION, DISSENTING IN PART

FEBRUARY 28, 1964

By ANDERSON, *Commissioner*:

I dissent from the majority's action in adopting that part of the hearing examiner's initial decision which holds in effect that there is no reasonable likelihood that the public would understand the expression "Chatham Created Emeralds" to refer to anything other than synthetic emeralds. I do not agree that the public is placed on notice by this expression that the stones so designated are synthetic stones.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission on appeal of counsel supporting the complaint from the initial decision of the hearing examiner, filed September 4, 1963, and upon briefs and argument in support thereof and in opposition thereto, and the Commission, having concluded that the appeal should be denied, and that the aforesaid initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed September 5, 1963, be, and it hereby is, adopted as the decision of the Commission.

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

Commissioner Anderson dissenting in part, and Commissioner Reilly not participating.

Complaint

IN THE MATTER OF

BAKERS OF WASHINGTON, INC., ET AL.

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

*Docket 8309. Complaint, Mar. 7, 1961—Decision, Feb. 28, 1964**

Order requiring a trade association with headquarters in Seattle, Wash., along with its responsible officers, and wholesale and retail baker members in Washington State, to cease conspiring among themselves and with others to fix and maintain prices, terms or conditions of sale of bread, and to deter or attempt to deter any competitor from exercising his individual judgment as to prices and terms of sale.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Commission, having reason to believe that the parties named in the caption hereof and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 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 Bakers of Washington, Inc., (hereinafter sometimes referred to as Bakers) is an incorporated association organized and existing under the laws of the State of Washington, with its principal office at 1512 Tower Building, Seattle, Washington.

Respondent Bakers is the medium whereby the officials and members of Bakers have performed many of the illegal acts and practices hereinafter alleged. Such illegal acts and practices were intended to, and did, bind said officials and said members in the same manner and with the same effect as though they had individually engaged in same.

PAR. 2. Respondents George B. Buchan, Richard Hoyt, and Arthur H. Lalime (hereinafter sometimes referred to as Bakers officials) are officers of respondent Bakers. The address of respondent George B. Buchan is 1604 North 34th Street, Seattle, Washington. The address of respondent Richard Hoyt is 600 First Avenue North, Seattle, Washington. The address of respondent Arthur H. Lalime is 1512 Tower Building, Seattle, Washington.

*Proceedings reopened and remanded to hearing examiner on May 21, 1964, 65 F.T.C. 1308; effective date of cease and desist order of Feb. 28, 1964, stayed pending the proceedings on remand by order dated June 3, 1964; order modifying findings of fact in Commission's opinion of Feb. 28, 1964 and making effective the cease and desist order of Feb. 28, 1964, issued Dec. 3, 1964, 66 F.T.C. 1222.

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During the several years last past the officials of respondent Bakers have varied from year to year. Those Bakers officials named and designated herein are fairly representative of all Bakers officials, and are herewith and hereby made respondents individually, in their respective capacities as officials of Bakers, and as representative of the officers, Board of Trustees, employees, representatives and agents of Bakers. The officials of respondent Bakers, as represented by the Bakers officials hereinabove specifically named, are hereby made parties respondent as though specifically named herein.

The control, direction and management of Bakers' business, affairs, policies, practices and actions are and, during the several years last past, have been vested in Bakers' officials. Said officials have formulated, directed and controlled the policies and activities of Bakers and in so doing have expressly or impliedly authorized, performed, adopted or affirmed the policies, acts and practices herein alleged to have been performed. Said officials aided, abetted, furthered and cooperated with other respondents and with others in establishing and carrying out the understandings, agreements, combinations and planned common courses of action hereinafter set forth, and participated in the furtherance thereof.

Respondent Arthur H. Lalime is now and has been since November 15, 1957, Secretary-Manager of respondent Bakers, and as such officer has full and complete charge of the administrative activities of Bakers, helps conduct, and actually participates in the meetings of the members of Bakers and helps formulate the policies of Bakers, all in pursuance and furtherance of the establishing, carrying out and maintaining of the understandings, agreements, combinations and planned common courses of action hereinafter set forth.

PAR. 3. Respondent Buchan Baking Co. is a corporation organized and existing under the laws of the State of Washington, with its principal office at 1604 N. 34th Street, Seattle, Washington.

Respondent Continental Baking Company is a corporation organized and existing under the laws of the State of Delaware, with executive offices at Halstead Avenue, Rye, New York, and a branch office and plant at 1805 Main Street, Seattle, Washington.

Respondent Langendorf United Bakeries, Inc., is a corporation organized and existing under the laws of the State of Delaware, with general offices at 1160 McAllister Street, San Francisco, California, and a branch office and plant at 2901 6th Avenue South, Seattle 14, Washington.

Respondent Hansen Baking Co., Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 600 First Avenue North, Seattle, Washington.

Respondent Holsum Baking Company is a corporation organized and existing under the laws of the State of Idaho, with its principal office at 1303 9th Avenue, Lewiston, Idaho.

Respondent Trennery's Bakery Co.,* a wholly owned subsidiary of respondent Holsum Baking Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office at 1202 Division Street, Yakima, Washington.

Respondent Snyder's Bakery, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 31 North Fourth Street, Yakima, Washington.

Respondent John M. Larson is an individual trading under the firm name and style of Larson's Bakery, with principal office at 25 No. 2nd Avenue, Yakima, Washington.

Respondent Vic H. Goethals is an individual trading under the firm name and style of Fortune's Bakery, with principal office at 604 Commercial Street, Anacortes, Washington.

Each of the respondents named in this paragraph with the exception of respondent Holsum Baking Company, has been during the several years last past, a member of respondent Bakers. During that period, the membership of Bakers has varied from year to year. Furthermore, the total membership of Bakers constitutes a class so numerous as to render it impracticable to specifically name each member as a party respondent herein, without manifest delay and inconvenience. Therefore, the aforesaid members of Bakers are named parties respondent, individually, and, since they are fairly representative of the entire membership of Bakers, they are also named as representative of all members of Bakers. All members of Bakers, as represented by the respondent members of Bakers hereinbefore specifically named, are hereby made parties respondent as though specifically named herein.

Each of the members of Bakers has for a number of years, through membership in Bakers or otherwise, directly or indirectly participated in the understandings, agreements, combinations planned common courses of action and other instances of cooperative and collective action hereinafter alleged. Each of the members of Bakers has authorized, participated in, adopted, confirmed, or otherwise ratified, as members of Bakers or otherwise, one or more of the alleged illegal acts, practices and policies of Bakers or of others of its members.

PAR. 4. Respondent Safeway Stores, Inc., is a corporation organized and existing under the laws of the State of Maryland, with principal offices at 4th & Jackson Streets, Oakland, California; a

*[The correct spelling is Trenerry's Bakery Co.]

Bread Division located at San Jose, California; and a Bread Plant at 1000 Fairview North, Seattle, Washington.

Respondent Safeway Stores, Inc., and respondent Holsum Baking Company have, for the several years last past, aided and abetted and participated in one or more of the wrongful acts and practices hereinafter alleged and have participated in the understandings, agreements, combinations, planned common courses of action and other instances of cooperative and collective action of all of those named herein as respondents, in the formation, putting into operation and making effective the methods, systems, practices and policies which are alleged herein to be unlawful.

PAR. 5. In the course and conduct of their respective businesses, various respondents produce bread for sale to retail sellers or to consumers, and transport, or cause to be transported, such bread to, or to be distributed to such retail sellers or to such consumers, many of whom are located in Territories of the United States or in states of the United States other than the states of origin of said shipments. Such respondents are and were, during the several years last past, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. The various remaining respondents, who are incorporated associations, or officials thereof or whose business consists of the production and sale of bread in intrastate commerce only, all aided, abetted, furthered and cooperated with the respondents specified in Paragraph Five hereof, as well as with each other, in establishing and carrying out the unlawful understandings, agreements, combinations and planned common courses of action hereinafter set forth, and actively participated in or acquiesced in the furtherance thereof.

PAR. 7. Each of the respondents described in Paragraphs Three and Four hereof is and was in competition with one or more of the other respondents therein described, and with other producers, distributors and sellers of bread not parties hereto, in the production, distribution and sale of bread in commerce, as "commerce" is defined in the Federal Trade Commission Act, except to the extent that actual and potential competition has been hindered, lessened, restricted, or restrained by the unfair methods and practices hereinafter set forth.

PAR. 8. For several years last past, Bakers and the other respondents, in some instances with the aid and assistance of, and also by and through Bakers, have been and are engaged in unfair acts and practices and unfair methods of competition in commerce, as herein described, by cooperating, combining, conspiring, agreeing and entering into understandings and following a planned common course

of action to hinder, lessen, restrict and suppress competition among and between themselves and others in the production, distribution and sale of bread.

PAR. 9. As a part of and pursuant to said understanding, agreement, combination, conspiracy and planned common course of action and to effectuate their common purpose, respondents have committed and are committing unlawful acts and have promulgated, used, adopted, accepted or acquiesced in, and are promulgating, using, adopting, accepting or acquiescing in unlawful policies, methods, and practices, among which are the following:

(1) Determined, fixed, established, stabilized, maintained, and made effective, and still do determine, fix, establish, stabilize, maintain and make effective, uniform, identical, non-competitive prices in the sale of bread.

(2) Cooperatively promoted adherence and do now cooperatively promote adherence to the said uniform, identical, non-competitive prices.

(3) Respondent Bakers officials and Bakers members organized, have operated and do now operate respondent Bakers as an incorporated association to promote and serve the mutual interests of Bakers members, and have used it and now use it as an instrument or vehicle for their joint and cooperative purpose and action in hindering, frustrating, suppressing and eliminating competition in price in the sale and distribution of bread.

(4) Regular meetings of the members of Bakers have been and are held from time to time in Seattle, Washington, and elsewhere, and, at said meetings, said members, including the respondent members herein named, have discussed and do discuss, with each other and with Bakers officials, trade and competitive conditions in the production, distribution and sale of bread and have agreed upon and established, and do agree upon and establish, trade policies to be followed and prices to be charged by respondent members in the sale of their said bread.

(5) Respondent Bakers, and respondent members thereof have employed and do employ respondent Arthur H. Lalime, to serve them as a common agent to make more effective their suppression of price competition, and he has served them, and does now serve them, as a common agent in the suppression of price competition in the sale of their said bread.

(6) Each respondent described in Paragraphs Three and Four hereof, with the knowledge that each other said respondent and each other member of respondent Bakers simultaneously does likewise, for the purpose and with the result of making more effective

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the fixing, establishing, stabilizing and maintaining of uniform, identical, non-competitive prices in the sale of bread, has sold and does sell its bread at such prices.

PAR. 10. The capacity, tendency and effect of the aforesaid understandings, agreements, combinations, conspiracies and planned common courses of action, and of the acts, policies, practices and things done thereunder and pursuant thereto by the respondents, as hereinbefore set forth, has been and is now to unlawfully restrict, restrain, hinder and prevent price competition between and among the said respondents in the sale of bread in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 11. In addition to the effects hereinbefore set forth, the understandings, agreements, combinations, conspiracies and planned common courses of action of the respondents, and the acts, practices and policies of the respondents, likewise have the capacity and tendency to substantially increase the cost of food by their effect on the prices which the public is required to pay for bread produced, distributed and sold in commerce, as aforesaid.

PAR. 12. The acts and practices of the respondents, all and singularly, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson, Mr. R. E. Ely and Mr. Karl Vasiloff, for the Commission.

Mr. Griffith Way, and Preston, Thorgrimson, Horowitz, Starin & Ellis, Seattle, Wash., for respondents Bakers of Washington, Inc., and Mr. Arthur H. LaLime.

Croson, Johnson & Wheelon, Seattle, Wash., for respondents Mr. George B. Buchan and Buchan Baking Co.

Little, Palmer, Scott & Slemmons, Seattle, Wash., for respondents Mr. Richard Hoyt, Langendorf United Bakeries, Inc., and Hansen Baking Co., Inc.

Mr. Roy M. Anderson, Rye, N.Y., and *Covington & Burling*, Washington, D.C., for respondent Continental Baking Company.

Cox, Ware, Stellmon & O'Connell, Lewiston, Idaho, for respondents Trenerry's Bakery Co. and Holsum Baking Company.

Mr. George E. Clark, Yakima, Wash., for respondent Snyder's Bakery, Inc.

Palmer, Willis & McArdle, Yakima, Wash., for respondent Larson's Bakery.

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Initial Decision

Bogle, Bogle and Gates, Seattle, Wash., and *Mr. Drummond Wilde, Mr. Bernal E. Dobell* and *Mr. Robert J. Van Gemert*, Oakland, Calif., for respondent Safeway Stores, Inc.

Unrepresented, respondent Fortune's Bakery.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

JULY 20, 1962

The Federal Trade Commission issued its complaint against the above-named respondents on March 7, 1961, charging them with violating the provisions of Section 5 of the Federal Trade Commission Act.

The complaint alleges in substance that Bakers of Washington, Inc., (sometimes hereinafter referred to as Bakers) and others combine and agree to suppress price competition among and between themselves and others in the sale and distribution of bread including the establishment and maintenance of uniform and non-competitive prices therefor.

A prehearing conference was held in Washington, D.C. on August 30, 1961. Hearings were held in Seattle, Washington on September 18-21, 1961 and February 26, 1962. At the conclusion of the Commission's case, respondents filed motions to dismiss. These motions were denied by the examiner and respondents rested their cases and renewed their motions to dismiss.

Respondent Fortune's Bakery was not represented by counsel nor did they enter an appearance. John M. Larson, trading as Larson's Bakery, did not file answer.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by the parties. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Bakers of Washington, Inc., was initially incorporated in 1936 in the State of Washington under the name of Bakers of Western Washington, Inc. In August of 1937 the corporate name was changed to its present name. Bakers' members are classified by division according to geographical location. More than half of the members have places of business in Seattle, Washington, but there

are also divisions in Aberdeen, Yakima, Bellingham, and Tacoma. All dues are paid to respondent Bakers in Seattle. Both wholesale and retail bakeries are included in the membership, but within the trade areas served by the Association, the great majority are wholesale bakeries.

2. Respondent George B. Buchan is President of respondent Buchan Baking Co., and President of respondent Bakers of Washington, Inc. The address of respondent George B. Buchan is 1604 North 34th Street, Seattle, Washington.

3. Respondent Richard Hoyt is the vice president of the Bakers of Washington, Inc., and his address is 600 First Avenue North, Seattle, Washington.

4. Arthur H. LaLime, secretary-manager of Bakers since November 15, 1957, was preceded in that position for some twenty years by Harry Alford. LaLime is paid a salary of \$12,000 a year by the Association and receives a retainer of \$600 annually from Safeway. The address of respondent is 1512 Tower Building, Seattle, Washington.

5. Respondent Buchan Baking Co. is a corporation organized and existing under the laws of the State of Washington with its principal office at 1604 North 34th Street, Seattle, Washington. Respondent does a gross annual volume of four million dollars.

6. Respondent Continental Baking Company is a corporation organized and existing under the laws of the State of Delaware with executive offices in Rye, New York, a branch office and bakery plant at 1805 Main Street, Seattle, Washington. Respondent had net sales in excess of \$350,000,000 for the calendar year of 1960.

7. Respondent Langendorf United Bakeries, Inc., is a corporation organized and existing under the laws of the State of Delaware, with general offices at 1160 McAllister Street, San Francisco, California, and a branch office and plant at 2901-6th Avenue South, Seattle 14, Washington. Respondent had net sales of \$73,825,340 for fiscal 1961.

8. Respondent Hansen Baking Co., Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 600 First Avenue North, Seattle, Washington. Respondent does a gross annual volume of three million dollars.

9. Respondent Trenerry's Bakery Co., (erroneously named in the complaint as Trennery's Bakery Co.) is a corporation organized and existing under the laws of the State of Washington, with its principal office at 1202 Division Street, Yakima, Washington. Since April 1, 1959, it has been a wholly owned subsidiary of respondent Holsum Baking Company.

10. Snyder's Bakery, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 31 North Fourth Avenue, Yakima, Washington.

11. Respondent John M. Larson is an individual trading under the firm name and style of Larson's Bakery, with principal office at 25 No. 2nd Avenue, Yakima, Washington.

12. Respondent Vic H. Goethals is an individual trading under the firm name and style of Fortune's Bakery, with principal office at 604 Commercial Street, Anacortes, Washington.

13. Respondent Safeway Stores, Inc., is a corporation organized and existing under the laws of the State of Maryland, with principal offices at 4th and Jackson Streets, Oakland, California. A Bread Division of Safeway is located at San Jose, California, and a Bread Plant at 1000 Fairview North, Seattle, Washington. Respondent had net sales in excess of \$2,468,000,000 for the calendar year of 1960.

14. Respondent Holsum Baking Company is a corporation organized and existing under the laws of the State of Idaho, with its principal office at 1724 Carson Avenue, Lewiston, Idaho. This respondent is not a member of Bakers.

15. The following were members of Bakers of Washington, Inc., as of September 19, 1961:

Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle.
Albertson's, Inc., 17000 Aurora Avenue, Seattle.
Baders' Dutch Bakeries, 3755 University, Seattle.
Baker Boy Bakery, 8050 Bothell Way, Seattle.
Bake-Rite Bakery, 1414 14th Avenue, Seattle.
Bellinger Bakery, North Bend.
Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle.
Big Four Donut, Inc., 319 Nickerson Street, Seattle.
Blake's Bakery, Inc., 4729 California Avenue, Seattle.
Bookter's Seattle Bakery, Inc., 3409 4th Avenue South, Seattle.
Buchan Baking Company, 1604 No. 34th Street, Seattle.
Butter-Krisp Bakery, Inc., 2203 23rd Avenue South, Seattle.
Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant No. 2, Seattle.
Carolyn's Cakes, 518 15th Avenue North, Seattle.
Caster's Lake City Bakery, 12532 Bothell Way, Seattle.
Continental Baking Company, (Wonder Bread Division), (Hostess Cake Division) 1805 Main Street, Seattle.
Frederick & Nelson, (Bakery Department), 5th at Pine, Seattle.
Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle.
Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle.
Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle.
Hansen Baking Company, Inc., 600 First Avenue North, Seattle.
Karl's Bakery, 1614 Hewitt Avenue, Everett.
Kent Bakery, 213 First South, Kent.

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Langendorf United Bakeries, Inc., (Bread and Cake Plants), 2091 6th Avenue South, Seattle.

Lippman's Bakery, Inc., 119 23rd Avenue, Seattle.

Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle.

Manning's, Inc., 621 Seaboard Building, Seattle.

Richard's Fried Pies, Inc., 220 1st Avenue North, Seattle.

Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle.

Smith & Sonleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon, (7710 Bagley, Seattle, Washington).

Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle.

Grand Central Bakery, Market & H Streets, Aberdeen.

Swanson's Foods, Inc., 1401 Simpson Avenue, Aberdeen.

Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen.

Bame's Ye Olde Home Bakery, Riverside, Mount Vernon.

Bellingham Baking Company, 2001 State Street, Bellingham.

City Bakery, 607—1st Street, Mount Vernon.

Fortune's Bakery, 604 Commercial Avenue, Anacortes.

Thrifty Foods, 130 Fairhaven Avenue, Burlington.

Buchan Baking Company, 3802 So. Yakima Avenue, Tacoma.

Continental Baking Company, 701 S. Sprague, Tacoma.

Golden Rule Bakery, Inc., 915 Center Street, Tacoma.

Hansen Baking Co. of Tacoma, Inc., 909 Center Street, Tacoma.

Jordan Baking Company, 3623 S. 54th Street, Tacoma.

Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima.

Larson's Bakery, 25 No. Second Street, Yakima.

Sigman Food Stores, P. O. Box 618, Yakima.

Snyder's Bakery, Inc., 31 No. 4th Street, Yakima.

Trenerry's Bakery, 1206 Division Street, Yakima.

16. Officers, committee members and trustees of Bakers as of the date of the complaint also named as respondents are as follows:

Officers: President—George B. Buchan, Buchan Baking Company, Inc., 1604 No. 34th Street, Seattle, Washington; Vice President—Richard Hoyt, Hansen Baking Company, Inc., 600 First Avenue North, Seattle, Washington; Treasurer—Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle, Washington; Section Manager—A. H. LaLime, Bakers of Washington, Inc., 1512 Tower Building, Seattle, Washington.

Bakers has an executive and financial committee with the following members:

George B. Buchan, Buchan Baking Company, Inc., 1604 No. 34th Street, Seattle, Washington; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle, Washington; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle, Washington; Lou Blackfield, Bake-Rite Bakery, 1414-14th Avenue, Seattle, Washington.

Trustees of Bakers are as follows:

Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima, Washington; Al Moore, Langendorf United Bakeries, Inc., 2901-6th Avenue South, Seattle, Washington; Roy Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle, Washington; LeConie Stiles, Jr., Ashbrook Ruth Bakeries Corp., 1407-11th Avenue, Seattle, Washington; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle, Washington; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle, Washington; Maurice Bybey, Baker Boy Bakery, 8050 Bothell Way, Seattle, Washington.

17. The purposes for which Bakers was formed as specified in its articles of incorporation include the collection and dissemination among its members of all lawful information for the benefit of the business of its members. Negotiations of labor contracts are not specifically mentioned.

18. Meetings of members are held in Divisions outside of Seattle. Regular meetings are held in Seattle almost weekly, generally on Monday, which is convenient for bakers. These meetings last about an hour and a half. Although Safeway is not a member, a representative from Safeway infrequently attends. These meetings are also attended by representatives of Buchan, Continental, Hansen & Langendorf. Bakers' expenses are defrayed by membership dues. Members include the largest wholesalers of bread in the Seattle area.

19. Arthur H. LaLime, secretary-manager of Bakers since November 15, 1957, was preceded in that position for some twenty years by Harry Alford. LaLime is paid a salary of \$12,000 a year by the Association and receives a retainer of \$600 annually from Safeway.

20. Respondents are engaged in interstate commerce and are subject to the jurisdiction of the Federal Trade Commission. Pertinent facts concerning interstate sales are set forth below.

21. Buchan Baking Company operates four bakery plants, one in Bellingham, two in Seattle and one in Tacoma. It grosses approximately four million dollars annually. Buchan sells bread to customers in Alaska.

22. Hansen's Baking Company, Inc., operates two plants, one in Seattle and one in Tacoma. It distributes most varieties of bread, primarily at wholesale, and other items which it purchases from competitors. Hansen does an annual volume of about three million dollars a year. It sells and ships bread to customers in Alaska.

23. Respondent Snyder's Bakery, Inc., transports bread produced in its plant in the State of Washington for sale in the State of Oregon.

24. Respondent Trenerry's Bakery Co. (erroneously named in the complaint as Trennery's Bakery Co.), a member of the Yakima Division of Bakers, is a wholly owned subsidiary of respondent Holsum Baking Co. Respondent Holsum Baking Co., causes bread produced by it in Lewiston, Idaho, to be transported to its wholly owned subsidiary, respondent Trenerry's for sale in and around Yakima, Washington.

25. Langendorf United Bakeries, Inc., has a bread and cake plant in Seattle. The bread plant produces bread and other various types of bread products such as brown and serve rolls and hamburger buns. It makes shipments of bread to customers in Alaska. The Seattle plants are but two of 11 bakeries operated by Langendorf in the States of California, Oregon and Washington. Its sales of bakery products for the fiscal year ended July 1, 1961, exceeded \$73,800,000 and it has almost 3,900 employees. It is engaged in interstate commerce in the sale and distribution of bread and other bakery products in California, Oregon, Washington and Alaska. Langendorf's operations are conducted upon an integrated basis. Ingredients for its products are centrally purchased and receipts from sales go into a single treasury. Ultimate responsibility for company affairs is vested in top management personnel in the company's general offices in San Francisco, California, and the control of operations which rests in plant managers, beyond that which is peculiar to the position of plant managers, such as house-keeping functions, is vested in them by delegation from top management. Each element of Langendorf's bread and bakery products' business is part of an integrated whole, the company being a single business entity benefiting or suffering from what is done locally by and through each plant or office.

26. Continental Baking Company has two baking plants in Seattle, one for bread and one for cakes. It sells and ships bread to customers for resale and delivery to Alaska and to its plant in Portland, Oregon. Continental produces bread and other bakery products in more than 70 bakeries located in 60 cities in 29 States. Its net sales of bread and other bakery products exceeded \$350,000,000 for the year ended December 31, 1960, and at that time it had more than 27,000 employees. Continental is regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products. It operates on an integrated basis. The ingredients for its products are purchased centrally and receipts from sales go into a single treasury. Ultimate responsibility for company affairs is vested in top management personnel at the company's general offices at Rye, New York. Each element of the company's bread and bakery business is part of an integrated whole. Continental is a single business

entity and benefits or suffers from what is done locally by and through each plant or office. The control over operations which rests in plant managers, beyond that which is peculiar to the position such as housekeeping functions, is vested in them by delegation from top management.

27. Safeway Stores, Inc., is one of the three largest operators of chain retail grocery stores in the United States. At the end of December 1960, Safeway operated some 2,000 grocery stores located in 28 States of the United States and in the District of Columbia. At the end of that year, Safeway and its subsidiaries had more than 63,500 employees and its net sales exceeded \$2,468,000,000. During each of the past 10 years, net sales have increased. Net sales made in 1960 exceeded those made in 1949 by more than \$1,270,000,000. Safeway's common stock is traded on the New York Stock Exchange daily or almost daily and is held by thousands of stockholders residing in every State in the Union. From time to time, the company declares and pays dividends upon this stock from profits realized from its operations. Profits are not segregated by store or facility. Safeway operates all of its stores or other facilities as a single business entity with its principal offices in Oakland, California. In the course of its business, Safeway purchases many products from many vendors in numerous States for resale through stores it operates. It also purchases from suppliers who are located in States other than the State of manufacture, ingredients to be used in the manufacturing by Safeway of products for resale. Many products manufactured by Safeway, including bread and other bakery products, are shipped by Safeway to its stores in other states than those of the State of manufacture, and sold to customers located in those States. Bread produced by Safeway within the State of Washington is shipped or sold outside the State of Washington.

28. Respondents, who do not sell or ship across State lines, are in competition with other respondents who do and all respondents are members in common with respondent Bakers and parties to a program of concerted action on methods, acts and practices as hereinafter found.

29. Bakers of Washington, Inc., serves not only as a medium for its members to negotiate uniform contracts with the unions with which they as bakers are concerned, but also serves as a medium for lessening and eliminating price competition between and among them. Respondents, using Bakers as a medium, do two things: one, cooperate in the establishment and announcement of price changes; and two, collectively enforce adherence to prices established and announced.

30. Respondents for many years have periodically discussed prices at Bakers' meetings. Price rises were usually discussed after negotiation of new labor contracts were concluded. Respondent Buchan testified that *all* competitors must move up or none can, and illustrated his point by reference to an experience of his own in which he stayed at 10½ cents per loaf when others went to 11 cents and the others had to drop back. Mr. Buchan said that increased labor costs meant increased prices and that costs of new labor contracts were the subject of discussion at Bakers' meetings.

31. Mr. Harry H. Shafer, who formerly owned and operated a bakery in Bellingham and was a member of Bakers, frequently attended meetings of Bakers in Seattle. He said prices were regularly discussed and that it was the wholesalers who were discussing prices. The head of Bakers was looked to for price leadership.

32. Wholesalers are in competition with bakers who bake for retail by themselves and do not wholesale. Accordingly, Mr. LaLime discussed retail prices with Mr. Charles D. Sylvester, the president of Washington Retail Bakers Association. He sought a working arrangement between them on prices. Prices of retail bakers affect those of wholesalers and retail bakers also were members of Bakers and attended meetings. However, price leadership rested with the major wholesalers.

33. Mr. Alford, Mr. LaLime's predecessor, conducted luncheon meetings where prices were discussed.

34. Albert A. Pettersen, bakery supervisor for Albertson's Food Stores, a member of Bakers, testified that prices were discussed at luncheon meetings conducted by Mr. LaLime.

35. LaLime and Alford followed the practice of calling members by phone to announce price increases in advance of the date of the increase. LaLime called Mr. Pettersen more than once. Mr. LaLime told Pettersen he acted for Bakers of Washington, Inc., in announcing prices.

36. Albert A. Pettersen from about 1955 through at least a part of 1959 was supervisor of the bread and baking operations for Albertson's Food Stores chain in the Seattle district. He was responsible for that portion of an Albertson's advertisement offering raisin bread for sale at 19¢ per loaf which appeared in the Seattle Port-Intelligencer on August 3, 1959. When this advertisement appeared, he was called by Mr. LaLime and urged to get the regular price of 26¢. He was called by LaLime two or three times. Mr. LaLime's predecessor, Mr. Alford, also called him with respect to his pricing practices on the same type of deal. When Pettersen was in Seattle, he attended the luncheon meetings held by Bakers. He attended

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such meetings around the period of the August 1958 price increase. At these meetings, ingredient prices were discussed and it was decided there should be a raise in bread prices. From there, the statement would be made "What do you think about certain prices?" and that proposal would then be "kicked around." After meetings he would receive information either written or by phone from LaLime that prices were going up. When he was managing for Albertson's, Pettersen testified that the chain could be independent in the pricing of bread but that " * * * we would like to be along and keep the prices right and be with the association here."

37. A former member of Bakers, Mr. Frank A. Maxeiner, Jr., who was engaged in the bakery business in Seattle, was told of price increases by Alford.

Mr. Maxeiner testified:

Q. Now, during the time Mr. Alford was associated with Bakers of Washington, did he ever contact you with respect to impending prices as to bread?

A. Yes, he called on the phone.

Q. And did this happen on several occasions?

A. Yes, it did over the years.

Q. Did he advise you as to an impending price rise in bread when he called?

A. Yes, he would usually indicate that we were to advance the price of bread.

38. During the period 1957-1960, which is the approximate time period of this complaint, there were three price rises in bread. The close coordination that prevailed between price announcements by the major companies is graphically shown when these announcements are tabulated. Price movements in 1957, 1958 and 1960 by the majors were as follows:¹

From 30¢ to 31¢, July 22, 1957	From 31¢ to 33¢, Aug. 11, 1958	From 33¢ to 34¢, Sept. 19, 1960	From 33¢ to 34¢ Sept. 22, 1960
Buchan Langendorf	Buchan Hansen Langendorf Continental	Hansen Langendorf	Buchan Continental

This shows that on July 22, 1957, respondents Buchan and Langendorf announced a price increase to 31 cents. The record is silent as to when Hansen moved up to 31 cents. Hansen's price was 31 cents before August 11, 1958.

39. It shows that in 1958 respondents Buchan, Continental, Hansen and Langendorf all moved up to 33 cents on August 11.

¹ Prices shown are for the standard one and one-half pound loaf.

40. In 1960, respondents Hansen and Langendorf increased their prices to 34 cents on September 19 and were followed on September 22 by respondents Buchan and Continental.

41. Respondents' explanations for price uniformity are without merit or completely absent. Witness Moore, local manager for Langendorf could offer no explanation as to why Langendorf had not raised its prices in 1959 for several months after wages had been raised.

Concerning the price rise in 1958, respondent George B. Buchan testified in answer to a question whether he had any advance information of it or working arrangement with respondents Hansen, Langendorf and Continental, "Just what I might surmise". It is hardly plausible that Mr. Buchan who said prices had to move together, moved his prices up upon surmise. Simultaneous movement of prices upward by a number of competitors strongly suggests collusion.

42. One of the most important functions of Bakers was to secure adherence to established prices. Bread baking has become highly standardized. In the State of Washington it is further standardized by state law. Pan sizes and certain other factors in the production and labeling of bread are fixed by state statute. The fact that bread is standardized adds importance to cooperative action to lessen price competition since the opportunity for price competition in standardized products is less than in non-standardized products. Price changes occur infrequently in the bread business. The principal avenue for price competition is in departure from established prices. Bakers of Washington was particularly active in preventing deviations from established prices and securing constant adherence thereto. Mr. LaLime and his predecessor Mr. Alford both worked at this task, and the evidence shows that they used full power of the organization in furtherance of this objective.

43. Mr. LaLime had a strong personal philosophy about price stability in the market, and he preached this philosophy to Bakers' members. It was that price wars were wasteful and that price competition was undesirable, as the following testimony he gave shows:

Q. When you are holding meetings aren't you from time to time approached with regard to these price situations?

A. No. I am not approached with the price situation. However, I vehemently recommend no price wars because it is economic waste and very devastating to the industry.

Q. How do you do that. How do you convey that recommendation?

A. By every persuasion that I am capable of stating.

Q. In the open meeting you use that philosophy, do you?

A. No, I don't recall of open meeting discussions on that basis. No. sir.

Q. Then how do you convey your philosophy to the membership?

A. By personal contact.

Alford and LaLime both considered it part of their job to stabilize prices, prevent price wars and assist in the establishment of uniform prices by giving advance notice of price increases and by policing adherence to announced prices.

44. Mr. LaLime explained that it was his practice to contact bakers who were cutting prices and to get them back in line. He testified that his job was to keep prices up to "where they belong."

45. In 1957 there was a break in bread prices in Bellingham. Concerning this price war one of the local bakers, Mr. Haggen, who operates a supermarket with an in-store bakery, said that in 1957 Mr. LaLime had talked to him about the price war in Bellingham, saying that he represented Bakers. Two week after the visit by Mr. LaLime, the price war stopped. The price war involved the in-store bakeries only.

46. In Bellingham there was another price war in November-December of 1959. Respecting his efforts to stop this war, Mr. LaLime testified as follows:

Q. I see. Going back specifically to the Bellingham situation, do you remember talking with anybody in particular up at Bellingham?

A. Oh, yes. I talked to Mr. Haggen.

Q. That is Haggen's Thriftway.

A. Yes.

Q. What did you say to him?

A. I asked him to not perpetuate a price war, not to become involved in one.

47. Mr. LaLime said he went to Bellingham specifically to stop the price competition there and that he talked to others of those engaged in it. He said he saw the Hall brothers:

Q. Did you go up there specifically because of the price war?

A. Yes.

Q. Who else did you see?

A. A man by the name of Hall.

Q. Two Hall brothers run a store up there, do they not?

A. Yes.

* * * * *

Q. Did you go to Clark's Supermarket?

A. Yes.

Q. Did you talk with the manager there?

A. Yes.

Q. What did you say to him anyway?

A. The same.

Q. Again?

A. I pointed out that a price war was very uneconomical, that it would be disastrous to the industry and it would be particularly disastrous especially to a smaller operation, that any time these price wars started there was only one thing that happened and that was complete chaos.

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Mr. LaLime's testimony is corroborated by the testimony of those who were contacted by him.

48. Mr. Robert Hall, a partner in Hall's Bakery in Bellingham corroborated Mr. LaLime's testimony. He said he was urged by Mr. LaLime to get his prices in line and solicited to join respondent Bakers. He added that in the summer of 1958 a meeting was called:

Q. And in the summer of 1958, was a meeting of bakers held in Bellingham?

A. Yes, sir.

Q. Were you invited to attend that meeting?

A. I did attend.

* * * * *

Q. By whom were you invited to attend?

A. The representative for the Bakers of Washington.

Q. And can you identify some of the people who were at that meeting?

A. Yes, sir. Mr. Buchan, the owner of Fortune's Bakery, the secretary from Hansen's Bakery.

Q. And can you tell us what transpired at that meeting?

A. Discussion of prevailing prices, and the bread rise that was about to take place and - -

Q. Continue. Have you finished your answer?

A. Yes.

Q. Was there any discussion of what Hall's Bakery intended to do with its price conduct?

A. Yes. Hall's Bakery had been known as a cut-rate bakery and they would like to have us join and follow in line with the rest of the bakeries.

Q. And did you refuse to do that?

A. I told them that we still had Hall's Bakery name on our place of business and we were maintaining our own place of business.

49. Mr. Robert Hall testified that he was informed by a representative of Bakers that one of the purposes of Bakers was price maintenance. He said:

Q. When you were solicited, were any representations made to you as to the purpose of this organization?

A. Yes. It said to make better labor relations, to maintain prices and generally better baking conditions.

50. Mr. LaLime did not make these calls as an individual to expound his own philosophy. He called in his official position as Secretary-Manager of Bakers of Washington, Inc., and on behalf of the wholesalers in that organization. He called at one time one Mr. Albert A. Pettersen who, when he was called, was Bakery Supervisor of Albertson's Food Stores in Seattle. Albertson's had about 12 stores in Seattle and had an in-store bakery. Mr. LaLime called Mr. Pettersen in regard to an advertisement he had run advertising raisin bread for 19¢. This was in 1959. Mr. LaLime told Mr. Pettersen that the wholesale bakers protested his price. Mr. Pettersen be-

lieved that Mr. LaLime acted for respondent wholesalers. He was asked:

Q. When he called you, did he say that he was calling because some wholesale baker protested your price?

A. That is right.

51. The brother of the above Mr. Robert Hall, Ralph Lorraine Hall, also testified that Mr. LaLime apprised the Halls before any price increase in bread, giving a week's prior notice in fact.

52. Respondent Victor H. Goethals, trading as Fortune's Bakery, in Anacortes, testified that Bakers through Mr. LaLime had contacted him in 1958 to raise his prices to the level of the rest of the wholesalers. This was done by telephone. Before the price rise in 1958, Mr. Goethals received notice of the price rise from Bakers. Mr. Alford also called Mr. Goethals to get him in line price-wise. The major bakeries through Mr. LaLime kept control of the in-store bakeries. These bakeries had low overhead and could afford to sell lower than prevailing prices. In fact, they and other on-the-premises bakeries, would have enjoyed a much larger volume if they were able to sell below advertised brands. Wholesalers have production costs for selling and delivery and packaging not incurred by in-store bakeries.

53. Vincent Kenneth Noga, from about October of 1954 to October 1959, operated an in-store bakery in a supermarket in Union Gap near Yakima, Washington, and for a part of this period, had a "cold spot" outlet in Yakima to which he transported bakery products from his "hot" location at Union Gap. His competition in bakery products was Snyder's, Continental, Langendorf, Trenerry's, Atkinson's and Safeway, among others. In the early part of 1958, Noga was charging 33¢ for the standard 1½ lb. loaf. However, in the summer of 1958 when it became apparent that he was going to lose the cold spot, which did a volume of approximately \$500 weekly, which volume was necessary to survival, Noga cut the price on this loaf to 25¢ to bring volume to his bakery. On several occasions, Bud Snyder of respondent Snyder's Bakery, approached Noga and urged him to get his prices in line with the rest of the bakeries. Continental's agent in Yakima, a friend of Noga's asked him how he would like to have a truck load of bread given away free in front of his store. Snyder inquired as to what Noga would do if they had Safeway cut the price of bread to 15¢ or even 10¢. Noga refused to raise his price, however, because he had to have the volume to keep his doors open. Noga was unable to maintain the 25¢ price very long, however, perhaps a week or two, because he lacked the physical capacity to meet

the demand for bread at that price. He, therefore, raised the price to 29¢ a loaf at which price the demand on week days leveled off at 150 loaves and reached 250 to 300 on Saturday. At this price, Noga was able to realize a satisfactory profit. His earnings more than tripled. From \$9.00 per day at 33 cents per loaf, he went to \$30.00 per day at 29 cents per loaf.

54. Wayne Atkinson at one time operated the Old Holland Bakery in Yakima which produced a full line of bakery products. In the fall or late summer of 1957, Atkinson advertised a week-end special on 1½ lb. white loaf bread of 21c per loaf at a time when the regular price of this loaf was 31¢. Atkinson was visited by Jim and Bud Snyder of Snyder's Bakery who inquired if he was attempting to break the price of bread. After his conversation with the Snyders, Atkinson went back to his original price. A few days later, a meeting was held at the Chinook Hotel which was attended by both of the Snyders, Dick Trenerry, the manager of Eddy's Bakery, and various representatives of retail bakeries including Atkinson. At this meeting it was agreed that retailers would not cut the prices on the large white and whole wheat loaves. Only one in-store bakery was permitted an exception to the rule that all prices must be the same at the retail level and this was respondent Safeway. Safeway was allowed to sell at 1¢ below the retail list required of the others.

55. It is the contention of respondents that a determination of a violation of Section 5 of the Federal Trade Commission Act requires the threshold finding that the alleged acts and practices — assuming they had been proved — were "unfair methods of competition in commerce." Respondent Continental-Seattle, together with respondents Hansen, Buchan and Fortune's filed a Motion to Dismiss prior to hearings in this proceeding in which they presented their contention that, because they sold bread only in the Seattle marketing area where no bread is sold in interstate commerce, any conspiracy to raise prices, even if proved, could not be held to be a violation of Section 5 of the Federal Trade Commission Act. These Motions to Dismiss were all renewed after respondents rested their cases.

Respondents contend that the sales by respondents that occur in the Seattle market are simply not sales of bread baked outside the State of Washington and for that reason if there had been any price fixing agreements in this market they could not be "unfair methods of competition in commerce." Therefore, respondents contend that Commission counsel has failed to prove jurisdiction over any such agreements, even if they had been proved.

56. Respondents suggest that Commission counsel will apparently make two arguments in resisting this conclusion. First, they ap-

parently will argue that Continental's, Langendorf's and Safeway's activities in Seattle are so controlled by the general offices located in Rye, New York, San Francisco and Oakland, California that anything done in Seattle is an act or practice "in commerce." Secondly, they will apparently argue that because some of the respondents in various ways cause their bread to be shipped out of the State of Washington, the commerce element of the Section 5 violation is made out.

57. Respondents argue that the fact that Continental, Langendorf and Safeway are corporations engaged in commerce with top managements responsible for the acts of their agents in Seattle, under the respondeat superior doctrine, is not sufficient to place the acts themselves in commerce. Respondents contend that the jurisdictional question is still that stated by the Federal Trade Commission as recently as *Union News Co.*, Docket 7396 (January 10, 1961) [58 F.T.C. 10, 23]: "Thus, the relevant jurisdictional issue is whether the practices subjected to challenge were employed in commerce, and not whether all operations of the entity employing the methods, acts, or practices were performed in interstate commerce."

58. The respondents rely on *FTC v. American Tobacco Co.*, 264 U.S. 298, where the Commission was denied access to records relating to intrastate sales and *FTC v. Bunte Bros, Inc.*, 312 U.S. 349 where the Supreme Court held that methods of competition of Bunte in Illinois, relating to goods manufactured in Illinois, were beyond the jurisdiction of the Federal Trade Commission acting under Section 5. Respondents contend that Bunte Brothers like Continental, Safeway and Langendorf was a large centrally organized corporation doing business in many states of the nation.

59. Respondents argue that the distinction between such cases as *Central Ice Cream Co. v. Goldenrod Ice Cream Co.*, 287 F. 2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961) and *Brosius v. Pepsi-Cola Co.*, 155 F. 2d 99 (3d Cir. 1946) which hold that no interstate commerce is involved, and those such as *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951) and *Holland Furnace Co. v. FTC*, 269 F. 2d 203 (7th Cir. 1959), holding that the flow of interstate commerce continued to the time of sale, is that in the former cases there was no interstate importation of the finished product, but simply importation of raw materials subsequently converted to the article sold. In short, respondents contend that no case has ever held that the flow of interstate commerce continued to the point of sale where there was, as in this case, complete *de novo* manufacture of the product in question in the state of sale.

60. In sum, the respondents argue that while they are engaged in interstate commerce as that term is defined in the Act, they nevertheless are *not* engaged in interstate commerce insofar as this proceeding is concerned because all of the sales of bread are intrastate.

61. While it is admitted by Continental and Langendorf that they sell bread to customers in Alaska, they contend that their sales are all made f.o.b. Seattle dock and therefore not interstate in nature. It appears to the examiner that *California Rice Industry v. FTC*, 102 F. 2d 716, 718 and *Carter Carburetor Corporation v. FTC*, 112 F. 2d 722, 730 reach a different conclusion.

62. In addition to the lack of jurisdiction argument propounded by respondents, they contend that in any event this proceeding should be dismissed because counsel supporting the complaint has failed to prove any unfair acts or practices or unfair methods of competition. It appears to the examiner that counsel supporting the complaint has met the above contentions by very strong legal and factual arguments. Counsel supporting the complaint contends and the examiner finds that respondents are engaged in interstate commerce and that they engaged in unfair methods of competition and unfair acts and practices in commerce.

63. In general, the cement case is appropriate here not the Bunte case. In the cement case (*FTC v. Cement Institute, et al.*, 333 U.S. 683 (1948)), two of the numerous respondents therein charged with combining to fix the price of cement, contended the Commission lacked jurisdiction as to them because they made all of their sales within the State of Washington. They relied upon the Bunte case for dismissal. The Court decisively rejected their argument with the following reasoning:

We cannot sustain this contention. The charge against these respondents was *not that they, apart from the other respondents, had engaged in unfair methods of competition * * * simply by making intrastate sales.* Instead, the charge was, as supported by the Commission's findings, that these respondents in combination with others agreed to maintain a delivered price system in order to eliminate price competition in the sale of cement in interstate commerce. The combination, as found, included the Institute and cement companies located in many different states. * * * The fact that one or two of the numerous participants in the combination happen to be selling only within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction. The important factor is that the concerted action of all parties to the combination is essential in order to make wholly effective the restraint of commerce among the states. *The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combination and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of*

a single state. We hold that the Commission did have jurisdiction to make an order against Superior Portland and Northwestern Portland." (Emphasis added).

This reasoning applies here for many of these respondents are in interstate commerce and those who might not be, who have combined with them to suppress competition, cannot escape the Federal Government's jurisdiction.

This same idea of the interconnections of companies engaged in a common course of action also applies inter-company-wise. As counsel supporting the complaint points out, respondents seek to create an intra-state island of the trade territory in and around Seattle, but the record is to the contrary.

64. An earlier case *U.S. v. Swift & Company*, 196 U.S. 375 (1905), sets forth a test of interstate commerce which is applicable here. In that case the Supreme Court said transactions should be regarded in the light of their setting, that the whole picture should be viewed to determine the position of something which, when viewed alone, appears local. The Court said:

* * * that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more States; and that the parties dealing with reference thereto deal from different States. *United States v. Swift & Company* 122 Fed. 529, 532-533 *aff'd.*, 196 U.S. 375 (1905).

