

Complaint

IN THE MATTER OF

NORTH AMERICAN PHILIPS COMPANY, INC.

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

Docket 8472. Complaint, Mar. 6, 1962—Decision, Apr. 9, 1964

Order dismissing—since respondent's advertising and promotional matter has carried no reference to price since issuance of the complaint and the Commission lacked information that its advertisements fail to satisfy the requirements of the Guides Against Deceptive Pricing—complaint charging the manufacturer of "Norelco" electric shavers with supplying its distributors and retail dealers with advertising material designating excessive amounts as "Suggested Retail Price", etc., and with advertising the same prices in newspapers and magazines.

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 North American Philips Company, Inc., a corporation, has violated the provisions of said Act, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent North American Philips Company, Inc., 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 at 100 East 42nd Street, New York 17, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of electric shavers to distributors and retail dealers under the trade name "Norelco".

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said merchandise, when sold, to be shipped from its places of business in the State of New York and elsewhere to purchasers thereof located in States other than the States in which the shipments originated and in the District of Columbia and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of this business, respondent has engaged in the practice of supplying its distributors and retail dealers with advertising material and other printed matter containing amounts designated as "Suggested Retail Price" and "Manufacturer's Suggested Retail Price." Respondent has also placed advertising

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containing the same prices in newspapers and magazines of general circulation. The several models of the electric shaver and the prices specified, as described above, are as follows:

Norelco Speedshaver with floating head.....	\$29.95
Norelco Speedshaver.....	24.95
Norelco Sportsman.....	19.95
Lady Norelco.....	24.95
Coquette	17.50

PAR. 5. By the aforesaid practices respondent has represented, and has placed in the hands of retailers and others the means and instrumentalities of representing, directly or by implication, that such prices are the usual and customary retail prices for such merchandise.

PAR. 6. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact the stated prices were and are substantially in excess of the prices at which the advertised products were and are usually and customarily sold at retail in the trade areas where the representations were made.

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 merchandise of the same general kind and nature as that sold by the 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.

ORDER DISMISSING THE COMPLAINT

The complaint herein, issued March 6, 1962, charged the respondent with the unfair trade practice of supplying distributors and retail dealers of its electric shavers with advertising material and other printed matter containing certain suggested retail prices which were substantially in excess of the prices at which said products were usually and customarily sold at retail in the trade areas where the representations were made. Respondent filed an answer thereto which in essence

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denied the material allegations of the complaint, and which asserted as a separate and complete defense abandonment of all references to price in all of its consumer advertising material more than six months prior to issuance of the complaint.

On September 11, 1962, the Commission placed this matter on the Suspense Calendar and referred the files to the Bureau of Industry Guidance for negotiation of an agreement of voluntary cessation of the aforesaid misleading advertising practices. The Commission has now been advised that neither respondent's consumer advertising nor its consumer promotional literature presently contains any reference to a suggested retail price, and we are informed that such material has carried no reference to price since the complaint issued. Further, we have been assured that respondent intends to continue to omit any reference to price in all consumer literature which advertises or promotes the electric shaver models presently marketed by it and that it has taken specific steps to effectuate this result. Finally, the Commission is not in possession of information indicating that respondent's advertising fails to satisfy the requirements of Guide III of the recently promulgated Guides Against Deceptive Pricing, effective January 8, 1964. Accordingly,

It is ordered, That the complaint herein be, and it hereby is, dismissed.

IN THE MATTER OF

FARRAR, STRAUS AND COMPANY, INC., ET AL.*

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

Docket 8588. Complaint, July 29, 1963—Decision, April 9, 1964

Order requiring a publisher and its advertising agency, both in New York City, to cease making various misrepresentations in advertising in newspapers and magazines and other promotional matter as to the health and other benefits to be derived by persons following the dietary principles, formulas and instructions in Gayelord Hauser's book entitled "Mirror, Mirror On The Wall".

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 Farrar, Straus and Company, Inc.,* a corporation, and Sussman and Sugar, Inc., a cor-

*Reported, as amended by order of hearing examiner dated Oct. 14, 1963, to reflect present corporate name of respondent.

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poration, herein 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 Farrar, Straus and Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. This respondent's office and principal place of business is located at 19 Union Square West, New York, New York.

Respondent Sussman and Sugar, Inc., is a corporation organized and existing and doing business under and by virtue of the laws of the State of New York. This respondent's office and principal place of business is located at 24 West 40th Street, New York, New York.

PAR. 2. Respondent Farrar, Straus and Company, Inc. is now, and for some time last past has been, engaged in the publication, promotion, sale and distribution of a book entitled "Mirror, Mirror On The Wall" by Gayelord Hauser. This respondent causes said book when sold to be transported from its place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. This respondent maintains, and at all times mentioned herein has maintained, a substantial trade in said book in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Sussman and Sugar, Inc., is now and at all times mentioned herein has been, the advertising agency of respondent Farrar, Straus and Company, Inc., and now prepares and places, and has prepared and placed, for publication the advertising and promotional material, referred to herein, to promote the sale of the aforesaid book.