In *Salt Producers Assn. v. FTC*, 134 F. 2d 354, 359-360, the Court said:

Respondent [FTC] was acting within its legal power when it directed a cessation of any conspiracy to curtail or regulate the production of salt. The production of salt is a local transaction, but an *agreement* between many producers, of diverse citizenship to limit their respective products is an unfair method of competition *in* interstate commerce. The Bunte case, *supra* is not, we think, a holding to the contrary. 134 F. 2d at 359, 360.

65. The Commission followed the rule of the foregoing cases in the *Matter of J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957). Therein respondent, a Maryland corporation, with its principal place of business in Baltimore, was charged with violation of Section 2(d) of the Clayton Act. It was alleged that respondent gave special allowances to Food Fair for advertising respondent's products and anniversary promotions by Food Fair. Respondent admitted that it was engaged in commerce in that it shipped its products from its principal place of business to customers located not only within Maryland but to other states and the District of Columbia; that it also sold its products through route and driver-salesmen to retail establishments in D. C., Pennsylvania and New York but contended that the payments from Filbert to Food Fair did not involve interstate commerce, and

also that respondent's production for delivery and sale, as well as the payment to Food Fair, were all made entirely for exclusive use within the State of Maryland. The Commission over-ruled the initial decision of the hearing examiner agreeing with this contention and stated as follows:

We must decline to restrict ourselves to this fragmented view of either respondent's or Food Fair's business in a "nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." *Stafford v. Wallace*, 258 U.S. 495, 519 (1922). Nor does such a view appear consistent with the evidence in the record.

Our conclusion that these "special payments" to Food Fair were made by the respondent in the course of its business in interstate commerce, part of which includes sales to Food Fair for interstate distribution, depends on (a) the character of the Food Fair organization which resells respondent's products and (b) the character of the advertising for which such payments were made, *regardless of the mere locus of the transactions between the respondent and Food Fair*. (Emphasis supplied).

So far as the record shows, all dealing between the respondent and Food Fair occurred in Baltimore.

* * * * *

As the hearing examiner found, Food Fair Stores, Inc., is "a supermarket chain incorporated in Pennsylvania conducting an *integrated interstate operation*" (emphasis supplied) with "headquarters at Philadelphia but with branches in other states * * *, buying products from many suppliers in various states and reselling them to consumers through 216 supermarkets located from New York to Florida, with average annual sales per store being \$2,000,000." Management of the supermarkets is directed from the organization headquarters in Philadelphia.

* * * * *

We believe it fair to conclude that sales to Food Fair and these payments to Food Fair were made in the whole course of respondent's sale and distribution of its products in interstate commerce.

If sales were solely in Baltimore by Filbert are regarded as made "in the whole course of its sales and distribution of products in interstate commerce," the same rationale must apply to the instant proceeding.

Additional support for holding that respondent's activities are in interstate commerce is to be found in other recent decisions both under the Sherman Act and the Federal Trade Commission Act.

66. In 1954, the question of jurisdiction was raised in *Moore v. Mead's Fine Bread Company*, 348 U.S. 115 (1954). The defendant maintained that jurisdiction was lacking under Section 2(a) of the Clayton Act, as amended, over a purely intrastate price discrimination where the prices affecting interstate sales were maintained. Re-

spondent was in the baking business, having plants in Texas and New Mexico, and sold bread both locally in New Mexico and interstate. In the course of business, respondent cut the price in New Mexico and maintained the price in interstate sales:

On pages 119-120 the Court said:

We think that the practices in the present case are also included within the scope of Antitrust Laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only the respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business.

* * * * *

The federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the state, and to protect interstate commerce itself from injury by influences within the state.

67. In a case very close to the instant one on its facts, the Supreme Court decided that price fixing, limited to intrastate sales came within the Commerce Clause. In *U.S. v. Frankfort Distilleries*, 324 U.S. 293 (1945), retail liquor dealers had agreed to fix the price on *retail* sales in Colorado. In that state the retailer dealers must purchase all their liquor from Colorado wholesalers. The Court stated on pages 297-298:

It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. * * * On the other hand, the sole ultimate object of respondents' combination in the instant use was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it "exercised all the power it possessed." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495.

The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance. Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado.

68. Suppression of price competition by concert of action between competitors falls under the interdiction of Section 5 of the Federal Trade Commission Act. The law against price fixing is clearly defined. It is well established that collective action to tamper with prices is illegal per se. *U.S. v. Socony Vacuum Oil Co., Inc.* 310 U.S. 150 (1940). It is equally well settled law that the Federal Trade Commission can deal with price fixing under its power to prevent unfair methods of competition. *FTC v. Cement Institute*, 333 U.S. 683 (1948). However, it is appropriate to note that the Commission has in many cases condemned price fixing in varied forms and that in previous actions, it has dealt with activities very similar to those, in issue here. The following are cases in point: *Milk and Ice Cream Can Institute, et al. v. FTC*, 152 F. 2d 478 (1946); *Bond Crown & Cork Co. v. FTC*, 176 F. 2d 974 (1949); *Fort Howard Paper Co., et al. v. FTC*, 156 F. 2d 899 (1946); *American Chain & Cable Co., Inc., et al. v. FTC*, 139 F. 2d 622, (1944), 142 F. 2d 909; *FTC v. Pacific States Paper Trade Assn., et al.*, 273 U.S. 52 (1927). These cases outline the tests for conspiracy and combination under modern methods of corporate behaviour and demonstrate the broad coverage of the rule against price fixing. It is not only outright agreements upon prices that the Commission may reach, but any and all concerted actions to eliminate, lessen or restrain price competition.

69. The Commission in *Milk & Ice Cream Can* followed the reasoning of the Supreme Court in *Sugar Institute v. U.S.* 297 U.S. 553, 601 (1936). There the Supreme Court said:

The unreasonable restraint which defendants imposed lay not in advance announcements but in the step taken to secure adherence without deviation, to prices and terms thus announced.

In the *Sugar Institute* case the Supreme Court also pointed out that with regard to standardized products, there is a strong tendency toward price uniformity and that "makes it more important that such opportunities as may exist for fair competition should not be impaired." This rule is important here because bread is a highly standardized item at least in the State of Washington. Thus the elimination of any opportunity to compete as between these respondents is suspect.

70. The rule of strict surveillance over concerted action to lessen competition on standardized products was emphasized in the *Mal-*

sters case. In upholding the Commission's order in that case, the Court said:

[I]n the instant case the fact that malt is a standardized product, if such it be, with a tendency toward uniformity of price, makes it all the more important that such products be permitted to enter the channels of commerce unfettered by any restrictions which might impair such competition as otherwise exists. *United States Maltsters Assn., et al. v. FTC*, 152 F. 2d 161 (1945).

71. Direct evidence of conspiracy is not required in price fixing cases. Concerted action to eliminate price competition constitutes proof of conspiracy to fix prices. This rule is clearly expressed in *Advertising Specialty National Association, et al. v. FTC*, 238 F. 2d 108 (1956) where the Court said:

It should be emphasized that, to affirm the order below, it is unnecessary for us to find a formal agreement among the jobbers or direct evidence of a conspiracy. "The agreement may be shown by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *American Tobacco Co. v. United States*, 147 F. 2d 93, 107 (C. A. 6th, 1944), aff'd 328 U.S. 781 (1946). "As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that 'The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words.'" *Fort Howard Paper Co. v. Federal Trade Com.* 7 Cir., 156 F. 2d 899, 905 [re F.T.C. 1087; 4 S. & D. 496]. *Bond Crown & Cork Co. v. FTC*, 176 F. 2d 974, 979 (C.A. 4th, 1949) [46 F.T.C. 1419; 5 S. & D. 150] Cf. *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939).

72. The following observations of the Court in *Bond Crown & Cork* (*supra*) are also apposite here:

Innocent explanations are offered as to each of the circumstances relied on by the commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as to their sufficiency to support the findings and conclusions of the commission.

* * * * *

As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that "The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words." *Fort Howard Paper Co. v. Federal Trade Com'n*, 7 Cir. 156 F. 2d 899, 905.

73. The respondents named as directors, officers, and members of the association were such and were fairly representative of the entire

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membership, as a class, which was so numerous that all could not be made parties without manifest inconvenience and oppressive delay.

The methods of competition described in the complaint contravene established public policy and are against the public interest.

CONCLUSIONS

The activities of respondents as set forth in the findings taken together add up to a conspiracy and combination on the part of respondents to fix prices and compel adherence to them and constitute unfair methods within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Bakers of Washington, Inc., an incorporated association, and respondents George B. Buchan, Richard Hoyt, and Arthur H. LaLime, individually and as officers of respondent association, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, to do or perform any of the following things:

- (1) Establish, fix or maintain prices, terms or conditions of sale of bread,
- (2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or
- (3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That respondents Buchan Baking Co., Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Co., Inc., Trenerry's Bakery Co., and Snyder's Bakery, Inc., corporations, John M. Larson, trading as Larson's Bakery, and Vic H. Goethals, trading as Fortune's Bakery, all members of respondent association, and the following members of said association, not named as respondents herein, Ashbrook Bakeries Corp., 1407 11th

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Avenue, Seattle, Washington; Albertson's, Inc., 17000 Aurora Avenue, Seattle; Baders' Dutch Bakeries, 3755 University, Seattle; Baker Boy Bakery, 8050 Bothwell Way, Seattle; Bake-Rite Bakery, 1414 14th Avenue, Seattle; Bellinger Bakery, North Bend; Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; Big Four Donut, Inc., 319 Nickerson Street, Seattle; Blake's Bakery, Inc., 4729 California Avenue, Seattle; Bookter's Seattle Bakery, Inc., 3409 4th Avenue South, Seattle; Butter-Krisp Bakery, Inc., 2203 23rd Avenue South, Seattle; Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant #2, Seattle; Carolyn's Cakes, 518 15th Avenue North, Seattle; Caster's Lake City Bakery, 12532 Bothell Way, Seattle; Frederick & Nelson (Bakery Department), 5th at Pine, Seattle; Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle; Karl's Bakery, 1614 Hewitt Avenue, Everett; Kent Bakery, 213 First South, Kent; Lippman's Bakery, Inc., 119 23rd Avenue, Seattle; Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle; Manning's Inc., 621 Seaboard Building, Seattle; Richard's Fried Pies, Inc., 220 1st Avenue, North, Seattle; Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle; Smith & Sonnleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon (7710 Bagley, Seattle, Washington); Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle; Grand Central Bakery, Market & H Streets, Aberdeen; Swanson's Foods, Inc., 1401 Simpson Ave., Aberdeen; Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen; Bame's Ye Olde Home Bakery, Riverside, Mount Vernon; Bellingham Baking Company, 2001 State Street, Bellingham; City Bakery, 607 1st Street, Mount Vernon; Thrifty Foods, 130 Fairhaven Avenue, Burlington; Golden Rule Bakery, Inc., 915 Center Street, Tacoma; Jordan Baking Company, 3623 S. 54th Street, Tacoma; Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima; Sigman Food Stores, P. O. Box 618, Yakima; Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle; Lou Blackfield, Bake-Rite Bakery, 1414 14th Avenue, Seattle; Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima; Al Moore, Langendorf United Bakeries, Inc., 2901 6th Avenue South, Seattle; Roy Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle; LeConie Stiles, Jr., Ashbrook Ruth

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Bakeries Corp., 1407 11th Avenue, Seattle; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; and Maurice Bybey, Baker Boy Bakery, 8050 Bothell Way, Seattle; and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, to do or perform any of the following things:

- (1) Establish, fix or maintain prices, terms or conditions of sale of bread,
- (2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or
- (3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That Safeway Stores, Inc., and Holsum Baking Company, corporations, respondents, but not members of the respondent association, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, to do or perform any of the following things:

- (1) Establish, fix or maintain prices, terms or conditions of sale of bread,
- (2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or
- (3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

OPINION OF THE COMMISSION

FEBRUARY 28, 1964

By DIXON, *Commissioner*:

Respondents appeal from the hearing examiner's decision holding that they have fixed bread prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Bakers of Washington, Inc., is a corporate trade association organized under the laws of the State of Washington for the purpose of promoting the interests of the baking industry. Its principal office is located in the city of Seattle, and more than half of its 49 members have their places of business there. The other members are located in the surrounding cities and towns of western Washington, particularly in Bellingham, Aberdeen, Tacoma, and Yakima. The association has "divisions" in each of those towns.

The complaint named as respondents the association; its three officials, including its former secretary-manager, Arthur H. LaLime, now deceased; eight of its members as representative of the entire membership; and two other companies, Safeway Stores and Holsum Baking Company.

The examiner found that the wholesale and retail members of this association had attended frequent association meetings at the Athletic Club in downtown Seattle; that, by means of agreements or "understandings" reached at these meetings, price competition in the sale of bread at both the wholesale and retail level had been eliminated or lessened; and that respondent Arthur H. LaLime, then secretary-manager of the association, acting as common agent for the several members, had engaged in various acts of suppressing or lessening price competition among the members of the association.

Respondents take exception to the examiner's decision in four principal particulars. They contend that there has been no price fixing; that, if such price fixing occurred, it did not occur "in" interstate commerce; that, if the association's secretary did in fact cause the suppression of price competition among certain of the association's members, the evidence is insufficient to hold various of the other members legally responsible therefor; and that, in any event, the order is excessively broad.

I.

The members of the association include both "wholesale" and "retail" bakers. As we understand the trade terminology a "wholesale"

baker is one that produces (bakes) bread and sells it exclusively to retail establishments (e.g., grocery stores); it does not generally sell directly to consumers. A "retail" baker, on the other hand, is one that performs both the producing (baking) and retailing functions. The most familiar example is the traditional retail bake shop with its baking plant in the rear of the establishment, and its retail sales counter in the front of the shop. Another is the "in-store" bakery. This includes the grocery store owner who installs, in one section of his store, a baking plant and a bakery products "sales counter," or who permits another party to lease a portion of his store for such an operation. The term "retail" baker also includes the grocer that, instead of installing baking equipment on its store premises, sets up a separate baking plant at some other location and then transports the self-baked bread to its grocery stores for retail sale. Safeway, a respondent here, has such a plant in Seattle. It bakes a "private brand" bread called "Mrs. Wright" and retails it at the various Safeway grocery stores located throughout the western Washington marketing area.

A further aspect of the relationship between the wholesale and retail bakers should be mentioned at the outset. The grocery store that bakes its own bread also handles the major "name brand" breads. For example, Safeway buys "Wonder" bread from Continental and retails it alongside its own self-baked private brand, "Mrs. Wright." Hence Safeway is *both a competitor and a customer of Continental*. The small retail bake shops, those that generally deal exclusively in baked goods, are of course competitors of both Safeway and Continental—all are striving for the same consumer bread dollars.

It is undisputed that a number of these bakers are not engaged in interstate commerce. Some of them are small bake shops who do no business of any kind outside the city of Seattle. They bake the bread in Seattle, and retail it to consumers in Seattle. Obviously, a price fixing conspiracy exclusively among these bakers to regulate their prices in Seattle would be of no concern to the Federal Trade Commission. On the other hand, if it appears that they have joined in a conspiracy with one or more firms that *are* fixing prices in interstate commerce, then even the most local of these bakers is subject to the federal law. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 695-696 (1948).

It is also undisputed that several of these respondents are, in fact, "engaged in" interstate commerce. Respondent Continental Baking Company, a Delaware corporation with principal offices in Rye, New

York, the baker of "Wonder" bread, owns and operates more than 70 bakeries in 60 cities located in 29 states and the District of Columbia. It had sales of bread and other bakery products of more than \$350 million in 1960, and more than 27,000 employees. Respondent Langendorf United Bakeries, Inc., a Delaware corporation with general offices in San Francisco, California, owns and operates 11 bakeries in California, Oregon, and Washington. It had 3,896 employees, and sales of more than \$73 million in 1961. Safeway Stores, Inc., a Maryland corporation with its principal offices in Oakland, California, operates some 2,000 grocery stores in 28 states and the District of Columbia. In 1960 it had more than 63,500 employees and sales of more than \$2,468,000,000. Safeway is one of the three largest retail grocery chains in the United States.

These respondents argue, however, that, while they are "engaged in commerce" and thus subject generally to the jurisdiction of the Federal Trade Commission, the particular "acts" or "practices" challenged in the instant complaint did not themselves occur "in commerce." They contend that counsel supporting the complaint would have met his burden on this point only if he had shown that state lines had been crossed by either (1) the price fixing conspiracy itself, or (2) overt acts committed pursuant to that conspiracy, *i.e.*, sales at the fixed prices. Respondents contend that this record shows neither.

Assuming that a conspiracy has been established, and assuming further, for the sake of argument, that the conspiracy itself is "local" in the eyes of the law, we do not agree that the overt acts committed pursuant to it—the sales subsequently made at the fixed prices—were themselves local. First of all, this record shows that several of these wholesale bakers sell something like 1% or less of the production of their Seattle plants in Alaska.¹ Further, it appears that

¹ Langendorf's Seattle plant manager testified that less than 1% of his sales were made to buyers in Alaska. Tr. 313. According to his affidavit, n. 4, *infra*, this amounted to \$35,789.50 in 1960. "It is sold FOB Dock right here [Seattle] at our regular wholesale prices." Tr. 344. Continental's Seattle plant manager testified that he sold less than "one-half of one per cent" in Alaska. Tr. 399. Since his plant has annual sales of some \$4.5 million, this suggests annual sales from Seattle to Alaska of about \$22,500. Buchan, with annual sales of some \$4 million, sells "less than a fraction of one per cent" to Alaska buyers. Tr. 230. Hansen makes some shipments to Alaska also. Answer, p. 3.

Interestingly enough, respondents claim even these sales, assuming a Seattle conspiracy, are not actionable under the statute. They say there is no showing that prices charged to Alaska buyers "affect" Seattle prices, or that Seattle sellers are "interested" in Alaska prices. But this assumes the inquiry is directed solely to retail prices. To be sure, the price at which an Alaska buyer *resells* the bread is of no interest to the Seattle conspirators. But we are concerned here with *wholesale* as well as retail prices. And these sales to Alaska purchasers were made f.o.b. the Seattle docks, at the "regular" (*i.e.*, the fixed) wholesale price. Hence they are sales "in" commerce at a price inflated by a conspiratorial agreement.

some Seattle bread is shipped to adjoining states² and that a small amount of the bread sold in the Seattle area was in fact baked in another state.³ While these amounts are not *de minimis*, this case involves a much larger problem. We think it not only important but necessary that we deal with the question of whether these great interstate firms can claim immunity from the statutory prohibition against price fixing in regard to the remaining 99% of the transactions involved, those that took place within the borders of the State of Washington.

Bakery products, including bread, are highly perishable (bread, to be considered acceptably "fresh," must be sold to the ultimate consumer within something like 48 hours after baking). And bakery products are bulky in relation to weight and value, thus making long distance transportation economically impractical. The result is that Continental, for example, instead of baking all its bread in New York and then transporting it into 29 states for sale to local grocery stores, gathers up the men, equipment, and ingredients that it needs, transports them to each of the 29 states, erects a baking plant in each, bakes the product inside the borders of each such State, and sells it inside those borders.

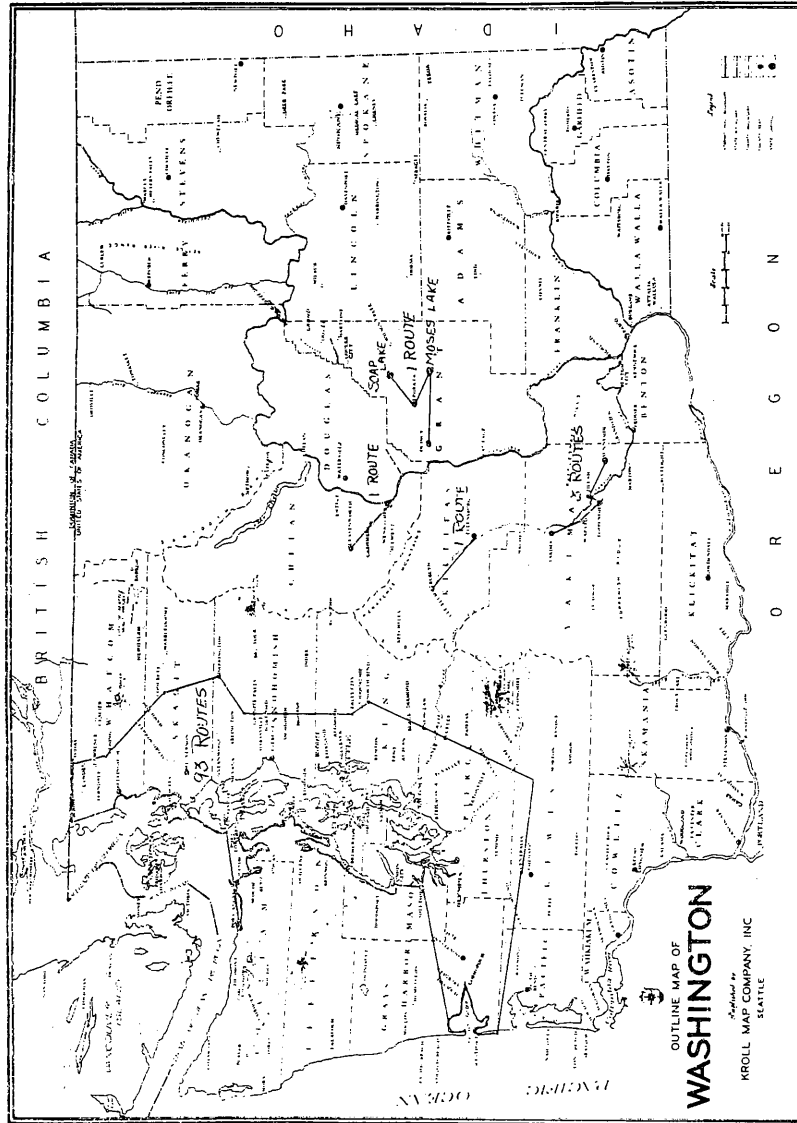
The fact that Continental has selected this method of doing business in Seattle is thus due to the nature of bakery products. It appears that, because of the bulk and perishability of bread, something on the order of 150 miles is the maximum distance from the baking plant it can be economically marketed. Here the Seattle marketing area (see Map of Washington,⁴ p. 1112a) runs generally from Seattle to the Canadian border on the north;⁵ to the Pacific Ocean on the west; to Yakima (Washington) to the southeast; and to the Cascade mountain range to the east. None of these market boundaries are more than 150 miles from Seattle. This is the area this trade association has selected for its theater of operations. Within it, respondents' prices are the same. When the retail price of bread goes from 33¢ to 34¢ in Seattle, it also goes up by precisely that amount in Bellingham (about 100 miles to the north), in Tacoma (some 25 miles south of Seattle), in Aberdeen (near the Pacific, roughly 100 miles west of Seattle), and in Yakima (over 100 miles southeast of

² Safeway (Answer, p. 2). Snyder ships some bread to Oregon (Answer, p. 2).

³ Holsum ships bread from its Idaho plant to its Trennery subsidiary in Yakima (Answer, pp. 1-2).

⁴ Attachment, affidavit of Al Moore, manager of Langendorf's plant in Seattle, filed July 13, 1961. (For a description of the marketing area of Continental's Seattle plant, see attachment, affidavit of Covington, plant manager, filed July 10, 1961. The Yakima area is served by another Continental plant, the one located in Portland, Oregon.)

⁵ It appears that these respondents do not sell their bread in Canada because of a "duty" Canada imposes.



LANGENDORF
Market Area for White Bread

Seattle). Yet, because this marketing area is well "inland" from the borders of any adjoining state, respondents contend that, if they fix prices in this area, they are beyond the reach of the Federal Trade Commission Act.

Respondents claim support for their position in *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349 (1941). There Bunte, a manufacturer of candy, made the candy in Illinois, and sold it in Illinois. The Commission, finding that Bunte was selling its candy in Illinois by means of a "lottery" scheme, and that it therefore enjoyed an unfair advantage over out-of-state competitors who could not lawfully sell their competitive candy across the state line into Illinois by the "lottery" sales method, concluded that Bunte was adversely affecting interstate commerce and ordered it to cease and desist. The Supreme Court reversed, pointing out that the Federal Trade Commission Act, by its express terms, reaches only unfair acts or practices "in" interstate commerce, and hence does not include those that merely "affect" interstate commerce. The *Bunte* case is not in point here. This complaint alleges that these respondents have fixed prices "in" interstate commerce.

We think the controlling case law here is not to be found in *Bunte*, but in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 695-696 (1948), and in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). In the first of these cases, the Northwestern Portland Cement Company, engaged wholly in intrastate commerce, entered into a planned, common course of action with others who were engaged in interstate commerce. The planned, common course of action restrained price competition. There the Supreme Court held that "the fact that one or two of the numerous participants in the combination happened to be selling within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction." In the second of these cases, namely *South-Eastern Underwriters Assn.*, an association of fire insurance companies had been indicted under Section 1 and 2 of the Sherman Act⁶ for fixing fire insurance premium rates (prices) and attempting to monopolize the fire insurance business, in six Southeastern States. The district court, relying upon *Paul v. Virginia*, 8 Wall. 168 (1869), had sustained a demurrer on the ground that insurance simply was not commerce at all, either local or interstate. The Supreme Court reversed.

⁶ While Sherman Act cases are not applicable to Federal Trade Commission Act "commerce" problems when the former turned on whether commerce had been "affected" by the acts charged, such cases are of course binding precedent when the issue, as in *South-Eastern Underwriters*, was whether those acts occurred "in" interstate commerce.

One of the contentions of the defendant insurance companies (more than half of which maintained their home offices in either New York, Pennsylvania or Connecticut, employing "local" agents to solicit "local" customers for them in the Southeastern states) was that the insurance policies sold by their agents were "local," not interstate, contracts. The Court replied:

But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. * * * We may grant that a contract of insurance, considered as a thing apart from *negotiation* and *execution*, does not itself constitute commerce. * * * But it does not follow from this that the Court is powerless to examine the *entire transaction, of which that contract is but a part*, in order to determine whether there may be a *chain of events which becomes interstate commerce*. Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift & Co. v. United States*, 196 U.S. 375, 398. In short, a *nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature*. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce. 322 U.S. at 546-547 (emphasis added).

Describing the activities of the defendant insurance companies that were in interstate commerce, the Court said:

And in great detail the indictment set out these total activities, of which the actual making of contracts was but a part. As recognized by the District Court, the insurance business described in the indictment included *not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts*. All of these alleged transactions, we shall hereafter point out, constituted *a single continuous chain of events*, many of which were multistate in character, and none of which * * * could possibly have been continued but for that part of them which moved back and forth across state lines. 322 U.S. at 537 (emphasis added).

The so-called "local" parts of these transactions had no separate existence of their own. The feet of each transaction were planted in a single southeastern state, but the whole body stretched across several States to its guiding member—the head—in one of the financial centers of the east, either New York, Pennsylvania, or Connecticut.

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. 322 U.S. at 541.

A continuous, life-giving stream flowed back and forth between the head and those distant extremities:

Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Ibid. (Emphasis added.)

The channels and instrumentalities of interstate commerce—telephone, telegraph, mail, and traveling agents—were used to effect the so-called “local” sales.

Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. 322 U.S. at 542.

The *terms* on which the “local” purchasers bought, and the value of what they got for their money, were determined not by the “local” salesmen, but by out-of-state management:

Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investment it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state. 322 U.S. at 541-542.

In the instant case, at least three of the respondents do business in substantially the same manner as those insurance companies. On November 29, 1961, Continental, Langendorf and Safeway entered into written stipulations with counsel supporting the complaint describing the interstate character of their operations. The stipulation with Continental, set out in part in the footnote below,⁷ is sub-

⁷ 4. Continental is regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products.

5. Membership in Bakers of Washington, Inc., was made in Continental's name and approved at headquarters.

6. Continental assumes legal responsibility for the acts of its plant manager in Seattle as to which testimony was taken.

7. Continental operates on an integrated basis. Ingredients for the products are purchased centrally [from central offices in New York] and receipts from sales go into a single treasury [in New York].

8. Ultimate responsibility for company affairs is vested in top management personnel at the company's general offices in Rye, New York.

9. Each element of Continental's bread and bakery product business is part of an integrated whole. The company is a single business entity and benefits or suffers from what is done locally by and through each plant or office.

10. The control over operations which rests in plant managers, beyond that which is peculiar to the position such as the housekeeping functions, is vested in them by delegation from top management.

stantially the same as the other two. "Continental operates on an integrated basis. Ingredients for the products are purchased centrally [New York] and receipts from sales go into a single treasury [New York] * * *. Each element of Continental's bread and bakery product business is part of an integrated whole."

The sales involved here are physically made through what are called "driver-salesmen," employees that generally perform both the selling and delivery functions. Each driver-salesman is assigned a specific "delivery route," generally a given number of city blocks. Continental serves 71 delivery routes from its Seattle plant. On those delivery routes, the driver-salesmen make deliveries to those stores that have already agreed to accept their product, and attempt to "sell" those stores that have not yet been persuaded to do so.

There is no suggestion here that these sales have to be "approved" by Continental's New York management. We have no doubt that they are "local" sales in the sense that, in an action for the price of goods sold and delivered, the law of the State of Washington would be controlling. But that is the "type of mechanical criterion" the Supreme Court rejected in *South-Eastern Underwriters*. A purchase-sale transaction under the trade regulation law is considerably more than this. We must, instead, "examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce." Here, as there, the business involved includes not only the execution of the contracts, "but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to *performance* of the contracts."

The instant record provides us with very little information as to the "innumerable transactions necessary to performance of the contracts" entered into by these local driver-salesmen on behalf of their out-of-state employers. From the stipulation quoted above, we know that Continental's plant manager in Seattle does not buy the ingredients or raw materials that go into the bread he sells; all purchasing is done for him by a central purchasing office located at the company's headquarters in New York. And from his testimony and certain exhibits we know also that there is a "chain of command" running from his plant in Seattle, Washington, to a "Regional Office"

in *California*, and thence to top management in New York.⁸ When he wants to increase prices, the plant manager writes to his regional manager in California asking for approval. The regional manager, in turn, gets approval from headquarters in New York. (In fact, it appears that the president of Continental personally approved the price increase in 1958.⁹)

From this "bare bones" record, we see only the broad contours of the taut strings that tie the Seattle plant manager to his out-of-state employer in New York. Fortunately, however, this Commission knows considerably more than this about Continental's over-all operation. On October 27, 1959, we issued our complaint in a proceeding entitled *In the Matter of Continental Baking Company*, Dkt. 7630, charging this same respondent, Continental Baking Company, with violating Sections 2(a) and 2(d) of the amended Clayton Act by granting discriminatory price concessions, and discriminatory promotional allowances, to certain favored customers. On March 8, 1963, the hearing examiner issued his initial decision dismissing the complaint. He found that, while the discriminations had occurred, and while the discriminations in price may have the requisite adverse effects on competition, they were not violative of the statute because they had been granted to meet the equally low prices and equally attractive promotional allowances of competitors. That initial decision was affirmed by this Commission on December 31, 1963.

One of the principal issues involved in that proceeding was similar to the instant problem—namely, whether, when one of Continental's "local" plants discriminated in price between two customers located in the same state in which the bread was baked, either of the two "*purchases* involved in such discrimination" was "*in*" commerce. Section 2(a) of the Clayton Act, as amended (emphasis added). The hearing examiner held that those purchase-sale transactions *were* "*in*" commerce.

In reaching this conclusion, the hearing examiner had the benefit of an adjudicatory record that explored the structure and operation of Continental's business with highly commendable thoroughness. Under the principle that a tribunal may take notice of its own rec-

⁸ Tr. 420-427; CX 23A-29.

⁹ CX 23E.

ords in other cases,¹⁰ we take official notice of the following facts developed in that record through documentary evidence secured from Continental, and by examination and cross-examination of Continental's officials and employees:

A. *Corporate organization.* Ultimate responsibility for corporate affairs is centered in the company's headquarters in Rye, New York. The headquarters staff is functionally divided into several "divisions," e.g., "purchasing," "sales," etc.

The company's multistate operation is divided into a number of "Regions." Each "regional office" is assigned, by headquarters, a given geographical area, an area that generally includes several states and, of course, several baking plants. The regional office staff, like the headquarters staff, is functionally divided into a number of divisions or departments. Each of these has a department head that reports to the "regional manager." He has (1) a "Regional Sales

¹⁰ "We may notice the record of that case in this court." *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 336 (1930). See also *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 546, n. 4 (1937) (quoting testimony from another case); *West Ohio Gas Co. v. Public Utilities Comm. (No. 1)*, 294 U.S. 63 (1935) (noticing evidence in record of a companion case between same parties); *Crichton v. United States*, 56 F. Supp. 876 (S.D.N.Y. 1944), *aff'd.*, 323 U.S. 684 (1945) (ICC noticed record of earlier case involving same party); Davis, 2 *Administrative Law Treatise* 338, 381-384.

As we understand it, the propriety of taking official notice of facts, whether such notice is taken at the beginning of a proceeding or in the agency's decision, turns upon whether the party is afforded an opportunity to challenge the facts so noticed, if it desires, and thus to correct any errors the tribunal may have made. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528-530 (1946); Davis, *id.*, at 388, 394, 400, 411; Davis, "On Official Notice," Proceedings of the Federal Hearing Examiners' First Annual Seminar 13, 22 (September 23-25, 1963). Section 7(d) of the Administrative Procedure Act provides: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Section 3.25 of our Rules of Practice authorizes the filing of a "petition for reconsideration" of any Commission decision. Should Continental desire to challenge any of these noticed facts, it will thus have an opportunity to do so in such a petition for reconsideration, specifying those particular factual statements it wishes to dispute, and setting forth, preferably by affidavits of knowledgeable persons, the true facts in those particulars.

It appears, however, that these noticed facts are undisputed. They were taken from another record involving the same party; they were presented there through the party's own officers, employees, and written records; they were adduced there for the same purpose as here (to show interstate commerce); and cross-examination and opportunity to present rebuttal evidence were afforded. These facts were then found by the examiner and set forth with great particularity in his initial decision in that case (Dkt. 7630, initial decision filed March 8, 1963, particularly pp. 11-21) [63 F.T.C. 2084-2092]. On its appeal to the Commission, Continental challenged the examiner's legal conclusion that those facts evidenced interstate commerce, but made no effort to dispute any of the factual findings themselves. We could, of course, remand the instant case for the taking of this same evidence a second time. And on a proper showing of the necessity therefor, we would do so. But until such a showing has been made, we are guided by the principle that "the intelligent functioning of the administrative process demands that the Commission [ICC] be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case." *Crichton v. United States*, *supra*, 56 F. Supp. at 880.

Manager," (2) a "Regional Production Supervisor," (3) a "Regional Cost Analyst," (4) a "Regional Vehicular Supervisor," (5) a "Regional Engineer," and (6) a "Regional Personnel Director."¹¹

This form of organization is, in effect, repeated at the bakery or plant level. The "plant manager" is responsible to his immediate superior, the "regional" manager. The plant manager has several divisional or departmental heads to assist him. He has: (1) a "Sales Manager," (2) a "Shop Superintendent," (3) an "Office Manager," (4) a "Fleet Superintendent," (5) a "Chief Engineer," and (6) a "Chief Janitor."¹²

B. *Territorial assignments.* New York management controls the geographical territory served by each regional office. It rearranges these sometimes, taking a baking plant (or a distribution "depot") out of one region and putting it under the jurisdiction of another. The regional office, presumably with the approval of the headquarters sales manager, controls the territory to be served by each of the local baking plants. It can have a particular plant manager confine his sales inside the state in which his plant is located, or it can have him sell across state lines. Local plant managers are assigned, promoted, and transferred from one plant to another, and from one "region" to another.

At the bakery level, the plant manager divides his territory into "delivery routes." Such a route might be 10 blocks long, or only two blocks, depending upon the "density" of the "stops" on that route. (A "stop" is a customer, e.g., a grocery store that buys Continental products.)

C. *Purchasing.* Continental's baking plants in 29 states secure the raw materials or ingredients needed in the baking of their goods by sending a "requisition," apparently through the regional office, to the company's "purchasing division" in Rye, New York. It does this by sending in, each and every week, a "weekly inventory" of the supplies it has on hand. From these, headquarters does the ordering "automatically." The suppliers of the various products needed by Continental's 29-state bakery operations are themselves located in many different states. Upon receipt of an order from Continental's Rye, New York, purchasing division, the suppliers deliver, in many instances across state lines, to whatever baking plant is indicated. Payment for ingredients is of course made by the purchasing division in New York from the central New York treasury.

¹¹ *In the Matter of Continental Baking Company*, Dkt. 7630, tr. 712.

¹² *Id.*, at tr. 366.

D. *Production.* Continental, in support of its efforts to maintain "a rigid standard of quality throughout the country," issues "Production Bulletins" prescribing in exact detail the production standards its plants are to follow. The regional production supervisor "is constantly in touch with the plants."¹³

E. *Pricing.* The local plant managers can only "recommend" prices. The regional office, presumably with the approval of the headquarters sales manager, determines prices. To get permission to vary his prices, either generally or to a particular customer, the plant manager submits a request to his regional superior.

F. *Money collected from sales.* Continental's local baking plants have no control whatsoever over the money collected from their sale of Continental products. The bakery has two bank accounts. Money collected from customers is initially deposited in a "general" account, and then periodically transferred to a New York headquarters' bank. For its own local expenses, the bakery is given a "local" account. From this account, it can meet its payroll and make certain other "miscellaneous" expenditures. Except in case of emergencies, the purchasing of the local plant manager is limited to expenditures of \$50 or less (\$300 for engineering services).¹⁴ For expenditure of more than \$50 the plant manager must send a requisition to headquarters. As to the money received from the sale of Continental's products, he is simply a collection agent for the headquarters treasury.

G. *Accounting.* Continental's baking plants follow an accounting system prescribed by the headquarters office in New York. Each week they submit a report that gives the home office in New York a complete breakdown on the past week's production, sales, percentage of "returns," etc. The bakery also submits a weekly "profit and loss" statement. A "Travelling Auditor" audits the bakeries' books twice a year, and may also make additional visits. The regional cost analyst also checks on the bakeries.¹⁵

H. *Personnel.* Continental's bakery manager can hire and fire employees below the "department head" level. He must have regional "approval" before he can hire, say a "production supervisor," or a "sales supervisor." The regional "personnel director" helps the plant personnel man with such programs as the "student program which we carry out at each plant," that is, recruiting from local colleges. Also, the regional personnel director "is a sort of liaison operator working with the plant personnel man in clearing ideas on safety

¹³ *Id.*, at tr. 714-715.

¹⁴ *Id.*, at tr. 526-527, 601-602.

¹⁵ *Id.*, at tr. 716.

programs and clearing the distribution of thoughts on hiring, training, et cetera.”¹⁶

I. *Insurance*. All group life and health insurance, for all Continental employees, is purchased by the “Insurance Department” in Rye, New York.¹⁷

J. *Engineering*. The regional engineer “irons out the engineering kinks” at the local plants. “He is very important. A plant will develop a new manner of maintenance. He picks it up at one plant and passes it on to the next plant, such as it might help their efficiency and maintenance problems, and so forth.”¹⁸

K. *Vehicles*. The regional “vehicular supervisor” assists the local plants in the maintenance and operation of their truck fleet.

L. *Sales*. The regional manager’s responsibilities “are to operate the business and the bakeries under my control and try to make some money. * * * I am responsible for pricing in the trading areas that I have charge of.”¹⁹ He is responsible to headquarters for the sales volume of each of his bakeries. “I run sales figures for my region constantly.”²⁰ To assist him, he has a regional “sales manager,” whose duties are to: “Call on the bakeries, work with the sales departments to develop sales, help them to develop sales campaigns, help in getting the right kind of sales people, help to train them, and make store contacts when necessary.”²¹ “He is in contact with all the plants in my Region. Each plant has some kind of sales activities going on constantly. Various sales promotions, various sales activities and the regional sales manager’s job is to go around [to] the plants and confer with the plant manager and insure that these are activities that are going along, and general contact with the activities of each plant, in the direction of sales.”²²

M. *Labor Relations*. Continental has “a Labor Relations man” that “functions for my region and several others * * *. He is the one that negotiates the contracts.”²³

N. *Packaging*. Continental, at its New York headquarters, has an “art department” that designs most of the packages and wrappers in which its bakery products are sold (e.g., “Wonder” bread). However, if a bakery manager feels strongly about a particular design, it won’t be forced on him.

¹⁶ *Id.*, at tr. 712-713.

¹⁷ *Id.*, at tr. 719.

¹⁸ *Id.*, at tr. 715-716.

¹⁹ *Id.*, at tr. 1837.

²⁰ *Id.*, at tr. 1888.

²¹ *Id.*, at tr. 1922.

²² *Id.*, at tr. 714.

²³ *Id.*, at tr. 713-714.

O. *Advertising.* In 1961, Continental's bread sales were approximately \$187 million. About 6.5% of that total was spent for advertising. Most of this is local or regional, except for some national TV advertising. Newspapers, radio, TV, and billboards are the principal media used. National magazines are not used.

Virtually all advertising is *placed* from headquarters in New York, and is *paid for* from New York. The company has its own "Advertising Department" at headquarters. Further, it retains a New York advertising agency to handle its account. Local bakery managers can "suggest" ads they would like to see run in their local areas, but the preparation of the ad copy, the making of the arrangements with the local media (newspapers, radio and TV stations), and the payment of the media's bill are all headquarters' functions.

The home office also prepares "point-of-purchase" advertising material (signs to be put on the grocery store's bread rack, signs for its windows, etc.) for the local bakeries. The home office keeps the plants informed of the material available, and sends it to them from New York on request.

While the local bakery does not prepare, place, or handle the payment for advertising conducted in its trade area, the costs incurred by headquarters are charged to the bakery.²⁴

We think the foregoing facts bring Continental's sales in the State of Washington squarely within the rule of *South-Eastern Underwriters* that a purchase-sale transaction includes not only the "execution" of the contract "but also negotiations and events prior to execution * * * and the innumerable transactions necessary to performance." Here, the acts by which technical title passes from Continental to its grocery store customers are obviously a small part of Continental's total operation. Its local sales agent can easily agree to deliver on consignment a dozen loaves of "Wonder" bread every Monday, but "innumerable transactions," many of them directly "in" interstate commerce, are "necessary to performance." The work of Continental's driver-salesmen is merely the peak of the iceberg; beneath it, sunk deep into the stream of interstate commerce, is the real body of the transaction.

We find that all of Continental's sales in the State of Washington were "in" interstate commerce. All of them involved a New York seller and a Washington buyer. Each of them was an indivisible part of a host of "transactions * * * [that] constituted a single continuous chain of events, many of which were multistate in character, and none of which, * * * could possibly have been continued but for

²⁴ *Id.*, at tr. 457.

that part of them which moved back and forth across state lines." *South-Eastern Underwriters, supra*, 322 U.S. at 537.

We think this result is also in full accord with the Court's decision in *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954),²⁵ and with the Fifth Circuit's recent opinion in *Shreveport Macaroni Mfg. Co., Inc. v. Federal Trade Commission*, 321 F. 2d 404 (1963), *cert. denied*, January 6, 1964. In the latter case it was squarely held that purchase-sale transactions may be "in interstate commerce although the deliveries * * * [are] intrastate." 321 F. 2d at 407 (emphasis added). Until the Supreme Court resolves whatever conflict may exist between this case and *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963), we feel bound to follow the Court's clear reasoning in *South-Eastern Underwriters, supra*, and our understanding of its opinion in *Moore, supra*. In doing so, we note that nothing in *Willard* suggests that the Court had the benefit there of the kind of intra-corporate data we have discussed here, a study in depth of the vast substratum of out-of-state control exercised over, and the never-ending stream of interstate activities and communications that form the underlying support for, the out-of-state firm's allegedly "local" sales. This is the "economic and business stuff" out of which these transactions are made, *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963), and we think it shows that any other ruling would not only do violence to the purposes of the statute, but would require this Commission to ignore what our careful study here has led us to believe are the economic realities of present day interstate commerce.

²⁵ In that case, a private treble damage action brought under the Robinson-Patman Price Discrimination Act, the Court found a discrimination "in" commerce where the defendant, operator of a bakery in Clovis, New Mexico, cut its prices inside the State (in Santa Rosa, New Mexico), thereby injuring a local competitor, while keeping its prices high on sales made nine miles across the border in Farwell, Texas. To be sure, the latter sales were enough to meet the technical requirements of the statute. But they were trifling in amount, by any standard. Farwell, Texas, in 1950, had a population of 400. Assuming the defendant had all the bread business in that town, that it received its full wholesale price of 14¢ per loaf, and that every man, woman, and child in town consumed half a loaf of bread per day, the defendant's gross sales there would have been no more than \$28 per day. Assuming a net profit of 10% of gross sales, it could not have netted more than \$2.80 per day on its Texas sales. (See analysis in Proposed Findings and Conclusions of counsel supporting the complaint, *Continental Baking Co.*, Dkt. 7630, submitted December 31, 1962, p. 59.) The injured New Mexico competitor won a judgment of \$68,400. If the Farwell, Texas, sales were the keystone in the Court's decision, then the holding is simply that the defendant used poor financial judgment in letting its trucks wander nine miles inside the Texas border: it would have had to retain all of the Farwell, Texas, bread business for more than 75 years to earn back that nearly \$70,000 sum.

The real basis for the Court's decision, we think, was not that the Mead plant in New Mexico made a few inconsequential sales in a small Texas border town, but the fact that Mead was one of several "interlocked companies," a member of an "interstate combine," 348 U.S. at 119, doing business in many states.

II

Respondents contend that the hearing examiner erred in finding that they had, in fact, conspired to "suppress competition among and between themselves and others in the production, distribution and sale of bread" as charged in the complaint. They call it merely a case of "conscious parallelism." Arguing that nothing has been shown here but price uniformity, they note the principle that: "An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices." *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *cert. denied*, November 18, 1963.

Respondents further contend that, whatever inferences of conspiracy might otherwise have been drawn here, they are affirmatively rebutted by several additional facts, namely, (1) that there is no community of interest between the "wholesale" and "retail" members of the association, and thus no reason for them to conspire; (2) that there is no community of interest, and hence no motive for a conspiracy, between those members that are located in different metropolitan areas; and (3) that several of the alleged conspirators said they had lost money during a part of the relevant time period.

The third contention is wholly fallacious. Even if it had been fully established that some of these wholesale bakers had in fact sustained losses,²⁶ that fact would be insufficient to rebut a reasonable inference of conspiracy. While conspiracy is normally associated with affluence on the part of the conspirators, it is certainly no guarantee of prosperity.

Nor is there anything in respondents' "territorial" and "functional" arguments that negate the existence of a price fixing conspiracy here. The latter contention—that "wholesale" and "resale" bakers do not compete with each other—is patently unsound. For example, one of the "retail" bakers, Mr. Vincent Noga, operator of an "in-store" bakery in Yakima, testified that while he was baking and selling his own bread in one section of the Yakima supermarket where he had his baking operation, the various "wholesale" brands (including Continental's "Wonder" bread) were being sold in another section of the same store, under the very same roof. He had no doubt that he was "competing" with the bread baked by the wholesaler.²⁷

²⁶ Those respondents offered no documentary evidence to support the claims on this point. The only written financial data in the record is CX 32, Continental's 1960 Annual Report, which shows a net after tax profit of over \$9 million (p. 6); and CX 34, Safeway's 1960 Annual Report, which shows a net profit of over \$34 million (p. 18).

²⁷ "[T]he wholesalers were my main competitors." Tr. 526.

It could not be otherwise. Wholesale and retail prices are tied together by a simple, mathematical formula. On their loaves of bread, the wholesale bakers stamp, for the consumer to see, a "suggested retail price." This is the price the retail grocer almost invariably charges the consumer. The price he pays the wholesale baker is simply that suggested retail price *less 20%*.²⁸ When the consumer is paying 34¢ for the regular loaf, the grocery store is paying 20% less, or 27.2¢. One of the wholesale bakers, testifying in regard to the 2¢ price increase in 1958, remarked that: "We don't get the two cents. We only get a part of that. 20% of it goes to the retailer, the grocer or the restaurant owner * * *." ²⁹

Hence the big wholesale bakers have a direct and immediate interest in preventing price competition between the retail bakers themselves, and thus between the retail bakers on the one hand and the retail grocery stores (the wholesalers' customers) on the other. For example, one wholesale baker summed up his competition this way: "Well, I was thinking of everybody in the baking industry. You know, our competition isn't just the wholesale baker or the retail baker or the grocery store baker or the house-to-house baker. * * * The *housewife* can bake her own bread. * * * [I]f she thinks the price is too high, she's going to bake in her own kitchen and she says she does a better job." ³⁰

As to respondents' argument that the geographical distances between these various metropolitan areas establishes the absence of competition and hence any motive for fixing prices, it should be noted first that many of these respondents sell in two or more of the towns in question.³¹ In fact, it appears that Safeway sells in *all*

²⁸ See, e.g., tr. 42-44, 205; CX 31.

²⁹ Tr. 182.

³⁰ Tr. 245 (emphasis added).

³¹ Of the 49 members of the association, all of whom are respondents in this proceeding (either named directly or through representative members), more than half of them have their businesses in Seattle itself and thus compete with each other in that city. (CX 8, a list of the members as of date complaint issued, and amount of dues paid by each, tr. 177, lists 29 Seattle members.) The others are located in North Bend, Everett, Kent, Aberdeen, Mount Vernon, Bellingham, Anacortes, Burlington, Tacoma and Yakima. All of these towns are well within 150 miles of Seattle, the distance bread can be economically transported from the baking plant. (See Map, p. 1112a.) Buchan has four plants: two in Seattle, one in Bellingham, and one in Tacoma. Tr. 179. Continental's Seattle plant sells all the way north to the Canadian border, east to North Bend, and south to Renton and Tacoma. Tr. 399-401. For example, it has a delivery route in Anacortes (near Bellingham), tr. 438, and thus competes with local bakers there. Langendorf's Seattle plant similarly sells north to the Canadian line, south to Aberdeen, and southeast all the way over to Yakima. Tr. 312-313. Hansen has two plants, one in Seattle and one in Tacoma. Tr. 288, 294-295. It appears, therefore, that each of the 49 members of this association, regardless of the town in which it sells, is competing with bread baked by one or more of these wholesale bakers.

of them.³² Therefore, a break in prices in any one of these towns would adversely affect not merely those respondents with baking plants in it, but also those who sell there from baking plants located elsewhere.

Returning to respondents' argument that "conscious parallelism," *i.e.*, uniform prices, does not prove a conspiracy, it should be noted at the outset that this is not a "conscious parallelism" case. It is a conspiracy case. To be sure, the record shows that these respondents have "matched" each other's prices with great diligence.³³ But the evidence here goes substantially beyond that. The record shows (1) that these alleged competitors have held regular "meetings" almost every week, generally every Monday at the Athletic Club in Seattle; (2) that they "discussed" prices at those meetings; (3) that, after certain of these meetings, the association's manager informed certain of the members that, on a certain date, there would be an increase in the price of bread; and (4) that the association's manager, as well as his predecessor in that job, repeatedly called on individual members of the association for the purpose of inducing them to refrain from cutting prices, sometimes threatening them with drastic price retaliation if they refused to keep their prices in line with the others.

Only one company was allowed to deviate from those prices—Safeway. While all the other bakers, wholesale and retail, were pressured to retail their bread for the same price Continental got for its "Wonder" bread, Safeway was permitted to sell for 1¢ less. It was permitted to do so for the simple reason that none of the others, not even the big wholesale bakers, had the power to stop it.³⁴ The result is that respondents have two prices in this market: (1) the high, uniform price (e.g., 34¢ in 1960 for the standard loaf) charged by the group in general—including the advertised brands produced by the big wholesale bakers (Continental's "Wonder" bread, etc.) as well as the unadvertised breads produced by the smallest of the retail bake shops, and (2) the 1¢ lower (33¢) price charged by Safeway for its self-baked, "private brand" bread.

While the association's by-laws provide for "annual" meetings of the entire membership, these are rarely held. Instead, "special" meet-

³² Safeway "ship[s] all over the State of Washington." Tr. 262.

³³ The hearing examiner's initial decision tabulates, at page 1093, the simultaneous and nearly simultaneous price increases by these respondents in the years 1957 (from 30¢ to 31¢ on the standard loaf of bread), 1958 (from 31¢ to 33¢), and 1960 (from 33¢ to 34¢). For example, in 1958, four of the largest—Continental, Langensdorf, Hansen, and Buchan—all raised their prices on the standard loaf of bread from 31¢ to 33¢ on precisely the same day, August 11, 1958.

³⁴ Buchan, asked why he didn't meet Safeway's 1¢ lower price, replied: "Well, I am afraid that we are not financially able to undercut Safeway." Tr. 195.

ings are called frequently. The Seattle division meets almost every week. "At times we have a meeting every week, not always every week."³⁵ The number of special meetings actually held each year totals less than 52, but more than 26.³⁶ While the meetings in Seattle are usually held on Mondays, and at the Athletic Club in Seattle, each meeting is individually called. The record contains a list of the "regulars" who have requested that they be notified of all meetings.³⁷ Members of the association located in the towns served by the other four divisions³⁸ are not routinely informed of the Seattle meetings, but are free to, and do, attend if they happen to be in town.³⁹ The manager of the association (then Arthur LaLime) presided at the meetings.

The ostensible purpose of these meetings is to discuss such matters as contracts with labor unions, labor grievance problems, and regulatory and legislative issues. But the testimony of several witnesses who attended these meetings makes it clear that the discussions frequently involved prices, particularly the alleged "need" of the members to raise their prices in order to recoup the costs of wage increases.

Witness Schafer, former owner of a bakery in Bellingham, testified that, as a member of the association, he occasionally attended its meetings at the Athletic Club when he was in Seattle. "Whenever it was convenient for me to be down here, I would go to their noon luncheon which we considered a luncheon and a meeting combined." He testified further:

Q. Did you ever hear any discussions of prices or price rises when you were at a meeting of the Bakers of Washington, Inc.?

A. Yes, sir.

Q. What would be the circumstances of such discussions? Would they usually occur around labor contract periods or what?

A. That is the reason for raising 'em. * * * Sometimes before and *after* our contract was signed.

³⁵ Tr. 36. "Whenever the occasion requires it," a meeting is called. *Ibid.*

³⁶ Tr. 114.

³⁷ CX 7, tr. 175.

³⁸ As noted, the association has five divisions: Seattle; Bellingham (about 100 miles north of Seattle, and about 20 miles south of the Canadian border); Aberdeen (on the Pacific Coast, about 100 miles southwest of Seattle); Yakima (slightly over 100 miles southeast of Seattle); and Tacoma (less than 50 miles south of Seattle).

³⁹ Tr. 35. The other four divisions have their own meetings. The association's manager, LaLime, apparently called meetings in the divisions whenever those members asked him to. He visited the divisions "[w]henver the occasion requires it. Any time *something happens* that would require it." Tr. 38 (emphasis added). He estimated that he visited each of the divisions about 10 or 12 times per year. Tr. 38-39. He presided (as chairman) over all meetings. Tr. 40.

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Q. Would you hear price discussions at other periods at these meetings or were they generally localized around the contract periods?

A. *Mostly* contract periods, yes.

Q. And what would be the nature of the discussions that you heard?

A. " * * * we're going to use red ink if we don't do something about the bread price."⁴⁰

To the same effect was the testimony of witness Albert Pettersen, formerly bakery supervisor for a local food store chain:

Q. Now, when you were here in Seattle, Mr. Pettersen, did you ever attend any meetings of the Bakers of Washington, Inc., sir?

A. Yes, sir. I attended their Monday luncheon at the Washington Athletic Club.

* * * * *

Q. [W]e have had testimony to the effect that the price of bread rose in August, August 11, 1958 here in Seattle, the Seattle area. Do you recall attending any meetings at the Washington Athletic Club of Bakers of Washington, Inc. *in which prices were discussed*, around that period?

A. Yes, I did.

Q. What would be the nature of the price discussion that you heard?

A. Well we discussed the labor, we discussed our price of our material—flour, shortening, sugar. And labor had jumped so high *that they decided that we should have a raise* in our bread. From there we just took it and they said, "What do you think about certain prices?" and they kicked it around and, so that is as far as it went *as long as I sat there.*⁴¹

After these meetings were over, the witness was notified by the association's manager, Arthur LaLime, that there was going to be a price increase:

Q. Did you receive information that prices were going up after this series of meetings?

A. Yes, sir.

Q. And how did you get that information?

A. Well, I believe it was a form sent to us. Now I am not sure whether it was a form or he called me, Art LaLime called me. I don't know whether it was a paper or telephone call.

Q. It was just the one instance when he called you or sent you a notice or was there more than one instance?

A. Well there was more than one instance because we weren't sure on different items to go up on, like buns and specialty breads.⁴²

The explanation offered by respondents for the remarkable coordination of their price increases is that the whole thing is a matter of "price leadership." First, they say, one of the respondents, acting independently of his competitors, decides to raise his prices. Because certain of the very large grocery chains insist on it, a *written* notice

⁴⁰ Tr. 488-489 (emphasis added), 490.

⁴¹ Tr. 259-260 (emphasis added).

⁴² Tr. 261.

of all price changes is sent to them by the price leader several days in *advance of the effective date* of the change. His competitors, through salesmen calling on the notified chains, learn almost immediately (perhaps the same day the notice was received) that the price leader will increase his prices on a certain date in the future. These competitors, equally eager to increase their own prices (respondents contend), immediately send out similar notices to the chains. For example, four of the principal respondents—Continental, Langendorf, Buchan, Hansen—all picked August 11, 1958, for the *effective* date of their 1958 price increase. On August 7, 1958—four days previous—Continental had sent A & P a written announcement that, effective August 11, 1958, the price of the standard loaf of bread would increase from 31¢ to 33¢ (and similarly on other bread items).⁴³ The *next day*—August 8, 1958—two of Continental's competitors, Langendorf and Hansen, sent similar announcements to A & P and their other large chain customers.⁴⁴ Their announcements, like that of Continental, stated that, effective August 11, 1958, the price would go up from 31¢ to 33¢. Had these three and all of their competitors made their announcements on the same date, say, August 7, it would have been hard to explain; the only inference would have been that each had agreed with the others to go up on that day. But where the first move is made by only one company, the others can claim they subsequently and "independently" learned of that competitor's "independent" announcement the day before, and thus that the moves of all amount to nothing but "meeting competition."⁴⁵

But some of the baker witnesses testified that they learned of their competitors' impending price increases not from the "trade" (grocery chain buyers) but from the *manager of the association*. For example, witness Albert Pettersen was quite clear that, although his employer, Albertsons Stores, was not only a baker of bread but a purchaser of it,⁴⁶ it did not receive written notices of price increases from its suppliers, but, instead, from the association.⁴⁷

This was not the only baker witness that testified to the receipt of such advance price information from the association. Mr.

⁴³ CX 21; tr. 402-403. (These are suggested retail prices; the wholesale price to the grocer is 20% less.)

⁴⁴ CX 15; tr. 320. CX 13; tr. 297-298.

⁴⁵ See, e.g., CX 23B, tr. 417, where Continental reported that it was *raising* its prices "in order to meet the competitive situation * * *."

⁴⁶ Albertsons bakes its own private brand bread and sells it in its own grocery stores. In addition, however, its stores carry the various "brand name" breads, e.g., Continental's "Wonder" bread. Hence Albertsons is both a customer and a competitor of Continental.

⁴⁷ Tr. 265-267.

Frank A. Maxeiner, Jr., former proprietor of Model Electric Bakery in Seattle, testified as follows:

Q. Now, during the time Mr. Alford was associated with Bakers of Washington, did he ever contact you with respect to impending price rises as to bread?

A. Yes, he called on the phone.

Q. And did this happen on several occasions?

A. Yes, it did *over the years*.

Q. Did he advise you as to an impending price rise in bread when he called?

A. Yes, he would usually indicate that *we were to advance the price of bread*.⁴⁸

In the face of such testimony, we are not "obliged to accept as true" the denials of the respondents. *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F. 2d 196, 202 (9th Cir. 1963). Moreover, even some of the larger respondents virtually admitted they discussed prices at their Seattle meetings and knew in advance of their competitors' impending price increases. George Buchan, president of one of the larger respondents, testified as follows:

Q. Were there any other discussions at the Bakers of Washington, Inc., in connection with the discussions on labor *regarding prices*?

A. Oh, I imagine during the negotiations there were. * * *

Q. Did you discuss then what the added costs would be of the added labor payments?

A. Oh, yes.⁴⁹

On the question of advance knowledge of competitors' price increases, the major respondents repeatedly emphasized that they had merely heard "rumors" of what their competitors were going to do.⁵⁰ But much of this testimony had a decidedly equivocal note to it. For example, a Mr. Covington, Continental's bread plant manager in Seattle, testified as follows concerning the 1960 price increases:

Q. Do you know in advance one way or another when a competitor is going to raise his prices?

A. We have some knowledge of it, yes, sir.

* * * * *

Q. * * * Do you learn of prospective increases, that is, do you learn in *advance* of the *announcement* of an increase that a competitor is going to make that increase?

A. Not *too far* in advance, no sir.

Q. Do you only learn after some announcement has been made? Which is it?

A. I only know *for sure* after some announcement has been made.⁵¹

⁴⁸ Tr. 282 (emphasis added).

⁴⁹ Tr. 189-190 (emphasis added).

⁵⁰ See e.g., tr. 186, 189, 237, 244, 247, 321-322, 335, 412, 443, 449.

⁵¹ Tr. 412-413 (emphasis added).

Representatives of the larger respondents were something less than persuasive when interrogated about how they happened to have picked a particular date to raise prices and about the reasons for deciding to raise the price by the particular amount chosen. Thus, the 1957 increase had been a 1¢ raise, the 1958 increase had been a 2¢ hike, and the 1960 jump was for only 1¢ again. Why pick 2¢ one year, and 1¢ another? "Well, I just didn't feel that I could get any more than one cent."⁵² But this doesn't explain why he "felt" he could get 2¢ in 1958. In other words, there were no "false starts" here. Each time a "price leader" raised his prices, it "stuck." The others followed him up quickly; the price leader did not first try 2¢, and then have to "back down" to 1¢. The figure he selected—whether 1¢ or 2¢—was always just the amount that his major competitors, also exercising their "independent" business judgment, agreed was neither too large nor too small for the state of the market.

As to the *dates* selected for the increases, e.g., August 11, 1958, rather than, say, a week earlier or a week later, Mr. Moore, manager of Langendorf's Seattle plant, testified as follows:

Q. Why didn't you do it the *previous* Monday because you were already paying the [increased] labor wages?

A. I can't answer that right now because I can't think why.⁵³

Arthur LaLime, then manager of the association, came to the job in November of 1957. He succeeded a Mr. Alford, who had held the post for more than 20 years, until his death in June of 1957. This predecessor had been regarded by the members as the price "bell-weather." Witness Harry Schafer, a baker in Seattle until 1956, testified as follows:

Q. Was there someone looked to in those meetings to be the bellweather for prices?

A. Well, usually the head of the bureau * * *. At that time it was Mr. Alford.⁵⁴

Mr. Maxeiner, as noted, testified that Alford had made it a practice, "over the years," to instruct him by telephone when prices were about to be raised: "Yes, he would usually indicate that we were to advance the price of bread."⁵⁵

Victor Goethals, proprietor of a small bakery in the Anacortes-Bellingham area, testified that Alford had threatened him with a "price war" in 1957 "if I do not put it [prices] up with the rest of

⁵² Tr. 303.

⁵³ Tr. 321-322 (emphasis added).

⁵⁴ Tr. 491.

⁵⁵ Tr. 282.

the bakers.”⁵⁶ The witness was similarly threatened the following year. “In 1958 I went up because I was almost—well, I was told to go up” by LaLime. “He said I should put the price of bread up with the rest of the wholesalers.”⁵⁷ This increase was followed because “I didn’t want the same trouble I had before, that I had in 1957.”⁵⁸ Asked what kind of pressure could be put on him, the witness replied: “Well, they can * * * undersell me and break me at any time.”⁵⁹

In 1960, however, the witness simply refused to go up again. “I just felt I couldn’t afford to go up because you lose too much business by keep raising and raising the prices.”⁶⁰

Another witness, Mr. Bennett Haggen, proprietor of a supermarket (“in-store”) bakery in Bellingham, testified that LaLime visited his place of business in the fall of 1957 to discuss the fact that three local bakers were cutting prices. It was a substantial visit. “One hour, two hours, I didn’t have too much to do.”⁶¹

Q. What occurred at this meeting between yourself and Mr. LaLime?

A. Well, I believe that Mr. LaLime was just new in the territory then and, of course, he came and introduced himself and then because of the situation, we discussed the bread deal.⁶²

The witness did not know whether LaLime had actually visited the three price-cutters in 1957, but he knew that, two weeks after LaLime’s trip to Bellingham, the “price war” ended.⁶³

In 1958, prior to the price raise of August 11, mentioned above, LaLime invited another witness, Mr. Robert Hall, proprietor of a small Bellingham bakery, to attend a meeting of the local bakers. The witness testified as follows:

Q. And in the summer of 1958, was a meeting of bakers held in Bellingham?

A. Yes, sir.

* * * * *

⁵⁶ Tr. 50. “Alford who was in charge of the [association] had called me and told me to put my price up. I did not do it for quite a while until I had several calls and then he threatened me to—there might be a price war if I do not put it up with the rest of the bakers.” Tr. 50. (It appears, however, that the witness was mistaken in attributing this particular incident to Alford. Since Alford had died on June 13, 1957, and since the incident would have logically followed the price increase of July 22, 1957, some five weeks after Alford’s death, this threat was probably made either by the “interim” association manager, one Gene Crawford, or by his successor, LaLime, who took the office in November.)

⁵⁷ Tr. 51.

⁵⁸ Tr. 54.

⁵⁹ Tr. 55.

⁶⁰ Tr. 51.

⁶¹ Tr. 374.

⁶² Tr. 357.

⁶³ Tr. 366.

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Q. By whom were you invited to attend?

A. *The representative for the Bakers of Washington.*

* * * * *

Q. And can you tell us what transpired at that meeting?

A. Discussion of prevailing prices, and the bread rise that was *about to take place* and—

* * * * *

Q. Was there any discussion of what Hall's Bakery intended to do with its price conduct?

A. Yes. Hall's Bakery had been known as a cut-rate bakery and they would like to have us join and follow on line with the rest of the bakeries.

Q. And did you refuse to do that?

A. I told them that we still had Hall's Bakery name on our place of business and we were maintaining our own place of business.

* * * * *

Q. Did Mr. LaLime ever tell you to get your prices up?

A. Mr. LaLime told me that, for instance, if Wonder Bakery [Continental] cared to bring up bread in Bellingham and sell it as an unbranded loaf of bread for 10 cents a loaf, what would that do for your business? * * * He did not say they were going to, he said: "What if they did?"⁶⁴

Mr. Albert Pettersen, former bakery supervisor for the Albertson grocery chain, testified that LaLime, the association's manager, had threatened him with a "bread war" unless he stopped advertising his bread at a cut price. In 1959, the "regular price" of raisin bread had been 26¢ per loaf. The witness ran an ad in a Seattle paper on August 3, 1959,⁶⁵ offering it for sale at 19¢. Asked if the ad caused any "repercussions," the witness said: "Well, the Association called me and told me that I shouldn't run raisin bread at 19 cents. * * * Well, he thought maybe we might have a bread war if I keep fooling around with the price of bread."⁶⁶

The smaller bakers in other areas testified to efforts of competitors and the association's manager to persuade them to raise their prices. Mr. Ralph Hall, brother and partner of Robert Hall, mentioned above, testified that "it was suggested by Mr. LaLime on two different occasions that he thought we could get more for our bread and more in line with what the other fellows were getting. However, we ignored all his suggestions and in fact told him that we would not raise the price."⁶⁷ One of those occasions was in 1959. "Well, in this regard, he was up there—the last time in 1959 he was there and he asked us—when this last bread war was going on, he asked the reasons. He came in one day and he asked me all about this price that we had on the window and asked us who had started this thing and

⁶⁴ Tr. 466-468 (emphasis added).

⁶⁵ CX 12, tr. 250.

⁶⁶ Tr. 255-257, 273.

⁶⁷ Tr. 477-478.

all * * *. Well * * * he asked me to do these things, I mean, he was asking me about them and, of course, the only thing that I can go on, he was the representative for the Washington State Bakers Association and I had a talk with him and that's what he was there about * * *. As my memory of the conversation goes he said to me: 'There are several of the other stores now that are getting 32 cents a loaf and we are wondering if you couldn't come up at least to meet those fellows at 32 cents!'"⁶⁸

LaLime wasn't the only one that tried to persuade Hall to raise his prices: "Now, in the spring, I believe, of 1959 I had a phone call that there was a bread war going on at the time and a fellow that represented himself, he said he was a Safeway store man, he never gave me any name on the phone, but he said he thought we'd *better get the price of bread up there*. And that was the only thing that's ever been said by anybody from the Safeway store. * * * No, in no way would I know except that he told me that he was a Safeway store man and that the price should be brought up there or else we would probably get in a bread war with them."⁶⁹

This occurred, as noted, in Bellingham, some 100 miles north of Seattle. Two years earlier, in 1957, another such incident occurred in Yakima, over 200 miles away. Mr. Wayne Atkinson, owner of a small bakery in Yakima, testified that he had run an advertisement featuring a price cut from 31¢ (the price his competitors were then charging) to 21¢. The ad ran on a Thursday night, and he sold at the low price on Friday and Saturday. On Monday morning, he was called on by Jim and Bud Snyder, owners of a competing bakery. They told him they had received a telephone call from Seattle:

Q. Whom did the Snyders say had called them from Seattle, did they say?

A. Yes, sir. * * * Safeway.

* * * * *

Q. Mr. Atkinson, what happened with regard to your prices, what did you do about them following this conversation with the Snyders?

A. I went back to the original price.⁷⁰

We conclude that, while some of the respondents may have thought these repeated price increases were in their "own economic interest," others did not feel that way and would not have raised their prices

⁶⁸ Tr. 481-482.

⁶⁹ Tr. 478-479.

⁷⁰ Tr. 381-383. Before he went back, however, "we had a meeting that was called. I believe it was the following Thursday or within a few days of when I had been called." The meeting was held at the Chinook Hotel, in Yakima. The witness attended, along with "nearly all bakeries in the city of Yakima, including retail and wholesale." Tr. 383. "Well, there were several things that were talked about, mostly coordinating the prices a little bit. * * * [T]hey all more or less *agreed* that we would not shoot [cut] prices on large white and large whole wheat, a pound and a half loaves, we wouldn't shoot the prices on those." Tr. 383, 385-387 (emphasis added).

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had it not been for the urgings, and sometimes the threats, of the association's manager and certain of their competitors. We think it clear that there was an actual agreement, understanding, or "meeting of the minds" here between some of the larger, more powerful of these respondents, and that the weaker members acquiesced in the agreement as a result of the promptings and pressures put on them by the former.

III

Respondents argue further that, even if the association's manager had in fact suppressed competition among the Washington bakers, the evidence is insufficient to "connect" the various individual members of the association with that official's unlawful acts. They argue that they hired him to handle their labor relations with the various labor unions; that labor negotiations were "all he was good for"; that he was given no authority to fix prices; that, in fact, he was expressly enjoined from doing so; that, if he did in fact fix prices, the individual members of the association neither knew nor should have known of it; and that, therefore, they cannot be held responsible for it.

The record, however, is otherwise. First of all, Mr. LaLime, the man they employed to run their association, had a deep personal conviction—a working "philosophy"—that was wholly opposed to the national policy in favor of competition. He was against it, and made no bones about it. He described his "philosophy" in these words:

A. No. I am not approached with the price situation. However, I vehemently recommend no price wars because it is economic waste and very devastating to the industry.

Q. How do you do that? How do you convey that recommendation?

A. *By every persuasion that I am capable of stating.*

Q. In the open meeting you use that philosophy, do you?

A. No, *I don't recall* of open meeting discussions on that basis. No, sir.

Q. Then how do you convey your philosophy to the membership?

A. *By personal contact.*

Q. What is it you say to them?

A. I tell them that a price war would be very devastating to the industry. The demands that we have from labor are extremely difficult to live with without having a sick industry on top of it.⁷²

⁷² Tr. 41 (emphasis added). Mr. LaLime elaborated upon this "philosophy" of his in describing the calls he made on members who attempted to cut prices: "I did all in my power to persuade these people not to do so." Tr. 42. "I asked him not to perpetuate a price war, not to become involved in one." Tr. 44. "I pointed out that a price war was very uneconomical, that it would be disastrous to the industry and it would be particularly disastrous especially to a smaller operation, that any time these price wars started there was only one thing that happened and that was complete chaos." Tr. 46.

Respondents contend they knew nothing of Mr. LaLime's proselytizing on behalf of his "philosophy" of noncompetition. They would have us believe that they were completely unaware of his many phone calls and visits to those members that cut prices, and those that were slow to recognize their "economic interest" in raising their prices. They tell us they hired him to take care of labor problems; if he fixed prices, he was strictly on a lark of his own.

We find, as noted above, that prices were discussed at the weekly meetings of the association at the Athletic Club in Seattle, and at meetings held in Bellingham and Yakima. This record establishes that at least 14 of the 49 members of the association were *regularly* in attendance at the Seattle meetings, including Safeway and the larger wholesale respondents in this proceeding, e.g., Continental, Langendorf, Buchan, and Hansen.⁷² It has also been shown by the testimony that the group was small enough, and the physical setting was arranged in such a manner, that every person present at those meetings was able to see and hear everything that was done or said. Mr. LaLime presided over these meetings. The smaller members of the association did not understand that labor matters were "all he was good for." They thought the purpose of the organization he represented was "to make better labor relations, to *maintain prices*, and generally better baking conditions."⁷³ They thought the association's manager was the industry's "bellweather" on prices.⁷⁴ They thought he was the one to call when a competitor got out of line on prices.⁷⁵ When he appeared in Bellingham for the stated purpose of stopping the local price cutting, they thought he was there as a representative of the association; they "couldn't say that he was up there on his own, no."⁷⁶ They took him seriously when he told them he "thought maybe we might have a bread war if I keep fooling around with the price of bread."⁷⁷ When they received a written notice that, on a certain date, all the bakers were to raise their prices, they knew it had to have come from him. "[T]hey [the association officials] would be the only logical ones to send us out the price. * * * Well, it was from him. It couldn't be from anybody else but him."⁷⁸ When he appeared at a member's place of business, the member knew he was there as the spokesman for the association:

⁷² CX 7, tr. 81-94, 175.

⁷³ Tr. 464 (emphasis added). Mr. LaLime himself had said this to the witness, Mr. Robert Hall of Bellingham. Tr. 464.

⁷⁴ Tr. 491.

⁷⁵ Tr. 258-259.

⁷⁶ Tr. 480.

⁷⁷ Tr. 257.

⁷⁸ Tr. 265.

"He didn't have to tell me. I know he is."⁷⁹ He was not on a lark of his own: "How can he represent himself when he is working for the association?"⁸⁰ And he did not represent merely the wholesale bakers, or just the retailers: "Well, sure he represents the wholesale people and the retail people."⁸¹ When he told a retail baker to raise his prices up to the level of his competitors' prices, the baker thought he spoke for the association: "I thought that was his job."⁸² When he intimated to a small baker that Continental might be called in to crush him by selling bread at his front door for 10¢ a loaf, that baker "figured he [LaLime] was speaking for the bakers' association of Washington."⁸³

The association, therefore, and the activities of the man they jointly put in charge of it, is the cement that binds the members together here. We find as a fact that each member of this association either knew or should have known that LaLime actively discouraged and suppressed price competition throughout the area in which it operates, and that they either affirmatively approved of those activities or acquiesced in them. All knew or should have known of the activities of the association and of its manager, and all adhered to the fixed prices the manager announced and policed.⁸⁴ It is elementary that a conspiracy creates an agency relationship among its members; every act performed by any member of the conspiracy in furtherance of its purposes is, in law, the act of all members of the conspiracy.⁸⁵ Proof of participation in meetings at which prices have been "discussed" is "sufficient to provide a foundation for the introduction of evidence of other acts on the part of one conspirator, in furtherance of the conspiracy, binding on all. *American Tobacco Co. v. United States*, 147 F. 2d 93, 118 (C.A. 6, 1944)." *Continental Baking Co. v. United States*, 281 F. 2d 137, 152 (6th

⁷⁹ Tr. 270.

⁸⁰ Tr. 276.

⁸¹ Tr. 275.

⁸² Tr. 62.

⁸³ Tr. 469-470.

⁸⁴ Respondents enjoyed almost complete success in bringing price cutters into line. An exception was Mr. Vincent Noga, owner of a small in-store bakery in a Yakima suburb, who resisted the threats and sold beneath his competitors' prices for over a year (increasing his sales volume from approximately 40 to 150 loaves per day, and his profits from about \$9 to \$30 per day) until he lost his lease. Tr. 517, 523-525. Bread prices throughout the area are "quite standard." Tr. 185. Asked if "the small retail baker" stayed at his own price level, Buchan, a wholesaler, replied: "Very much so." Tr. 197. See also tr. 514.

⁸⁵ "[W]hen any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249 (1917).

Cir. 1960). Here, the principal respondents, including Continental, Langendorf, and Safeway, all participated in the Seattle price discussion meetings. Continental's Seattle plant manager testified that he not only attended those meetings generally, but that he had attended them "around September of 1960,"⁸⁶ the month in which Continental and its major competitors simultaneously raised their prices from 33¢ to 34¢. Langendorf's Seattle bread plant manager testified that "I attend meetings quite often, yes."⁸⁷ He was the witness that, when asked why he had elected to raise his prices on August 11, 1958 (the date on which his major competitors raised their prices), rather than a week earlier or a week later, replied: "I can't answer that right now because I can't think why."⁸⁸ Jens Hansen, president of Hansen Baking Company, testified that "Well, I have always been quite regular [in attending the Seattle meetings] but I haven't of late; last year or so I have been off and on."⁸⁹ He was quite regular in 1958; in fact, of the 26 or more meetings held by the association in that year, "I attended a good proportion of them."⁹⁰ George Buchan, president of Buchan Baking Company, testified that he regularly attended the association's Seattle meetings, and that he "imagined" prices were "discussed."⁹¹ Other witnesses testified to seeing representatives of these and other companies at the Seattle meetings.⁹²

⁸⁶ Tr. 414.

⁸⁷ Tr. 315.

⁸⁸ Tr. 322.

⁸⁹ Tr. 294.

⁹⁰ Tr. 304.

⁹¹ Tr. 189-190.

⁹² See, e.g., testimony of Harry Schafer, of Schafer's Bakery, who saw Jim Hansen, George Buchan, Mr. Richards (of Continental), and Al Moore (of Langendorf), at the meetings, tr. 496, together with numerous other wholesale and retail bakers. (The number attending varied from perhaps 10 to 25. Tr. 493, 495.)

The association's manager, LaLime, submitted a list (CX 7) of the "regulars" who had left standing instructions that they be notified of all meetings (tr. 87, 94, 175). There are fourteen of these regulars, including Continental, Langendorf, Buchan (represented by respondent George B. Buchan), and Hansen (represented by respondent Dick Hoyt).

The association's manager also testified to the attendance at the meetings of representatives of Safeway, Continental, Langendorf, Hansen (represented by its president, Jens Hansen, or Richard Hoyt, who is also vice president of the association) (tr. 81, 176), and Buchan (president of the association) (tr. 81). Witness Wayne Atkinson, former owner of the Old Holland Bakery in Yakima, identified Jim and Bud Snyder, owners of respondent Snyder's Bakery, in Yakima, as competitors who had pressured him to raise

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And of course Safeway was represented at those meetings. Safeway was not a "member" of the association. It was not carried on the rolls and did not pay dues. But it nonetheless managed to secure all the benefits of membership by "retaining," on an annual "fee" basis, the association's manager to handle its labor negotiations. Safeway paid LaLime, as it had his predecessor, Alford, a "retainer" of \$600 per year.⁹³ In addition, however, Safeway's representatives attended the Seattle meetings at the Athletic Club:

Q. Does a representative of the Safeway organization attend meetings of the Bakers of Washington, Inc.?

A. Their labor relations man would on occasion during contract negotiations.

Q. What about their *divisional bread man*?

A. He would attend meetings.

Q. He does regularly attend meetings?

A. *Usually, not always.*⁹⁴

As noted, Safeway has its own baking plant in Seattle, producing its "private brand" bread called "Mrs. Wright." It sells this bread in its various retail stores located, apparently, "all over the State of Washington."⁹⁵ In addition, Safeway's retail stores handle the "name brand" breads produced by the wholesale bakers. It thus has two prices: first, the full, "suggested" retail price for the wholesalers' bread (e.g., 34¢ for "Wonder" bread); and, second, 1¢ less (33¢) for its own self-baked brand, "Mrs. Wright."

In fact, Safeway is the local bread industry's club over the smaller bakers. Witness Wayne Atkinson, proprietor of a small bakery in Yakima, testified that when he cut his price, a local competitor, a

his prices (tr. 379). He also testified to a meeting at the Chinook Hotel, in Yakima, attended "by nearly all bakeries in the city of Yakima, including retail and wholesale" (tr. 383), at which "they all more or less agreed that we would not shoot [cut] prices on large white and large whole wheat * * *." Tr. 386. The witness specifically noted the presence at that meeting of the Snyders, Dick Trenerry (of respondent Trenerry's Bakery, a wholly-owned subsidiary of respondent Holsum Baking Co.), and Jack Larson (tr. 384). Respondent Victor H. Goethals, proprietor of Fortune's Bakery in Anacortes (near Bellingham), testified to following, although apparently "unwillingly," *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 719 (1948), the association's instructions to raise prices (tr. 50-62).

⁹³ Tr. 32.

⁹⁴ Tr. 80 (emphasis added). See also tr. 81-82.

⁹⁵ Tr. 262.

Mr. Snyder, immediately showed up at his place of business to tell him Safeway had called about his price:

Q. Whom did the Snyders say had called them from Seattle, did they say?

A. Yes, sir.

Q. And who was it?

A. Safeway.⁹⁶

Another price cutter testified that he had personally received a threatening phone call from Safeway: "Now, in the spring, I believe, of 1959 I had a phone call that there was a bread war going on at the time and a fellow that represented himself, he said he was a Safeway store man, he never gave me any name on the phone, but *he said he thought we'd better get the price of bread up there*. And that was the only thing that's ever been said by anybody from the Safeway store. * * * No, in no way would I know except that he told me that he was a Safeway store man and that the price should be brought up there *or else we would probably get in a bread war with them*."⁹⁷

As to the remaining respondents, it is true of course that "mere membership" in the association is not enough to warrant an order against them. *Phelps Dodge Refining Corp. v. Federal Trade Commission*, 139 F. 2d 393, 396 (2d Cir. 1943). Here, however, many of these respondents were shown to have either attended meetings where prices were discussed, either in Seattle or in one of the divisions, or to have actively attempted to influence the prices of competitors.⁹⁸ And they generally adhered to the prices fixed at those meetings.⁹⁹ But certainly all of them knew or should have known of the price fixing activities of the association's manager, LaLime. He was outspoken in his hostility to price competition, openly spreading his "philosophy" to the members by "personal contact." (Each of the "divisions" was visited by LaLime from 10 to 12 times per year.¹⁰⁰) His threats, and those of Safeway and the other powerful bakers, could hardly have failed to come to the attention of these respondents, and thus to have put them on notice of the fact that the association was engaged in unlawful pricing activities.¹⁰¹

⁹⁶ Tr. 381-382A.

⁹⁷ Tr. 478-479 (emphasis added).

⁹⁸ See n. 92, *supra*.

⁹⁹ See n. 84, *supra*.

¹⁰⁰ Tr. 39

¹⁰¹ "Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put." *Phelps Dodge, supra*, 139 F. 2d at 396-397.

IV

Finally, respondents contend that the order entered by the hearing examiner is improperly broad—that it should be limited to the precise geographical area in which the price fixing has been found (State of Washington), rather than extending to wherever each of the respondents do business; and that, in enjoining them from continuing to fix prices in the future, it should not prohibit them from fixing prices generally, but only from achieving that result by the precise *means* involved here, *i.e.*, through this particular *trade association*, Bakers of Washington, Inc.

The latter contention borders on the frivolous. While the Commission must tailor its orders to the particular “practice” found to have existed, “price fixing” is a single, well-defined “practice.” Respondents, in contending for an order that merely prohibits price fixing *through the instrumentality* of Bakers of Washington, Inc., misconceives the distinction between a generic “practice” and the several *techniques* of effecting it. For example, an order so limited would leave these respondents free to resume their conspiracy tomorrow, holding conspiratorial meetings at high noon in the most public place in the city of Seattle, so long as they kept the association, Bakers of Washington, out of the matter. Such an order would be no more effective than one limited to a prohibition of price fixing only where it was accomplished by meetings held at a particular place, *e.g.*, at the Athletic Club in Seattle. The order could be avoided by using the telephone instead of having a meeting, or by moving the site of the meeting from the Athletic Club to other premises. In *Cement Institute v. Federal Trade Commission*, 333 U.S. 683 (1948), the respondents objected to the fact that the order not only prohibited price fixing by means of the “basing-point system,” but also by selling “pursuant to or in accordance with *any other plan or system* which results in identical price quotations or prices for cement * * *.” The Court said: “The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result. We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices.” 333 U.S. at 729.

Respondents’ suggested “territorial” limitation of the order is equally unsound. The general rule is that a violation of law, whether practiced in one area or in many, warrants an order covering the whole of the violator’s business. There being no reason to suppose that an entity showing no reluctance to fix prices in Seattle, Wash-

ington, would act differently in another city or another state, the public interest in the cessation of such unlawful conduct requires an order that protects the public in all of the states, not merely in Washington.¹⁰²

Finally, respondents profess the fear that the order, as drafted, might be so construed as to prohibit such lawful business practices as marking their loaves of bread at the baking plant with suggested retail prices, especially since they make "accommodation" sales to each other. The language that bothers them here is that part of the preamble that prohibits conspiracies and collusive understandings between any two or more members of the association "or between any one or more of them and others not parties hereto," to fix prices, adhere to such fixed prices, or deter any competitor from exercising his own independent judgment in pricing his goods. The prohibition of future price fixing conspiracies between one or more of the respondents "and others not parties hereto" is a routine provision, one that has been expressly sanctioned by the Supreme Court. For example, in *Cement Institute v. Federal Trade Commission*, *supra*, the order approved by the Court prohibited future conspiracies not only between the parties themselves but "between any one or more of said respondents and others not parties hereto * * *." The Court, noting that the conspirators had secured the aid of others in the past, and that the entry of new members in the industry in the future could be reasonably anticipated, declared that "the Commission was authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves." *Id.*, at 728-729.

The instant order, which is substantially the same as the order approved in *Cement Institute*, *supra*, could not conceivably be construed to prohibit the common practice of placing "suggested" retail prices on bread wrappers. The line between the "suggesting" of prices and the "fixing" of prices is so well settled as to require no discussion. Respondents are simply being required to leave their competitors alone—to stop agreeing with them, and stop interfering with them—in the pricing of bread. Selling them bread that happens to bear a suggested retail price constitutes neither agreement nor interference. As the Court said in *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957): "Respondents pose

¹⁰² "As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices in all areas in which it was doing business." *Maryland Baking Co. v. Federal Trade Commission*, 243 F. 2d 716, 718 (1957). See also *Foremost Dairies, Inc.*, Dkt. 7475 (1963) [62 F.T.C. 1344], holding that an order was properly extended to the respondent's operations throughout the country, rather than being limited to Albuquerque, New Mexico, the city where the violation was found to have occurred.

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Dissenting Opinion

hypothetical situations which they say may rise up to plague them. However, 'we think it would not be good judicial administration' * * * to strike the contested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingencies. As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies." Moreover, under the Commission's present rules of practice, provision is expressly made for those bound by an order to secure advice from the Commission as to whether a proposed course of action would be in compliance therewith. Rules Sec. 3.26(b), (c), 28 Fed. Reg. 7080, 7091 (July 11, 1963). See also *Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765 (3d Cir. 1963); *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962).

We think the order should be modified in one particular, however. As issued by the examiner, it prohibits any two of these respondents, or any one of them and any other person, from collusively engaging in the described price fixing activities, without regard to whether any of those activities occur in interstate commerce. This Commission is without jurisdiction to issue an order prohibiting two Seattle bakers, neither of which does business of any kind outside the city, from conspiring solely with each other to fix local prices. Accordingly, the order will be modified to prohibit future collusion on prices "where any one or more of the parties to that planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto."

Respondents' exceptions are denied. The initial decision and order as supplemented and modified to conform to the findings and views contained in this opinion will be adopted as the decision of the Commission.

Commissioner Anderson concurred in the result; Commissioner Elman dissented and has filed a dissenting opinion; and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

DISSENTING OPINION

FEBRUARY 28, 1964

By ELMAN, *Commissioner*, dissenting:

I do not concur for the following reasons: The Commission's assertion of jurisdiction seems to me to be, at least, highly questionable. On the merits, the finding of an illegal price-fixing conspiracy is not supported by the record. And, even assuming such a conspiracy

has been proved, the order is not responsive to the needs of the situation.

I

In *F.T.C. v. Bunte Bros. Co.*, 312 U.S. 349, the Supreme Court held that local practices are not within the Commission's jurisdiction under the Federal Trade Commission Act where they have a merely remote or indirect relationship to interstate commerce; they must be "in" commerce. Clearly, the Commission has jurisdiction over a price-fixing conspiracy if there are sales in commerce, or if the conspiracy extends across state lines, or if any of the means or instrumentalities by which the conspiracy is formed or carried out is in commerce. Moreover, the Commission would have jurisdiction, I believe, even over an essentially local price-fixing conspiracy, if one of the participants was engaged elsewhere in interstate commerce and used power or resources, derived from its interstate activities, in furtherance of the conspiracy, for example by bringing pressure on local competitors or customers to join or continue in the conspiracy. Cf. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *Borden Co.*, F.T.C. Docket 7474 (decided Feb. 7, 1964), pp. 2-4 [pp. 534, 574-575 herein] (dissenting opinion). But, so far as appears from the record, none of these conditions obtains in the present case. No interstate sales were involved in the alleged conspiracy;* the markets involved were all within a single state; none of the other acts involved in the alleged conspiracy was in commerce; and interstate commerce was not used as a weapon for suppressing intrastate commerce.

I do not believe that the Commission, under the Federal Trade Commission Act, has jurisdiction over interstate companies as such (compare, e.g., Section 7 of the Clayton Act, as amended; *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962) [60 F.T.C. 944], pp. 36-37 [1077-1079], which seems to be the upshot of the Commission's jurisdictional holding. Certainly *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, on which the Commission chiefly relies, stands for no such proposition. The Supreme Court's detailed tracing in that case of the interstate ramifications of the typical large insurance company was directed to showing that the insurance business is a commercial activity like any other, and that the localized act of contracting for insurance is just one aspect

* As to the evidence that some members of the respondent trade association made sales in Alaska, I find no indication that these sales were part of the alleged price-fixing conspiracy. The vast majority of the association members, who did no business in Alaska, had no interest in fixing prices there. And the theory on which this case was tried is that there was a conspiracy to fix prices in the Washington, not the Alaska, market.

of the business; such an analysis was required because of earlier Supreme Court decisions which had held that the insurance business was basically not commerce at all. Since the indictment in *South-Eastern Underwriters* charged nothing less than a single combination to fix the price terms upon which insurance business was conducted throughout a six-state area, the decision can hardly be said to have established that any restrictive practice by an integrated multi-state enterprise, however localized in its scope and character, is within the reach of the federal antitrust laws, and in particular of Section 5.