PAR. 3. In the conduct of its business, at all times mentioned herein respondent Farrar, Straus and Company, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of books.

In the conduct of its business, at all times mentioned herein, respondent Sussman and Sugar, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase in commerce of said books, respondents have made certain statements and representations with respect hereto in advertisements inserted in newspapers and magazines, and in other promotional material having a general circulation throughout the various States of the United States and in the District of Columbia.

PAR. 5. Among and typical but not all inclusive of the statements and representations made and appearing in said advertisements, and in other promotional material disseminated as herein set forth are the following:

For the long suffering reducers who try every new diet. Gayelord Hauser offers welcome and comforting relief with his shortest short cut to reducing an easy to follow common sense way of shedding weight gradually, without tears or calory charts.

* * * * *

Give your husband a new heart, a new waistline.

* * * * *

A beautifying slimming diet with no mention of calories.

* * * * *

* * * this says Mr. Hauser does not mean you must suffer the rigors of a low calory diet.

* * * * *

Forget calories

* * * * *

Once you discover the way to control chemical balance of your body you'll enjoy eating exotic foods, bread, butter, salad oil, * * * and delicious desserts.

* * * * *

For your husband,

How to exercise scalp and save the hair * * *

Diet and Potency * * * how to Protect the heart

* * * * *

Teach him how to exercise the scalp to save his hair

Reveal to him the connection between diet and potency

Show him how he can protect his heart

* * * * *

Wonder working new formulas for beauty.

Face tightener apply it wash it off and watch droopiness disappear

A vinegar cure for stubborn dandruff

10 second slenderizer

easy to prepare neck tightener helps bring beauty stream to loose neck tissues.
herb recipe to add brightness and clarity to eyes

* * * * *

The wonder-working secret is that you will learn how to control the chemical balance of your body. Remember: the most beautiful woman in the world is made of the very same chemicals as you. The difference is in the way those chemicals are distributed throughout the body.

* * * * *

* * * Mr. Hauser, who has already led thousands of people to better health and longer life tells how you can achieve a deep and lasting loveliness through this wonderful new beauty plan. It is a plan based on the magic of beauty giving foods and simple skin-nourishing facials.

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This is the way of natural cosmetics.

You will learn what foods to eat, what easy, never-tiring exercises to take, what simple, nutritious cosmetics to apply * * *

* * * you too must nourish yourself with beauty giving foods and cosmetic treatments * * *

Now, Gayelord Hauser reveals these surprising secrets:

* * * What can Dr. Rudolf Virchow's experience teach you about the order in which to eat your food?

He shows that you can be more beautiful, almost instantly, by getting rid of tension.

Mr. Hauser's most important principle is that no cosmetic treatment can equal or measure up to the natural glow of good health, and he shows how it can be attained and maintained

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein respondents have represented and are now representing directly and by implication:

1. That by following the dietary principles set forth in the book a person will:

- (a) Lose weight without reducing his caloric intake,
- (b) Protect the heart or restore it to normal,
- (c) Increase sexual potency,
- (d) Be able to control the chemical balance of the body and distribute chemicals within the body in a prescribed manner.

2. That by following certain formulas or instructions set forth in said book a person will:

- (a) Tighten the skin of the face and neck and eliminate loose face and neck tissue.
- (b) Slenderize in 10 seconds.
- (c) Add brightness and clarity to the eyes.
- (d) Prevent baldness.
- (e) Cure stubborn dandruff.
- (f) Rid himself of tension.
- (g) Attain health and remain healthy.

3. That the order in which one eats food is important to his health.

4. That the cosmetics described in the book are natural and nutritious.

5. That the book contains hundreds of marvelous secrets of health.

6. That the exercises described in the book will never be tiring to the one performing them.

PAR. 7. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. A person following the dietary principles in the book:
 - (a) Will not lose weight without reducing his caloric intake.
 - (b) Will not protect his heart or restore it to normal, or have any other beneficial effect upon his heart.
 - (c) Will not increase his sexual potency.
 - (d) Will not control the chemical balance of his body or distribute chemicals within the body in a prescribed manner.
2. A person following the formulas and instructions in the book:
 - (a) Will not tighten the skin of his face and neck and will not eliminate loose face and neck tissue.
 - (b) Will not slenderize in 10 seconds or in any other period of time.
 - (c) Will not add brightness or clarity to his eyes.
 - (d) Will not prevent or retard baldness or excessive hair loss.
 - (e) Will not cure dandruff.
 - (f) Will not rid himself of tension, or reduce or relieve tension.
 - (g) Cannot rely upon attaining health or remaining healthy.
3. The order in which one eats food is not important to his health.
4. The cosmetics described in the book are not natural nor are they nutritious.
5. The book does not contain hundreds of secrets of health.
6. The exercises described in the book may produce fatigue in the person performing them.