II

Direct evidence is rarely available to prove a conspiracy or secret agreement to fix prices. To establish the requisite meeting of minds, it may often be necessary to rely exclusively on circumstantial evidence. Considered individually, the circumstances may be equally consistent with an inference of innocence as with one of guilt; the pattern may have a significance which the pieces lack. But in the present case I fail to discern a pattern indicative of unlawful price fixing.

The Commission in its opinion makes much of the fact that "prices" were occasionally mentioned at meetings of the respondent trade association. But I find it difficult to see a sinister significance in this fact, since the ostensible—and concededly legitimate—purpose of the association was to act as the collective bargaining agent for its members. Some discussion of prices, surely, is inseparable from discussion of wages. Indeed, in *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, the Supreme Court held that it was an unfair labor practice for an employer to refuse to furnish information as to his financial status to substantiate his claim of inability to pay a requested wage increase.

Next, the Commission emphasizes—and exaggerates—the price uniformity prevailing among the members of the association. Actually, all the record shows is that the prices charged by the largest bakeries were generally the same, and that a price increase by one was soon followed by the others. These facts do not suggest abnormal competitive behavior, especially since bread is a highly standardized product and the bakeries have virtually identical costs.

The Commission places very great emphasis on the conduct of Arthur Lalime, the association's manager. Lalime, the Commission observes, had a "philosophy" of antipathy to bread price wars, and he occasionally communicated his feelings on this subject to some of the members of the association. It was not unnatural for Lalime, whose job was labor negotiations, to have definite views on the price

of bread. That he expressed his views on a few occasions to a few of his employers does not, without more, prove that he was a participant in or agent of a price-fixing conspiracy. If all he did was "tell them that a price war would be very devastating to the industry", surely that does not make him a price fixer.

There is some evidence that Lalime occasionally crossed the line between persuasion and intimidation, and also that he sometimes communicated price information to members of the association. Such conduct was *ultra vires* his position as manager of the association, and there is no evidence that the members of the association (apart, of course, from those he allegedly communicated with improperly, who are not respondents in this proceeding) were aware of this conduct, let alone that they put him up to it. The Commission is unable to link up the members of the association in a price-fixing conspiracy, except on the theory, which the record does not support, that they "should have known" of Lalime's misbehavior.

Viewed severally or as a whole, the circumstances upon which the Commission relies do not permit an inference of a conspiracy or agreement to fix prices; they form no sinister pattern. At most, they suggest that Lalime acted with excessive and officious zeal in expressing his views on price wars.

III

Even if the Commission is correct in its conclusion that a price-fixing conspiracy or agreement has been established, I have reservations concerning the appropriate remedy. Stripped of redundancies, the Commission's order is simply a general prohibition against unlawful price fixing. While I do not believe that an order which merely repeats the applicable statutory provision or rule of law is necessarily inappropriate as a remedy for unlawful conduct, in the present circumstances I think it falls short of the most effective relief.

To prevent recurrence of the unlawful conduct, the order in a price-fixing case such as the present, where the existence of a conspiracy is inferred from circumstances which in themselves are for the most part innocuous, should not simply enjoin the conspiracy. Conspiracy is a rather shadowy thing. Its essence is not overt conduct, but a meeting of minds. There may be some deterrent value to enjoining participation in a price-fixing conspiracy. But in view of the existence of criminal sanctions for price fixing, there is a question how much additional deterrence is provided by such an injunction. Moreover, effective deterrence would seem to require that the persons

subject to an injunction have a reasonably clear idea of the conduct they must avoid if they are to comply with it.

What, concretely, must respondents do to comply with the Commission's order in this case? Must they dissolve the trade association? Abandon multi-employer collective bargaining? Fire LaLime? Monitor all his telephone conversations? Repudiate his "philosophy"? Cease providing customers with notice of price increases? Engage in price wars? I take it they need do none of these things; but if they do not depart from the overt conduct on which the Commission bases its inference of unlawful price fixing, how can they be sure that they have ceased to conspire? Under the kind of general order entered here, respondents' only guides are their consciences. They are being ordered to refrain from conspiring to fix prices but are not being told what, if anything, they must do to obey this order. If that is all the order does, one wonders, to repeat, whether a significant deterrent has been added beyond the criminal prohibitions to which price fixers are subject in any event.

In my opinion, the way to "beef up" a price-fixing order, and avoid the pitfall of ineffectual generality, is to forbid not only the conspiracy itself but also the specific acts and practices upon which the effectiveness of the conspiracy—its translation into actual anticompetitive conduct—depends. It is immaterial that these acts and practices may be lawful in themselves; the Commission has ample power to forbid them if necessary to ensure that the conspiracy will cease and not be resumed. *F.T.C. v. National Lead Co.*, 352 U.S. 419, 430. It might be appropriate in this case—on the assumption that a conspiracy was established—to direct the trade association to terminate its employment of LaLime, who, on the Commission's view of the case, was the prime actor in the conspiracy; to order that a complete record be kept of all association meetings and turned over to the Commission periodically; and to forbid respondents to send price-increase notices to customers more than, say, three days in advance. Conceivably, the Commission might even enjoin respondents' joint bargaining with labor. Cf. Hale, *Agreements Among Competitors: Incidental and Reasonable Restraints of Trade*, 33 Minn. L. Rev. 331, 339-43 (1949). These are examples—not the only and not necessarily the best examples—of what a price-fixing order in a case such as the present can and should provide if it is to offer a fair promise of effectively stopping the conspiracy.

FINAL ORDER

This matter having been heard by the Commission upon exceptions to the hearing examiner's initial decision filed by respondents and

upon briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the findings of fact in the initial decision be, and they hereby are, modified by adding to finding number 26, page 1091 of the initial decision, the further findings set forth in the paragraphs designated "A" through "O" beginning on page 1118 and extending through the fourth paragraph on page 1122 of the accompanying opinion.

It is further ordered, That in lieu of the order to cease and desist contained in the initial decision, the following be, and it hereby is, entered as the order of the Commission:

It is ordered, That respondent Bakers of Washington, Inc., an incorporated association, and respondents George B. Buchan and Richard Hoyt, individually and as officers of respondent association, and respondents Buchan Baking Co., Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Co., Inc., Trenerry's Bakery Co., and Snyder's Bakery, Inc., corporations, John M. Larson, trading as Larson's Bakery, and Vic H. Goethals, trading as Fortune's Bakery, all members of respondent association; and the following members of said association: Ruth Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle, Washington; Albertson's, Inc., 17000 Aurora Avenue, Seattle; Baders' Dutch Bakeries, 3755 University, Seattle; Baker Boy Bakery, 8050 Bothell Way, Seattle; Bake-Rite Bakery, 1414 14th Avenue, Seattle; Bellinger Bakery, North Bend; Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; Big Four Donut, Inc., 319 Nickerson Street, Seattle; Blake's Bakery, Inc., 4729 California Avenue, Seattle; Bookter's Seattle Bakery, Inc., 3409 4th Avenue, South, Seattle; Butter-Krisp Bakery, Inc., 2203 23rd Avenue, South, Seattle; Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant #2, Seattle; Carolyn's Cakes, 518 15th Avenue, North, Seattle; Caster's Lake City Bakery, 12532 Bothell Way, Seattle; Frederick & Nelson (Bakery Department), 5th at Pine, Seattle; Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle; Karl's Bakery, 1614 Hewitt Avenue, Everett; Kent Bakery, 213 First South, Kent; Lippman's Bakery, Inc., 119 23rd Avenue, Seattle;

Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle; Manning's Inc., 621 Seaboard Building, Seattle; Richard's Fried Pies, Inc., 220 1st Avenue, North, Seattle; Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle; Smith & Sonnleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon (7710 Bagley, Seattle, Washington); Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue, North, Seattle; Grand Central Bakery, Market & H Streets, Aberdeen; Swanson's Food, Inc., 1401 Simpson Avenue, Aberdeen; Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen; Bame's Ye Olde Home Bakery, Riverside, Mount Vernon; Bellingham Baking Company, 2001 State Street, Bellingham; City Bakery, 607 1st Street, Mount Vernon; Thrifty Foods, 130 Fairhaven Avenue, Burlington; Golden Rule Bakery, Inc., 915 Center Street, Tacoma; Jordan Baking Company, 3623 S. 54th Street, Tacoma; Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima; Sigman Food Stores, P. O. Box 618, Yakima; and the following officials of Bakers of Washington, Inc.: Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue, North, Seattle; Lou Blackfield, Bake-Rite Bakery, 1414 14th Avenue, Seattle; Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima; Al Moore, Langendorf United Bakeries, Inc., 2901 6th Avenue, South, Seattle; Roy Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle; LeConie Stiles, Jr., Ruth Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; and Maurice Vyvey, Baker Boy Bakery, 8050 Bothell Way, Seattle, as officers of Bakers of Washington, Inc.; and respondents Safeway Stores, Inc., and Holsum Baking Company, corporations; and respondents' representatives, agents and employees, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, where any one or more of the parties to

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such planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto, to do or perform any of the following things:

- (1) Establish, fix or maintain prices, terms or conditions of sale of bread.
- (2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or
- (3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Arthur H. LaLime, deceased.

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

Commissioner Anderson concurring in the result; Commissioner Elman dissenting; and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

WALTHAM WATCH COMPANY ET AL.

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

Docket 8396. Complaint, May 15, 1961—Decision, Feb. 28, 1964

Order requiring Chicago importers of watches, watch movements, cases and attachments which they assembled, to cease using inflated prices, in advertising and preticketing, as regular retail prices, misrepresenting, in advertising and labeling, the number of friction bearing jewels, the extent of their guarantee, and that their watches are manufactured in the United States by the well-known Waltham Watch Co. of Mass. by using such terms as "Waltham Premier, a famous name, part of the American scene since 1850," and the name "Waltham" in advertising and labeling to describe their watches.

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

Complaint

64 F.T.C.

such planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto, to do or perform any of the following things:

- (1) Establish, fix or maintain prices, terms or conditions of sale of bread.
- (2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or
- (3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Arthur H. LaLime, deceased.

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

Commissioner Anderson concurring in the result; Commissioner Elman dissenting; and Commissioner Reilly not participating for the reason that he did not hear oral argument.

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

Trade Commission having reason to believe that Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole, and Morris Draft, 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 Waltham Watch Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois.

During a part of the time referred to hereinafter the individual respondents Harry Aronson, Ben Cole and Morris Draft were officers of Hallmark, Inc., a corporation organized under the laws of the State of Illinois, which had its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois. Hallmark, Inc., has been merged into the respondent corporation, Waltham Watch Company.

The aforesaid individual respondents are officers of the corporate respondent and they formulate, direct and control the acts and practices of the respondent corporation, and they formulated, directed and controlled the acts and practices of Hallmark, Inc., prior to its merger into the respondent corporation, Waltham Watch Company. The individual respondents' office and principal place of business is the same as that of the corporate respondent.

PAR. 2. In the course and conduct of their business respondents import watches, watch movements, cases and attachments, assemble and sell them. Respondents cause their said products, when sold, to be transported from the State of Illinois and elsewhere, to purchasers thereof located in various other states of the United States and in the District of Columbia.

Respondents have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents have engaged in the practice of attaching or causing to be attached, price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, catalog insert sheets, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in

fact, said prices are in excess of the prices at which said watches are usually and customarily sold at retail and are fictitious retail prices.

PAR. 4. Respondents in their advertising, catalogs, brochures and other promotional material represent that their products are guaranteed by the use of such terms as "guaranteed", "fully guaranteed" or "lifetime guaranteed", and other terms and expressions of which these are typical. Respondents also represent in guarantee certificates that their products will be serviced upon the payment of one dollar. In truth and in fact, the representations as to guarantee are false, misleading and deceptive. The fact that the guarantee provides for payment of a service charge is not set forth in advertising and the respondents frequently impose service charges in excess of that set out in the certificates of guarantee. The terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee.

PAR. 5. The respondents purchase 17-jewel watch movements made in, and imported from, Switzerland, add a device containing 4 or 8 synthetic jewels, and affix attachments to the watches and case the movements. The watches are then represented, advertised, offered for sale and sold by respondents as "21" and "25" jewel watches, to retailers, catalog houses and wholesale distributors.

PAR. 6. By means of the statements that the said watches were 21- and 25-jewel watches, respondents represented that said watches contained 21 and 25 jewels, each of which serves a mechanical purpose as a frictional bearing, and that, each jewel provides a mechanical contact at a point of wear. In fact, the additional jewels in the device added by the respondents are not functional and these watches are not 21- and 25-jewel watches as represented and advertised.

PAR. 7. The respondents have advertised their said watches in newspapers, jewelers' trade magazines, nationally distributed magazines, catalogs, catalog insert sheets and circulars, and on labels and packages. Among and typical, but not all inclusive, of the statements appearing in such advertising material have been the following:

Waltham Watches—Timing the Nation since 1850.

Waltham Premier, a famous name, part of the American scene since 1850.

By means of such statements, respondents have represented, directly or by implication, that their said watches are manufactured in the United States by the old and well-known Waltham Watch Company of Waltham, Massachusetts. Such statements are false, misleading and deceptive. In truth and in fact, said watches are not

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manufactured in the United States by the old and well-known Waltham Watch Company of Waltham, Massachusetts.

PAR. 8. By the acts and practices aforesaid respondents have placed in the hands of retailers and others, a means and instrumentality whereby such retailers may mislead and deceive members of the purchasing public as to the regular and usual retail prices, the character of the guarantee, the number of friction bearing jewels and the origin and manufacturers of respondents' watches.

PAR. 9. Respondents, in the course and conduct of the sale of their watches, have been and are in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of said statements and representations are true, and into the purchase of a substantial number of their watches as a result of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, have been and are, all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Harry E. Middleton, Jr., of Washington, D.C., for the Commission.

Mr. Ben Paul Noble, of Washington, D.C., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

OCTOBER 18, 1962

In a complaint issued May 15, 1961, the Federal Trade Commission charged Waltham Watch Company, a Delaware corporation, and its officers, Harry Aronson, Ben Cole and Morris Draft, both individually and as officers, with engaging in 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 acts complained of were related to the sale and distribution

of watches by the respondents. In general, they were charged with deceptive pricing activities, false representations as to guarantee and jewel content of watches and deceptive use of the Waltham name.

In their answer, the respondents denied generally the allegations of the complaint. They asserted also that they were defending prior Commission proceedings involving identical issues and thus were subjected to a multiplicity of law suits and harassment.

Waltham Watch Company actually was a respondent in two other cases then pending before the Commission.

In one, Docket No. 6914, it was joined with others not parties to this proceeding. Aronson, Cole and Draft were not respondents there. That case was concerned with alleged deceptive practices involving the jewel content of watches and the use of the name "Waltham". It was decided adversely to the respondents there by the Commission on October 16, 1962 [61 F.T.C. 1027].

The other case, Docket No. 7997, was brought against Waltham and Aronson. Other respondents in that case are not respondents here. Ben Cole and Morris Draft, respondents in this case, were not charged there. It was concerned with, among other things, the alleged deceptive use of the name "Waltham" in the sale of clocks. It was decided adversely to the respondents there by the Commission on June 15, 1962 [60 F.T.C. 1692].

Waltham's present officers, the individual respondents here, are admittedly responsible for its most recent business practices. Even though the use of the name "Waltham" was involved in the other cases and jewel content was involved in one of them, this case need not be regarded as a repetition of the prior litigation nor as an unwarranted harassment. Since the individual respondents constitute new management of Waltham and the effect of the allegations was that they were persisting as such in Waltham's prior practices, some of which had been litigated in the other cases, it seems proper that Waltham be joined as a respondent with them. We are here concerned with their conduct in their administration of Waltham's activities. (The fact that Aronson also was a party in Docket No. 7997, involving, among other things, the Waltham name, does not alter this. That was the case concerned with clocks as distinguished from watches.)

Moreover, there is more to this proceeding than jewel count and use of the Waltham name. As stated above, this proceeding is concerned also with alleged deceptive price practices and claimed false guarantees. These last were not involved in the prior cases as far as Waltham and Aronson were concerned.

Together with their submission of proposed findings of fact, conclusions of law and order, respondents have filed a formal "Motion to Dismiss Paragraphs 5, 6, 7 and 8 (in part)" of the complaint. While the Hearing Examiner has some doubt whether he could consider a motion such as this, which attacks the Commission's exercise of its discretion to issue the complaint in this proceeding while the two prior proceedings were pending, in view of the outcome of those proceedings and the action to be taken by the Hearing Examiner in this proceeding, he concludes that respondents' motion need not be decided. To the extent that Waltham Watch Company already is subject to an order of this Commission requiring it to cease and desist from practices related to jewel count and use of the Waltham name, the Hearing Examiner will not duplicate such order or orders by any action here. He believes that one Commission order directing that a party cease and desist from a particular action is sufficient and it is not necessary that an additional order issue providing the same remedy. In a sense, this appears to be the relief sought by respondents in, and the only purpose of, their formal motion.

The Pretrial Order, the Hearing Examiner's certification to the Commission and the Commission's approval of the Hearing Examiner's recommendation that he be permitted to hear this proceeding first in Chicago, then in Milwaukee, then in Minneapolis, and finally, again in Chicago, all were predicated on the expectation that the issues herein would be litigated bitterly and that hurried trips would be made from city to city in order expeditiously to complete the proceeding. However, on the day that the Hearing Examiner left Washington to commence the hearing, he received the decision and opinion of the Commission dated July 20, 1962, in the case bearing Docket No. 6914. These became available to all counsel on the morning set for the opening of the hearing. That decision clearly and definitely ruled that Waltham Watch Company was to cease and desist misrepresenting the jewel content of watches and using the name "Waltham" without clearly stating the country of origin of its watches or using the Waltham name in an historical sense for the purpose of describing its watches. In addition, Commissioner Philip Elman in the opinion stated,

Respondents should be prohibited from using the term "American", or any reference to "Waltham", in any manner or context suggesting that the watches which they sell under the Waltham name are made in the United States. To provide effective relief these provisions are necessary at least until such time as the harmful effects of respondents' deceptive advertising have been erased. If and when this has been accomplished, the Commission will entertain any

application for such modification as may then be appropriate. Cf. *Federal Trade Commission v. National Lead Co.*, 352 U. S. 419.

Respondents appear to have been very much impressed by the possibility that an application for modification at some future time might receive favorable consideration and, in their defense of the instant proceeding, apparently began to lay the groundwork for a demonstration of good faith by cooperating most commendably in the simplification of the issues and the elimination of evidence which would have been necessary to bring the individuals within the restrictions of the order already effective against Waltham. This resulted in more leisurely sessions than had been anticipated.

They have stipulated sufficient to justify the issuance in this proceeding of an order against them similar to that entered against Waltham in the case bearing Docket No. 6914. It should be observed, however, that while their stipulation of facts is sufficient to permit the issuance of such an order in this proceeding, they do not agree thereby, as a matter of law, that, upon the facts stipulated, the order is right.¹ They assume also that, regardless of whether it is right or not, if, in the future, the Waltham order be modified or suspended, they will receive the same treatment and have the benefit of such modification or suspension. (In this connection it should be noted clearly that whether this is to be done is not at all the function or concern of the Hearing Examiner, but the sole prerogative of the Commission.)

This leaves for consideration in this proceeding only the issues involving alleged deceptive pricing and alleged false guarantee. The deceptive pricing portion of the case is concerned with (a) advertising by respondents of published "list" or alleged "retail selling prices" separately from or in catalogue sheets prepared for the use of catalogue companies such as are described at some length by Commission Chairman Paul Rand Dixon, in his opinion in *Leeds Travelwear, Inc.*, Docket No. 8140, October 3, 1961 [61 F.T.C. 152, 165], slip printing pages 4 to 7 inclusive, and, (b) with the tagging, affixing or use of price tickets on or in connection with the watches in

¹ On the legal justification for the jewel count ruling, the Commission's prior decisions and *Allen v. Tornek Company*, 276 F. 2d 513, 107 App. D. C. 267, all cited by Commissioner Elman in Docket No. 6914, are conclusive. As to the use of the Waltham name, apart from what was said by Commissioner Elman in his opinion in Docket No. 6914 above, respondents' argument that the owner of a trademark has the right to cheapen or "water it down" leaves this Examiner unimpressed. It ought to be quite clear that, regardless of what trademark a business may own, it cannot use that trademark for the purpose of deception. How long would any man whose own true name was Howard Johnson be permitted to operate a roadside restaurant and call it "Howard Johnson's" without qualification? Would any clothier who happened to have a customer, James F. King, get away with advertising during the John F. Kennedy administration that JFK buys his clothes there?

the form or package in which they are offered and delivered for sale. The evidence as to the deceptive nature of the advertising and use of the list prices, whether the same be in general advertising, in catalogue sheets or in the form of preticketing, is adequate and sufficient to support remedial action in this proceeding. A long dissertation is not necessary here. Numerous witnesses testified, and it is clearly to be concluded from their testimony, that Waltham watches are customarily sold at prices far below (a) the advertised prices, (b) the alleged or stated "retail price" in the catalogue sheets prepared by respondents for the use of catalogue houses, and (c) the prices on the tickets or labels attached to or packaged together with the watches when offered and delivered for sale. Respondents' officers, the individuals involved herein, have too long an experience and background in business, particularly the watch business, not to be fully aware of the manner in which the business of the catalogue houses is conducted. They know, as the witnesses testified here, almost anyone who knows about and has the desire so to do (a) can obtain access to a catalogue house and (b) can purchase any article offered by the catalogue house at the coded price rather than at the so-called or represented "retail price". The Hearing Examiner believes that, separate and apart from this litigation, the individuals involved herein certainly would be embarrassed or outraged if it were suggested that they were so naive that they did not have this awareness or did not know how the catalogue houses for which they supply the catalogue insert sheets operate. *Leeds Travelwear, Inc.*, Docket No. 8140 [61 F.T.C. 152], *Rayex Corporation*, Docket No. 7346 [60 F.T.C. 664], *Baltimore Luggage Co. v. Federal Trade Commission*, Docket No. 8382, C. A. 4, 296 F. 2d 608, *cert. den'd*, 369 U. S. 860, *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838, C. A. 7.

To the extent that respondents urge that the prices advertised by them should be regarded only as "suggested retail prices", their position is rejected. Their argument seems to be pitched at this Hearing Examiner's reasoning in his Initial Decision in the *Regina* case, November 16, 1961, which was not adopted by the Commission.² Nevertheless, the facts in this case are not at all similar. In *Regina* there was no advertising or preticketing. In this case there are both. It also is clear that the respondents here knew that their "list prices" were not the usual and customary retail prices. Since, with that knowledge, they furnished and disseminated to vendors advertising containing such prices, they thereby placed in the hands of their

² The *Regina Corporation*, Docket No. 8323, October 11, 1962 [61 F.T.C. 983].

vendors the means whereby the public was misled and deceived. This case is aggravated far beyond the *Regina* case as far as the respondents are concerned. Their apologia that they cannot control the prices at which their watches are sold does not absolve them from the consequences of their own conduct. While there is testimony that the "retail" prices were only "suggested", the facts are to the contrary.

This leaves only the charge with respect to the alleged false guarantee. The testimony and physical exhibits show that the respondents advertised their watches as "Guaranteed", "Fully Guaranteed" and "Lifetime Guaranteed". It was advertising such as this that, in many cases, induced the purchaser to buy one of respondents watches. This sort of guarantee was featured prominently on all the catalogue sheets. Two propositions of law are elementary. If, at the point when a decision to buy is made, the decision is brought about by a false or deceptive statement, the deceptive practice must be stopped. The word "guarantee" must be accompanied by clear and conspicuous words of limitation if the guarantee is in any way limited, even to the extent of a small fee such as a handling charge. Here, in most instances, the vice was greater. A potential customer, turning the pages of a catalogue for the purpose of purchasing by mail, sees only the expression, "Fully Guaranteed". He has the right to assume that it means what it says, that no strings are attached and that no service charges are imposed. When such a purchaser orders by mail, whether directly or through the medium of a vendor exhibiting the catalogue, he first discovers, on receiving the watch and examining the guarantee certificate, that there is a service charge of one dollar and restrictive language as to just what the guarantee covers. He learns this for the first time only after he has bought and paid for the watch. In this respect, the advertising and representation were false and deceptive.

Counsel supporting the complaint goes further, both in the evidence he offered and in his ninth proposed finding, to claim that charges are made for cleaning and oiling when watches are sent in for performance under the guarantee. There are two reasons why the Hearing Examiner does not accept this proposed finding. First, the complaint does not allege an unfair practice consisting of imposing, arbitrarily, cleaning and oiling charges when watches are sent in for performance of the guarantee. Second, although it is clear the respondents did make charges for cleaning and oiling under such circumstances, the Hearing Examiner is of the opinion that this is a service operation much like the lubrication of an automobile or care for any product in constant use, not normally considered an element

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of a guarantee unless expressly stated. While the Hearing Examiner recognizes this distinction, he does not condone respondents' practice of taking advantage of the fact that possession of the watch after being sent in for guarantee performance acts as a lever to compel a cleaning and oiling and payment therefor. The better practice would be if, upon examination, a cleaning and oiling is needed, respondents notified the owner of the watch that the same was needed and obtained his authorization to provide it at the charge specified. It may be noted in passing, however, that in some cases when the charge was protested, the respondents canceled it.

Careful consideration has been given to the proposed findings submitted both by counsel supporting the complaint and counsel for the respondents. Many of the proposals have not been accepted or have been considered substantially the same as findings ultimately made herein. To the extent that any proposed finding or conclusion is not adopted, either directly or in substance, the same has been rejected because of irrelevance, immateriality or lack of support in the evidence, as contrary to law, or as unnecessary.

After careful consideration of the entire record, the following are my

FINDINGS OF FACT

1. Respondent Waltham Watch Company (hereafter "Waltham") is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 231 South Jefferson Street, Chicago, Illinois.

2. During some of the time involved herein, the individual respondents, Harry Aronson, Ben Cole and Morris Draft were officers of Hallmark, Inc. a corporation which had been organized under the laws of the State of Illinois and had its office and principal place of business located where Waltham is now located. Hallmark, Inc. was merged into Waltham in June 1959.

3. The individual respondents thereupon became and have continued to be officers of the corporate respondent. They formulate, direct and control its acts and practices and they formulated, directed and controlled the acts and practices of Hallmark, Inc. prior to the merger. Their offices and principal place of business are the same as that of Waltham.

4. In the course and conduct of their business, respondents import watches, watch movements, cases and attachments, assemble and sell them. Respondents cause such products, when sold, to be transported from the State of Illinois and elsewhere to purchasers located in

various other States of the United States and in the District of Columbia.

5. Respondents have maintained a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

6. Respondents have engaged in the practice of attaching or causing to be attached price tickets to their products. A price ticket is a label or tag upon which an amount in dollars and cents or dollars alone is printed for exhibition to or view by a prospective customer of the article being offered for sale. Such amount is a representation to the prospective customer that the article is reasonably worth the amount shown and that it is usually sold at that price.

7. Respondents also have disseminated or caused to be disseminated price lists, catalogue insert sheets, brochures, leaflets, newspaper and magazine advertisements and other forms of advertising in which certain amounts are shown as the retail prices of their products.

8. Respondents represent directly or indirectly by such materials that the amounts shown are the usual and regular retail prices.

9. In truth and in fact the prices on the tickets and in the materials mentioned are in excess of the prices at which said watches usually and customarily are sold at retail and are fictitiously retail prices.

10. Respondents, in their advertising, catalogues, brochures and other promotional material, represent that their products are "Guaranteed", "Fully Guaranteed" or "Lifetime Guaranteed".

11. In truth and in fact such representations as to guarantee are false, misleading and deceptive because, only after having purchased a watch, if the purchase be made by mail, or only after having carefully read the guarantee certificate which accompanies the watch at the time of purchase or after the purchase, if the purchase be made over the counter, is the customer informed of the fact that the guarantee is a limited guarantee and that a service charge is required to be paid by the customer incident to the performance of the guarantee, as limited.

12. The respondents purchase 17-jewel watch movements, made in and imported from Switzerland, add a device containing 4 or 8 synthetic jewels, affix attachments to the watches and case the movements. The watches are then represented, advertised, offered for sale, and sold by respondents as "21" or "25" jewel watches to retailers, catalogue houses and wholesale distributors.

13. By means of the statements that the said watches are 21- and 25-jewel watches, respondents represent that they contain 21 or 25 jewels, each of which serves a mechanical purpose as a frictional bearing and that each jewel provides mechanical contact at a point

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of wear. In fact, the additional jewels in the device added by the respondents are not functional and the watches are not 21- and 25-jewel watches as represented.

14. The respondents have advertised their watches in newspapers, jewelers' trade magazines, nationally distributed magazines, catalogues, catalogue insert sheets and circulars, and on labels and packages. Among and typical but not all inclusive of the statements appearing in such advertising material have been the following:

Waltham Watches—timing the Nation since 1850.

Waltham Premier, a famous name, part of the American scene since 1850.

15. By means of such statements, respondents have represented directly or by implication that their watches are manufactured in the United States by the same Waltham Watch Company of Waltham, Massachusetts, which had been an old and well-known company and that they were the same interests which had controlled that company during times long prior to the acquisition by them of their control of the name thereof. Such statements are false, misleading and deceptive. In truth and in fact (a) such watches are not manufactured in the United States, (b) are not manufactured by what had been the old and well known Waltham Watch Company of Waltham, Massachusetts, and (c) respondents acquired only recently control of a company which had been incorporated in Delaware in 1957 under the name "Waltham Watch Company" to acquire assets involved in a "spin off" from the old Waltham Watch Company of Massachusetts.

16. By the said acts and practices respondents have placed in the hands of retailers and others means and instrumentalities whereby such retailers may mislead and deceive members of the purchasing public as to the regular and usual retail prices, the character of the guarantee, the number of frictional bearing jewels and the origin and manufacturer of respondents' watches.

17. Respondents in the course and conduct of the sale of their watches have been and are in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

18. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had and now has the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken beliefs that they are true and into the purchase of substantial numbers of their watches in consequence of such erroneous and mistaken beliefs. Substantial trade in com-

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merce has been unfairly diverted thereby to the respondents from their competitors and substantial injury has been done to competition in commerce.

From all of which and upon the whole record I have made the following

CONCLUSIONS

A. That all the respondents, whether charged in their corporate, official or individual capacities, are engaged in the business of importing, assembling and distributing in commerce, watches from Switzerland and that the individual respondents are responsible for the acts and practices of the corporate respondent and for the acts and practices set forth above.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

C. This proceeding is in the interest of the public.

D. The activities of the respondents, as more particularly set forth in the Findings of Fact, constitute unfair and deceptive acts or practices in violation of the Federal Trade Commission Act.

E. The order hereinafter set forth is necessary and reasonable to effectuate the purposes and policy of that Act.

ORDER

It is ordered, That respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850.", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

It is further ordered, That Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben Cole and Morris Draft individually and as officers of said corporation and their agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of pre-ticketing merchandise at an indicated retail price when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where offered for sale or when there is no generally prevailing retail price for such merchandise in such trade area.

2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalogue sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area where offered for sale or when there is no generally prevailing retail price for such merchandise in such trade area.

3. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.

4. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise or the terms of any claimed guarantee affecting the same.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

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

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel

supporting the complaint, and having determined that the hearing examiner's findings of fact and order should be modified and that respondents' appeal should be denied:

It is ordered, That the initial decision be modified by striking therefrom findings of fact numbered 8 and 9 on page 9 and substituting the following:

8. Respondents represent directly or indirectly by such materials that the amounts shown have been established in good faith as an honest estimate of actual retail prices which do not appreciably exceed the highest prices at which substantial sales of their watches are made in their trade territory.

9. In truth and in fact respondents know that the retail prices set forth on catalog sheets and tickets attached or accompanying watches furnished by them to catalog house customers are appreciably in excess of the highest price at which substantial sales are made in their trade area by those customers. Thus, these retail prices are not disseminated in good faith as an honest estimate of the actual retail selling price of catalog house customers. This practice is dealt with in Guide III of the Commission's revised Guides Against Deceptive Pricing. To provide guidance and assistance to respondents in compliance, an order to cease and desist will be entered in the language of Guide III.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Harry Aronson, Ben Cole, and Morris Draft, individually and as officers of Waltham Watch Company, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stat-

ing in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "Waltham Watches—timing the nation since 1850", "Waltham Premier, a famous name, part of the American scene since 1850", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

It is further ordered, That Waltham Watch Company, a corporation, and its officers and Harry Aronson, Ben Cole and Morris Draft, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device in connection with the sale and distribution of watches or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising, disseminating or distributing any list, pre-ticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area.

2. Representing that their merchandise is guaranteed unless the nature, extent and conditions of the guarantee and the manner in which the guarantors will perform thereunder are clearly set forth in conjunction with the representation of guarantee.

3. Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by the above provisions of this order.

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

It is further ordered, That Waltham Watch Company, a corporation, and Harry Aronson, Ben Cole and Morris Draft shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

Complaint

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IN THE MATTER OF

MAJESTIC ELECTRIC SUPPLY COMPANY, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8449. Complaint, Oct. 31, 1961—Decision, Feb. 28, 1964*

Order requiring Skokie, Ill., mail order sellers of general merchandise such as watches, jewelry, cameras, furniture, appliances, sporting goods and others, to individuals, firms and associations, to cease misrepresenting that its merchandise is offered for sale at wholesale prices, and dismissing charges concerning deceptive pricing and saving claims.

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 Majestic Electric Supply Co., Inc., a corporation, and Charles Mostow, Arthur Mostow and Leon Gurny, 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 Majestic Electric Supply Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 8250 Skokie Boulevard, Skokie, Illinois.

Respondents Charles Mostow, Arthur Mostow and Leon Gurny are individuals and officers of the said corporate respondent. They formulate, direct and control the policies, acts and practices of said corporate respondent, including those hereinafter set out. The address of each individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale of various articles of merchandise, including but not limited to watches, jewelry, cameras, furniture, appliances and sporting goods, to individuals, firms, corporations and associations located throughout the United States.

Respondents are also engaged in the wholesale sale and distribution of electrical supplies to hardware stores, electrical contractors, and

other wholesale purchasers of such merchandise. This phase of respondents' business is not involved in this complaint.

Respondents cause, and have caused, their said merchandise, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and at all times mentioned herein have maintained a course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of such business in commerce is, and has been, substantial.

PAR. 3. Respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, have advertised the same by means of catalogs and circulars, circulated and disseminated by and through the United States mail to prospective purchasers located in various states other than the State of Illinois.

PAR. 4. Respondents in all of their advertising refer to themselves as wholesalers and to the prices of all of their merchandise as wholesale prices. Among and typical, but not all inclusive, of the statements appearing in respondents' catalogs and other advertising are the following:

Majestic Wholesale Distributors; A fresh new way to buy wholesale; As a wholesale distributor for over 30 years Majestic etc.; Majestic is a distributor not a discount house, therefore you buy at true wholesale dealer costs.

Retail \$21.95—special dealer price \$15.37

Save the wholesale way, \$13.66 Retail \$29.98; Retail \$1.79 now 88¢;

½ Carat Diamonds \$88; \$275 Values.

Example of your hidden wholesale price, 36-1803-6950 Retail \$111.50; Stock Number \$69.50 your wholesale cost.

Lowest wholesale prices—We don't just meet prices—Majestic sets the prices others cannot meet, that's why you save more.

PAR. 5. Respondents in referring to various articles of merchandise, set forth in their catalogs mailed to prospective purchasers who buy for their own use, set out two prices; one, a so-called coded price, is represented to be the wholesale price of the merchandise and the other, a higher price, is designated as "Retail". By means of such pricing methods, the aforesaid quoted statements, and other of like import not specifically set out herein, respondents represent, directly or by implication, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, as set out in their catalogs, at which the merchandise referred to is offered for sale, are wholesale prices; that the prices designated as "Retail" in their catalogs are the prices at which the merchandise

referred to is usually and customarily sold at retail; and that the difference between their coded price and "Retail" price represents savings from the usual and customary retail prices in the trade areas where the representations are made.

PAR. 6. The aforesaid statements, representations and the implications arising therefrom are false, misleading and deceptive. In truth and in fact, respondents are not wholesalers with respect to many of the articles offered for sale and sold by them, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles are in excess of wholesale prices. In many instances the coded prices of many articles of merchandise set out in respondents' catalogs are not wholesale prices but are in excess thereof, and the prices designated as "retail" prices for many of their articles of merchandise are in excess of the prices at which said merchandise is usually and customarily sold at retail in the trade areas where such representations are made. The difference between respondents' said coded and "retail" prices does not represent savings from such usual and customary retail prices.

PAR. 7. At all times mentioned herein respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair 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. John W. Brookfield, Jr., and Mr. William A. Somers for the Commission.

Marks, Marks and Kaplan, Chicago, Ill., by Mr. William S. Kaplan, and Shaffer, Seelig, Mandel & Shapiro, Chicago, Ill., for respondents.

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INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

AUGUST 13, 1962

The Federal Trade Commission, on October 31, 1961, issued and subsequently served its complaint, charging the respondents named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act by misrepresenting in their mail-order catalogs that they are wholesalers who sell all of their merchandise at wholesale prices, and by using fictitious comparative prices for their merchandise. By their answer, respondents made general denials of the alleged violations and entered certain special pleas.

A prehearing conference was held on January 29, 1962; continuous hearings in support of the complaint were held in Chicago, Illinois, South Bend, Indiana, and Beloit, Wisconsin, beginning on April 24 and ending on May 3, 1962; and defense hearings were held in Chicago, Illinois, on May 14, 15, and 16, 1962. The record of evidence, including the prehearing conference, consists of 1180 pages of transcript and 32 exhibits.

Proposed findings of fact, conclusions of law, and order with supporting briefs were filed by counsel for respondents on June 28, and by counsel supporting the complaint on June 29, 1962, and reply briefs were filed on July 13, and July 9, respectively.

After having carefully considered the entire record in this proceeding and the proposals and briefs of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties which are not adopted herein, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent, Majestic Electric Supply Company, Inc. (sometimes herein referred to as Majestic), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 8250 Skokie Boulevard, Skokie, Illinois. It also operates under the registered trade name, Majestic Wholesale Distributors.

2. Respondent, Arthur Mostow, an individual, is vice president of Majestic. He functions as the executive head and general manager, and he formulates, directs, and controls the policies, acts and practices of Majestic, including those hereinafter set out. His address is the same as that of Majestic.

3. Respondent, Charles Mostow, an individual, is president of Majestic. He has been semi-retired, and has not actively participated in the business affairs of Majestic for a period of about five years. Respondent, Leon Gurny, an individual, is treasurer of Majestic. He is engaged primarily in the buying and servicing functions of the business, and he has no responsibility for the formulation, direction, or control of the policies, acts, or practices of Majestic which are challenged in this proceeding. At the conclusion of the presentation of evidence, a motion to dismiss the complaint as to the individual respondents, Charles Mostow and Leon Gurny, which was not opposed by counsel supporting the complaint, was granted. Appropriate effect will be given to that action in the order herein.

4. Majestic is engaged in the sale of various articles of merchandise, including, but not limited to, a general line of merchandise intended primarily for personal or household use, such as watches, jewelry, cameras, furniture, appliances, sporting goods, toys, linens, furs, and many others. It sells such merchandise to individuals, firms, and corporations located primarily in the midwestern section of the United States.

5. Majestic has been in business since 1929, and since 1948 it has done a substantial catalog mail order business. During each of the years 1960 and 1961, it mailed between 50,000 and 100,000 catalogs advertising its general line of merchandise to prospective customers located in various States of the United States; and during each of those years, its interstate sales through its catalogs exceeded \$500,000.

6. The catalog division of Majestic is located in Skokie, Illinois, and, in addition to the corporate name, it also operates under the trade name, Majestic Wholesale Distributors. In the operation of this division, Majestic contacts its customers and sells its general line of merchandise principally through its mail order catalogs.

7. Majestic also operates a place of business in Chicago, Illinois, where it is engaged in the wholesale sale and distribution of electrical supplies to hardware stores, electrical contractors, and other wholesale purchasers. Although it formerly did so, it has not issued a catalog solely devoted to electrical supplies for approximately the past four years. Some items of electrical supplies, but not the complete line, are included in Majestic's general catalogs, but its sales of electrical supplies are not made primarily through its catalogs.

8. In all of its advertising, Majestic refers to itself as a wholesaler, and to the prices of all of its merchandise as wholesale prices. Among

and typical, but not all inclusive, of the statements appearing in Majestic's catalogs and other advertising are the following:

Majestic Wholesale Distributors; a fresh new way to buy wholesale; as a wholesale distributor for over 30 years Majestic etc.; Majestic is a distributor not a discount house, therefore you buy at true wholesale dealer costs.

Retail \$21.95—special dealer price \$15.37

Save the wholesale way, \$13.66 Retail \$29.98; Retail \$1.79 now 88¢;

½ Carat Diamonds \$88; \$275 Values.

Example of your hidden wholesale price, 36-1803-6950 Retail \$111.50 Stock Number \$69.50 your wholesale cost.

Lowest wholesale prices—We don't just meet prices—Majestic sets the prices others cannot meet, that's why you save more.

9. Majestic, in referring to various articles of merchandise set forth in its catalogs mailed to prospective purchasers, sets out two prices: one, a so-called coded price, which is its selling price, is represented to be the wholesale price of the merchandise, and the other, a higher price, is designated as "Retail".

10. The essential charges, in substance, are that by means of its pricing methods and representations, Majestic misrepresents: that it sells all of its merchandise at wholesale prices; that the "retail" prices in its catalogs are usual and customary retail prices; and that the difference between its selling prices and the "retail" prices shown in its catalogs represents savings from usual and customary retail prices.

11. On March 6, 1962, before the hearings began, the hearing examiner took official notice that in common and ordinary trade usage in connection with a general line of merchandise intended for personal or household use, the word "wholesale" means "to sell merchandise, usually in quantity lots, to one who intends to resell it in one form or another, or to use it for business needs as supplies or equipment"; and that the word "retail" means "to sell merchandise, usually in single units or in small quantities, to the ultimate consumer for personal or household use". The evidence received herein did not disprove, or materially limit or qualify, these noticed meanings for the purposes of this case.

Wholesale Prices

12. Majestic sends its catalogs to those whose names appear on its mailing lists, which include the names of persons who request a catalog and of persons from whom it receives orders for merchandise.

Eighty to ninety per cent of the names appearing on its mailing lists are those of business firms, but there is no indication as to what proportion of such business firms may be engaged in the resale of the type of merchandise advertised in the catalogs. Majestic sends its catalogs to anyone who requests them or who may be a potential customer, and makes no effort to determine whether any customer is purchasing for use, consumption, or resale. It makes some sales on credit, but the overwhelming bulk of its sales is made for cash.

13. During 1961 Majestic made sales through its catalogs to about 20,000 customers. It was able to determine that in a few cases its customers purchased for resale, but otherwise it has no knowledge and makes no inquiry to ascertain whether its customers are consumers or resellers.

14. Counsel supporting the complaint offered fifteen witnesses as members of the consuming public. The testimony of one was stricken; another had made no purchases from Majestic; and another was engaged in business activities in Albion, Indiana, and purchased from Majestic primarily for resale or for use for business needs as supplies or equipment. (On the basis of 1960 U.S. Census figures, it is officially noticed that the population of Albion is approximately 1300.)

15. The remaining twelve consumer witnesses had made purchases of single units or small quantities from Majestic for personal use or as gifts. One was a dentist who received Majestic's catalog at his office; two ordered from catalogs obtained from acquaintances; four ordered from catalogs which were addressed to business firms, including a law firm and a county highway department; and five received the catalogs directly in their own names. One consumer witness ordered merchandise from Majestic in the name of her employer, a county highway department, because she thought the order would be accepted only if she were an employee; and another ordered in the name of her husband's oil company. Although all of them were not specifically questioned on the point, the testimony of three of these witnesses affirmatively indicated that they considered Majestic's catalogs, and similar catalogs of others, to be wholesale catalogs.

16. The record discloses, therefore, that Majestic sells in single units or in small quantities to ultimate consumers for personal or household use. The record as a whole supports the inference that it does so extensively, and that such sales are substantial and constitute a substantial part of the sales made by Majestic through its catalogs. Accordingly, it is not a wholesaler in transactions in which many articles of merchandise are offered for sale and sold by it.

17. There can simultaneously be more than one wholesale price for an item. For example, the price by a manufacturer to a distributor

for a particular item is frequently lower than the distributor's price to a jobber, which, in turn, is frequently lower than the jobber's price to a retailer. But they are all wholesale prices. A retailer may also sell a particular item at a wholesale price, or at a price equivalent to a wholesale price, for any of a variety of reasons, such as an advertising leader, a quantity sale to an industrial user, an accommodation sale to another retailer, clearance sales of overstocked or obsolete items, etc. It thus becomes necessary to determine the meaning of "wholesale prices" as the term is used by Majestic.

18. One sporting goods dealer in Chicago, who also sells by mail order primarily at retail, and 24 dealers in South Bend, Indiana, and Beloit, Janesville, and Waukesha, Wisconsin, who sell essentially at retail in their local areas, were called as witnesses by counsel supporting the complaint. It is officially noticed, on the basis of 1960 U.S. Census figures, that the Indiana and Wisconsin towns in which these dealers are located range in population from about 30,000 to about 130,000. They testified as to the prices at which each of them purchased in 1961 one or more of an aggregate of 71 of the various items of merchandise which were also advertised and sold in 1961 by Majestic through its catalogs. Most of these witnesses purchased directly from the manufacturers, but in some instances they also purchased certain of the items in question from distributors or jobbers. In the great majority of instances, the prices at which they purchased were substantially below the wholesale prices shown in Majestic's 1961 general catalog.

19. Respondents presented evidence from a mail order house in Chicago which sells a general line of merchandise similar to that sold by Majestic. It distributes catalogs throughout the United States, including specifically the States of Indiana and Wisconsin. It is the policy of this mail order house, expressed in its catalogs and generally adhered to in practice, to sell to retail dealers in small towns, usually of 5,000 population or less, who have established credit with it. It discourages sales on a cash basis, and the overwhelming proportion of its sales are made to dealers. In 1961, this mail order house did not sell all of the articles of merchandise with respect to which the dealers offered in support of the complaint testified. It did, however, sell approximately half of the same items, and on those items the prices at which it sold to dealers were the same, or substantially the same, as Majestic's selling prices. Largely on the basis of this evidence, respondents contend that Majestic's prices on these items were in fact wholesale prices.

20. Although there is evidence that a substantial part of the sales by Majestic through its catalogs are retail sales, there is also uncon-

tradicted evidence that a substantial part of its sales are to retailers, and are therefore wholesale sales. In some of its sales, therefore, Majestic functions as a wholesaler, and in others as a retailer. All of its sales of the same items, however, are made at the same prices, which in some transactions are wholesale prices and in some transactions are retail prices.

21. Whether or not it is deceptive to represent as "wholesale prices" the prices at which sales are regularly made in retail and in wholesale transactions depends upon the circumstances in which such sales are made and the understanding which the representation is likely to convey to the purchaser.

22. Majestic uses two prices in conjunction with each item of merchandise described in its catalogs. One price, which is designated "Retail", appears in plain figures; and the other price, which is designated as Majestic's wholesale price, appears in code. The coded price is substantially lower than the "retail" price, and is the price at which Majestic actually sells to all customers.

23. The coded price used to show Majestic's actual selling price is explained on the inside of the front cover of the catalog:

Your wholesale price is concealed in the stock number of each item, which is made up of 3 groups of numerals separated by hyphens. The right hand group represents your wholesale cost. Simply point off two places from the right in this group of numerals and add the decimal. This is your wholesale cost price.

In this connection, it is explained, for example, that the stock number 36-1596-325 contains Majestic's "wholesale" price of \$3.25.

24. The catalogs representing that Majestic sells at wholesale prices are used extensively by consumers in making purchases. Some of the consumers who testified considered these, and similar catalogs distributed by others, to be "wholesale catalogs", and in some instances they felt that they could not purchase through these catalogs directly in their own names, but must purchase in the name of some business firm. Some who had not compared the prices assumed that the "wholesale prices" in these catalogs were lower than the prices at which they could purchase the same articles in local retail stores.

25. Examination of Majestic's catalogs discloses that the term "wholesale prices", as used in them, conveys the impression that it refers to prices at which the articles in question are ordinarily sold to retail dealers who intend to resell them in their local areas at a profit. This impression is increased and emphasized by showing the "wholesale price" in a code which, although easily decipherable, is ostensibly confidential, and by showing in connection with it in plain figures a comparative and substantially higher "retail" price for the

article. The encoding of Majestic's actual selling prices in its catalogs clearly constitutes a device which lends an aura of credibility to the representation that they are wholesale prices, while avoiding the likelihood that they may be concealed even from obtuse prospective purchasers.

26. From the record in this case, it is clear that in some instances consumers purchase from Majestic through its catalog, rather than from local retailers, in reliance, among other things, upon their understanding, engendered by its catalogs, that Majestic is a wholesaler and that it sells at wholesale prices. Based upon the representations in the catalog, consumers are warranted in believing that the prices which they pay to Majestic are equivalent, or substantially equivalent, to the prices which the local retailers, or at least some of the local retailers, in their areas pay for the same articles for the purpose of reselling them at a profit.

27. The local retailers who testified in this proceeding purchased the articles of merchandise sold by Majestic, with respect to which they testified, at prices which, with very few exceptions, were substantially below the "wholesale" prices shown in Majestic's catalog. There is no evidence that other local retailers in the same areas purchased such articles of merchandise from higher cost wholesale sources, from Majestic or elsewhere, at, or reasonably near, the "wholesale" prices shown in Majestic's catalog.

28. It is concluded, therefore, that, as used by Majestic in its catalogs, the term "wholesale price" means the price at which merchandise sold by Majestic is usually and customarily sold at wholesale in the area or areas where the representation is made. Majestic is not a wholesaler in transactions in which many articles of merchandise are offered for sale and sold by it. In many instances such articles are not offered for sale or sold by Majestic at the usual and customary wholesale prices of such articles in the trade area or areas where such offers or sales are made, but its prices are, in many instances, in excess of such wholesale prices.

Retail Prices

29. In about January preceding the year shown on the cover, Majestic begins contacting its suppliers, looking toward the preparation of its general catalog; and during the latter part of August it begins distributing the catalog. Approximately 50% of the pages in the catalog are furnished by the manufacturers of the merchandise appearing thereon, and the other pages are prepared by Majestic,

using in large measure the art work, literature and information supplied by the manufacturers.

30. The comparative prices in Majestic's general catalog, which are designated "Retail", are based upon retail prices suggested by the manufacturers or upon determinations made by Majestic. The coded prices at which Majestic sells are based on dealer prices suggested by the manufacturers or upon Majestic's own determination of its gross profit, which varies on different items, but which averages approximately 23%.

31. The complaint alleges that, as used in its catalogs, Majestic represents that the prices designated as "Retail" are the prices at which the merchandise referred to is usually and customarily sold at retail. No evidence was offered in support of the complaint as to the public understanding of the term "retail" as used in Majestic's catalogs. Counsel supporting the complaint relied upon previous decisions in cases before the Federal Trade Commission involving the use of this and equivalent representations.

32. Respondents denied that the term "retail", as used in its catalogs, constitutes a representation that the prices so designated are the prices at which the merchandise referred to is usually and customarily sold at retail. In support of their position, they presented, *inter alia*, the testimony of two expert witnesses, one a professor in the School of Business, Northwestern University, and the other a professor in the Graduate School of Business, University of Chicago. Both are doctors of philosophy with considerable background and experience in subjects relating to marketing, and both taught courses in marketing.

33. Both expert witnesses professed unfamiliarity with the term "usual and customary price" either in their own experience or in marketing literature. Both also expressed the opinion that there is no such thing as a usual and customary retail price for a particular article of merchandise in any given market area, with the exception of the limited number of articles upon which manufacturers effectively maintain retail prices. They indicated that there could be no usual and customary price in a market unless all of the retailers of an article sold it at the same price for a long period of time.

34. In expressing their opinions, they discussed the difficulty of determining a prevailing specific price at any one place at any one time. Their discussions indicated that this difficulty arises, among other things, from the fluctuation of retail prices in a particular market area from time to time, the variations of retail prices among different categories of retailers in the same market area, the varia-

tions of retail prices between different market areas, the imprecision of market area definitions, and the effect on retail prices of the different marketing problems involved in selling various types of merchandise.

35. The expert witnesses also testified that the terms "retail price", "list price", "suggested retail price", "manufacturer's suggested retail price", and similar terms are interchangeable, and have substantially the same meanings. They also discussed in some detail their opinions that prices designated with these terms, used in conjunction with actual selling prices, afford useful and helpful information and guides to consumers.

36. One of the expert witnesses was of the opinion that a suggested retail price used in advertising does not indicate to the consumer the usual and customary price at which the article is sold, but that it may indicate the highest retail price at which it is sold. The testimony of the other expert witness was substantially to the same effect, except that he was of the opinion that the term "retail price" does not necessarily mean to the consumer that the article has ever been sold in any market in the United States at the indicated price. Neither of these witnesses had ever made a survey or a study to determine what the term "retail price" means to consumers.

37. In summary, the opinions of the two expert witnesses are in direct conflict with the frequently expressed opinion of the Federal Trade Commission on precisely the same question. For example, in its recent opinion in *Giant Food, Inc.* (Docket No. 7773, issued on June 13, 1962) [61 F.T.C. 326], the Commission stated:

Rightly or wrongly, many people believe that a manufacturer's "suggested list price" expresses his considered and expert judgment as to the approximate retail value of his product, a judgment which necessarily would be inexpert and unsound if it did not in fact reflect his knowledge of what the product actually and generally does sell for in the area. (p. 347)

In that case the finding that there is a public understanding that the term "manufacturer's suggested list price" reflects the usual and customary retail price in the trade area rested on "overwhelming" evidence in the form of testimony of consumer witnesses (Op., pp. 5-6). In appraising the consumer testimony in that case, however, the Commission made it clear that such evidence was not necessary, quoting with approval its statement in *Manco Watch Strap Co.* (Docket No. 7785):

"This is an area of administration that has evolved to a point at which the accumulated experience and knowledge of the Commission may properly be invoked in exercising its fact-finding function." (Op., fn. 2, p. 347)

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38. On the authority of the Commission's recent decisions in *Giant Food, Inc.*, (*supra*) and *The Regina Corporation, et al* (Docket No. 8323, Opinion June 13, 1962) [61 F.T.C. 983, 996], and the authorities therein cited, further analysis of the considerations here presented is not warranted. If there is any difference in the meanings of the terms "manufacturer's suggested list price" and "retail price", the latter is clearer and more specific, and leaves no room for interpretation or misunderstanding.

39. It is, accordingly, found that, as used in its catalogs, Majestic represents that the prices designated as "Retail" are the prices at which the merchandise referred to is usually and customarily sold at retail in the areas where its catalogs are distributed. No evidence was required in the present record to establish this meaning. Insofar as the opinions of the expert witnesses who testified are at variance with this meaning, they are rejected as being inconsistent with the common and ordinary meaning of the term "retail price" and with the public understanding of that and equivalent terms as determined by the Commission in many prior proceedings.

40. Counsel supporting the complaint offered the testimony of retailers concerning the prices at which they sold in 1961 seventy-one of the various items of merchandise which were also advertised and sold in 1961 by Majestic through its general catalog.

41. One of these retailers was a sporting goods dealer with four stores located in Chicago and three in the suburbs. This dealer also sells by mail order, primarily at retail, through a catalog distributed all over the United States. This dealer testified as to his 1961 prices on seven items, one fishing rod and six reels. No other witness in support of the complaint testified concerning the retail prices of any of these seven items. The Chicago dealer testified that his prices varied greatly from those of his competitors, and that it was not the policy of certain of his competitors, who were identified, to cut prices as much as he did. It is apparent, therefore, that the record does not establish that the prices at which this retailer sold these seven items were the prices at which they were usually and customarily sold at retail in his area of competition. Since no other witness in support of the complaint testified with respect to them, the record provides no basis for a finding that Majestic misrepresents the usual and customary retail prices of these seven items.

42. Testimony in support of the complaint was also received from twenty-four dealers in South Bend, Indiana, and Beloit, Janesville, and Waukesha, Wisconsin, which, as hereinbefore officially noticed, are towns ranging in population from about 30,000 to about 130,000.

These dealers sell essentially at retail in their local areas, and they will sometimes herein be referred to collectively as the local dealers. Their testimony related to sixty-four items of merchandise which were advertised and sold by Majestic through its 1961 general catalog.

43. Thirty of these items were sold in 1961 by one or more of the local dealers at prices which were the same, or substantially the same, as the comparative "retail" prices appearing in Majestic's catalog. As to these items, which include photographic film, cameras, projectors, pens, typewriters, baseballs, soft balls, golf balls, and shears, the record discloses that the comparative "retail" prices advertised by Majestic were not in excess of the usual and customary prices in the areas in which the dealers were located.

44. Two of the items, vacuum cleaners, were advertised in Majestic's 1961 general catalog at "retail" prices substantially in excess of the prices at which they were sold by the local dealers in 1961. These two vacuum cleaners were also included in the 1961 Spring and Summer Catalog of Majestic, which advertised only a part of its whole line of merchandise. In that catalog, the comparative retail prices shown for the two vacuum cleaners in question were substantially the same as the prices of the local dealers. There is no evidence as to whether or not these items have subsequently been advertised by Majestic at excessive retail prices. It is unnecessary to determine whether or not Majestic's 1961 Spring and Summer Catalog was adequate to correct its advertising of excessive retail prices on these items in its 1961 general catalog. The decision herein does not depend upon Majestic's advertising of these two items, and accordingly, for the purposes of this decision, they will be disregarded.

45. Two other items, photographic projectors, were advertised in Majestic's 1961 general catalog at "retail" prices which were the same as the prices at which they were sold by the local retailers during the first two months of 1961. In March of 1961, however, the manufacturer of these items reduced its suggested retail prices substantially below the "retail" prices advertised in Majestic's 1961 general catalog, and the local dealers thereafter sold at the lower suggested retail prices. It is unnecessary to determine whether or not Majestic's "retail" prices on these two items contained in copies of its 1961 general catalog distributed after the March, 1961 price reduction by the local retailers, are justified as representations that they were the prices at which the items were sold by others in the recent regular course of business. The decision herein does not depend upon Majestic's advertising of these two items, and accordingly, for the purposes of this decision, they will be disregarded.

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46. This leaves for consideration the advertising by Majestic in its 1961 general catalog of thirty items at comparative "retail" prices substantially in excess of the prices at which they were sold in 1961 by the local retailers. The evidence with regard to these items is summarized in the tabulation which appears below. Some of these items were sold by several of the local retailers, and in some instances each of them sold at the same prices and in others their prices varied. Except as otherwise specifically noted, the highest price at which any of the local retailers sold an item is the price included in the tabulation. The tabulation shows the number of local retailers in each town who testified with respect to each item. Beloit and Janesville are located approximately thirteen miles apart, and are in the same trade area.

Comparison of (1) the retail prices of local dealers with (2) Majestic's advertised comparative retail prices and with (3) Majestic's actual selling prices in 1961 on 30 items

Item	(1) Highest local retail price	(2) Major advertised compara- tive retail price	(3) Major actual selling price (code)	Number of dealers in South Bend, Beloit, Janesville, and Waukesha			
				SB	Be	Ja	Wa
Hoover 31..... ¹	\$59.95	\$79.95	\$53.97	3	2	-----	1
attachment set for							
Hoover 31.....	9.95	15.95	9.90	1	-----	-----	-----
Hoover 67.....	89.95	² 109.95	73.97	3	2	-----	-----
Hoover 66.....	79.95	99.95	68.97	3	1	1	-----
Rawlings:							
Stan Musial							
Trap-Eze							
glove.....	32.50	39.95	25.90	1	-----	1	-----
Stan Musial							
autograph							
glove.....	12.95	15.95	10.40	1	1	-----	-----
Eddie Matthews							
autograph							
glove.....	17.95	21.00	13.60	1	1	-----	-----
Mickey Mantle							
autograph							
glove.....	5.95	7.45	4.90	1	1	-----	-----
Remington:							
Quiet-riter.....	126.50	137.85	119.95	2	1	-----	-----
Travel-riter.....	75.00	85.35	69.95	1	-----	-----	-----
Royal Futura 800.....	126.50	142.28	109.95	4	2	1	-----
Royal Diana.....	95.00	126.07	89.88	2	-----	-----	-----
Royalite.....	53.11	79.75	49.95	3	1	1	-----
Smith-Corona Galaxy.....	130.00	149.27	109.77	4	2	1	-----

See footnotes at end of table.

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Comparison of (1) the retail prices of local dealers with (2) Majestic's advertised comparative retail prices and with (3) Majestic's actual selling prices in 1961 on 30 items—Continued

Item	(1) Highest local retail price	(2) Major advertised compara- tive retail price	(3) Major actual selling price (code)	Number of dealers in South Bend, Beloit, Janesville, and Waukesha			
				SB	Be	Ja	Wa
Spalding:							
Rocky Colavito glove-----	11.50	13.45	8.80	1	-----	1	1
Super Trappper mitt-----	10.95	13.45	8.80	-----	-----	-----	1
Yogi Berra mitt--	17.95	21.00	13.60	1	-----	1	1
Pancho Gonzales racket-----	9.95	12.45	8.73	-----	-----	1	1
Doris Hart racket-----	10.95	12.45	8.73	1	-----	1	1
Ashley Cooper racket-----	14.95	17.50	12.30	1	-----	-----	1
Fast-Play racket--	4.95	6.00	4.30	1	-----	1	1
Official basket- ball-----	7.50	8.45	5.60	1	-----	1	-----
Bill Sharman basketball-----	9.95	12.45	8.00	-----	-----	1	-----
Wilson:							
Hol-Hi golf balls dozen-----	10.95	15.00	10.00	1	-----	-----	-----
12-in softball-----	2.95	3.50	2.35	1	-----	-----	-----
Little League baseball-----	2.00	2.40	1.65	1	-----	-----	-----
Luis Aparicio glove--	13.95	17.00	11.20	1	-----	-----	-----
Nelson Fox glove---	22.95	32.00	20.80	1	-----	-----	-----
Championship tennis balls (3)---	2.35	2.75	2.10	1	-----	-----	-----
TV basketball-----	18.95	21.25	14.13	1	-----	-----	-----

¹ One dealer in Beloit sold at \$64.95. The other 5 dealers sold at \$59.95 or below.

² Majestic's 1961 Spring and Summer Catalog shows \$99.95.

47. The local dealers, whose testimony is summarized in the foregoing tabulation, were not so-called discount stores, and there is nothing to suggest that they followed cut-price policies or policies of underselling competition generally. On the contrary, they were essentially department stores and specialty stores, including camera shops, sporting goods stores, and typewriter stores, and their testimony generally was to the effect that they sold their merchandise at

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prices as high as they were able to obtain under the local competitive conditions which they were required to meet.

48. The prices of the local retailers reflected the general competitive level of retail prices in their local areas. The items of merchandise referred to in the foregoing tabulation were not usually and customarily sold at retail in 1961 in those trade areas at higher prices. As to those items, therefore, the prices designated as "retail" in Majestic's 1961 general catalog were substantially in excess of the prices at which such items were usually and customarily sold at retail in those trade areas in 1961.

49. The local dealers discussed their sources of the merchandise with respect to which they testified, the prices which they paid, and the margins of profit which they endeavored to obtain. They also discussed the problems and considerations which affected them in determining their selling prices, including price fluctuations from time to time, price variations among different categories of retailers, the activities of discount stores, the effects of prices in nearby market areas, price changes by manufacturers, and the influences of suggested retail prices and of resale price maintenance. Two witnesses who were presented by respondents as experts in the field of marketing, testified in some detail that these are factors normally affecting prices in retail markets.

50. The record indicates that the competitive experiences and problems of the dealers who testified were not peculiarly different from those of other dealers similarly situated. On the basis of this record, there is substantial reason to presume that the competitive conditions existing in the towns of South Bend, Indiana, and Beloit, Janesville, and Waukesha, Wisconsin, are not peculiarly different from competitive conditions existing in other towns of comparable size in the midwestern section of the United States. It is, accordingly, inferred that the competitive level of retail prices in those towns is generally representative of such prices in many other areas in which Majestic's catalogs are distributed.

51. Majestic's general catalog advertises more than 10,000 articles of merchandise. The evidence that it advertises comparative "retail" prices in excess of usual and customary retail prices is limited to thirty items. Respondents contend that the evidence reflects an insubstantial quantity of proof and does not sustain the burden of supporting the allegation that the prices designated by Majestic as "retail" prices on *many* of its items were in excess of usual and customary retail prices.

52. Counsel supporting the complaint offered evidence of the selected items as typical of Majestic's method of pricing, and the record indicates that the selected items did not represent isolated or exceptional instances. On thirty items the prices designated by Majestic as "retail" were substantially in excess of usual and customary retail prices, and on at least as many other items they were not. The evidence is sufficient to be convincing that there was a substantial number of items in each category, but there is nothing to indicate what proportion of the more than 10,000 items in Majestic's catalog was in each category. Presumably the proof with respect to both categories could be multiplied many times without being materially more definitive or conclusive on this point.

53. Evidence must be limited to practical dimensions. The circumstances here involved, as disclosed by the record as a whole, require the presumption that the evidence with regard to specific items and prices is representative of Majestic's method of pricing generally. The evidence supports the allegation that the prices designated by Majestic as "retail" prices for many of its articles of merchandise are in excess of the prices at which such articles of merchandise are usually and customarily sold at retail in the trade areas where such representations are made.

54. Majestic's use in its catalogs of comparative retail prices for many of its articles of merchandise is, therefore, false, misleading, and deceptive. To the extent that Majestic sells such articles to consumers for personal or household use, the comparative retail prices constitute misrepresentation of the prices at which such articles are usually and customarily sold at retail in the trade areas where such sales are made. To the extent that Majestic sells such articles to dealers for resale, the comparative retail prices constitute misrepresentation of the retail value of such articles; and they provide such dealers with an instrument for misrepresenting to their customers the usual and customary retail prices of such articles.

55. The use by Majestic in its catalogs of its actual selling price, which is in code and which is represented as a wholesale price, in conjunction with a higher comparative price, which is designated as "retail", constitutes the representation that the difference between the two prices represents savings from the usual and customary retail price in the trade areas where the representation is made. The difference between Majestic's actual selling price and the comparative retail price which it advertises for many of its articles of merchan-

dise does not represent savings from usual and customary retail prices.

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56. Respondents have identified twenty-five or more direct competitors in the "catalog industry" who are engaged in businesses similar to that of Majestic. The form and context of the catalogs of these competitors are similar to those of Majestic, the same general line of merchandise is offered, the same type of dual price system is used, including coded selling prices and comparative retail prices, similar wholesale status representations are made, and some of these competitors solicit the same types of customers in the same general areas. It is contended that this is a relevant industry of limited membership to which Majestic belongs, and that the practices and competitive features of this industry are such as to indicate that all of its members should be treated in identical fashion.

57. In these circumstances, respondents contend that if Majestic were required to discontinue its present method of pricing while its competitors in the catalog industry are left unhindered, it would be placed at a serious competitive disadvantage. They assert that it would be preempted from competing effectively and that it would be put out of business in the catalog field. These contentions are supported by the uncontradicted opinion testimony of Majestic's chief executive officer and the two expert witnesses who testified. Respondents urge, therefore, that if an order to cease and desist should be issued in this matter, its effective date should be stayed until similar orders are entered and made effective against all other members of the catalog industry.

58. There are now outstanding at least two proceedings by the Federal Trade Commission, charging similar violations by companies identified by respondents as competitors of Majestic in the "catalog industry", *National Porges Company, et al* (Docket No. 8248) and *Continental Products, Inc., et al* (Docket No. 8517), but this record does not disclose whether or not corrective action is warranted in those proceedings. An official of another company identified as a catalog competitor was called as a witness by respondents. That company follows a policy and method of operation substantially different from Majestic, and this record does not disclose whether or not its representations, under the conditions of its policy and operations, are false, misleading, and deceptive. There is no basis in this record for determining whether or not all or any of the other catalog

competitors identified by respondents are also engaged in unfair and deceptive practices similar to those of Majestic, or whether or not or when proceedings may be instituted by the Federal Trade Commission against any of them.

59. The record discloses, however, that Majestic's competition is not limited to other members of the "catalog industry" identified by respondents. It is also in competition with the many local retailers who operate stores in the area in which its catalogs are distributed. Consumer customers of Majestic who appeared as witnesses testified generally that they made purchases through its catalogs, rather than from local stores, largely because they believed its prices were lower than those of local retailers. At least two major catalog mail order companies, Sears Roebuck and Company and Montgomery Ward & Company, do not use a dual price method of advertising in their catalogs. Although respondents contend that no valid comparison can be drawn between the catalogs of those companies and of Majestic, there can be little doubt that those companies are competitive with Majestic.

60. The record also discloses that the dual method of pricing is not limited to Majestic's direct competitors in the catalog industry. The practice of advertising selling prices in conjunction with higher retail prices based upon manufacturers' suggestions or other factors is frequently used by the local dealers who testified, and there is testimony in the record that the practice is widespread among local retailers generally. It is also apparent from the numerous proceedings instituted and corrective orders issued by the Federal Trade Commission, that the practice of fictitious price advertising is widespread and warrants vigorous remedial action.

61. Under all of the circumstances, it appears that it would be contrary to the public interest to postpone an order prohibiting continued violations of law by these respondents for an indefinite period while the practices of a selected group of Majestic's competitors were examined and their propriety determined. Any attempt on a broad basis to postpone effective action against particular offenders until all of their competitors are similarly restrained would be hopelessly abortive.

62. Respondents' unfair and deceptive acts and practices have the capacity and tendency to mislead and deceive Majestic's customers, to provide others with instruments for deception, and unfairly to injure its competitors, and they should be stopped. In the Matter of *The Clinton Watch Company, et al* (Docket No. 7434), with respect to a request for a stay of the effective date of an order against

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fictitious pricing, the Commission said in its opinion of July 19, 1960 [57 F.T.C. 222, 231]:

We have carefully considered the grounds set forth by respondents in support of this request, and it is our opinion that the public interest far outweighs the private considerations urged by respondents.

Similar circumstances are present here, and the request by these respondents for a stay of the effective date of an order must be governed by the same considerations. It is, therefore, denied.

CONCLUSIONS

1. The use by respondents, Majestic and Arthur Mostow, of the false, misleading, and deceptive statements, representations, acts, and practices, as herein found, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were, and are, true and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

2. The aforesaid acts and practices of said respondents were, and are, all to the prejudice and injury of the public and of Majestic's 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.

3. Respondents Charles Mostow and Leon Gurny, in their individual capacities, have not been responsible for the formulation, direction, or control of the acts or practices of Majestic which are challenged in this proceeding.

ORDER

It is ordered, That respondents Majestic Electric Supply Company, Inc., a corporation, and its officers, and Arthur Mostow, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Any merchandise is offered for sale or sold at a wholesale price unless the price at which it is offered is, in fact, the price at which the merchandise or product is

usually and customarily sold at wholesale in the trade area or areas where the representation is made.

(b) Any amount is the usual and customary retail price of merchandise when it is in excess of the price at which the merchandise is usually and customarily sold at retail in the trade area or areas where the representation is made.

(c) Any savings are afforded in the purchase of respondents' merchandise from the usual and customary retail price in respondents' trade area unless the price at which said merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold in said trade area or areas where the representation is made.

2. Misrepresenting in any manner the amount of savings available to purchasers of respondents' merchandise or the amount by which the price of said merchandise has been reduced from the price at which it is usually and customarily sold at retail in the trade area or areas where the representation is made.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents, Charles Mostow and Leon Gurny, in their individual capacities.

OPINION OF THE COMMISSION

FEBRUARY 28, 1964

The complaint in this matter charges respondents with violating Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents (except for respondent Charles Mostow and Leon Gurny as to whom the complaint was dismissed) to cease and desist from the practices found to be unlawful. Respondents, having been granted a petition for review, have filed exceptions to the initial decision and the matter is now before us for consideration.

The respondent corporation, Majestic Electric Supply Company, Inc., hereinafter referred to as Majestic, is engaged in the business of selling general merchandise such as watches, jewelry, cameras, furniture, appliances, sporting goods, toys, linens and furs. Since 1948 it has sold merchandise through catalogs and circulars distributed through the mail to customers located in about 25 States of the United States. During each of the years 1960 to 1961 it distributed between 50,000 and 100,000 catalogs in commerce and during each of these years its interstate sales through its catalogs exceeded \$500,000.

In all of its advertising, Majestic is referred to as a wholesaler and the prices of all of its merchandise are designated as wholesale prices. The following representations are typical of those appearing in Majestic's catalogs and other advertising:

Majestic Wholesale Distributors; A fresh new way to buy wholesale; As a wholesale distributor for over 30 years Majestic etc.; Majestic is a distributor not a discount house, therefore you buy at true wholesale dealer costs.

Retail \$21.95—Special dealer price \$15.37.

Save the wholesale way, \$13.66 Retail \$29.98; Retail \$1.79 now 88¢; ½ Carat Diamonds \$88; \$275 Values.

Example of your hidden wholesale price, 36-1803-6950 Retail \$111.50, Stock Number \$69.50, your wholesale cost.

Lowest wholesale prices—We don't just meet Prices—Majestic sets the prices others cannot meet, that's why you save more.

Majestic, in referring to various articles of merchandise set forth in its catalogs mailed to prospective purchasers, sets out two prices: one, a so-called coded price, which is its selling price, is represented to be the wholesale price of the merchandise, and the other, a higher price, is designated as "Retail".

The complaint alleges, in effect, that respondents through use of claims such as those quoted above have falsely and deceptively represented that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, at which their merchandise is offered for sale, are wholesale prices; that the prices designated as "Retail" are the prices at which the merchandise referred to is usually and customarily sold at retail; and that the difference between their coded price and "Retail" price represents savings from the usual and customary retail prices in the trade areas where the representations are made.

Respondents have taken numerous exceptions to the initial decision, contending that the evidence does not support the findings upon which the examiner's conclusions as to the deceptive nature of respondents' practices are predicated.

With respect to the allegations concerning respondents' use of "wholesale price" claims, respondents do not deny that they have held themselves out as wholesalers or that they have represented that the prices at which their merchandise is sold are wholesale prices. They maintain that these claims are true, arguing that the majority of their sales are made either to retailers or to other business firms that buy in quantity for use as gifts, premiums, etc. Respondents further contend that the only evidence offered by counsel supporting the complaint to prove that they are not wholesalers was the testimony of several consumer witnesses who had purchased from re-

spondents "isolated products upon isolated occasions" and that it cannot be inferred from such evidence that respondents sell primarily to the ultimate consumer.

We think the basic issues raised by the aforementioned allegations are whether respondents generally sell to the ultimate consumer and, if so, whether the representations that they are selling at wholesale prices have the capacity and tendency to mislead such purchasers.

As to the first question, we have no doubt from our review of the record that respondents sell to the consuming public as a general practice. Looking first at respondents' catalogs, we note that various representations appearing therein are directed to persons who ordinarily buy at retail prices merchandise of the type featured in the catalog. Such a claim as "Save the Wholesale Way" is susceptible of no other interpretation. Certainly, retailers who customarily buy at wholesale prices would not consider the "wholesale way" as a different method of doing business or as a new way of saving. The reader is also invited to visit respondents' "Buying Centers" in Chicago and Skokie, Illinois, and is assured of "Ample Free Parking," "Car Loading Service" ("When your parcels are difficult to carry, we load them safely into your car."), and "No salesmen to bother you, and No Waiting, No Lines" ("Faster than self-service, incomparably faster than dep't. store service * * *"). Those who order from the catalog and wish to have the merchandise shipped by truck or rail are given the following instructions:

If your address is a Post Office Box or Rural Route, give brief directions to assist Carrier to locate your *house*. For example: South on Route 66, turn right at Super Mart, *first white house on left*. (Emphasis added.)

Doctors, lawyers, architects, and other "people of professional standing" are advised that they can open a Majestic charge account. A special sales catalog, two hundred thousand copies of which were distributed, states that Majestic had "One Price—The Lowest—To Everyone." (This catalog was distributed in addition to Majestic's regular catalog.)

The testimony of Arthur Mostow, executive head and general manager of respondent corporation, is also most revealing. Mostow admitted that Majestic's catalogs are sent to anyone who asks for one and that no investigation is made to determine the purpose for which the merchandise is purchased.¹ He further testified that sales were made to the public at the "coded" or "wholesale" prices in Majestic's "Buying Centers". Mostow also testified that the "average person" ordering from Majestic must pay cash or have the merchandise

¹ Mostow could not recall from memory the name of a single retailer out of 20,000 customers.

sent c.o.d. and that this type of transaction represented the great bulk of the sales made by Majestic. This same witness also testified that Majestic's *selling price* is determined by applying its average mark-up over cost of approximately 23%.²

Counsel supporting the complaint also called the aforementioned consumer witnesses to show that members of the public could, and did, purchase merchandise from Majestic for their own use. Their testimony on this point serves to corroborate the other evidence of record adduced to show the true nature of the business operated by respondents. It is our opinion, therefore, that the evidence adduced by counsel supporting the complaint establishes that respondents sell generally to the ultimate consumer in the ordinary course of their business.

It is also apparent from the testimony of respondents' two expert witnesses that they believed that Majestic was selling as a retailer. As a matter of fact, one of them testified that the only difference between Majestic and a discount house was that Majestic sold through catalogs whereas the discount house sold directly to the purchaser; and that there would be no difference between them if the discount house sold through a catalog.³

The next question to be decided is whether members of the public would be deceived by the representations that respondents are selling to them at wholesale prices. The examiner held in this connection that the term "wholesale prices" is understood to mean the prices at which the articles in question are ordinarily sold to retail dealers who intend to resell them in their local areas at a profit. The hearing examiner further found, and the record shows, that retail dealers in various trade areas purchased articles of merchandise sold by respondents at prices substantially below the "wholesale prices" shown in respondents' catalog.

Respondents contend, however, that their coded prices are wholesale prices since the examiner has also found that a substantial part of their catalog sales are "to resellers, and are therefore wholesale sales."⁴ In making this argument, respondents are in effect saying that such sales are literally and technically wholesale transactions

² Respondents' brief erroneously states that the amount designated in Majestic's catalogs as the "Retail" price is determined by applying an average markup over cost of approximately 23%.

³ Sales by a discount house are retail sales. See *Helbros Watch Company, Inc. v. Federal Trade Commission*, 310 F. 2d 868 (1962), wherein the court stated that "A retail sale is the transaction by which the merchandise comes into the possession of the ultimate consumer, regardless of the title by which the vendor may choose to denominate himself."

⁴ This finding is apparently based solely on the testimony of respondent Arthur Mostow.

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since they are made to customers who purchase for resale, and that the prices at which such sales are made are therefore wholesale prices. (See *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 F. 46 (1915), and *L. & C. Mayers Co., Inc. v. F.T.C.*, 97 F. 2d 365 (1938)). It appears, however, that the only type of retailer that purchases from respondents' catalog is one that resells from the catalog, maintaining no inventory or showroom. Mostow testified as follows with respect to these retailers:

Q. * * * You testified that you sell to retail dealers for resale to their customers. Do you know whether they use your catalogs to display merchandise?

A. I would think that would be the only way they have of selling it.

The Hearing Examiner: Did you intend the answer to mean you do know that they use your catalog?

The Witness: I have never been to their display to see them in a transaction with a customer, no, but how else would the customer know about it?

The Hearing Examiner: Is it your understanding that they use it in that way?

The Witness: Yes.

The record shows that the prices to such customers are the same as the prices at which respondents sell to the ultimate consumer and are substantially greater than the wholesale prices paid by respondents or by other retailers buying from the same sources as respondents.

Whether or not respondents' sales to purchasers who resell from respondents' catalog can be characterized as "wholesale" transactions is wholly irrelevant to the issue of whether the consumer may be deceived by the representation that respondents are selling to him at wholesale prices. The theory of the complaint here is that respondents sell to the ultimate consumer and that the consumer is led to believe by respondents' "wholesale" price claims that he can buy at the prices at which retailers purchase. A person reading respondents' catalog would not construe the term "wholesale prices" to mean only those prices at which articles of merchandise are sold to persons or firms who resell through respondents' catalog or some similar catalog. A prospective purchaser could reasonably interpret "wholesale prices" to mean the prices at which retailers normally purchase, or even the lowest prices at which any retailer purchases. Certain representations used by respondents undoubtedly convey the latter meaning. Cf. *Brown Fence & Wire Co. v. F.T.C.*, 64 F. 2d 934 (1933). For example, "Majestic is a DISTRIBUTOR not a Discount House, therefore you buy at true wholesale dealer cost" and "Lowest Wholesale Prices—we don't just meet prices—Majestic sets the prices others cannot meet, that's how you save more." It is clear from

the record that these claims are untrue. The evidence adduced by counsel supporting the complaint and corroborated by respondents' own witnesses is that Majestic is not a "Distributor" or a wholesaler but a retailer that makes some sales to a particular type of reseller at the same prices at which it sells to the public. These prices are not the "Lowest Wholesale Prices," nor do they represent the "true wholesale dealer cost," nor are they "wholesale prices" as that term is understood by the public. We find, therefore, that the examiner did not err in holding that respondents' designation of their selling price as "wholesale" was misleading and deceptive, and our order will prohibit respondents from using this representation in connection with their sale of merchandise to the ultimate consumer.

Respondents next take exception to the hearing examiner's holding that they had made misleading and deceptive representations as to the usual and customary prices of the products listed in their catalog and as to the savings which would be realized by purchasers of such products. This part of the appeal will be granted.

We have recently issued Guides Against Deceptive Pricing (effective January 8, 1964) which specifically cover the use of pricing claims such as those made by respondents. Guide III discusses the advertising of retail prices which have been established or suggested by manufacturers. Although not so designated, the higher "Retail" prices in respondents' catalog are, for the most part, retail prices which have been suggested by the manufacturers of the products. Guide III specifically states in this connection that:

* * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list of pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price), which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice.

The evidence in this case establishes that some of the articles listed in respondents' catalog were not usually and regularly sold in certain communities in which the catalog was disseminated at the represented higher "Retail" prices. But no showing was made, and, in view of the allegations of the complaint, no attempt was made to show, that the so-called "Retail" prices were appreciably in excess of the highest price at which substantial sales of the merchandise were being made throughout the area in which respondents' catalog was circulated. Consequently, the record does not support a finding that respondents' claims as to the "Retail" prices of their merchandise were deceptive under the new pricing guides. That part of the

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complaint challenging respondents' use of such claims will be dismissed.

Respondents have taken other exceptions to that part of the initial decision holding that they had made deceptive pricing representations. Since we are dismissing the charges covering use of such claims, it will be unnecessary to rule on these exceptions.

To the extent indicated herein respondents' appeal is granted and in all other respects it is denied. As modified by this opinion, the initial decision will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondents, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking therefrom paragraphs 31 through 62 and substituting therefor the following:

31. The evidence does not show that the prices designated "Retail" in respondents' catalogs were in excess of the prices at which substantial sales of the articles referred to were being made in the area in which the catalogs were distributed. Consequently, the evidence fails to establish that respondents' use of comparative pricing claims has the capacity or tendency to mislead or deceive the public.

It is further ordered, That the order to cease and desist in the initial decision be modified to read as follows:

ORDER

It is ordered, That respondents Majestic Electric Supply Company, Inc., a corporation, and its officers, and Arthur Mostow, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise to the ultimate con-

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sumer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that said merchandise is being offered for sale at wholesale prices.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents, Charles Mostow and Leon Gurny, in their individual capacities.

It is further ordered, That the allegations of the complaint that the respondents falsely and deceptively represented that the prices designated as "Retail" in their catalogs were the prices at which the merchandise referred to was usually and customarily sold at retail and that the difference between their coded price and "Retail" price represented savings from the usual and customary retail prices in the trade areas where the representations were made, be, and they hereby are, dismissed.

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

It is further ordered, That respondents Majestic Electric Supply Company, Inc., and Arthur Mostow shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

GRUEN INDUSTRIES, INC., TRADING AS
GRUEN WATCH COMPANY

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

Docket 8455. Complaint, Dec. 7, 1961—Decision, Feb. 28, 1964

Order requiring a leading manufacturer of watches to cease the practice of attaching to its watches or placing in conjunction therewith, tickets or tags bearing fictitious amounts which are represented thereby as the usual retail prices in the trade areas where the representations are made.

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 Gruen Industries,

Inc., a corporation, trading as Gruen Watch Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gruen Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 20 West 47th Street, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacturing, assembling, advertising, offering for sale, sale and distribution of watches to retailers, wholesalers and others for ultimate resale to the public.

PAR. 3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its 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 maintains, and at all times mentioned herein has maintained, a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, for the purpose of inducing the purchase of its products, has engaged in the practice of using fictitious prices in connection therewith by attaching or causing to be attached tickets to their said watches, or by placing or causing to be placed in conjunction therewith tickets or tags, upon which certain amounts are printed, thereby representing, directly or by implication, that said imprinted amounts are the usual and customary retail prices of said watches in the trade areas where the representation is made and where said watches are offered for sale. In truth and in fact, the said amounts are fictitious and in excess of the usual and customary retail prices of said watches in the trade areas where the representation is made and where said watches are offered for sale.

PAR. 5. Respondent, by the aforesaid acts and practices, provides means and instrumentalities whereby retailers and others may mislead the public as to the usual and customary retail price of their said watches.

PAR. 6. In the conduct of its business, and at all times mentioned herein, respondent has been in substantial competition in commerce with corporations, firms and individuals in the sale of watches of the same general kind and nature as that sold by respondent.

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and

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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 respondent's products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's 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. Sheldon Feldman and Mr. Anthony J. Kennedy supporting the complaint.

Cahill, Gordon, Reindel & Ohl, New York, N. Y., *Mr. Denis G. McInerney and Mr. Marshall H. Cox, Jr.*, for respondent.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

NOVEMBER 29, 1962

STATEMENT OF PROCEEDINGS

Complaint in this matter was issued by the Federal Trade Commission December 7, 1961, and was duly served on respondent. It charges the use of fictitious prices to promote the sale of Gruen watches. Specifically, it alleges that Gruen pretickets its watches with amounts represented to be the usual and customary retail prices when actually, the preticketed prices are higher than usual and customary prices. Thus, according to the complaint, Gruen provides "means and instrumentalities whereby retailers and others may mislead the public" as to the prices of Gruen watches. Violation of Section 5 of the Federal Trade Commission Act is alleged.

After being served with the complaint, respondent appeared by counsel and filed answer making certain admissions but denying generally any violation of law, and also advancing certain "further and additional defenses," concluding with a plea for dismissal of the complaint.

A prehearing conference was held in Washington, D.C., March 29, 1962, and hearings were held, also in Washington, May 14-16, 1962.

Because of stipulations of fact entered into between counsel, providing for the admission of considerable documentary evidence, it was unnecessary for Government counsel to call any witnesses. Re-

spondent called three of its officials and two retail jewelers as witnesses in its defense.

After closing of the record, Government counsel filed a motion to reopen the proceeding for the presentation of newly discovered evidence. The motion was granted, over respondent's opposition, and further hearings were scheduled in Seattle, Washington. Again, however, counsel stipulated the facts and agreed to the admission in evidence of the documents proposed to be adduced, and no additional hearings were required.

Before filing of the supplemental stipulation of facts, respondent, pursuant to leave granted, filed an amended answer admitting all the material allegations of fact in the complaint. That amended answer presented certain additional matters, as more fully set forth hereinafter, and proposed that no order be entered against Gruen until its competitors are similarly enjoined.

Thus, this record presents no real issue of fact for the hearing examiner to determine. On the contrary, the only factual issues framed by the pleadings have either been stipulated or are substantially uncontroverted, and the basic legal issues are likewise subject to no real dispute.

The one issue remaining to be resolved is the timing of the order—the question whether a stay is called for. This is a material issue of discretion concerning which the hearing examiner is required to make “findings and conclusions, with the reasons or basis therefor.”¹

Accordingly, although an admission answer has been filed, and the evidence in the record is largely uncontroverted, it is necessary for an informed determination that the facts and circumstances concerning the practices and present status of Gruen be clearly set forth—not simply a *pro forma* series of findings in the language of the complaint.

At the hearings referred to, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, and this 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.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by

¹ Rules of Practice, § 4.19(b).

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counsel supporting the complaint and counsel for respondent. 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 both parties, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of 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 Gruen Industries, Inc.,² also trading as Gruen Watch Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 20 West 47th Street, New York, New York.

2. Gruen is now, and for some time last past has been, engaged in the manufacturing, assembling, advertising, offering for sale, sale and distribution of watches to retailers, wholesalers and others for ultimate resale to the public. Its manufacturing and assembling operations are conducted through a wholly owned subsidiary, Gruen Watch Manufacturing Company, S. A., Bienne, Switzerland.

3. In the course and conduct of its business, Gruen now causes, and for some time last past has caused, its products, when sold, to be shipped from its 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 maintains, and at all times mentioned herein has 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 its business, and at all times mentioned herein, Gruen has been in substantial competition in commerce with corporations, firms and individuals in the sale of watches of the same general kind and nature as that sold by respondent.

5. For the purpose of inducing the purchase of its products, Gruen has engaged in the practice of attaching, or causing to be attached, tickets to its watches, or placing, or causing to be placed, in conjunction therewith tickets or tags upon which certain amounts are printed. For example, such tags are placed in the boxes in which its watches are displayed to the purchasing public by retailers.

² Sometimes referred to herein as Gruen or as respondent.

The amounts printed on such tags or tickets are Gruen's "suggested" retail prices. Although a Gruen official testified that there is a single national suggested retail price for each model or style of watch, and that this is reflected in Gruen's price tags, the evidence shows fictitious pricing in its classic sense—not simply a price figure suggested in good faith by the manufacturer that turns out to be higher than the prevailing price in a given trade area, but deliberate deceptive inflation for some retailers of the price figure printed on the Gruen tickets. (See Par. 22–29, *infra*.)

6. Gruen thereby has represented, directly or by implication, that the imprinted amounts are the usual and customary retail prices of its watches in the trade areas where the representations are made and where the watches are offered for sale.³

7. In truth and in fact, the imprinted amounts are fictitious and in excess of the usual and customary retail prices of Gruen's watches in some of the trade areas where the representations are made and where such watches are offered for sale.

8. In the Philadelphia, Pennsylvania, and the Newark, New Jersey, trade areas, Gruen watches usually and customarily sell at retail at amounts which are substantially—*i.e.*, more than 10 percent—below the amounts shown on the Gruen price tickets. Of the approximately 30 or more different model watches sold by Gruen in those trade areas, preticketed with amounts from \$19.95 to \$89.95, only the four models which are preticketed at \$19.95 usually and customarily sell at that price.⁴

A Gruen executive testified that Gruen sales in Philadelphia and in Newark account for approximately $1\frac{7}{8}$ percent and $\frac{7}{8}$ percent, respectively, of Gruen's total sales.

9. The Government's evidence is limited to those areas and, as developed below, to certain West Coast states,⁵ but since Gruen admitted in its amended answer that all of the material allegations of fact in the complaint are true, there is basis for a finding—as proposed by Government counsel—that the preticketed prices are

³ Even if Gruen had not admitted the truth of this allegation, the principle is well established by Commission and Court decision that a price ticket attached to or placed in conjunction with an article of merchandise constitutes a representation that the amount shown is the usual and customary price of the article in the trade area where the representation is made. *Clinton Watch Co.*, Docket 7434 (July 19, 1960), 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); *The Baltimore Luggage Co.*, Docket 7683 (March 15, 1961), 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962). Also, Gruen's own witnesses testified to the effect that the tickets were price representations.

⁴ These facts stipulated by the parties.

⁵ Actually, the evidence as to the West Coast States does not establish the "usual and customary price" in any trade area, but it leaves no doubt that Gruen engaged in fictitious pricing practices.

higher than the usual and customary retail prices in *all* trade areas where the representations are made. However, in its reply brief, Gruen argues that the term "some trade areas" more accurately reflects the facts of record.

10. There is evidence to support a finding that in Norfolk, Virginia, and Raleigh, North Carolina, Gruen watches customarily retail at Gruen's preticketed price.

The evidence shows that Bosse Jewelers, Inc., identified by Gruen's vice president as the purchaser of 72 percent of all Gruen watches sold in 1961 in Raleigh, North Carolina, sold them at preticketed prices.

Similarly, Barr Brothers Jewelers was identified as the purchaser of 83 percent of the Gruen watches sold in 1961 in Norfolk, Virginia. The testimony was that approximately 95 percent of Barr's sales were at preticketed prices.

11. There may be a basis for questioning the validity of the inference that Bosse's prices in Raleigh and Barr's in Norfolk were the usual and customary prices,⁶ but even accepting the premise that they were, such a fact does not, of course, constitute any defense to the uncontroverted showing of fictitious pricing elsewhere. *The Baltimore Luggage Co.*, Docket 7683 (March 15, 1961), 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962). The finding of misrepresentation in some areas is sufficient to support an order to cease and desist. Indeed, respondent makes no issue of this.

12. By the acts and practices described above, Gruen provides means and instrumentalities whereby retailers and others may mislead the public as to the usual and customary retail price of Gruen watches.

Not only has Gruen admitted this allegation, but it also is supported by the evidence and, in any event, is an inescapable inference from the other facts found.

13. Gruen's retail accounts are offered proportionally equal advertising allowances and are furnished with a mat service supplied by

⁶ The retailers themselves did not clearly demonstrate their qualifications to testify as to usual and customary prices. Bosse did state that "there is no cut price advertising in Raleigh, North Carolina, on watches of any description," and he was not aware of any stores there selling Gruen watches at a discount. However, on cross-examination, he conceded he did not know whether his ten competitors in Raleigh were selling Gruen watches and if so, at what price. According to Gruen's vice president, the only other purchaser of Gruen watches in Raleigh is Raleigh Distributing Company—presumably a wholesale distributor. Regarding Norfolk, Barr testified that only one other jewelry store—out of 35 or 40—carried Gruen watches. He stated also that he thought the GEX discount store there sold Gruen watches at a discount.

On balance, and particularly in view of the purchase volume shown by the record for these two retailers, it is found that their prices—and hence, Gruen's preticketed prices—were the usual and customary prices in those trade areas.

Gruen. The mat service contains illustrations of watches and, in immediate conjunction therewith, the same amounts found on the price ticket enclosed with each watch. The local retailers prepare and run their own ads without any control by Gruen, and they may disregard the Gruen mat service or use only parts of it. After the retailer's ad has been published, a "tear sheet" or copy of it may be forwarded to Gruen, where an adjustment is made for lineage attributable to Gruen. This policy is the same for direct mail advertising and for radio and television advertising.

Gruen has paid advertising allowances for ads in which retailers have displayed Gruen's suggested (or preticketed) price in conjunction with their own lower price, thereby showing the prospective purchaser a purported saving between the preticket price and the retailer's lower selling price. An example is CX 7b, an ad for Getz Jewelry Co., a large midwestern chain, showing preticketed prices stricken.

The Getz ad proclaims that the chain "breaks the price barrier" in selling at "1/2 off regular factory list prices."

14. Gruen has no control over the prices at which its customers resell to the public. It does not attempt to insist that its customers use the price tickets which it supplies or that they set their retail prices to correspond to those shown on such tickets. Although Gruen's customers are free to discard the price tickets, they generally use them because they consider them helpful sales aids.⁷

15. In its original answer, Gruen defended its preticketing as "a practice adopted * * * in good faith to meet the similar practices of competitors," and as a practice that "has served reasonably to inform both retail merchants * * * and the watch-purchasing public with respect to the value of watches sold by respondent."

It contended further that if respondent is forced to cease preticketing, it "will suffer serious financial loss and retail merchants and the watch-purchasing public will be deprived of useful and valuable information."

16. In the hearings, Gruen's quality control manager testified that "* * * if the price ticket is put on by a company such as Gruen, it is my belief it would be more sincere than if an individual jeweler or anyone who is selling the watch would put a ticket on it." He

⁷Although these facts have been stipulated, and must be taken as true, they take on a different coloration in the context of the evidence developed subsequent to the execution of this initial stipulation, as set forth in the supplemental stipulation (CX 54), showing Gruen's active sponsorship of fictitious price advertising. See *infra*, Par. 22-29.

referred to the price ticket attached by Gruen as "the only measuring stick the consumer can go by."

17. Similarly, Gruen's vice president in charge of advertising, described preticketing as a practice begun by Gruen 50 years ago "to establish a standard of value for any customer who bought a Gruen watch and to take it out of the area of permitting a retailer to charge whatever the traffic would bear." In defending preticketing as especially useful in connection with the sale of watches, he explained:

A watch to a consumer is a very blind item. He does not have the vaguest idea of the quality of the watch inside or the quality of the watch outside. He must therefore depend upon the integrity or the stability of the company whose product he buys as a guide to himself as to whether he is receiving a fair and honest value.

Gruen has "one national suggested retail price for each individual watch," and this is the preticketed price, according to this official. He stated that the preticketed price "is what we have established as the fair retail price for this watch and it applies to any customer of ours and to any consumer throughout the country who wishes to buy this watch." However, it is not intended, he said, to represent to consumers that it is the actual retail selling price in any given market.

18. After both sides had rested their case, a motion to reopen the proceeding for the reception of newly-discovered evidence was made by Government counsel and granted by the hearing examiner over respondent's objection. No further hearings were held, however, the new evidence being presented through a supplemental stipulation of facts (CX 54).

19. In the light of the additional evidence thus presented, Gruen's protestations of establishing, by means of its price tickets, a "standard of value"—"a fair retail price"—to guide the consumer to "a fair and honest value," based on the "integrity" of the manufacturer, are exposed as window-dressing for a deliberate scheme to mislead and deceive the watch-purchasing public—a plan to use fictitious price tags to make the consumer think he is realizing "tremendous savings."

If the "sincere" price tickets furnished for Gruen watches constitute "the only measuring stick the consumer can go by," the evidence here presented suggests that he would be well-advised to buy "blind."

20. The picture disclosed by this additional evidence is one calculated to give meaning to the warning *caveat emptor*.

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The facts developed in CX 54 and the accompanying exhibits spell out a sordid story of commercial immorality—of a cynical disregard for the “integrity” of the 88-year-old Gruen Company.⁸

21. From the stipulation (CX 54) and the supporting exhibits, there emerge the facts detailed in Paragraphs 22–29.

22. In June 1961,⁹ Weisfield's, a retail jewelry chain with 34 stores in the States of Washington, Oregon, Idaho and California,¹⁰ ordered 200 watches from Gruen. The cost to Weisfield's was \$12.95 each.¹¹

Gruen's suggested retail price on these watches was \$19.95. This was the price at which they were customarily preticketed by Gruen.

But Weisfield's requested that they be preticketed at \$49.50. Gruen complied and shipped the watches with \$49.75 price tickets included. (Why it raised the ante a quarter is not explained.) It appears that the transaction was with the knowledge—actual or constructive—of Gruen's president and its vice president in charge of sales.

Successive orders followed. Each time, the watches, usually preticketed at \$19.95, were preticketed, instead, at \$49.75.

Weisfield's advertised and sold these watches at special “sale” prices of \$17.77 and \$18.88.

23. According to the stipulation, this promotion achieved the desired purpose: “to bring customers into the store so that an opportunity would be afforded to salesmen to sell the customer an article which carried a greater margin of profit.”¹²

24. The stipulation matter-of-factly recites:

Both respondent and Weisfield's knew that these watches were ordinarily shipped to retailers with a \$19.95 preticket and respondent knew that these

⁸ This kind of operation was foreshadowed, perhaps, by evidence admitted earlier. Pushing to sell watches in ever-increasing volume, Gruen's vice president in charge of sales was surprised to find a jeweler reluctant to embrace the deceptive practices urged. This Gruen official, in a memorandum to a salesman, appears to sneer at a merchant who “talks about the dignity of the jewelry business,” and who worries about where this cut-rate and comparative price advertising “will head the chain.” (CX 19) There is evidence too (CX 20a-b) of Gruen's encouragement of advertisements featuring watches at “less than ½ price,” where the selling price is contrasted with the “factory ticketed” price.

⁹ The record indicates that the practice here described probably was in effect at an earlier date.

¹⁰ In addition, Weisfield's owns four Valu-Mart discount houses in the state of Washington and maintains jewelry concessions in Phoenix, Arizona, and Portland, Oregon. It annually devotes approximately \$500,000 to newspaper advertising. In 1961, its gross sales, exclusive of Valu-Mart, were \$18,617,507.

¹¹ Less 10% advertising allowance.

¹² See CX 39, a Weisfield's memorandum to store managers pointing out that the chain doesn't “make a legitimate profit” at the \$17.17 price, so that “step-up selling is necessary.”

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watches were the subject of a promotion whereby these watches were advertised in newspapers and prominently displayed in stores in conjunction with the \$49.75 preticket and were offered for sale at \$17.77 and \$18.88. Respondent also new that Weisfield's never had any intention to offer these watches to the public at \$49.75.

25. That wasn't all.

Gruen watches customarily preticketed at \$49.75 were specially preticketed at \$71.50 and shipped to Weisfield's. Stores of that chain advertised and sold them at \$37.50.

Other watches, usually preticketed at \$59.50, were preticketed at \$85, and Weisfield's sold them at \$44.75. Still another Gruen model, sold to Weisfield's at \$17.06, was preticketed at \$65, then advertised and sold at \$32.50.

26. The same sort of arrangement was blown up into sales promotions in which the public was urged to "save 1/2 and more." Again, the watch formerly preticketed at \$19.95 blossomed forth with a "regular" price of \$49.50, with the customer required to "pay only \$18.88."

27. On a bigger scale, Gruen devised and fostered an advertising and sales scheme that it calls its "Nationally Advertised Watches" promotion.

Like the Weisfield's deal, it involves shipment of watches with extraordinarily high pretickets. For example, the prime item would be watches costing the retailer \$12.95 and ordinarily preticketed at \$19.95. But for this promotion, they are preticketed at \$49.75, and the retailer advertises and sells them at "bargain" prices of \$17.77 or \$18.88.

Gruen suggests this promotion to its customers, old and new, and grants an advertising allowance for advertisements carrying it out.

There's an additional "kicker" to this promotion that Gruen points out to its customers (CX 48a). The suggested advertisements picture a Gruen watch, with the Gruen trademark "Precision" visible, but the brand name "Gruen" is omitted.

Instead, Gruen admitted in the stipulation, the advertisement is headlined "Nationally Advertised Watches" for the purpose of giving the consumer the impression that the retailer sponsoring the ad offers *all* national brands, not just Gruen, at drastically reduced prices.

28. The "Nationally Advertised Watches" promotion has been widely sponsored by Gruen in many parts of the country. It has involved other retail jewelry chains besides Weisfield's, including Gordon Jewelers, one of the largest jewelry chains in the United States, which has purchased almost \$300,000 worth of watches from Gruen.

29. Copies of advertisements featuring this promotion and similar deals involving the use of fictitious comparative prices are sent by Gruen to other jewelers. Through a campaign of correspondence, according to the stipulation, efforts are made to persuade the retailer that if he uses such promotions, they will bring customers into his store, where specially trained salesmen will have the opportunity to sell other items of merchandise carrying a greater margin of profit.

Gruen grants advertising allowances for retailer advertisements of this kind.

30. When Government counsel, in its motion to reopen, made known the substance of the evidence set forth in Paragraphs 22 through 29 of these findings, respondent's counsel, after determining that the allegations were substantially correct, filed a Motion for Leave to Amend Answer, accompanied by the amended answer. Duly received and filed without objection, the amended answer admitted all the material allegations of fact in the complaint. It also alleged that:

1. The use of price tags or tickets in the manner complained of herein as a practice followed by respondent's competitors and affords a competitive advantage to the user over one who does not follow that practice.

2. If respondent is required to cease and desist from that practice while its major competitors continue to do so, respondent will suffer serious and irreparable financial loss and will probably be forced out of business.¹³

In support of those contentions, the record contains evidence giving rise to the findings set forth in Paragraphs 31 — 41.

31. Many years ago, leading watch companies, including Gruen, adopted the practice of preticketing their watches with their suggested retail prices. Gruen has done so for about 50 years. The practice of preticketing watches with purported suggested retail prices is prevalent throughout the industry and is followed by Bulova, Benrus, Waltham, Elgin and all other brand-name watch companies. These preticketed prices are frequently not the actual retail selling prices.

32. Gruen's principal competitors in the watch industry are Bulova Watch Company and Benrus Watch Company, Inc.; Waltham Watch Company is also a major competitor. Complaints alleging substantially the same charge as that made against Gruen here are pending against each of these three principal competitors (Dockets 7352, 7583 and 8396).¹⁴ Gruen watches are of at least comparable

¹³ Cf. Paragraph 15. Note the deletion of the claim of "good faith" and also of the allegation that pretickets provide retailers and consumers with useful and valuable information respecting the value of Gruen watches.

¹⁴ All three cases are pending before the Commission on petitions for review.

quality to competitive watches bearing similar preticketed prices.

33. If an order in the form proposed by Government counsel—which is the order being issued by the hearing examiner—were to be entered, the practical effect of such an order would be to require Gruen to stop all preticketing. (This may be speculative, but the uncontradicted evidence to that effect is persuasive.)

34. If Gruen were to stop preticketing its watches while its competitors continued the practice, substantial customers would cease to do business with Gruen.¹⁵ It is estimated that the company's sales would fall off by at least 20 percent and probably by as much as 31 or 32 percent.

35. After a history of profitable operations extending through the fiscal year ended March 31, 1954, in which it earned \$886,985, Gruen suffered severe reverses which resulted in the following losses by it:

<i>Fiscal years ended March 31</i>	<i>Losses</i>
1955 -----	\$1,125,674
1956 -----	965,799
1957 -----	2,333,481
1958 -----	3,553,278
1959 -----	2,920,528
1960 -----	1,830,723

36. In 1959 a new group of investors became financially interested in Gruen and late that year brought the present management into the company. Gruen was then in desperate financial straits. Outstanding bank loans exceeded \$4,000,000; each week brought a crisis as to whether the company could meet its payroll and pay its suppliers; Gruen's manufacturing subsidiary was virtually inactive since Gruen lacked funds to finance the manufacture of watches by it; and the company's watch inventory was excessive and in large part obsolete.

37. Gruen's new management was able to effect substantial savings by a number of stringent cost-cutting measures, including moving its offices and reducing its inventory from \$1,800,000 to \$800,000. The company was also able to enter into a revolving credit arrangement with The Chase Manhattan Bank under which it regularly pledged its receivables in return for loans of 85 percent of their value. This made available working capital which permitted the respondent to reactivate its Swiss manufacturing plant, to re-establish credit with its suppliers in the United States, and otherwise to meet its obligations as they came due.

¹⁵ The importance of preticketing in the watch trade is illustrated by the testimony of the two retail jewelers who testified at the hearing. Each testified that Gruen's price tickets were of sufficient importance to him that he would stop buying Gruen watches if Gruen stopped furnishing tickets with its watches. There is other evidence indicating this attitude is widespread.

38. Under the new management, the company reduced its losses in the fiscal year ended March 31, 1961 to \$508,759. Final consolidated figures for the fiscal year ended March 31, 1962, were not available at the time of hearing, but preliminary, unaudited figures for the parent company alone showed a profit for the year of \$11,011, and the consolidated figures were expected to show a profit of approximately that figure.

39. Gruen's financial condition, although greatly improved in the two years of its current management, nonetheless remains precarious. The company, because of its lack of capital, is still dependent upon continuously pledging new receivables in order to maintain working capital. It has no other collateral on which to obtain more funds and no further source to which to turn for funds.

40. There is uncontradicted testimony that in its present financial condition, Gruen would be forced out of business if sales should drop 15 percent to 20 percent, since the company would then be unable to generate sufficient cash from receivables to continue operations. A 20 percent drop in sales was the minimum forecast by a Gruen official, on the basis of his experience, if Gruen stops preticketing its watches while its principal competitors continue the practice. Thus, there is basis for believing that if the order here sought were to become effective immediately, it would force Gruen out of business.

41. Gruen would be severely and irreparably injured, indeed it might be eliminated as a competitor in this field, if it were required to cease preticketing its watches while its principal competitors continued that practice.

42. Although Gruen's present precarious economic status obviously is no defense in this proceeding, there is merit in the argument that any order herein should be so fashioned as to enable it to continue in business. Although it has foreign subsidiaries, Gruen is an American-owned and operated company, in business here since 1874. It has over 700 employees and is a substantial enterprise.

Not only Gruen's interest, but more important, the public interest, would be better served by keeping Gruen as a healthy, vigorous competitor in this field.

43. Simultaneously with the filing of its amended answer, Gruen also made application to the Commission for the promulgation of a "Trade Regulation Rule" providing substantially as follows:

No manufacturer, wholesaler, or other person selling watches in commerce shall, with respect to such watches:

(a) represent, directly or indirectly, by means of preticketing or in any other manner, that any amount is the usual and regular retail price of said watches when such amount is in excess of the price at which they are usually

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and regularly sold at retail in the trade area or areas where the representation is made; or

(b) furnish or place in the hands of others any means or instrumentality, or put into operation any plan or device, with knowledge that others may thereby mislead the public as to the usual and regular retail price of said watches.

44. Calling attention to the pendency of proceedings against Gruen's major competitors complaining of preticketing practices, the amended answer then "prays that the effect of any order against [Gruen] be suspended until similar orders have been entered against its major competition or until the Commission has promulgated an industry rule prohibiting the practice * * *."

45. In its Proposed Findings of Fact and Conclusions of Law, respondent specifically proposes that the order to cease and desist herein be subject to a proviso as follows:

PROVIDED, HOWEVER, that this order shall not become effective until after the Commission has acted on the Application of Gruen Industries, Inc., filed July 24, 1962, for the promulgation of a trade regulation rule prohibiting misleading representations regarding the retail price of watches and, if said application is granted, until the effective date of said rule. In the event that said application is denied or no such rule is promulgated, this order shall not become effective until the proceedings in Commission Docket Nos. 7583, 7352 and 8396 are concluded.¹⁶

46. In considering Gruen's proposals, we are met by a threshold question whether they properly may be entertained by the hearing examiner, or at least, whether he may provide, in an initial decision, for stay or suspension of an order to cease and desist.

We begin with the proposition that the Commission obviously has discretionary authority to suspend or stay its cease and desist orders for good cause shown, *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958). And it has exercised that authority in numerous instances comparable to the instant matter.

However, for reasons that are not altogether clear, Government counsel take the position that the hearing examiner has no authority to include a proviso for suspension in his initial order.

There appears to be no valid reason why, in a proper case, the hearing examiner may not provide for suspension of a cease and desist order in an "initial" order that is subject to appeal to the Commission or to review by the Commission *sua sponte*.

47. According to § 8 of the Commission's Statement of Organization, in *Rules of Practice, Procedures and Organization* (June 1962),

¹⁶ These proceedings involve Bulova Watch Company, Benrus Watch Company and Waltham Watch Company, identified as major competitors of Gruen. See footnote 14, *supra*.

"Hearing examiners are officials to whom the Commission, in accordance with law, delegates the initial performance of its adjudicative functions to be exercised in conformity with Commission policy directives and with its Rules of Practice."

Under § 4.13 of the *Rules of Practice*, hearing examiners are empowered "To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adversary proceeding * * *."

Additionally, § 4.19(b) of the *Rules* provides:

An initial decision shall include a statement of (1) findings and conclusions, with the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) an appropriate order.

48. To rule initially on the instant matter is to carry out the Commission's "adjudicative function" delegated to the hearing examiner for "initial performance." Likewise, this may be considered in the nature of a motion "appropriate in an adversary proceeding," which the hearing examiner is called upon to "consider and rule upon, as justice may require."

Finally, the question whether the facts and circumstances of a particular case warrant suspension of an order to cease and desist also appears to be an issue of discretion upon which the hearing examiner is required to rule. Similarly, the question of the effective date of an order appears to be one embraced in the question of what constitutes "an appropriate order."

49. The only case cited by Government counsel in support of their position is *Clinton Watch Company*, Docket 7434 (July 19, 1960).¹⁷ That case, however, does not stand for the proposition contended for. There, the question before the hearing examiner was the acceptance of a consent settlement agreeable to both parties but conditioned on the part of the respondent by a proviso that the Commission decision be withheld until all pending cases against competitors were also ready for decision—a condition opposed by Government counsel.

That is a far different situation from that obtaining in the instant case.

50. Thus, it is concluded that the matter is one on which the hearing examiner may rule initially.

51. That determination having been made, the question for decision is what action should now be taken.

¹⁷ 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962). Despite Government counsel's citation of the Court's decision, the point here in issue—that is, the role of the hearing examiner—was not considered in the appeal. The only ruling on that point was that of the hearing examiner, who held he could not accept the settlement.

52. Interestingly enough, it is on the *Clinton Watch* case that respondent principally relies in seeking suspension of the order to cease and desist. In reviewing the initial decision in that case, the Commission took note that:

Throughout this proceeding, respondents have requested that the Commission stay the effective date of any cease and desist order with respect to the fictitious pricing charge until Commission proceedings involving similar charges against certain of their competitors are completed.

Rejecting that petition, the Commission stated:

We have carefully considered the grounds set forth by respondents in support of this request, and it is our opinion that the public interest far outweighs the private considerations urged by respondents.

On review, the Court of Appeals for the Seventh Circuit took note of the claim that to require Clinton to discontinue its deceptive advertising and ticketing practices while larger competitors (against whom Commission proceedings were pending) persisted in those practices would mean that Clinton "would thereby be placed in a disadvantageous competitive position, would sustain heavy financial loss, and would possibly be eliminated from competition * * *." The Court stated:

Petitioners' theory is not without flaws. They are prematurely assuming that pending proceedings against competitors will culminate in findings of violations of the Act and in the issuance of orders to cease and desist. Further, petitioners are asking this court to *assume* that they will be prejudiced by discontinuance of the deceptive practices. *There is no evidentiary basis from which it must be inferred that petitioners will be forced out of business if they are restricted to honest practices while their competitors are free to employ questioned methods pending termination of Commission proceedings against them.* The circumstances of this case do not warrant resort to the court's equitable powers or interference with the Commission's exercise of its wide discretion in the choice of remedy deemed adequate to cope with deceptive trade practices. Petitioners have failed to show that there has been a patent abuse of discretion by the Commission.¹⁸

53. Commenting, during the hearings (Tr. 120), on the lack of evidentiary basis in the *Clinton Watch* record for a conclusion that the respondent might go out of business as a result of the order being entered, respondent's counsel stated "Now, we do not propose to have our record barren in that respect. We propose to offer proof of that."

As a result, the record here, unlike that in *Clinton*, is replete with evidence that Gruen will in fact be forced out of business if an order in the form proposed is entered against it while its principal competitors remain unaffected.

¹⁸ 291 F. 2d at 841. Emphasis added. The language certainly suggests that the presence of evidence such as is contained in this record might have led to a different result.

54. The Commission in the past has not hesitated to adopt appropriate means to assure that an industry-wide practice would be banned as to all members of the industry at the same time.¹⁹

55. The instant case may be distinguished from that of *E. Edelman & Co.*, Docket 5770, 51 F.T.C. 978, 1008 (1955),²⁰ where the Commission held that there was "no valid reason" for making the hearing examiner's order "inoperative until all of respondent's competitors are put under similar restraints. To advance the argument is to answer it—obviously this Commission could not function under such restrictive and unwielding [*sic*] procedures. Orders would be forever pending, and unlawful industry practices rarely, if ever, corrected." Involved also in that determination was a misinterpretation of the order by respondent.

Here, there is no such sweeping request as was involved in *Edelman*. The request does not contemplate an order "forever pending."

56. It should be emphasized that this is not relief that respondent can demand as a matter of right, particularly under the circumstances of this case. It is a matter within the sound discretion of the Commission, a determination here made initially by the hearing examiner.

The cases teach that the test is not the effect on the *private interests* involved but the effect on the *public interest*.

We have already seen that this was the test applied by the Commission in *Clinton Watch*. Similarly, in the case of *The Great Minneapolis Surplus Store, Inc.*, Docket 7589, 56 F.T.C. 917 (1960), a petition that a consent order prohibiting deceptive pricing be suspended or modified on the ground that competitors were engaging in the practices forbidden to respondent was denied. The Commission said that no showing was made that modification of the order would be *in the public interest* (Order Denying Petition to Modify, July 22, 1960).

57. In the opinion of the hearing examiner, this is an appropriate case for the exercise of the Commission's discretion to stay an otherwise justified order to cease and desist in order to prevent undue

¹⁹ For example: *Sperry Rand Corporation*, 55 F.T.C. 655 (1958); *Schick, Inc.*, 55 F.T.C. 665 (1958); *North American Phillips Company*, 55 F.T.C. 682 (1958); *Ronson Corporation*, 55 F.T.C. 1017 (1959); the *Carpet Industry* cases, Dockets 7420, 7421, 7631, 7632, 7633, 7634, 7635, 7636, 7637, 7638, 7639 and 7640 (1960, 1961, 1962); *Swift & Co.*, Docket 8304 (dismissed July 20, 1962); *American Home Products Corp.*, Docket 8318; *Bristol-Myers Co.*, Docket 8319; *Plough, Inc.*, Docket 8320 and *Sterling Drug, Inc.*, Docket 8321 (suspense orders, June 25, 1962).

²⁰ *Affirmed*, 237 F. 2d 152 (7th Cir., 1956), *cert. denied*, 355 U.S. 941, *rehearing denied* 356 U.S. 905.

competitive injury to a respondent—injury that may be fatal, with consequent lessening of competition.

This conclusion is reached despite the fact that respondent's petition does violence to the concept that one seeking equity must come into court with "clean hands." The flagrant nature of the practices engaged in by Gruen does not commend the case as one warranting special consideration for respondent.²¹

Furthermore, it is repugnant to the principles and standards for which this Commission stands to make a concession permitting a continuation of deceptive practices, even temporarily, in apparent recognition of the claim that they are necessary for Gruen to stay in business.

Nevertheless, all things considered, suspension appears appropriate on the basis of the showing made of the possibility, if not the probability, that because of its already precarious financial situation, Gruen might be forced out of business if it were forced to stop preticketing²² before its principal competitors are subject to the same prohibitions.

58. It may be argued that an order must be entered against Gruen immediately because orders already have been entered against other members of the watch industry. But none of those other respondents made the showing of irreparable injury to a substantial enterprise that Gruen has made here, and none of those cases can justify an order removing Gruen from the field of competition for practices which all national brand watch companies still pursue. It is protection of the public interest and not survival of the most dilatory that the Commission should seek.

59. Regarding Gruen's petition to the Commission to initiate a rule-making proceeding, pursuant to § 1.61 *et seq.* of the Commission's Rules of Practice, it is evident that if the Commission initiates the rule-making proceeding and issues the rule requested by Gruen, the entire industry would be required to abandon preticketing at the

²¹ In fairness to respondent and its counsel, it should be noted that both before and after the complaint was issued, Gruen voluntarily produced to the Commission all files or other data requested of it. Moreover, despite Gruen's admitted interest in postponing the entry of any order, respondent has made no effort to delay this proceeding. On the contrary, Gruen's counsel expedited the proceeding at every stage by entering into stipulations of fact making it unnecessary for counsel supporting the complaint to introduce any testimonial evidence. These stipulations, and respondent's cooperation in bringing all its witnesses to Washington, made it possible to conclude the actual hearings before the examiner in two-and-a-half days and to avoid expensive and time-consuming hearings in Philadelphia, Pennsylvania; Newark, New Jersey; and Seattle, Washington. The Gruen complaint was issued December 7, 1961, and respondent concluded its testimony on May 16, 1962. (See Statement of Proceedings, *supra*.)

²² Granted that the order prohibits preticketing only where it is deceptive, nevertheless, respondent has persuasively demonstrated that the practical effect is to preclude altogether the use of preticketing in the sale of its watches. See Par. 33, p. 1206.

same time. Thus, the Commission's objectives would be accomplished without further competitive injury to any individual industry member resulting from its being under an order while its competitors are free to continue the preticketing practice.

60. If the Commission should decline to initiate such a proceeding for any reason, it appears to the hearing examiner that the impact of any order against Gruen should at least be stayed until final disposition of the proceedings pending against its three principal competitors, Benrus, Bulova and Waltham. This alternative form of relief, in the examiner's opinion, would be less satisfactory from both public and industry viewpoints, because it would expose Gruen to competitive injury resulting from the continuing practices of other competitors as to whom there may be further delay before entry of an enforceable Commission order. However, such relief, in the examiner's opinion, would constitute the bare minimum necessary to enable Gruen to survive in what appears to be a fiercely competitive industry.

61. Gruen's problem of how to stop preticketing and yet stay in business is a problem faced in greater or lesser degree (depending upon individual economic strength) by each company in the industry. Although obviously, Gruen is not eager to abandon preticketing, because it does not know what the effect of abandonment will be on the sales of watches generally, its present concern is with the perilous prospect of being forced to abandon preticketing while other companies continue the practice.

62. To sum up, the record here demonstrates Gruen's precarious economic condition, and the irreparable injury that would result to Gruen from the immediate entry of the order proposed by Government counsel. The company's executives have testified, on the basis of past experience and without undue pessimism, that abandonment of preticketing by Gruen while its competitors continue the practice would be a fatal blow to Gruen.

Yet the order here, as a practical matter, would effectively prohibit preticketing. To enforce such an order against Gruen alone under these circumstances, while all other national brand watch companies are allowed to continue preticketing, would not, in the opinion of the examiner, be in the public interest.

63. Accordingly, the hearing examiner is entering (as Paragraphs 3 and 4 of the initial order) the order proposed by Government counsel — the same order that the Commission in its complaint indicated would be appropriate "if the facts are found to be as alleged" — and has provided for suspension of its effective date pending further order of the Commission.

64. The hearing examiner has avoided making the termination date of the suspension specifically dependent on Commission action on the proposed Trade Regulation Rule, or, alternatively, on Commission and perhaps Court action in three other pending cases. Those appear to be appropriate matters to take into account, but the hearing examiner is aware that to tie one case to another, and more particularly, to a group of cases, poses practical and legal problems that cannot be foreseen at the time such a provisional order is entered.

65. In the opinion of the hearing examiner, if the Commission concurs that the public interest requires suspension of the broad order in this case, at least until respondent's major competitors are similarly enjoined, that result may be achieved by the order here entered, and without the complications inherent in making suspension specifically dependent on some action in the indefinite future. In that way, the relief requested by respondent is provided for so long as the Commission considers suspension to be in the public interest. Respondent is entitled to ask no more than that.

66. However, this record makes it clear that during the period of suspension, the public—including consumers, Gruen's competitors and honest retailers—must be protected from the gross form of fictitious pricing described in Paragraph 22 to 29 of these findings—the wholly artificial and flagrantly deceptive inflation of price tickets shown in the Weisfield's transactions, for example.

Obviously, there should be *immediate* cessation of that type of practice, and this is provided for in Paragraphs 1 and 2 of the initial order. Furthermore, the initial order has made the suspension of Paragraphs 3 and 4 of the order dependent on a showing of good faith by respondent in regard to Paragraphs 1 and 2.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The acts and practices of respondent, 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 usual and customary retail prices of its watches, and into the purchase of substantial quantities of such products as a result. As a consequence, trade has been, and may be, unfairly diverted to respondent from its

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Order

competitors, and substantial injury has thereby been done, and may be done, to competition in commerce.

4. By its acts and practices respondent 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 usual and customary retail prices of respondent's merchandise.

5. The acts and practices of respondent, as herein established, were, and are, all to the prejudice and injury of the public and of respondent's 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.

6. Although respondent does not come before the Commission with "clean hands" so as to entitle it to demand relief in the nature of equitable relief, it has made a showing that it may suffer irreparable injury—with consequent injury to competition—unless the order to cease and desist proposed by Government counsel is stayed or suspended. Such stay or suspension would be to the interest of the public.

7. The public interest requires, however, that there be immediate cessation of respondent's deliberate, wholly artificial and flagrantly deceptive inflation of price tickets, as described in Paragraphs 22 to 29 of the foregoing Findings of Fact.

ORDER

It is ordered, That respondent Gruen Industries, Inc., a corporation, trading as Gruen Watch Company or under any other name, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing merchandise at an indicated retail price, or otherwise making representations to the public, directly or indirectly, concerning retail prices, when respondent knows, or has reason to know, that the indicated retail price is fictitious and in excess of the price at which the merchandise is sold, or is reasonably expected to be sold, at retail in a substantial segment of the trade area where the representation is made.

2. Supplying to or placing in the hands of any distributor or retailer any price tags or tickets, or other materials displayed to the purchasing public, which contain retail prices, list prices, suggested retail prices or suggested list prices, whether so designated or not, when respondent knows, or has reason to know, that such price figures are fictitious and in excess of the price at which the merchandise is sold, or is reasonably expected to be sold, at retail in a substantial segment of the trade area where the representation is made.

3. Representing, directly or by implication, by means of preticketing, or in any other manner, that any amount is the usual and regular price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representation is made.

4. Furnishing or placing in the hands of others any means or instrumentalities, or putting into operation any plan or device, whereby others may mislead the public as to the usual and regular retail price of respondent's products.

Provided, however, That the effective date of Paragraphs 3 and 4 of this order be, and it hereby is, suspended until further order of the Commission; and

Provided further, That such suspension be, and it hereby is, conditioned on the execution by respondent, within 20 days after service on respondent of the initial decision herein, of assurances satisfactory to the Commission that respondent is complying and will comply with Paragraphs 1 and 2 of this order.²³

OPINION OF THE COMMISSION

FEBRUARY 28, 1964

By ELMAN, *Commissioner*:

The complaint in this matter charges respondent, a leading manufacturer of watches, with having preticketed its merchandise with fictitious retail prices, in violation of Section 5 of the Federal Trade Commission Act. In its amended answer, respondent admitted that it had engaged in the unlawful practice charged in the complaint. Consequently, the trial before the hearing examiner was concerned solely with the question of relief. In his initial decision, the exam-

²³ This procedure is undoubtedly novel, but it is designed, in the light of § 4.19 of the Rules of Practice, to give the Commission opportunity, if no petition for review is filed, to determine, on the basis of respondent's assurances, whether to permit the initial decision to become its decision on the expiration of the 30-day period after service, or whether it is necessary or desirable to docket it for review.

iner entered a cease and desist order containing four paragraphs. Paragraphs 1 and 2 are intended to forbid the specific form of deceptive pricing in which respondent was found to have engaged—what the examiner described as “the wholly artificial and flagrantly deceptive inflation of price tickets” (initial decision, p. 1214). Paragraphs 3 and 4, on the other hand, are intended to forbid the deceptive practice of a manufacturer’s advertising or disseminating fictitious suggested retail prices. However, in a proviso to paragraphs 3 and 4, the examiner ordered these provisions of the order suspended, on the ground that immediate entry of a “broad” order against respondent would be inequitable because its principal competitors were not subject to such orders.

Complaint counsel have appealed from the initial decision, challenging the suspension proviso and also suggesting certain modifications in the language of the examiner’s order. Respondent has also appealed, contending that paragraphs 1 and 2 of the examiner’s order are too broad and that paragraphs 3 and 4 should be suspended pending promulgation of a Trade Regulation Rule by the Commission (see Section 1.67 of the Commission’s Procedures and Rules of Practice (August 1, 1963)) dealing with the general problem of fictitious pricing in the watch industry.

As already noted, there is no issue as to respondent’s violation of law. Concededly, respondent preticketed merchandise with retail prices it knew to be grossly in excess of what the merchandise would actually command in the retail market. These prices were not *bona fide* estimations of retail value; they were not respondent’s customary suggested retail prices for the merchandise in question. These inflated prices were, rather, deliberate fabrications made at the demand of certain retailer customers of respondent who were bent on deceiving the buying public with the offer of nonexistent bargains.

Nothing in the Commission’s newly revised Guides Against Deceptive Pricing (issued January 8, 1964) justifies respondent’s conduct. On the contrary, the unlawfulness of such conduct is made explicit in Guide III: “a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions” (p. 5). However, while the revised Guides do not change the law with respect to such conduct, they have a definite bearing on the issue of relief—the only issue before the Commission.

As both the parties and the hearing examiner appear to recognize, the fact that respondent has been found guilty of a particularly flagrant form of an unlawful practice does not justify an order limited to the particular flagrant acts; rather, it emphasizes the

necessity for an order that will effectively prevent the recurrence of the unlawful practice—here, the practice of a manufacturer's advertising or disseminating fictitious suggested retail prices for his merchandise. Guide III of the Commission's newly revised Guides Against Deceptive Pricing deal explicitly and at length with this practice. Accordingly, we have drafted an order to cease and desist in the language of Guide III.

Should respondent desire guidance with respect to the requirements of this order, the provisions of Guide III should prove helpful. The Guides are designed to afford practical, concrete guidance and assistance to the businessman as to the requirements of law, or, in this case, to respondent as to the requirements of the cease and desist order. If respondent in the future conforms in good faith to the standards set forth in Guide III, it will be in compliance with the Commission's order. In addition, if Guide III does not answer all of the specific questions that may arise as to respondent's duties under the order, the Commission's procedures afford ample opportunity for obtaining definitive advice from the Commission as to the application and interpretation of the order. Section 3.26(b), Procedures and Rules of Practice (August 1, 1963); see, e.g., *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F. 2d 480, 488 (2d Cir. 1962).

Our modification of the cease and desist order contained in the initial decision renders unnecessary an extended discussion of respondent's contention that the "broad" parts of the order should be suspended pending promulgation of an industry-wide Trade Regulation Rule. The unduly broad portions of the order contained in the initial decision, which caused concern to the examiner and to respondent, have been eliminated. With respect to the modified order we are entering, what the Commission recently stated in rejecting a similar contention made by another watch manufacturer is apposite:

The Commission does not believe that the public interest warrants a suspension of the existing order pending completion of the Commission's proceedings against respondents' competitors. However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. Compliance with such orders, as thus modified, should not impose on respondents any onerous or unreasonable burden. The Guides give adequate recognition to the legitimate interests of the businessman and are not punitive or inflexible. The fact that respondents are formally obliged to comply with the order should not interfere with the effective marketing of their products or place respondents at an unfair competitive disadvantage vis-a-vis their competitors who, though not under formal order, are equally

bound by the substantive requirements of the Federal Trade Commission Act, as defined and particularized—in relation to fictitious pricing—by the recently revised Guides. *Clinton Watch Co.*, F.T.C. Docket 7434 (Order Denying Petition to Reopen Proceeding, issued February 17, 1964 [p. 1443 herein]).

Commissioner MacIntyre did not concur, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

FINAL ORDER

Upon consideration of the cross-appeals of the parties from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That the initial decision be, and it hereby is, adopted by the Commission to the extent consistent with the accompanying opinion, and rejected to the extent inconsistent therewith.

It is further ordered, That respondent, Gruen Industries, Inc., a corporation doing business under the name of Gruen Watch Company or under any other name, and its officers, representatives, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches, or any other merchandise, in commerce, do forthwith cease and desist from:

(1) Advertising, disseminating or distributing any list, pre-ticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondent's trade area;

(2) Furnishing any distributor, dealer or retailer with any means whereby to deceive the purchasing public in the manner forbidden by subparagraph (1) of this order.

It is further ordered, That respondent shall file with the Commission, within sixty (60) days of receipt of this order, a written report setting forth in detail the manner and form of its compliance with the order.

Commissioner MacIntyre not concurring for the reason he believes the Commission in this case did not adequately and properly consider the petition of the respondent with reference to the institution of a trade regulation rule proceeding, which proceeding prospectively would have provided greater precision in guide lines and equitable treatment to business and protection for the consuming public than anything now provided in recent actions by the Commission. Commissioner Reilly not participating for the reason that he did not hear oral argument.

Complaint

64 F.T.C.

IN THE MATTER OF

VIRGINIA DARE STORES CORPORATION

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

Docket 8476. Complaint, Apr. 2, 1962—Decision, Feb. 28, 1964

Order requiring the corporate operator of numerous department stores using "Atlantic Mills" as part of their trade name and selling to the general public clothing and other merchandise purchased from manufacturers, to cease misrepresenting that it is a manufacturer and to cease using the word "Mills" or other word of similar meaning as part of its trade name.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Virginia Dare Stores Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Virginia Dare Stores Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 111 8th Avenue, New York, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the operation, in various states of the United States, of numerous department stores using "Atlantic Mills" as part of their name.

Said stores are operated through subsidiary corporations wholly owned and controlled by respondent. Through the aforesaid stores respondent sells clothing and other merchandise to the purchasing public.

Respondent causes and has caused merchandise, which it purchases from manufacturers, to be shipped to its several stores for resale to the purchasing public. In many instances shipments are made to respondent's stores in states other than the state in which said shipments have originated. Respondent has maintained, and now maintains a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, as aforesaid, and for the purpose of inducing the purchase of its merchandise which had been shipped and received in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has used the name "Atlantic Mills" in advertisements of its merchandise in newspapers having general circulation in various states of the United States, and in radio and television broadcasts having sufficient power to carry across state lines.

PAR. 4. Through the use of the word "Mills" as part of the respondent's trade name, respondent represents that it owns or operates a mill or factory in which the clothing and other merchandise sold by it are manufactured.

PAR. 5. Said representation is false, misleading and deceptive. In truth and in fact, respondent does not own or operate the mill or factory in which the clothing and other merchandise sold by it are manufactured, but buys from manufacturers for resale to the purchasing public.

PAR. 6. There is a preference on the part of many members of the purchasing public to buy merchandise, including clothing, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing and other merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. The use by respondent 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 respondent's products by reason of said erroneous and mistaken belief.

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

Mr. Sigmund Timburg, Washington, D.C., *Mr. Elliott A. Wyso* and *Mr. Harry Schneider, Jaffin, Schneider, Kimmell & Galpeer*, New York, N.Y., for respondent.

Initial Decision

64 F.T.C.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

FEBRUARY 15, 1963

Virginia Dare Stores Corporation, hereinafter called respondent, is charged with false, misleading and deceptive representations by using the word "Mills" as part of the trade name of department stores which it operates in various cities in the eastern one-half of the United States, allegedly in violation of the provisions of Section 5 of the Federal Trade Commission Act.

The complaint issued April 2, 1962, alleges *inter alia*, that, through use of the word "Mills" as part of the name of the department stores which it operates, respondent represents that it owns or operates a mill or factory in which the clothing and other merchandise sold by it are manufactured; that said representations are false, because respondent does not own or operate a mill or factory in which the clothing and other merchandise sold by it are manufactured but buys from manufacturers for resale to the purchasing public. There was also an allegation that many members of the purchasing public prefer to buy merchandise, including clothing, direct from factories or mills, believing that by so doing, lower prices and other advantages thereby accrue to them. Respondent answered and denied that it is engaged in "commerce" and denied the charging paragraphs of the complaint.

Prior to the hearing, counsel supporting the complaint filed a motion requesting that the hearing examiner take official notice of the validity of the following statements:

1. "That the use of the word 'mills' in a corporate or trade name constitutes a representation that the user owns and operates mills or factories in which products sold by it are manufactured.
2. "That a preference exists on the part of many purchasers to buy directly from mills or factories believing that by so doing lower prices and other advantages thereby accrue to them."

The above motion for the taking of official notice was denied by the hearing examiner. Application by Commission counsel for permission to file an interlocutory appeal from this order of the hearing examiner was denied by the Commission.

A hearing was thereafter held in New York, New York, at which time oral testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. Thereafter, proposed findings of fact, conclusions of law and order were filed by respective counsel. These have been considered. All proposed findings of fact and conclusions of law not found or concluded herein are denied. Accordingly, upon the basis of the entire record herein,

the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. Respondent Virginia Dare Stores Corporation is a corporation organized under the laws of the State of Delaware. Its principal office and place of business is located at 111 Eighth Avenue, New York, New York.

2. Respondent operates two different types of retail stores. One type, womens' apparel shops, in downtown locations, are not involved in this proceeding, and no further findings will be made in respect thereto. The stores which are involved in this proceeding are approximately 34 low mark-up, self-service junior or discount department stores operated by respondent through wholly-owned subsidiaries for each store under the name "Atlantic Mills Thrift Center Store." The Atlantic Mills Thrift Center Stores sell clothing and other merchandise and are located in various cities of the United States east of an imaginary line drawn from Minneapolis to Texas.

3. There is no claim by Commission counsel that respondent or either of its Atlantic Mills Thrift Center Stores has made any affirmative statement or representation that respondent is a manufacturer or manufactures any of the products advertised for sale in the Atlantic Mills Thrift Center Stores. Counsel relies solely on respondent's use of the word "Mills" in the trade name and advertising of its 34 Atlantic Mills Thrift Center Stores and the alleged inference from respondent's use of the word "Mills" that respondent manufactures the clothing and other merchandise sold by it in its Atlantic Mills Thrift Center Stores.

4. Respondent opened its first self-service, or so-called "Thrift" department store in New Bedford, Massachusetts, in 1955. This store was opened in a vacant building on the outskirts of New Bedford, out of the downtown, higher-rent district. The building is located at the base of the bridge leading to Fairhaven, Massachusetts. It was a familiar landmark in the area, known as Fairhaven Mills. For this reason, respondent chose the name "Fairhaven Mills Bargain Center" for this first store.

5. A second store was also opened in 1955, in Providence, Rhode Island, in a large building formerly occupied by the Atlantic Mills Division of A. D. Julliard Company. This was a well-known building in Providence, and respondent called this store "Atlantic Mills Thrift Center." In the spring of 1956, a third store was opened in Trenton, New Jersey, in a building formerly occupied by the Simonize Corporation. This corporation was still active in business, and

its name could not be used for the store. Respondent settled on the name "Atlantic Mills Thrift Center" for this third store. Later, respondent decided to reduce costs by syndicating its advertising, and, in so doing, changed the name of each store to "Atlantic Mills Thrift Center Store." Since the opening of this third store, 34 additional stores have been opened, each under the name Atlantic Mills Thrift Center Store.

6. The buildings in which Atlantic Mills Thrift Center Stores are located are generally of one floor, approximately 70,000 square feet of floor space, with ample parking area in front of the building. Some of the buildings are of old construction and, where not available, a new building has been built to respondent's specifications. The principal consideration respondent uses in selecting the location of a store is ample floor and parking space, away from the downtown, higher-rent district. A picture showing the front of a store and the name "Atlantic Mills Thrift Center" across the front of the building is shown in CX 18.

7. Each Atlantic Mills Thrift Center Store has approximately 21 major departments, divided into 75 sub-departments. Of the 21 major departments, 8 are company-owned and 13 are leased departments.¹ RX 2A-G, 3A-L, 4A-F and 5A-G show the interior of four Atlantic Mills Thrift Center Stores, one in Chicago, Illinois, one in New Bedford, Massachusetts, and two stores in the Detroit, Michigan, area. These photographs are representative of the interior of the stores and illustrate some of the types and wide varieties of merchandise displayed for sale in the stores. There are more than 30,000 different products sold in the Atlantic Mills Thrift Center Stores, purchased from approximately 7,500 different suppliers. Only a small percentage of the items displayed, offered for sale and sold in the Atlantic Mills Thrift Center Stores are produced in mills. Suits, dresses and coats are hung and displayed on racks. Other merchandise is displayed on tables and open counters, convenient for inspection and examination by customers. There are no clerks nor sales people. The customer is provided with a metal basket built on wheels, similar to those used in modern supermarkets, which the customer pushes through the aisles of the store, placing in the basket merchandise selected by him for purchase. After completing his selection of merchandise, the customer pushes the basket to one of several check-out counters, where a cashier totals the price of each item of merchandise in the shopper's basket and collects the aggregate amount due from the customer.

¹ A leased department is one owned and operated by third parties.

8. The respondent is not a manufacturer. It is solely a retailer. The respondent maintains a buying office in New York. All of the merchandise sold in the Atlantic Mills Thrift Center Stores is purchased through this buying office. Respondent also maintains a warehouse in New York in which merchandise purchased from manufacturers and other sources is stored and ticketed prior to shipment and distribution to the 34 Atlantic Mills Thrift Center Stores. In excess of \$35,000,000 in merchandise at cost was shipped from respondent's New York warehouse to its stores during the year ended July 31, 1962. The respondent, through its owned and operated departments in Atlantic Mills Thrift Center Stores, did a volume of approximately \$55,000,000 during the year ended July 31, 1962. Thus, respondent maintains a substantial course of trade in merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

9. The advertising expenditures for respondent during the fiscal year ending July 31, 1961, was \$716,000. For 1962, the advertising expenditures reached approximately \$1,000,000. More than 90 percent of respondent's expenditures for advertising is in the form of newspaper advertisements, with less than 10 percent spent for radio. The stores carry more than 700 nationally advertised brand products. All advertising for the Atlantic Mills Thrift Center Stores is handled by the Goldsmith-Tregar Company, an advertising agency, with headquarters in Providence, Rhode Island. All advertising is approved by respondent's New York office. The advertising includes merchandise sold in the company owned and operated departments as well as the leased departments.

10. The owned and operated departments of Atlantic Mills Thrift Center Stores sell womens' apparel, mens', boys' and girls' wear, and domestics, which includes curtains and draperies. They also sell records, candy, and a limited range of food items. Recently, the luncheonette and snack bar has become company owned and operated. The leased departments sell millinery, shoes, housewares, hardware, toys, health and beauty aids, and costume jewelry.

11. There is no difference in the appearance of the leased departments from the company owned and operated departments. A customer in an Atlantic Mills Thrift Center Store has no means of distinguishing between a store owned and a leased department. The method of display of the merchandise in the store is the same and the advertising of the merchandise is the same for both the company owned and leased departments.

12. In the conduct of its business and to induce the purchase of merchandise in its Atlantic Mills Thrift Center Stores, respondent

has placed various advertisements in newspapers and on radio broadcasting stations, advertising merchandise for sale in its various Atlantic Mills Thrift Center Stores. Some of these advertisements form the basis of the complaint in this proceeding. The advertisements relied upon by counsel supporting the complaint to establish the allegations in the complaint emphasize the words "Atlantic Mills." As examples, spot announcements on radio station WRIT, in Milwaukee, Wisconsin, advertising respondent's Atlantic Mills Thrift Center Store in Milwaukee, broadcast on Thursday and Friday, July 16 and 17, 1960, (CX 16A), were as follows:

Another big Atlantic Mills scoop! Today * * *
 For Father's Day * * * The greatest collection
 of sport shirts you've ever seen * * * Price?
 1.34! You heard me right! 1.34 for handsome
 sport shirts * * * now from Atlantic Mills!
 Father's Day flash! Right now! Today! Atlantic
 Mills has the greatest collection of fine sport
 shirts *ever* at 1.34! That's right * * * 1.34 You
 can afford to give *more* * * * only with Atlantic Mills!

Spot announcements broadcast on the same station, June 30 and July 1, 1960 (CX 16B), were as follows:

Extra—Savings flash from Atlantic Mills! Today!
 a galaxy of gorgeous summer dresses at 2.88! Cool,
 all occasion, go-*everywhere* dresses in junior,
 misses, and half-sizes! All wanted fashions and
 fabrics * * * 2.88 * * * *Only* from Atlantic Mills!
 Special Pre-Fourth value riot from Atlantic Mills!
 gorgeous cool summer dresses to take you everywhere
 in high style * * * 2.88! 2.88 for sun dresses,
 shirt waists, 2-piece models * * * *All* wanted
 fashions and fabrics * * * *Only* from Atlantic Mills!

13. Some examples of respondent's newspaper advertisements offered in evidence by Commission counsel to support the allegation in the complaint that respondent, through the use of the word "Mills" as part of its trade name, represented that it owns or operates a mill or factory in which the clothing or other merchandise sold by it are manufactured, are CX 1, 2, and 3. CX 1 is a newspaper advertisement which appeared in The Commercial Appeal, Memphis, Tennessee, on Wednesday, December 16, 1959. In the advertisement on this page of the newspaper, the trade name of respondent's stores involved in this proceeding, namely, Atlantic Mills Thrift Center Store, is not mentioned. Across the top of the advertisement, in large block letters approximately 2¼ inches high, are the words "ATLANTIC

MILLS." Underneath are pictures of various articles of merchandise advertised for sale, with the prices shown for each item. Some of the merchandise advertised were ladies' reversible car coats, lounging pajamas, brocade slippers, girls' dresses, comforters, blankets, infants' booties, toys, metal Christmas trees and spike lights.

CX 2 is an advertisement which appeared on another page of the same newspaper. In this advertisement, unlike CX 1, no name appears across the top of the advertisement. In CX 2, the name ATLANTIC MILLS appears in the lower left-hand corner of the advertisement, in letters approximately $\frac{3}{4}$ inch high. Underneath the words ATLANTIC MILLS, in small letters, are the words "America's Largest Self-Service Thrift Department Stores, 2500 Lamar Avenue, 2 Blocks East of Airways, Memphis." In this advertisement, pictures of various items of merchandise are also shown, with the price for each item, including ladies' sweaters, mens' sport shirt and tie sets, mens' sweaters, ladies' gloves, boys' sport shirts, mens' leather slippers, Remington Electric Shavers and window candelabras.

CX 3 is an advertisement which appeared on Wednesday, November 2, 1960, in the Trenton Evening Times, Trenton, New Jersey. Across the top of the advertisement are the words, "America's Largest Self-Service Thrift Department Stores," and underneath, are pictures of the articles of merchandise advertised for sale, among them being a lady's housecoat, lady's skirt, girl's 2-piece slack set, lady's winter coat, slippers and socks for men, ladies, boys, misses and children, infants' blankets, and a walking doll. At the bottom of the page, underneath the pictures of the articles advertised, are these words in large letters: "ATLANTIC MILLS." Underneath, in smaller letters: "325 Jersey Street, Off 504 Lalor Street, Trenton, America's Largest Self-Service Thrift Department Stores."

14. At the hearing, Commission counsel offered the testimony of seven witnesses together with eight newspaper advertisements and the scripts of spot announcements broadcast on radio station WRIT in Milwaukee, Wisconsin, advertising merchandise offered for sale in Atlantic Mills Thrift Center Stores, to support the allegations of the complaint. One of the witnesses, Mr. Harold Gottfried, is a vice president, secretary and director of respondent. Another witness was Mr. Leonard Lev, attorney-examiner, in the New York office of the Federal Trade Commission, who testified concerning his visit to respondent's Atlantic Mills Thrift Center Store, in Trenton, New Jersey, on July 27, 1962, subsequent to the issuance of the complaint in this proceeding. The other five witnesses were so-called consumer or public witnesses.

15. The testimony given by Mr. Lev will not be discussed in detail. Mr. Lev described the building, location, and general appearance of both the exterior and interior of respondent's Atlantic Mills Thrift Center Store in Trenton, New Jersey, and testified that he examined some of the merchandise in the store, including mens' clothing; that some of the mens' shirts bore various labels, such as "Atlantic Mills" and "Made Expressly for Atlantic Mills"; and that some of the shirts bore no labels at all. Mr. Lev purchased two mens' athletic shirts which were contained in a transparent plastic bag, bearing the label "Atlantic Mills" (these two athletic shirts were received in evidence at the hearing as CX 19). Some of the towels on display in the store bore the label "Atlantic Mills, Tarleton Quality." On cross examination, Mr. Lev testified that, from his limited inspection of the store and the number of articles of merchandise displayed for sale, it did not appear to Lev that the Atlantic Mills Thrift Center Store manufactured the bulk of the items displayed for sale.

16. The five consumer or public witnesses testified concerning their respective impression from examining and reading three of respondent's newspaper advertisements, CX 1, 2, and 3, (described in paragraph 13 hereof) exhibited to them by counsel supporting the complaint, and their preference in purchasing from a manufacturer rather than from a retailer. Neither of the consumer witnesses had ever visited or shopped in an Atlantic Mills Thrift Center Store and their knowledge concerning Atlantic Mills Thrift Center Stores was limited to their examination and reading of the "Atlantic Mills" newspaper advertisements exhibited to them by counsel supporting the complaint (CX 1, 2, and 3). The aggregate of the testimony of four of these witnesses is to the effect that the advertisements exhibited to them by counsel indicated to them that "Atlantic Mills" sells clothing, that the word "Mills" indicates that "Atlantic Mills" manufactures the clothing, and that the witnesses prefer to purchase from a manufacturer. One of the witnesses, a publicist, testified that, in looking at the advertisements, he could not say who the manufacturer was, "it never entered my mind actually as to who the manufacturer of these products is."

17. Of the five witnesses who testified that they prefer to buy merchandise direct from the manufacturer rather than from a retail store, only one of these witnesses had ever actually made a purchase direct from a manufacturer, and this purchase was under special circumstances. The witness testified that she purchased a dress from a manufacturer who did not ordinarily sell to the general public. However, the witness had a friend who was an employee of the

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manufacturer and, through the intercession of this employee-friend, the witness was able to purchase a dress or dresses direct from the manufacturer. Several of the other witnesses testified that they had purchased merchandise direct from manufacturers through "factory outlets." These witnesses did not actually know that these so-called "factory outlets" were owned and operated by the manufacturer. This was pure speculation and supposition on the part of these witnesses. With respect to this testimony, that there is a preference on the part of the public to purchase direct from the manufacturer rather than from a retail store, it must first be shown that the public is able to purchase direct from manufacturers. A preponderance of the reliable and probative testimony is to the effect that the general public is not able to purchase merchandise direct from manufacturers. Accordingly, a preponderance of the evidence does not establish the allegation in the complaint that many members of the purchasing public prefer to buy merchandise direct from the manufacturer.

18. The newspaper advertisements CX 1, 2, and 3, as well as the radio spot announcements CX 16A & B, and the label "Atlantic Mills" on CX 19, are misleading and deceptive on their face. The words "ATLANTIC MILLS" are shown in large, heavy type, either at the top or bottom of the newspaper advertisements and emphasized in the radio spot announcements. It will be noted that in neither of these advertisements is respondent's trade name Atlantic Mills Thrift Center Store, as such, even mentioned—only the name ATLANTIC MILLS. Therefore, it is reasonable to conclude that some members of the purchasing public, in reading or hearing these advertisements, especially CX 1 and CX 16A & B, might believe that ATLANTIC MILLS was a manufacturer of at least some of the items shown in the advertisement or broadcast in the spot announcement and patronize the store for this very reason. Of course, after arriving at the store and seeing the name "Atlantic Mills Thrift Center" in large letters on the outside front of the store building and the wide variety and types of merchandise displayed for sale within the store, some of it nationally advertised trade-marked merchandise, a reasonably prudent person would likely conclude that the Atlantic Mills Thrift Center Store was not the manufacturer of any of the merchandise advertised and offered for sale. Nevertheless, if the customer was attracted to the store by reason of the newspaper advertisement or radio spot announcement which caused him to mistakenly believe that ATLANTIC MILLS was a manufacturer of some of the merchandise advertised, respondent would be guilty of violating Section 5 of the Act. The Commission has held that, where the initial impression created by an advertisement is deceptive, Section 5 of the Act is

violated even though the true facts are made known to the buyer before he enters into the contract of purchase. *Exposition Press Inc., et al., v. F.T.C.*, Docket No. 7489, 295 F. 2d 869; *Carter Products Inc., v. F.T.C.*, 186 F. 2d 821.

19. The findings made herein with respect to CX 1, 2 and 3, 16A & B do not apply to all of respondent's advertising. In its own behalf, respondent offered a great number of its newspaper advertisements in evidence, including RX 9A through 9A-108, inclusive. These advertisements, unlike those offered by counsel supporting the complaint, state that Atlantic Mills Thrift Center Store is the advertiser. In none of the advertisements, RX 9A-9A-108, are the words ATLANTIC MILLS used alone, without using respondent's full trade name, Atlantic Mills Thrift Center Store. In fact, the evidence seems to indicate that respondent has not used newspaper nor radio advertising listing only the words ATLANTIC MILLS since more than two years ago. Most of the newspaper advertisements which respondent has used during recent years show respondent's full trade name, Atlantic Mills Thrift Center Store, as the advertiser. Furthermore, most of the advertisements indicate that Atlantic Mills Thrift Center Stores are retailers and emphasize the wide variety and types of merchandise available by reason of respondent's large number of buyers who make their selections from various manufacturers. Some of respondent's advertisements (RX 9A-41) affirmatively state, among other things, that the Atlantic Mills Thrift Center Stores are "Retailers Only, not manufacturers, so our buyers have the choice of all the leading brands made, assuring you of the most fabulous selections possible in fashions, household and outdoor living needs." (Contained in an advertisement in the Oklahoma City Times of April 19, 1961.) However, the circumstance that some of respondent's advertising may not be misleading or deceptive does not excuse respondent from violating the provisions of Section 5 of the Federal Trade Commission Act.

20. Accordingly, it is found that respondent's use of the aforesaid false, misleading and deceptive statements in said newspaper advertisements 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 true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

21. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing and other

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merchandise of the same general kind and nature as that sold by respondent.

CONCLUSIONS

1. Respondent's acts and practices, as found herein, are to the prejudice and injury of the public and of respondent's competitors and 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.

2. The order proposed by counsel supporting the complaint would have the effect to excise the word "Mills" from respondent's trade name. In the opinion of this hearing examiner, the record does not support such harsh a remedy. Over the years, respondent has expended a considerable sum of money in advertising. Its trade name is a valuable business asset. Excision is not warranted if there is some other means by which the deceptive implications of the word "Mills" can be removed. As this hearing examiner interprets Commission counsel's contention, it is respondent's use of only the words "Atlantic Mills" in its advertising, as distinguished from its full trade name Atlantic Mills Thrift Center Stores, which is false and deceptive. Respondent's use of its complete trade name Atlantic Mills Thrift Center Stores in its advertising is not, in itself, misleading or deceptive. The likelihood of deception from use of only the words "Atlantic Mills" in its advertising would be eliminated if persons reading or hearing the advertisements and dealing with respondent at its stores are adequately informed of the true nature of the business operations of the stores. This can be accomplished through the use of a concise statement on advertising, including radio broadcasts and television telecasts, to the effect that "Atlantic Mills" is not a manufacturer or mill, but is a retail store. *The Lafayette Brass Manufacturing Company, et al.*, Docket No. 6671 [57 F.T.C. 704].

ORDER

It is ordered, That respondent Virginia Dare Stores Corporation, a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of clothing or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly, using only the words "Atlantic Mills" or "Mills" or any other words of similar import or mean-

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ing in its advertising, as distinguished from respondent's full trade name Atlantic Mills Thrift Center Stores, unless in immediate connection and conjunction with each such name or names a clear and conspicuous disclosure is made that "Atlantic Mills" or "Mills" is a retail store and not a factory or mill where any clothing or other merchandise is manufactured.

OPINION OF THE COMMISSION

FEBRUARY 28, 1964

By ANDERSON, *Commissioner*:

The respondent herein, Virginia Dare Stores Corporation, was charged with violations of Section 5(a)(1) of the Federal Trade Commission Act.¹ Virginia Dare, a Delaware corporation with its principal offices in New York City, operates thirty-four low markup, self-service discount stores throughout the eastern, midwestern, and southern portions of the United States. Each of these stores is a wholly owned subsidiary of Virginia Dare and all but one operate under the trade name "Atlantic Mills Thrift Center Stores." The respondent is solely a retailer and has never owned or operated a mill or manufacturing plant. The complaint charged that the use of the term "Mills" in the trade name and advertisements of the discount stores was a representation that respondent owned or operated a mill in which at least some of the merchandise offered for sale in the stores was produced. The complaint further alleged that many members of the consuming public prefer to purchase directly from a manufacturer in the belief that by so doing, they receive lower prices and other advantages and that the above representation is deceptive and has the capacity and tendency to induce the purchase of substantial quantities of respondent's merchandise.

The matter is presently before the Commission on cross-appeals. The hearing examiner found that the use in newspaper advertisements of the abbreviated title, "Atlantic Mills," as distinguished from the complete trade name, "Atlantic Mills Thrift Center Stores," was misleading and deceptive. Accordingly, he issued an order requiring respondent to cease using only the words "Atlantic Mills" or "Mills" in its advertising, as distinguished from the full trade name, unless in immediate conjunction with such usage there was conspicuous disclosure that the store is a retail store and not a factory or mill. The examiner found no preference on the part of members of

¹ 66 Stat. 681 (1952), 15 U.S.C. 45(a)(1) (1958).

the purchasing public to buy directly from a manufacturer, and, correspondingly, no deception on the part of respondent in the use of "Mills" when used as a part of the complete trade name. Respondent now asserts, *inter alia*, that the failure of the examiner to find such a preference and the absence of proof of actual deception require dismissal of the complaint. Counsel supporting the complaint contends that there was sufficient evidence for a finding of the alleged preference and that an order should issue excising the term "Mills" from respondent's trade name.

We first consider whether the evidence establishes that many members of the consuming public prefer to purchase directly from a manufacturer.² Complaint counsel's evidence on this point consisted of five consumer or public witnesses from the New York metropolitan area, an area in which respondent operated no store at the time of the hearing.³ These witnesses were unfamiliar with respondent's advertising and organization, and none had shopped in an Atlantic Mills Thrift Center. There is no indication of bias on their part. Four of the witnesses testified that they preferred to purchase goods directly from a manufacturer where possible. Unanimously they gave as their reason the belief that they would be able to obtain merchandise at lower prices than would be available to them in retail outlets.

In an effort to rebut this testimony, respondent called an associate professor of merchandising from the School of Retailing at New York University. This witness stated that the practice of buying direct from the manufacturer was so small that it was not reported by the Department of Commerce and that it was generally confined to friends and relatives of employees of manufacturers. He further testified that it was his observation that the public prefers to purchase from a retailer instead of from a manufacturer, because the retailer is more conveniently located than a manufacturer, will grant refunds and exchanges, has a wider selection, and markets seasonal merchandise in season.

² The preference is significant from the standpoint of determining the degree of public interest. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933). In determining whether a proposed proceeding will be in the public interest, the Commission exercises a broad discretion. *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929).

³ Counsel supporting the complaint had moved prior to the hearing that the examiner take official notice of the facts "[t]hat a preference exists on the part of many purchasers to buy directly from mills or factories believing that by so doing lower prices and other advantages thereby accrue to them," and that respondent, by the use of "Mills" as part of its trade name, represents that it owns or operates a mill or factory in which the clothing and merchandise sold by it are manufactured. The examiner declined to take official notice of these facts; a subsequent interlocutory appeal to the Commission from this ruling was denied.

Contrary to the decision of the examiner, it is our conclusion that the absence of an opportunity to purchase directly from a manufacturer is not grounds for concluding that no preference to so purchase exists. Merely because members of the consuming public are in most cases unable to purchase directly from a manufacturer does not mean that they have no such desire or preference when the opportunity is available. Moreover, after sifting all of the testimony on preference, it appears to us that where the prime consideration in the consumer's mind is price, he would prefer to purchase from a manufacturer. However, where he is concerned with wider selections, better service, or convenience of access, he will purchase where these considerations are available, irrespective of whether the seller happens to be a manufacturer or retailer. The statement by respondent's expert that consumers prefer to purchase from retailers for specific reasons may thus be reconciled with the testimony of the consumer witnesses that they prefer to purchase from manufacturers in the expectation of receiving lower prices. Such a conclusion is supported by the concession of respondent's expert on cross-examination that if a manufacturer could offer the same selections and services as a retailer, consumers would purchase from the manufacturer. It is therefore our holding that the evidence is sufficient to establish a preference on the part of many members of the purchasing public to buy directly from a manufacturer. The examiner's finding to the contrary is not adopted.

The evidence in this case also establishes that respondent emphasized the abbreviated trade name "Atlantic Mills" in its newspaper and radio advertisements. On some occasions, the abbreviated trade name was used without further explanation or qualification. On other occasions, there appeared elsewhere in the advertisement the words "America's Largest Self-Service Thrift Department Store." On a few occasions, respondent specifically disclaimed a manufacturing status by the words "Retailers only, not manufacturers, so our buyers have the choice of all the leading brands made, assuring you of the most fabulous selections possible in fashions, household and outdoor living needs." On all occasions, however, "Atlantic Mills" appeared in large, bold-faced type, while the words of qualification or explanation appeared in thinner, smaller type. One of the consumer witnesses stated that the word "Mills" in respondent's newspaper advertisements "looks at you, stares at you."

On numerous occasions, respondent referred to its price as "our usual mill price" when making a comparison with the "usual retail price." Those products so advertised were for the most part textile

products. In the same advertisements, other products were offered for sale at an "anniversary price." Near the top of these advertisements appeared the phrase, "These unbelievable prices made possible by the cooperation of the manufacturers who supply us regularly." The words "Atlantic Mills" appeared in large letters, followed in smaller letters by the words "Shopping Center," "Shoppers World," or "America's Self-Service Thrift Department Stores." Since some of the products in these advertisements were preceded by "our usual mill price" while others were preceded by "anniversary price," the qualifying words cannot be interpreted as an adequate disclaimer of a manufacturing status.

The initial misrepresentation created by respondent's use of "Mills" in its advertising and trade name was not necessarily dispelled when the prospective customer arrived at the store and observed the vast array and multiplicity of products offered for sale.⁴ Various articles, such as blankets, towels, lingerie, diapers, and men's underwear and sox, were labeled "Atlantic Mills." Other products bore no labels at all. Thus, although respondent carried many nationally branded items which it obviously did not manufacture, the customer who arrived at the store with the impression that respondent manufactured some of the goods offered for sale might retain that impression. In addition, even though the more sophisticated might recognize the true nature of respondent's operations, there is a substantial possibility that the less wary and less observant would not achieve the same degree of awareness and thus would need protection. *Standard Mills, supra*; *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. 2d 676 (2d Cir. 1944).

We conclude, therefore, that respondent, through the use of the word "Mills" as part of its trade name, in its newspaper and radio advertising, and on some of its labels, represents to the public in an affirmative manner that it owns and operates a mill or factory in which at least some of the clothing and other merchandise sold by it are manufactured. *Federal Trade Commission v. Mid West Mills, Inc.*, 90 F. 2d 723 (7th Cir. 1937); *Bear Mill Mfg. Co., Inc. v. Federal Trade Commission*, 98 F. 2d 67 (2d Cir. 1938); *Herzfeld, et al. v. Federal Trade Commission*, 140 F. 2d 207 (2d Cir. 1944); *Rudin & Roth, et al.*, 53 F.T.C. 207 (1956); *Standard Mills, et al.*, Docket No.

⁴The examiner concluded that the initial misrepresentation created by respondent's use of its abbreviated trade name in its advertising was clarified by a visit to one of respondent's stores. He nevertheless found a violation of the Federal Trade Commission Act as a result of the initial misrepresentation. *Exposition Press, Inc., et al. v. Federal Trade Commission*, 295 F. 2d 869 (2d Cir. 1961). We disagree only with his finding of fact.

8484, 63 F.T.C. 978, September 30, 1963; cf. *Federal Trade Commission v. Army and Navy Trading Co.*, 88 F. 2d 776 (D.C. Cir. 1937). We also conclude, in light of the testimony on preference for purchasing from a manufacturer in the belief that lower prices thereby ensue, that this is a material misrepresentation requiring action on our part. Our own examination of the advertisements, coupled with consumer testimony to the effect that respondent's advertisements conveyed the impression that respondent was a manufacturer, convinces us that the misrepresentations have the capacity and tendency to mislead and deceive members of the purchasing public. The absence of proof of actual deception does not affect our decision. The Commission may nevertheless act where, as here, it is convinced that the representations have the requisite misleading capacity and tendency. *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149 (1942); *Herzfeld, et al. v. Federal Trade Commission*, *supra*; *Northern Feather Works, Inc. v. Federal Trade Commission*, 234 F. 2d 335 (3d Cir. 1956); *United States Retail Credit Association, Inc., et al. v. Federal Trade Commission*, 300 F. 2d 212 (4th Cir. 1962).

In determining the proper remedy, we must consider all relevant facts and weigh the danger of public deception against the private inconvenience and expense of a change in trade name. Where a respondent engages in some type of milling or converting activity, words of qualification or explanation used in conjunction with the trade name have been held to be sufficient to dispel any misrepresentation or deception. E.g., *Federal Trade Commission v. Royal Milling Co.*, *supra*; *Standard Mills*, *supra*. However, where a respondent does not operate any manufacturing, milling, or converting facilities whatsoever and where the proposed words of qualification or explanation are in complete and absolute contradiction with the words which convey the deceptive and misleading impression, excision has been held to be the appropriate remedy. *Federal Trade Commission v. Army and Navy Trading Co.*, *supra*; *Herzfeld, et al. v. Federal Trade Commission*, *supra*; *Deer, et al. v. Federal Trade Commission*, 152 F. 2d 65 (2d Cir. 1945); *Rudin & Roth, et al.*, *supra*.

In the instant case, any words of disclaimer would be in contradiction with the word "Mills." Further, since respondent makes contact with the consuming public through a broad program of radio and newspaper advertising and deals directly in its stores with per-

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sons of varying degrees of sophistication, great difficulty would be encountered in arriving at adequate and practical methods of disclaiming a manufacturing status. We are therefore of the opinion that the public interest in an accurate portrayal of respondent's true business status is substantial and of greater importance than the expense and inconvenience involved in the alteration of respondent's trade name.⁵ We conclude that excision of the term "Mills" from respondent's trade name is the appropriate remedy.

For the aforementioned reasons, we grant complaint counsel's appeal and reject that of respondent. An order will issue, striking portions of the examiner's initial decision and requiring excision of the term "Mills" from respondent's trade name. Those portions of the examiner's initial decision which are in conflict with our findings and conclusions herein are not adopted. The remaining facts found by the examiner are hereby adopted. Rules of Practice, § 3.24(b), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

Commissioner Elman dissented, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

FINAL ORDER

This matter having been heard by the Commission on cross-appeals from the hearing examiner's initial decision filed by counsel supporting the complaint and by respondent, and on briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that respondent's appeal should be denied and complaint counsel's appeal granted and that the initial decision should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision, filed February 15, 1963, be modified by striking therefrom paragraphs 3, 17, 18, and 20 of the Findings of Fact and paragraph 2 of the Conclusions, and substituting therefor the findings and conclusions of the accompanying opinion.

⁵ Respondent experienced little difficulty in changing the name of its first store from "Fairhaven Mills" to "Atlantic Mills" by advertising for a period as "Fairhaven Atlantic Mills," then reversing the name to "Atlantic Fairhaven Mills," and ultimately omitting "Fairhaven" from the name altogether. Dropping "Mills" from "Atlantic Mills Thrift Center Stores" is a change much less stark and does not alter the name to the point where it is unrecognizable.

It is further ordered, That the aforesaid initial decision be modified by striking therefrom the order issued by the examiner and substituting therefor the following:

ORDER

It is ordered, That respondent, Virginia Dare Stores Corporation, a corporation, and its officers, and respondent's agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of clothing or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the word "Mills" or any other word of similar import or meaning in or as a part of respondent's corporate or trade name, or representing in any other manner that respondent is the manufacturer of the clothing and other merchandise sold by it unless and until respondent owns and operates, or directly and absolutely controls, the manufacturing plant wherein such clothing and other merchandise is made; provided however, that should respondent so desire for reasons of continuity, it may use the identifying phrase "formerly Atlantic Mills Thrift Center Stores" or words of similar import in its advertising for a period not to exceed one year from the effective date of this order.

It is further ordered, That the initial decision, as above modified and as modified by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

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

Commissioner Elman dissenting and Commissioner Reilly not participating from the reason that he did not hear oral argument.

IN THE MATTER OF

GENERAL ELECTRIC COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 8487. Complaint, May 28, 1962—Decision, Feb. 28, 1964

Order dismissing—the record being inadequate for a determination on the merits—complaint charging a manufacturer of household appliances,

among other products, with violation of Sec. 2(d) of the Clayton Act and the Federal Trade Commission Act through use of a cooperative advertising plan with its wholesale distributors and retail dealer customers under which advertising allowances were credited to the accounts of retailers who did not sell at prices lower than those listed in respondent's schedule entitled "Minimum Retail Prices Eligible for Cooperative Advertising Claims", but were not offered to competing retailers who advertised lower prices than those so listed.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating the provisions of subsections (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), and has been, and is now, using unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, the Commission hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH 1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1 River Road, Schenectady, New York.

PAR. 2. Respondent is now and for a number of years has been engaged in the manufacture, distribution and sale of numerous household or consumer used products and appliances, such as but not limited to toasters, irons, clocks, blankets, electric light bulbs, photo lamp equipment and others of various description.

Respondent General Electric Company consists of a number of divisions, one of which is the General Electric Supply Company. The General Electric Supply Company has approximately 100 offices located in major cities throughout the United States, which are engaged in the sale and wholesale distribution of respondent's household or consumer used products and appliances.

Respondent also has a large number of independent distributors in cities throughout the United States engaged in the sale and wholesale distribution of respondent's said products and appliances.

Respondent is the largest producer of such household or consumer used products and appliances in the United States and its volume of

business in the sale and distribution of such products and appliances is substantial.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent is now engaged, and for the past several years has been engaged, in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, having sold and distributed its aforesaid products and appliances manufactured in plants in various states and transported, or caused the same to be transported, from these plants to purchasers located in other states of the United States and other places under the jurisdiction of the United States.

PAR. 4. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or authorized payment of, money, goods or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished or agreed to be furnished by or through such customers in connection with the processing, handling, sale or offering for sale of respondent's said products and appliances and respondent has not made or contracted to make such payments, allowances, or consideration available on proportionally equal terms to all its other customers competing in the sale and distribution of such products and appliances.

For example, respondent on January 1, 1959, promulgated and put into effect a cooperative advertising plan with its wholesale distributors whereby advertising allowances are paid or credited to the account of retail dealers purchasing respondent's household appliances from said wholesale distributors. In addition, respondent, through its General Electric Supply Company, also offers the plan to its retail dealer customers. Under this plan respondent contributes to the cost of advertising only on condition that:

(a) Prices mentioned in such advertising are no lower than those listed in a schedule entitled "Minimum Retail Prices Eligible for Cooperative Advertising Claims" issued by respondent.

(b) Advertising of premium or combination offers will not reduce the price below the prices listed in said schedule of minimum retail prices.

(c) In some instances prices mentioned in advertising are no higher than those shown in respondent's schedule of suggested list prices.

(d) Price comparisons are not made in advertising.

(e) Proposed advertising is cleared and authorized in advance by wholesale distributors.

(f) That such advertising is audited by respondent or its agents after publication to determine compliance with its terms, and

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(g) That in lieu of suggested minimum prices, retail advertiser may elect to advertise without mentioning price.

Such advertising or other allowances received by some retailers, as alleged in the particular example above, are not offered or otherwise made available on proportionally equal terms to competing retailers who advertise merchandise at prices lower than those listed in respondent's schedule of "Minimum Retail Prices Eligible for Cooperative Advertising Claims". Moreover, in addition to the foregoing and as alleged in the first paragraph of Paragraph Four above, such compensation or allowances were not offered or made available on proportionally equal terms to all other customers competing with the favored customers.

PAR. 5. The acts and practices of respondent, as alleged in Paragraphs One to Four are all in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

COUNT II

PAR. 6. Paragraphs One through Four of Count I are hereby set forth and with the same effect as if set forth here verbatim.

PAR. 7. In the course and conduct of its business, respondent General Electric Company has been for some time past, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it has shipped its products or caused them to be transported from its place of business to said customers with places of business located in the several states of the United States and in the District of Columbia.

PAR. 8. Except to the extent that competition has been hindered, frustrated, lessened and eliminated, as set forth in this complaint, respondent has been and is now in competition with persons, firms, and other corporations likewise engaged in the manufacture, sale and distribution in commerce of household appliances. Many of the wholesale distributors to whom respondent sells such household appliances were, and are, in competition, some in commerce, with each other and with respondent's wholly owned General Electric Supply Company which sells to retail dealers in competition with said wholesale distributors. Many of the retail dealers who purchase respondent's household appliances and sell such products to consumers are in competition with each other.

PAR. 9. In the course and conduct of its business as a manufacturer and wholesale distributor, respondent promulgated and put into operation a cooperative advertising plan, as outlined in Paragraph

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Four herein. Respondent by itself and in combination, understanding, course of dealing and agreement with its independent wholesale distributors sought by said cooperative advertising plan to induce and persuade, and did induce and persuade, in unreasonable restraint of trade, certain retail dealers of its household appliances to hinder, lessen, or eliminate or abandon price competition through the restriction of advertising to ultimate consumers and prospective purchasers by said retail dealers.

PAR. 10. The aforesaid acts and practices of the respondent manufacturer and wholesale distributor of household appliances in competition with independent wholesale distributors of its household appliances and acting in combination with them and through them to suppress and restrain retail price competition by the restriction of advertising are unfair, oppressive and to the prejudice and injury of the ultimate consumer and prospective purchasers of said household appliances in depriving them of knowledge of price competition and the benefit of competitive prices in the sale of appliances and are all to the prejudice and injury of retail dealers in such appliances competing by means of retail price advertising with retail dealers who have been and are being induced and persuaded to suppress or abandon such competition in return for such allowances.

PAR. 11. The acts, practices, methods and agreements of respondent as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to unduly hinder competition and restrain trade, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER DISMISSING COMPLAINT

This case has been heard by the Commission on cross-appeals by the parties from the initial decision of the hearing examiner. The Commission has determined that the record is not adequate to enable an informed determination on the merits. Rather than remanding the case to the hearing examiner for the taking of further evidence, the Commission considers that the public interest would be better served by instructing its staff to maintain a close scrutiny of respondent's Cooperative Merchandising Plans to determine whether their purpose or effect is to bring about retailers' adherence to resale prices specified or suggested by respondent, or otherwise to constitute an unlawful price-fixing or price-stabilizing arrangement. Accordingly,

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and without adjudicating any issue of fact or law contested on this appeal,

It is ordered, That the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre not concurring for the reason that he believes the Commission should have adjudicated the issues involved here. It is his view that the public interest would be better served by the Commission reaching and rendering a judgment in the disposition of this important case. It is his understanding that this case is a forerunner of other like important situations, the resolution of which will be required by the public interest.

IN THE MATTER OF

SINKRAM INCORPORATED, ET AL.

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

Docket 8490. Complaint, June 7, 1962—Decision, Feb. 28, 1964

Order requiring Brooklyn, N.Y., sellers of a home instruction course or program known as "The Height Increase System," to cease representing falsely by use of the words "Height Increase" as part of their trade name and by other statements in advertisements in newspapers and magazines that their course would permanently add inches to the body height of all persons who followed the instructions set forth.

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 Sinkram Incorporated, a corporation, and Samuel N. Kram, individually and as an officer 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 would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sinkram Incorporated 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 982 East 106th Street, Brooklyn, New York. Respondent Samuel N. Kram is an officer of said corporation. He

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directs and controls the policies and practices of the corporate respondent. His address is the same as that of the corporate respondent.

PAR. 2. Respondents under the trade name of The Height Increase Institute are now, and for some time last past have been, engaged in the sale and distribution of a home instruction course, or program offered for the increasing of body height. The name of said course is The Height Increase System.

PAR. 3. Respondents cause said course when sold to be transported from their place of business in the State of New York to purchasers thereof located in various other states of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said instruction course in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, hereinbefore described, and for the purpose of inducing the purchase of their said course, respondents advertise the same by means of advertisements inserted in newspapers and magazines of general circulation and by pamphlets, brochures and other advertising material distributed through the United States mail. Typical, but not all inclusive, of the statements contained in said advertisements are the following:

New Scientific method will add inches to your present height, even after maturity! Are you too short? Let us show you how you can be taller in only 6 weeks at absolutely no cost to you, scientific proven method.

Yes, you can increase your height in only a matter of weeks by using the famous Height Increase System. Science has shown that growth after maturity is still possible through the proven principle of "Interstitial Accretions". It has helped many small men and women, and it can help YOU! The Height Increase System is based on scientific facts and designed to utilize the full "growing power" of your body.

Since 1957 the Height Increase Method has helped hundreds of men pass their measurements for the police and fireman physical exams without the use of drugs, pills or mechanical apparatus and without harmful effects. This is a revolutionary system that permits your body to extend itself with visible results in a few weeks.

This course is expressly for the adult who has already acquired his full stature regardless of age thereafter or sex, and youngsters whose growth for some reason or another has been stunted.

Quick results positively guaranteed.

PAR. 5. By and through the use of the words "Height Increase" as a part of their trade names, and various other statements appearing in the aforesaid advertisements, and other statements of the

same import but not herein set forth, respondents represented, and now represent, that the use of the said course of instruction, sold by them, will permanently add inches to, and increase the body height of, any and all persons who follow the instructions set forth therein.

PAR. 6 In truth and in fact the said course of instruction will not increase the body height of anyone. The aforesaid representations, therefore, are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the purchase of their instruction course, respondents have represented that said course is "positively guaranteed", thereby representing that respondents' instruction course is guaranteed in every respect.

PAR. 8. In truth and in fact the guarantee is limited, and the terms, conditions and the extent to which said guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed in said advertising material. Respondents' guarantee representation, as aforesaid, therefore is false, misleading and deceptive.

PAR. 9. Respondents, through the use of the trade name "The Height Increase Institute", have represented, and do represent, that they are an institute devoted to the study of means of increasing body height.

In truth and in fact, respondents are not an institute devoted to the study of means of increasing body height. On the contrary, respondents are primarily engaged in the sale of their instruction course for profit. The aforesaid representation, therefore, is false, misleading and deceptive.

PAR. 10. The use by the respondents of the foregoing false, misleading and deceptive statements has had, and now has, the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of respondents' book by reason thereof.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson supporting the complaint.

Mr. Stanley M. Estrow, New York, N. Y., for respondents.

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INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

JANUARY 8, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission, on June 7, 1962, issued its complaint charging Sinkram Incorporated, a corporation, and Samuel N. Kram, individually and as an officer of said corporation, with violation of the provisions of the Federal Trade Commission Act. The complaint alleges that respondents, under the trade name of "The Height Increase Institute", have for some time last past engaged in the interstate sale and distribution of a home instruction course or program claimed to increase body height called "The Height Increase System". It is alleged that for the purpose of inducing the purchase of said course, respondents, through use of the words "Height Increase" and other statements of the same import appearing in advertisements inserted in newspapers and magazines of general circulation and by pamphlets, brochures and other advertising material distributed through the United States mail, represent that the use of the said course will permanently add inches to, and increase the body height of, any and all persons who follow the instructions therein set forth. Respondents' said representations are alleged to be false, misleading and deceptive for the reason that the said course of instruction will not increase the body height of anyone as claimed.

It is also alleged that for the purpose of inducing the purchase of the said course, respondents have further represented that said course is "positively guaranteed" in every respect, and that this guarantee representation is false, misleading and deceptive, because said guarantee is limited, and the terms, conditions and the extent to which said guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed in said advertising material. It is finally alleged that respondents through use of the trade name "The Height Increase Institute", represent that they are an institute devoted to the study of means of increasing body height, and that such representation is false, misleading and deceptive because respondents are in fact primarily engaged in the sale of their home instruction course for profit.

Answer to the complaint was filed by the respondents on July 11, 1962, following which an order was issued cancelling the hearing scheduled in the complaint and setting a prehearing conference for August 16, 1962. Prior to the prehearing conference, counsel sup-

porting the complaint filed a motion requesting that official notice of certain facts be taken relative to the charge in the complaint concerning respondents' use of the word "Institute". Following oral answer made to said motion by counsel for respondents during the prehearing conference, said motion was granted to the extent set forth in the order issued herein on August 17, 1962. By agreement of respective counsel, the prehearing conference was made part of the public record herein.

A stipulation as to relevant facts not in dispute was entered into by counsel supporting the complaint and counsel for the respondents during the prehearing conference and made of record during the opening hearing on October 10, 1962. Following the certification to the Commission of a Certificate of Necessity, the Commission granted leave for hearings to be held in Washington, D. C., and in New York, New York, subject to the conditions set forth in said certification.

A hearing was held in Washington, D.C., on October 10 and 11, 1962, during which respondent Samuel N. Kram, New York, New York; Dr. Felix P. Heald, Director, Adolescent Unit, Children's Hospital, Washington, D.C.; Dr. J. Lawrence Angel, Curator of Physical Anthropology, Smithsonian Institution, Washington, D.C.; and Dr. Henry L. Feffer, Associate Clinical Professor of Orthopedic Surgery, George Washington University School of Medicine, Washington, D.C., appeared and testified as witnesses and following which the case-in-chief was closed.

A hearing for the presentation of respondents' defense was held in New York, New York on October 15 and 16, 1962, during which Mr. Clifford Atkins, 545 West 146th Street, New York, New York, a user of respondents' home instruction course; Dr. Charles J. Lakritz, Doctor of Osteopathy, 6838 Clyde Street, Forest Hills, New York; and respondent Samuel N. Kram, appeared and testified as witnesses and following which the case for the defense was closed.

Respective counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses, and to introduce such evidence as is provided for under Section 4.12(b) of the Commission's Rules of Practice for Adjudicative Proceedings. The record exhibits marked for identification and received in evidence in this proceeding are Commission exhibits 1 through 14 A-B; respondents' exhibits marked for identification 1 through 31 A-B were rejected.

Respondents' rejected exhibits are subject to Section 4.12(f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification,

shall be retained in the record so as to be available for consideration by any reviewing authority.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent Sinkram Incorporated 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 700 Dumont Avenue, Brooklyn, New York. Respondent Samuel N. Kram is an officer, the president, of Sinkram Incorporated and directs and controls the policies and practices of said respondent corporation. Said individual respondent's address is the same as that of the corporate respondent. Respondents' former address was 982 East 106th Street, Brooklyn, New York.

2. Sinkram Incorporated and Samuel N. Kram, president, under the trade name of "The Height Increase Institute", have been since the corporation was organized on April 20, 1961, engaged in the sale and distribution of a home instruction course, or program, for the increasing of body height known as "The Height Increase System". Said course or program consists of a booklet entitled "The Height Increase System—Treatise and Application" and a blank chart to be kept daily by the purchaser entitled "20 Week Height Increase Progress Chart".

3. Respondents Sinkram Incorporated and Samuel N. Kram have caused the said course or program, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other states of the United States. Prior to incorporation on April 20, 1961, respondent Samuel N. Kram operated the said business as a sole proprietorship under the laws of the State of New York. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in the sale of said course or program in commerce as "commerce" is defined in the Federal Trade Commission Act.

4. An example of statements and representations for the purpose of inducing the sale of said course or program and appearing in advertisements caused to be disseminated by respondent Samuel N. Kram, prior to the incorporation of Sinkram Incorporated on April 20th, 1961, in the New York Daily News, the New York Herald Tribune, the New York Journal American, the New York Enquirer, all daily newspapers published in the City of New York, New York, and in other publications throughout the United States, is the following:

Be Taller

New scientific method will add inches to your present height, even after maturity! Quick results positively guaranteed. Send 25¢ (to cover cost of handling & postage) for complete data and literature, to:

Height Increase Institute, Dept. EN-33 G.P.O. Box 1902, New York 1, N.Y.

5. An example of statements and representations for the purpose of inducing the sale of said course or program and appearing in advertisements caused to be disseminated by respondents Sinkram Incorporated and Samuel N. Kram, subsequent to the date of the incorporation of Sinkram Incorporated on April 20, 1961, in the New York Journal American, the New York Daily News, the New York National Enquirer, all newspapers published in the City of New York, New York, and magazines with a national circulation such as Sterling's Men's Publications, Sterling's Detective Publications, and Leonard Green's Publications, all of which newspapers and other publications are distributed throughout the United States, is the following:

Are you too short?

Let us show you how you can become taller in only 6 weeks

At absolutely no cost to you

Scientific proven method

Yes, you can increase your height in only a matter of weeks by using the famous Height Increase System. Science has shown that growth after maturity is still possible through the proven principle of "Interstitial Accretions." It has helped many small men and women, and it can help You! The Height Increase System is based on scientific facts and designed to utilize the full "growing power" of your body.

No drugs

No harmful effects

Since 1957 The Height Increase Method has helped hundreds of men pass their measurements for the police and fireman physical exams without the use of drugs, pills or mechanical apparatus and without harmful effects. This is a revolutionary system that permits your body to extend itself with visible results in a few weeks.

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Act now. Get the complete facts. Documented and illustrated information is yours (sent in plain wrapper) for only 25¢ to cover the cost of postage and handling.

Height Increase Institute, Dept. J-18, Box 1902, New York 1, N.Y.

6. The following statements and representations by respondents for the purpose of inducing the sale of said course or program, appear, among others as hereinafter set forth in finding seven following, in a letter or brochure entitled The Height Increase Institute sent by respondents to each prospective purchaser of The Height Increase System, by United States mail, upon receipt of an inquiry in response to respondents' above and other advertising promotions:

This course is for the adult who has already acquired his full stature regardless of age thereafter or sex, and youngsters whose growth for some reason or another has been stunted.

We would be the last to contravene that gland performance and natural hereditary qualities are important factors in determining a person's height. We also agree that proper food, rest and relaxation are prime factors in developing an enviable stature.

Can an adult add to his height? The answer is an emphatic *yes* as you will now find out.

The diagrams juxtaposed represent a typical section of the spinal column joints which constitute the flexibility of the spinal column. These so-called joints are in reality, pads or discs which have the ability to expand and contract. Between morning when you awaken and evening when you retire, there may be as much as a whole inch difference. Consequently you are about one inch taller in the morning than in the evening.

These discs are known as the 'Intervertebral Discs' of the spinal column. They separate the 'Bodies of Vertebrae' of the spine. The Bodies of Vertebrae themselves have no flexibility.

Our purpose is therefore to expand these discs—rebuild and *add* cartilaginous tissue, consequently resulting in an increasing thickening of the joints. Our aim is to maintain a gradual cumulative expansion and thickening process which increases each day and each week through the height increasing program. This process is known by medical men as "Interstitial Accretions."

The multiplicity of ligaments and joints in the spinal column accounts for its flexibility. The Height Increase System will stretch, thicken and consequently elongate the Intervertebral Discs. The spine herein is our major concern, as this is the factor involving the overall difference in height. The Intervertebral Discs will react by the body's own natural process.

7. In addition to the statements and representations set forth in finding number six above, respondents' aforesaid letter or brochure contains the following:

In almost a decade of persistent work, dedicated exclusively to physical culture, but particularly to growth, we have been able to develop an organization of wide renown—the greatest in this field. Our systematic, progressive

method to attain increased height is the only one in its class, based on principles which have been studied and elaborated by medical men and anthropologists for many years.

This letter or brochure entitled, The Height Increase Institute, shows an ornate appearing building of considerable size in an apparent park-like setting. Respondents' business operation in actuality is limited to one room located in a store in a combination commercial-residential area. This room is used for mailing purposes, and the storage of such notes, photostat copies and materials as has been gathered from outside libraries by respondent Samuel N. Kram. The business has no library facilities and no employees, and is solely operated by respondent Samuel N. Kram as president, with his wife acting as secretary-treasurer of the corporate respondent.

Respondent Samuel N. Kram's formal education is that of a Bachelor of Science in Civil Engineering obtained in February, 1957 from the School of Engineering, City College of New York, New York. Said individual respondent alone is responsible for the preparation and placing of the corporate respondent's advertising as aforescribed. Said individual respondent alone prepared the letter or brochure entitled The Height Increase Institute and the pamphlet entitled The Height Increase System and accompanying material sent to prospective purchasers and purchasers of said course or program.

The business operation of respondents Sinkram Incorporated and Samuel N. Kram is not an "Institute" as such term is properly used and applied. It is not an organization for the promotion of research, experimentation, investigation and study in the science of body growth, and maintains no trained technical staff, properly equipped laboratory, or other facilities for such purpose.

Respondent Samuel N. Kram has not had any formal medical education or other training sufficient as a background to qualify for proper research as such term is properly used and applied, and any alleged research conducted by said individual respondent, must necessarily have been limited to a medically uninformed and uncritical assessment as to the medical truth of any controversial statements, representations or claims, which may have appeared in the various books, articles, or published materials read or reviewed by said respondent.

Respondents Sinkram Incorporated and Samuel N. Kram are primarily engaged in the commercial sale of their aforesaid instruction course or program for profit. Said sales have been substantial in that about 3,000 or more sales are made annually. Approximately fifty percent of the dollar sales volume received by said respondents

has been from sales made to purchasers in states other than New York.

Official notice is further taken in conformance with the prior order issued herein on August 17, 1962, and the finding is made, based on the additional evidence now of record in this proceeding, that such use of the word "Institute" by the respondents in their trade name and in the advertising, solicitation, sale and distribution of their said instruction course or program, constitutes a misrepresentation of the status of a business which is, in reality, not an institute but, to the contrary, is a business operated primarily for profit, and that such representation is false, misleading and deceptive to the public and induces a substantial number of the public to purchase the said instruction course or program because of such erroneous and mistaken belief. See, *In the Matter of Post Institute* (1941) 34 F.T.C. 394; *In the Matter of Natural Foods Institute* (1953) 50 F.T.C. 434.

8. Respondent Sinkram Incorporated and respondent Samuel N. Kram, individually and as an officer of said corporation, by and through the use of the words "Height Increase" as a part of their trade name, and various other statements and representations appearing in their aforesaid advertising, sales letter or brochure, or other solicitations for the purchase of said instruction course or program, have and do represent that the use of the said course or program, sold by them and used as directed, will permanently add inches to, and increase the body height of, any and all persons who follow the instructions therein set forth. These said representations are false, misleading and deceptive to the purchasing public, for in fact, respondents' said course or program when used as directed will not increase the body height as respondents claim.

The above is found to be amply demonstrated and shown by the overwhelming weight of the probative testimony of record introduced in this proceeding through Dr. Heald, Dr. Angel and Dr. Feffer. In the light of this testimony, little or no weight can be given the testimony of Dr. Lakritz, and the two lay witnesses, Mr. Atkins and Mr. Kram, with relation to any alleged body height increase claimed due to actual body growth directly or indirectly attributed to use of the respondents' exercise instruction course or program.

9. Dr. Felix P. Heald, basically trained in pediatrics and engaged in the full time teaching of research in adolescent medicine, is the Director, Adolescent Unit, Children's Hospital, Washington, D.C. and holds the degree of medical doctor received from the University of Pennsylvania Medical School in 1946. Prior to his present position, the witness's medical experience included, among others, a residency in pediatric pathology, and a medical resident in pediatrics,

Children's Medical Center, Boston, Massachusetts; and an instructor in pediatrics, Harvard University Medical School, with full time hospital teaching research in adolescent medicine, 1949-1960. The witness was certified in 1952 to the American Board of Pediatrics and, in connection with his specialty, the exhibit record in this proceeding discloses a two-page list of numerous medical journal articles authored by the witness alone or in collaboration with others.

Dr. Heald testified adolescent medicine would encompass medical, nutritional and psychological disorders, and would necessitate a considerable amount of knowledge about the adolescent growth spurt. This growth spurt was described as the time since birth during which the most rapid growth of the human organism occurred during the entire growing period. An adolescent boy was stated to have achieved eighty percent of his adult height by age twelve and to finish out the additional twenty percent in height at or around age seventeen. The witness testified as to the examination of many young patients coming to him in the interest of increasing their body height, and related the tests for evaluating at what stage an adolescent is in the growth spurt, and the manner of predicting how much more, if any, growth would proceed.

The witness testified that height is no more nor no less than a measure of bone growth, since linear growth is entirely oseous development. There being approximately twenty-six oseous growing bones in the hand-wrist, the witness stated one chooses a hand-wrist X-ray to find out about bone growth. By comparing the X-ray to a standardized atlas for hand-wrist X-rays, estimates can be made as to whether the individual's oseous growth is normal, delayed, or accelerated. This observation was said to be one of the most important things to be done in evaluating growth, for when an epiphysis is fused, the particular bone can no longer grow. The epiphysis was explained to be the growing part of the bone, and it was further stated that growth and height is, in general, related to the growth of the long bones in the leg and in the spine, and that when the epiphyses in both of these regions fuse, growth ceases.

This cessation in body or bone growth was said to be at a time period that would correspond to the end of the growth spurt. The witness adding, but there is evidence in the literature that growth of the spine will continue in adult life up to about the 40th year, but this change is "very, very small, very small". Any such body or bone growth as tended to be indicated by this literature would be due to oseous development in the epiphysis and would be minute. In other words, said Dr. Heald, "it has been fairly well shown that by the 16th year in girls, 16½ years in girls, and by the 17¾ year in boys

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that by and large adult height has been achieved, plus or minus 10 months, either way."

With relation to the management of young patients coming to him in the interest of a body height increase, the witness testified that the usual approach is a conventional good history and physical examination to make sure there is not a chronic disorder such as diabetes, renal, or cardiovascular disease, or a severe nutritious disorder which would produce short stature. In the absence of poor posture or physical deformity, exercise is not used, because it was stated exercise will not increase ultimate body height, nor speed the attainment of ultimate body height.

With reference to respondents' exercise instruction course or program, the witness stated its use would have no effect on the growth spurt as biologically determined, and such exercise could not affect the epiphysis fusion in the bones. It was further stated that exercise has no relationship to velocity or intensity of growth, that biologically there are growth processes which do go on strikingly during adolescence and that this growth essentially is over by late adolescence, and that exercise in addition to the biologically determined growth could not add permanently to height.

The witness testified that posture should not be equated with height because once growth ceases and height becomes stable, a correction in posture can alter height to the extent of standing more erectly and thus obtaining whatever inherent growth one has achieved. It was stated that position can give you all kinds of variation in height and that anatomical height is what one measures at the end of growth. According to the witness, "if one has poor posture so that one slumps, visibly slumps, if one stands erect, this increases his height, but not his anatomical height."

10. Dr. J. Lawrence Angel, Curator of Physical Anthropology, Smithsonian Institution, Washington, D.C., holds a Doctor of Philosophy degree received from Harvard University in 1942. Since graduation, the witness taught anthropology at the Universities of Harvard, California, and Minnesota, following which he was appointed to the Anatomy and Physical Anthropology Department of Jefferson Medical College, Philadelphia, Pennsylvania, from which he retired as a full professor on August 31, 1962, to his present position. For five years prior to such retirement from Jefferson Medical College, the witness also taught a course in surgical anatomy to surgeons at the United States Naval Hospital, Philadelphia, Pennsylvania. The exhibit record in this proceeding contains a list of seven pages showing the biography and education of the witness, his pub-

lications, abstracts of papers given at scientific meetings, books reviewed, and research and travel grants received from the Guggenheim Foundation and the Wenner-Gren Foundation, New York, New York, the American Philosophical Society, and from the United States Public Health Service.

Dr. Angel testified to having engaged in study and research pertaining to the anatomy and structure of the spinal column and the bone changes which might take place in it with age in the adult. The witness expressed familiarity from his research, with the factors that determine the ultimate body height that would be reached by a person at maturity. The witness testified that to his knowledge, there is no new scientific method which would add inches to the height of an individual after maturity, and that no growth was possible after the closure of the epiphyses of the long bones and the vertebral column.

With reference to respondents' exercise course and various of the representations therein set forth, the witness testified that exercises which involved a rigorous routine of stretching might improve posture, but would not lead to an increase in height after maturity; that an eventual permanence in the expansion and thickening of the joints could not be so achieved; and that an increase in the size of the joints by natural growth could not be accomplished by interstitial accretions, because in relation to bone, growth cannot take place by interstitial accretions. The witness stated the term "interstitial accretions" to have been introduced into the anatomical literature some decades back, because at one time it was considered to be a possible way of growth in bone. According to the witness, this theory has since been investigated and disproved.

With reference to the representation made in respondents' instruction course or program that "Men and women of 40 are still growing and the process continues into the fifth and sometimes sixth decade according to anthropologists of the Smithsonian Institute", Dr. Angel testified that such was not a reflection of the official position of the Smithsonian Institute. The witness stated he knew of no scientific or medical evidence that would support the proposition, that there could be an increase in the bone structure or an enlargement of the intervertebral discs by reason of any system of exercises which would be particularly directed to stretching in their execution. The witness further stated there was evidence opposed to it, in that, the common observation of individuals who have exercised strenuously and had been measured repeatedly through their lives, shows that once the epiphyses have permanently closed, their body

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stature does not increase. As a practical illustration of this, the witness cited the example of ball players.

11. Dr. Henry L. Feffer, Associate Clinical Professor of Orthopedic Surgery, George Washington School of Medicine, Washington, D.C., holds the degree of medical doctor received from Indiana University School of Medicine in 1942. Following graduation the witness trained in orthopedics in Kings County Hospital, New York, and Gallinger Municipal Hospital, Washington, D.C. The witness was an orthopedic surgeon in the United States Army, 1945-1947, and since then has been in the practice of orthopedic surgery in Washington, D.C. He is a consultant to the National Institute of Health; Mount Alto Veterans Hospital; D.C. General Hospital; and George Washington University Hospital, all of Washington, D.C.

Dr. Feffer, a Diplomate of the American Board of Orthopedic Surgery, testified that he was a member of a four-man symposium picked to discuss intervertebral discs before the American Academy of Orthopedic Surgery in January, 1962, and that the study of intervertebral discs has been his principle interest. The exhibit record in this proceeding contains a two-page list of Dr. Feffer's professional qualifications and publications.

Dr. Feffer explained at length the structure and functioning of an intervertebral disc. The intervertebral disc was stated to be the shock absorber like structure which lies between each two vertebral bodies and functions as a distributor of forces. Its center contains a gel or fluid able to absorb force and thus prevent bone damage, which was stated to be its primary function. The witness testified that in older people when the bones soften, that a disc could increase in height but then only with an equivalent loss of bone, because before the disc will extend it will fracture bone, and that in the case of a damaged intervertebral disc, the healing or replacement process was not a growth process in the spine in the context of a height increase.

The witness further stated that he had never undertaken any experimental work with respect to the effect of mechanical motion upon the intervertebral discs in living persons, and did not see how it could be done, because one would not operate on normal tissue in a living person just before and after physical exercise to determine its effect on an intervertebral disc. Nor had the witness undertaken any laboratory experimentation in connection with the physical makeup of the intervertebral disc from the particular viewpoint of determining the effect upon it of exercise, because in a dead person that would be impossible.

With regard to various of the statements and representations made by respondents in the advertising and sale of their exercise instruction course or program, Dr. Feffer testified to having no objection to the said exercises and that such would probably make the individual stand straighter. The witness then added, "But when the advertisement and the system claims a growth factor, with scientific proof thereof and an increase in height due to the ability of living cells to multiply, this is absolutely fallacious."

With reference to respondents' representation that the purpose of respondents' exercise course or program was directed "above all, to stretch, restretch, and achieve eventual permanence in the expansion and thickening of the joints", Dr. Feffer stated such claim also to be false.

The witness testified that to his knowledge there was no scientific method known to make the cells multiply themselves, stating, the intervertebral disc is one of the earliest parts of the body to undergo degenerative stages, it starts to go in the teens. There is no increase in cellular content. It is just the opposite, in spite of anything anybody has ever been able to do. "There is no, there is absolutely no, way to increase growth" once the growth of the individual epiphyseal centers are closed, there is no way to open them and start growth again. "This is ridiculous", according to Dr. Feffer.

The witness further testified that the period in a person's life when the epiphyseal growth centers close vary in all parts of the body. In the spine it was stated to be in the mid-teens and once they were closed, it was impossible to reopen them again, and growth has then stopped. The witness stated that there are tables available for all the different joints, and that you can determine the bone age of an individual through their use. In the case of disorders of growth, such as endocrine imbalance, one can use X-rays and from comparison with such tables, bone age can be determined in contradistinction to chronological age.

Dr. Feffer distinguished between body growth and an increase in body height. As to body growth, this was stated to be regulated by endocrine gland performance and hormone output in the body, or in the normal adult, to menopause age in women and to the approximately equal age in men. The witness then testified that the growth centers close by a trigger mechanism of the pituitary gland output which occurs at puberty. In other words, stated the witness, the same pituitary gonadotrophic hormone which stimulates the gonads to develop into functional sexual organs closes the growth centers. Dr. Feffer testified that in speaking of the growth centers reference was

being made to the bones, stating that to have an "increase in longitudinal length you would have to have change in bone size since this is what holds everything else together."

The witness also testified to using exercises in his practice, and further, that the exercises in respondents' course were good but standard, and that the witness could devise 100 different kinds that would do the same thing to correct posture and eliminate excessive spinal curvatures. As to what extent respondents' exercise course would increase the height of a person with excessive spinal curvature, the witness stated it would depend upon the curve to be straightened and that an increase in apparent height of a quarter of an inch through exercise would be a pretty good result. The witness added that considerably more would be produced if there was a fantastic, severe, idiopathic scolios or a severe curvature of the spine which one actually operated upon and straightened. In the case of a severe curvature, the witness testified exercises would not straighten it out, but one could attempt to afford some correction.

12. Dr. Charles F. Lakritz, 6838 Clyde Street, Forest Hills, New York entered Kirksville College of Osteopathy and Surgery, Kirksville, Missouri, in 1936 and graduated in 1940, with the Degree of Doctor of Osteopathy. The witness also holds the Degree of Master of Arts in Psychology received in 1957 from the New School for Social Research, New York, New York. Dr. Lakritz served his internship in the Gleason Hospital, Larned, Kansas, 1940-1941, and since has been licensed to practice in the States of Ohio and New York. He is a member of the New York State Osteopath Society, an associate member of the American Psychological Society, and an associate member of the New York Clinical Psychologists. The record shows no published work by the witness.

The witness testified osteopaths are distinguished from medical doctors by the fact that they employ manipulative therapy in the treatment of a disease. This therapy is usually applied to the back, the spine, the vertebral column, and other areas of the body as well, according to the witness. Dr. Lakritz testified that no one had ever come to him with the specific request that his height be increased, but that he had on occasion observed a height increase collaterally resulting from his therapy.

The witness testified that patients have been referred to him by medical doctors for manipulative or osteopathic treatment. The particular example testified to by Dr. Lakritz in this proceeding, to support an observation of alleged height increase, represented an abnormal situation dealing with an apparent posture defect. The witness

testified he had observed an increase in height in an elderly man of 60 who allegedly increased in height about five or six inches resulting from his therapy. This man according to Dr. Lakritz, had a slipped intervertebral disc in the lumbar area for which he was being treated in a New York hospital without apparent improvement, and had decided to try osteopathic treatment before resorting to an operation. Dr. Lakritz testified to treating this man, who came to him in pain with a contorted posture, with medicines and the application for about 90 to 100 days of a harness using traction of about 50 to 70 pounds applied to the problem area. The doctor testified that in his opinion this traction, in principal, was the equivalent of a stretching exercise, and that the mechanical therapy he applied, in principal, was similar to what would be received by a person following respondents' exercise course or program.

Dr. Lakritz further testified that he had made some research of the effect of exercise on the spine at respondent Samuel N. Kram's request, although the extent of such research of the literature, and on what literature Dr. Lakritz based his testimony in this proceeding in such regard, was not stated or made clear on the record. The witness, on the question of body growth, generally testified that exercise would increase metabolism, that the endocrine gland partaking in this increase in metabolism would increase the amount of their production, and that this would mean a heightened amount of endocrine secretion in the body, and the witness then concluded with the statement that body growth could only occur in the presence of endocrine activity. The only example the witness could give from personal observation as to any joints of the body which might expand their structure due to an increase of endocrine production, in an adult past the growth spurt, was an expansion in the pelvic joints during pregnancy which, according to the witness, was believed to be due to increased endocrine production. The witness stated with relation to such belief, that to his knowledge, no one knew how the body channels such increased endocrine production to the pelvic area, and added, "I think there are many assumptions, of course. But I don't believe that anybody has declared with certainty that this is so and nothing else."

Previous medical testimony was to the effect that physical exercise had no relation to bone growth, and that body growth and height were, in general, related to the growth of the long bones in the leg and the spine, and further, that when the epiphyses in both of these regions fuse, growth ceases. This fusion had been stated to occur, in general, at a time period corresponding to the end of the adoles-

cent growth spurt. It had also been testified that "there is evidence in the literature that growth of the spine will continue in adult life up to about the 40th year, but this change is "very, very small, very small."

Dr. Lakritz, after testifying that the epiphysis centers are in the vertebral body and that the vertebral body is distinct from the intervertebral disc which is not a bony substance, was read the above quoted testimony to which he stated his agreement. The witness was then asked if exercises were localized to the vertebral column, and based on his prior testimony that exercises would stimulate hormone or endocrine gland activity, whether in his opinion such endocrine action would focus upon the epiphyseal center of the vertebrae. To this Dr. Lakritz answered: "I can only say to you that I could entertain it as a possibility." The witness was then further asked if, in his opinion, this could result in an epiphyseal growth; to which the answer was: "Yes, sir; it's a possibility."

In assessing this testimony by Dr. Lakritz as to any such resulting bone growth in the vertebral column, little or no probative value can be given to the conjectural possibilities arrived at on such a speculative basis. The great weight of the acceptable probative testimony in this proceeding is found to be that while physical exercise may, to some degree, correct posture and cause one to stand more erect and thus create a height increase appearance, it cannot accelerate bone growth and the attainment of biologically determined ultimate body height, and further, that no bone growth resulting in or producing any permanent increase in actual body height or structure, can be caused by or result from physical exercise of any description or application.

13. Witness Clifford Atkins, purchased and used respondents' exercise course for an unspecified four weeks sometime in 1961. Mr. Atkins testified he was five feet seven inches tall at the beginning of the exercises, and at the end of four weeks when he concluded such exercises, that he had gained an inch and one half in height. Mr. Atkins, a man of very limited education, age 54, for the past 19 years of his life has been engaged as a porter in work involving the lifting of heavy objects. His testimony as to an increase in body height was based on two measurements taken by his wife with a tape measure as he stood against a wall in his house. Obviously the accuracy of his wife's visual observations as orally related to the witness, and in turn orally related by the witness on the witness stand, was both hearsay and not convincing evidence that Mr. Atkins' body grew one and one half inches, at his age and in four weeks, as a direct re-

sult of the use of respondents' exercise course. At best, and even if such an alleged increase in body height measurement figures were to be accepted as accurate, they could reasonably only be taken under such circumstances to indicate an improvement in posture causing the witness to stand more erect and appear taller than formerly.

14. Respondent Samuel N. Kram, age 30, testified that at the earlier age of twenty years, he was five feet three and one half inches tall. Witness Kram testified that at such earlier age he had read an article in a physical culture magazine on exercises alleged to increase body height, that he diligently performed such exercises for a period of six or seven months and thereby gained an inch and a quarter in stature. The witness stated the foregoing exercises to be similar to those contained in respondents' instruction course as offered for sale, and further claimed that he had since retained most of this increase but not all of it up to the date of his testimony. Respondent's alleged body height increase was based on measurements he alone made of himself on a measurement scale in the Brooklyn YMCA. The witness testified that prior to these exercises he was an ardent weight lifter and that the new exercises undertaken were stretching exercises that tended to counter his weight lifting exercises which were body compressing. Under these circumstances, it is again more reasonable to relate any alleged body height increase to a postural improvement and not bone growth as a direct result of the exercises in question.

The witness also testified as to certain library materials he had personally researched both prior and subsequent to the preparation of said course. The so-called research material gathered by respondent Samuel N. Kram and attempted to be introduced into evidence through said respondent comprised respondents' exhibits marked for identification 1 through 31 A-B which were rejected for receipt in evidence. They included, for example, exhibit 2-A for identification, a photostat of a New York Times newspaper article dated February 1937; exhibits 11, 12 and 13 for identification, which were 1928, 1960 and 1937 articles offered as written in the original French and which were testified to have been translated by the respondent with the aid of a French dictionary; exhibit 14 for identification, being certain pages from a book stated to have been written by a nonmedical author and published in 1939; exhibits 15 through 20 for identification being articles in various medical journals written in 1939 and reviewing said exhibit 14; and finally a group of exhibits marked for identification 23 through 31, being letters of various dates received by the respondents from alleged satisfied users of their exercise course or program.

None of the authors or writers of the articles, books, book reviews, or respondents' course or program users' letters were attempted to be presented for cross-examination as to their background, the verity of the underlying data, and the probity of any controversial statements or assertions which might therein appear. None of the witnesses, Dr. Heald, Dr. Angel or Dr. Feffer, relied on such exhibits as the basis for their testimony in this proceeding, nor was any showing made that such exhibits were generally known and accepted as authoritative, or as reputable works by any part of the medical profession. It is also significant that no attempt was made through respondents' witness, Dr. Lakritz, either to identify or ascertain whether any of said exhibits were considered either authoritative or a well-known reputable work.

15. The Commission's Rules of Practice for Adjudicative Proceedings, Section 4.12(b) with reference to admissibility states, "Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded." Respondents, notwithstanding, urge the admission herein of these rejected exhibits in the obvious presence of a lack of opportunity for adequate cross-examination in such regard. Respondents would also urge that this rejected material should have been allowed to be used in cross-examination of the expert witnesses in this proceeding.

Respondents rely upon and quote from *Dolcin Corporation v. Federal Trade Commission* (1954) 219 F. 2d 742. In the *Dolcin* case, however, we find the court stating, "When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions," citing 6 Wigmore, Evidence, Third Edition, Section 1690.

In *Wybrant System Products Corporation, et al.* (1958) 54 F.T.C. 1681, 266 F. 2d 571, *cert. den.* 361 U.S. 883, the Commission stated: "Finally, on their appeal respondents assert that the examiner erred in ruling that passages from medical treatises were inadmissible as evidence. Respondents offered as evidence four excerpts from books on dermatology, described by them as written by well-recognized authorities. The examiner refused to admit the excerpts because the authors were not present for cross-examination. Respondents argue that this ruling conflicts with the holding in *Dolcin Corporation, et al. v. Federal Trade Commission*, 219 F. 2d 742 (1954), *cert. denied* 75 S. Ct. 571 (1955). The Commission does not so understand the *Dolcin* decision. The court there stated that:

When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions. (Emphasis supplied.)

It went on to say that cogent arguments can be made in favor of their use, but recognized the difficulty under the hearsay rule. 'Yet that objection,' the court said, 'may be largely obviated by requiring the introduction of the articles through experts in the field who will, themselves, be subject to cross-examination.' No such procedure was followed herein. Moreover, not only did the court in *Dolcin* note that the examiner should have a certain broad discretion in this connection, it did not reverse the decision because of the exclusion of the scientific writings. It stated that it would do this only where substantial justice so requires and that it would hesitate in most cases to say that a rule almost universal in the courts would, in an administrative proceeding, deny the parties substantial justice. Under the circumstances, we cannot find that the examiner committed error here in refusing to admit the scientific writings."

The court in the *Wybrant* case stated: "The firm testimony of the Commission's several expert witnesses that petitioners' preparations and treatments cannot cure male pattern baldness provides ample basis for the Trial Examiner's conclusion that the advertisements were false. And since these witnesses freely conceded that some authorities had expressed somewhat contrary views, we do not think the Trial Examiner's refusal to receive in evidence the medical treatises that petitioners offered constituted reversible error. See *Dolcin Corp. v. F.T.C.*, D.C. Cir. 219 F. 2d 742, 747-749 [5 S.&D. 646], *certiorari denied* 348 U.S. 981."

In the *Dolcin* case, the court states in a footnote that before *Reilly v. Pinkus* (338 U.S. 269) the circuits were split on whether or not works on which the witness had not relied could be used in cross-examination. In the *Dolcin* opinion, the court states, *Reilly v. Pinkus*, we think, stands for the general proposition that an expert witness who bases an opinion to a *significant* degree upon his *reading* may be cross-examined as to that opinion by reference to other *reputable* works in *his field* (italics supplied).

Another footnote in the *Dolcin* case states with reference to *Reilly v. Pinkus* that the court does not therein say how the authority of those works is to be determined. The footnote further states that it seems clear from the facts given in the opinion that it is unnecessary for the witness himself to recognize the authority of the work [but see *Lawrence v. Nutter*, 203 F. 2d 540 (4th Cir. 1953)] or even to have read it [but see *Shaw v. Duncan*, 194 F. 2d 779 (10th Cir. 1952)]. We think the authority of the work is for the presiding officer to decide. And we think he should have a broad discretion in determining what—and how much—evidence may be presented on that question.

Shaw v. Duncan, cited in the above footnote, following its construction of the opinion in *Reilly v. Pinkus* holds: "We do not think it was error to sustain the objection to the question propounded to Dr. Norris with respect to the teachings in "Modern Dermatology and Syphilology" as it treats of acne, because of his answer that he never read the work."

Lawrence v. Nutter, cited in the above footnote, following its construction of *Reilly v. Pinkus* holds: "We need go no further in the pending case than to hold that the attention of an expert may be called in the course of cross-examination to statements in conflict with his testimony contained in relevant scientific works which he recognizes as authoritative."

In the present proceeding it will be noted that respondents' exhibits marked for identification 2-A through 31 A-B and rejected, were identified and sought to be introduced into evidence through the lay witness respondent Samuel N. Kram. Omitting respondents' satisfied customer letters, proposed exhibits 2 and 23 through 31, none of the above exhibits would have qualified for receipt in evidence or for use on cross-examination under the foregoing case law. Moreover, in the attempt to identify various of these latter exhibits through the prior witnesses, Dr. Heald, Dr. Angel and Dr. Feffer for attempted use in the cross-examination of these witnesses, respondents were met with the statement that the authors and their work was unknown to them. The record discloses this with particular reference to the attempted use of exhibits marked for identification 1 A-E, 2-A, and 9 A-C, as regards Dr. Heald; 9 A-C, as regards Dr. Angel; and 2-A, 3 A-D, with regard to Dr. Feffer.

The fact that Dr. Heald, Dr. Angel and Dr. Feffer were not acquainted with said exhibits in no way detracts from the expert qualifications and the probative value of the testimony of these expert witnesses. See, *United States v. Wood* (1955) 226 F. 2d 924; *Irvin v. Federal Trade Commission* (1944) 143 F. 2d 316.

With reference to the irrelevancy, in addition to the hearsay character of respondents' rejected exhibits, the so-called satisfied customer letters marked for identification 2 and 23 through 31, see *Independent Directory Corporation, et al. v. Federal Trade Commission* (1951) 188 F. 2d 468 at 282; *Erickson Hair and Scalp Specialists v. Federal Trade Commission* (1959) 272 F. 2d 318 at 322, cert. den. 362 U. S. 940.

16. Respondents Sinkram Incorporated and Samuel N. Kram, in the solicitation and the sale and for the purpose of inducing the sale of their aforesaid course or program, have advertised and repre-

sented as shown in finding number four, supra: "Quick results positively guaranteed."

The above representation is unqualified. In truth and in fact the guarantee is limited, and the terms, conditions and the extent to which the guarantors will perform thereunder are not disclosed in said advertising material. Respondents' said advertised guarantee representation is therefore found to be false, misleading and deceptive to prospective purchasers of said course or program.

Prospective purchasers, responding to respondents' above advertisement, are first informed that such guarantee is limited and confined to only the return of the purchase price, upon receiving respondents' mailed sales letter or brochure. This letter or brochure adds the following further limitation: "A written guarantee that your entire money will be returned if you follow the system steadfastly and rigidly and you do not increase your height to your own complete satisfaction."

Prospective purchasers responding to the advertisements set forth in findings number four and five, supra, and forwarding twenty-five cents to the respondents, are not shown by the record in this proceeding to have been returned such forwarded money following a reading of this letter or brochure sent them by the respondents. The purchase price of respondents' course or program is stated in said letter or brochure to be \$15, with \$5 being initially paid, and the balance of \$10 due as stated in said letter or brochure: "Only after you have received complete satisfaction and are simply overjoyed over the gains you have made."

While the record does not disclose the number of prospective purchasers that sent respondents 25 cents and thereafter received respondents' letter or brochure and then declined to purchase respondents' course or program, respondent Samuel N. Kram testified to making approximately 7,000 sales since early 1960. The witness further estimated that of this number, about ten per cent of the purchasers paid the additional \$10 balance over and above the initial \$5 payment, and that about 35 dissatisfied purchasers had requested and been refunded whatever purchase price respondents had received for said course or program.

The record discloses the advertisement shown in finding number four, supra, to have been used prior to April 20, 1961, and further, there is testimony to the effect that respondents' exercise course or program and their letter or brochure had undergone a recent change in nomenclature, and that the term "Institute" had been discarded although the tenor of said course or program remains the same. In

Initial Decision

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Clinton Watch Company v. Federal Trade Commission (1961) 291 Fed. 838, it was held: "Voluntary discontinuance of an unfair trade practice does not necessarily preclude issuance of a cease and desist order. The order to desist from an abandoned unlawful practice is in the nature of a safeguard for the future. Other than the mere discontinuance at an undisclosed time of their practice relating to the guarantee of their merchandise, petitioners have shown no facts before the Commission which would require that this portion of the order be set aside (citing cases)." See also, *Inter-Communication System of America, Inc. v. Federal Trade Commission* (1948) 45 F.T.C. 361; *Parker Pen Company v. Federal Trade Commission* (1946) 159 F. 2d 509.

17. Applicable to the prior findings herein that the use of the word "institute", the unqualified guarantee representation, and respondents' body height increase representation and claim, are each and all false, misleading and deceptive, is the following from the case law.

In *Carter Products, Inc. v. Federal Trade Commission* (1951) 186 F. 2d 821, it was held: "The law is violated if the first contact or interview is secured by deception even though the true facts are made known to the buyer before he enters into the contract of purchase (citing cases)."

In *Charles of the Ritz Dist. Corp. v. Federal Trade Commission* (1944) 143 F. 2d 676, it was held: "That the Commission did not produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown in Federal Trade Commission proceedings (citing cases). Representations merely having a 'capacity to deceive' are unlawful (citing cases)."

The court in the above case further held: "There is no merit to petitioner's argument that, since no straight-thinking person could believe that its cream would actually rejuvenate, there could be no deception. Such a view results from a grave misconception of the purposes of the Federal Trade Commission Act. That law was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous,' and the 'fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.' The important criterion is the net impression which the advertisement is likely to make upon the general populace. And, while the wise and the worldly may well realize the falsity of any

representations that the present product can roll back the years, there remains 'that vast multitude' of others who, like Ponce de Leon, still seek a perpetual fountain of youth. As the Commission's expert further testified, the average woman, conditioned by talk in magazines and over the radio of 'vitamins, hormones, and God knows what,' might take 'rejuvenescence' to mean that this 'is one of the modern miracles' and is 'something which would actually cause her youth to be restored'. It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements, and should have the discretion, undisturbed by the courts, to insist if it chooses 'upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein." (citing cases)'

18. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, and acts and practices as hereinbefore found and set forth in Paragraphs 1 through 17, supra, 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 a substantial number of respondents' exercise instruction courses or programs by reason of said erroneous and mistaken belief.

CONCLUSIONS

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 aforesaid acts and practices of respondents, as hereinbefore found and set forth in Paragraphs One through Eighteen of the Findings of Fact, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Sinkram Incorporated, and its officers, and Samuel N. Kram, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of an exercise instruction course or program for body height increase, or any

other course or program of a similar nature and purpose, sold under the same or any other name, do forthwith cease and desist from:

1. Using the word "Institute", or any simulation thereof, in or as part of a corporate or trade name, or otherwise in any manner through any means or device, representing directly or by implication, that the business operated by them, or any of them, is an organization for the promotion of research, experimentation, investigation and study, or anything other than a private business enterprise for profit.

2. Using the words "Height Increase" or any other words of similar import to describe a course or program, or representing or implying in any other manner that the use of a course or program will thereby cause, contribute to or result in an increase in ultimate body height.

3. Representing directly or by implication that a course or program, or the results of the use thereof, are guaranteed, unless the terms and conditions of such guarantee, and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

OPINION OF THE COMMISSION

FEBRUARY 28, 1964

The complaint in this matter charges respondents—a corporation, and the individual who controls it, doing business under the name of The Height Increase Institute—with falsely and deceptively advertising that their home instruction course can "add inches" to the user's height, and with other deceptive acts or practices, in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner filed an initial decision in which he upheld the complaint and entered an order to cease and desist, and respondents have appealed. Only one of the contentions urged by respondents on this appeal—viz, that the examiner erred in making certain evidentiary rulings—has sufficient merit to warrant discussion in this opinion.

The contention is that the examiner erred in refusing (1) to admit, on direct examination, scientific writings offered in evidence by respondents, and (2) to permit respondents to use these writings, on cross-examination, to impeach the testimony of expert witnesses supporting the complaint. We do not find it necessary to decide whether these rulings of the examiner were erroneous. The excluded documents are part of the record before us on this appeal, and the Commission has studied them at first hand. We have also reviewed

the examiner's findings and conclusions, and the evidence on which they are based, in the light of the excluded materials. On the basis of the entire record, including those materials, we conclude that the examiner's ultimate findings and conclusions are warranted by the evidence and are correct.

Complaint counsel argued before the examiner that the questioned scientific writings should be excluded as evidence because of the hearsay rule. This argument, as the examiner recognized in his initial decision, is wide of the mark. Evidentiary hearings before the Commission are not governed by the common-law exclusionary rules, such as the hearsay rule. Rather, "any oral or documentary evidence," so long as it is "reliable, probative, and substantial," is competent and admissible in Commission proceedings. Administrative Procedure Act, Section 7(c); see, e.g., *John Bene & Sons, Inc. v. Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924). As stated in the Commission's Procedures and Rules of Practice, (August 1, 1963), "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded." (Section 3.14(b).)

The test governing use of scientific writings as evidence in administrative proceedings has been stated in *Reilly v. Pinkus*, 338 U.S. 269 (1949), and *Dolcin Corp. v. Federal Trade Commission*, 219 F. 2d 742 (D.C. Cir. 1954). Emphasizing the inapplicability of the hearsay rule to agency proceedings, the court stated in the Dolcin case: "We think authoritative scientific writings can—and should—be freely used by administrative agencies." *Id.*, at 749. While the proper rule is that scientific writings are not, as a class of evidence, inadmissible in Commission proceedings, they should be excluded when they are irrelevant, immaterial or unduly repetitious, or when they are patently unreliable or worthless—in the language of the *Dolcin* decision, not "authoritative."¹

As to the use of scientific writings on cross-examination, the Supreme Court stated in *Reilly v. Pinkus*, 338 U.S. 269, 275:

In cross-examination respondent sought to question these witnesses concerning statements in other medical books, some of which at least were shown to be respectable authorities. The questions were not permitted. We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.

¹ In *Dolcin*, the court "assumed" authoritativeness of the scientific writings offered through qualified experts who could be cross-examined on the science in the field, including the literature offered, but made it clear that ordinarily the authority of the work is for the hearing examiner to decide.

This test was further elaborated in the *Dolcin* decision:

Reilly v. Pinkus, we think, stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field. It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use. And we do not think that the Court limited its ruling to cases involving fraud. The *Reilly* case also holds that the trial examiner has broad discretion to determine the extent of the cross-examination on written authorities. He probably has, in some cases, discretion to determine whether there should be any such cross-examination at all. But it is error to exclude such questions by blanket rule, without more. 219 F. 2d, at 746-47.

The rules established in *Reilly v. Pinkus* and *Dolcin* have the advantage of simplifying the conduct and consideration of Commission proceedings. Under these rules, a hearing examiner should not by blanket rule exclude from evidence scientific writings shown to be reliable, but on the other hand should prevent a deluge of material of comparatively small value; and in determining the extent, if any, to which the use of such writings may be permitted on cross-examination, he should exercise a "broad discretion" in the light of all the circumstances surrounding the testimony of the expert sought to be cross-examined.²

Considered as a whole, the initial decision in this case indicates that the hearing examiner followed these general principles, and, accordingly, we are denying the respondents' appeal. An appropriate order will be entered.

Commissioner Anderson concurred in the result. Commissioner MacIntyre did not concur. Commissioner Reilly did not participate for the reason that he did not hear oral argument.

SEPARATE OPINION OF THE COMMISSION

FEBRUARY 28, 1964

By MACINTYRE, *Commissioner*:

I cannot concur in the opinion of the Majority, for I believe the statements made therein may have unfortunate and far-reaching results.

The first question here presented is: Are scientific writings offered to prove purported factual statements made therein admissible into evidence without their author present in the courtroom? Of course,

² In a proper case it may be presumed—in the absence of a showing to the contrary—that articles written by apparently qualified experts in reputable scientific journals are "respectable authorities" within the meaning of *Reilly v. Pinkus*.

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such writings are hearsay when offered for such a purpose and their admissibility depends upon a host of factors. In general, however, it can be said that such evidence should be accepted when its incompetence is overcome by a showing that the writing is of such an authoritative nature as to be generally accepted by a substantial segment of the scientific community involved. Proof of such acceptance will more often stem from the expertise and reknown of the author, rather than from the nature of the publication. But these are questions for the hearing examiner to decide and he must be permitted to exercise his discretion unencumbered by ambiguous Commission fiat that " * * * evidentiary hearings before the Commission are not governed by the common-law exclusionary rules, such as the hearsay rule." The simple truth is that some hearsay is admissible and some is not and it is up to the hearing examiner to sift the wheat from the chaff, with the end in view of compiling a factual record of reliable evidence.

In this proceeding the hearing examiner ruled that the writings offered were not authoritative and could not be relied upon for the truth of the statements contained therein and rejected them as hearsay. I believe that these rulings were correct and the Commission should have so ruled. The Majority quotes from *Dolcin Corp. v. Federal Trade Commission*, 219 F. 2d 742 (D.C. Cir. 1954), to the effect that " * * * authoritative scientific writings can—and should—be freely used by administrative agencies." With this statement, say my colleagues, the court was "Emphasizing the inapplicability of the hearsay rule to agency proceedings * * * ." As I read *Dolcin*, it holds only that authoritative scientific writings, vouched for by a qualified witness, may be "used" by administrative agencies. To opine from this narrow holding that the hearsay rule is inapplicable in a Federal Trade Commission proceeding is stretching the decision far beyond its proper scope.

It is my fear that the Commission's opinion may be interpreted by hearing examiners and counsel as an invitation to amass records with hearsay evidence which in the final analysis is incapable of supporting an order to cease and desist, for only evidence which is "reliable, probative, and substantial" can support such an order. Administrative Procedure Act, § 7(c), 5 U.S.C. 1006(c) (1952).

There appears to be a good deal of support among members of the bar and the judiciary for the proposition that the rules of evidence should be relaxed in administrative proceedings. I am in full sympathy with the view that evidence which would not be admitted in a criminal or civil proceeding tried before a jury can and should be

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freely admitted in administrative proceedings. However, this sensible rule should not be adulterated to permit the admission of incompetent evidence lacking corroboration or other support as to its reliability. After all, we, no less than the courts, are dealing with the absolutes of fact and truth and the nature of neither changes with the tribunal. There is absolutely no reason or justification why the evidentiary basis of, for example, an order of divestiture should vary depending upon the unhappy accident of whether the Justice Department or the Federal Trade Commission instituted the Section 7, Clayton Act, proceeding. Respondents and defendants are entitled to equal justice.

The second question presented by this proceeding is: Was the hearing examiner's refusal to permit the respondents' counsel to utilize certain scientific writings in cross-examining the Commission's expert witnesses reversible error? The Majority, relying upon *Reilly v. Pinkus*, and *Dolcin*, held that the use of scientific writings on cross-examination should be left to the discretion of the hearing examiner, to be exercised in the light of the circumstances surrounding the expert testimony. While I am in substantial agreement with this ruling, I would point out that hearing examiners should follow a more relaxed rule in permitting materials to be used for cross-examination purposes than is used to govern the admissibility of evidence. The probing of cross-examination is such an important part of the judicial search for truth that it must never be unduly restricted or curtailed. Most of the considerations which bar the admission of hearsay documentary evidence do not apply when the material is utilized solely for cross-examination purposes. If the witness being examined is properly qualified, he will evaluate the materials used to question him. If he is not qualified, the materials may help to expose this fact and that is an important purpose of the cross-examination.

FINAL ORDER

Upon consideration of respondents' appeal from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That:

- (1) The findings of fact and conclusions of law contained in the initial decision are adopted by the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;
- (2) The order contained in the initial decision is adopted and incorporated herein as the final order of the Commission:

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(3) Respondents shall file, within sixty (60) days of receipt of this order, a written report setting forth in detail the manner and form of their compliance with the order.

Commissioner Anderson concurring in the result; Commissioner MacIntyre not concurring; and Commissioner Reilly not participating for the reason that he did not hear oral argument.