PAR. 8. The use by 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. 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 of the Federal Trade Commission Act.

Mr. Garland S. Ferguson and Mr. Howard S. Epstein supporting the complaint.

Mr. Patrick H. Sullivan, Mr. E. Kendall Gillett, Jr., and Whitman, Ransom and Coulson of New York, N.Y., for respondents.

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INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER¹

FEBRUARY 11, 1964

In this proceeding the Federal Trade Commission seeks to prevent alleged false advertising exemplified by that relating to a copyrighted book, "Mirror, Mirror on the Wall," by Gayelord Hauser. Some of the questioned advertising quotes the dust cover of the book. Respondents question the power of the Commission to prevent such advertising and also the issuance of any order against the advertising agency respondent.

The Pleadings and Pretrial Proceedings

The complaint herein was issued by the Federal Trade Commission July 29, 1963. It alleges that respondent Farrar, Straus and Company, Inc.,² (herein designated Farrar) is a New York corporation engaged in publishing and that it is the publisher of "Mirror, Mirror on the Wall." Respondent Sussman and Sugar, Inc., (Sussman) is also a New York corporation and the advertising agency which prepared the advertising for the book. Both respondents are alleged to be engaged in interstate commerce and in competition with other corporations in the sale and in the advertising of books, respectively. The advertising of the book is quoted and there are allegations concerning the representations made thereby. These representations are alleged to be false, misleading, and deceptive. They are further alleged to have the tendency to lead the purchasing public to purchase the book and thus to constitute a violation of § 5 of the Federal Trade Commission Act.

Respondents filed their answer August 30, 1963, admitting the states of incorporation, the jurisdictional facts regarding interstate commerce, and that most of the quoted matter in the complaint appeared in advertisements of the book or on the dust cover. The answer claimed that some of the advertising was quoted out of context or incorrectly. Respondents denied that the advertising was misleading or that they had violated § 5 of the Federal Trade Commission Act.

A prehearing conference was held October 11, 1963, which is summarized by the order of the undersigned dated October 14, 1963, the transcript thereof was thereafter amended, on notice, by order dated November 12, 1963.

Following the prehearing order, and on the eve of trial, counsel for respondents moved to amend their answer, among other things, to

¹ Caption and body of complaint amended by order dated October 14, 1963, to reflect present corporate name of respondent.

² The complaint originally used the title Farrar, Straus and Cudahy, Inc., former name of one of the respondents. This was changed by order of October 14, 1963.

agree that if complaint counsel presented medical testimony such testimony would support the allegations in the complaint concerning the falsity of the representations. Respondents continued to deny that the advertising should be construed as alleged in the complaint but entered into a stipulation which counsel represented made further hearings unnecessary. Thereupon on motion of counsel supporting the complaint, the hearing examiner entered an order dated December 26, 1963, which granted respondents' motion to amend its answer and counsel supporting the complaint's motion to receive the stipulation and exhibits, close the record and set times for filing proposed findings, conclusions and memoranda and counter proposals. Thereafter proposed findings, conclusions and memoranda were filed pursuant to such order.

Basis for Decision

Based on the record of this proceeding consisting of the complaint, answer, amended answer (and motion papers filed with it), stipulation dated December 11, 1963, and the exhibits marked for identification during the prehearing conference, and received in evidence by the undersigned's order of December 26, 1963; and, having considered the proposed findings, conclusions and memoranda of counsel; the following findings of fact, conclusions and order are made.³ All proposed findings of fact and conclusions not made in substance or in the terms proposed are rejected.

FINDINGS OF FACT

1. Respondent Farrar, Straus and Company, Inc. (hereinafter sometimes referred to as Farrar), 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 19 Union Square West, New York, New York. (C 1 admitted by failure to deny AA, RF 1, see CF 1.)

2. Respondent Sussman and Sugar, Inc. (hereinafter sometimes referred to as Sussman), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York,

³ Pursuant to rule 3.21 (b), abbreviated references are made as follows:

(A) means respondents' answer.

(C) refers to complaint.

(S) means stipulation dated December 11, 1963.

(AA) means respondents' amended answer.

(CF) refers to Commission proposed findings.

(RF) refers to respondents' proposed findings.

(TR) refers to the transcript of the prehearing conference.

(CX) refers to an exhibit made part of the record by order dated December 26, 1963.

Reference to particular proof is made as an example. It in no way indicates that the hearing examiner has failed to consider the entire record.

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with its office and principal place of business located at 24 West 40th Street, New York, New York (C 1 admitted by failure to deny AA, RF 2, see CF 2.)

3. Respondent Farrar is now, and for some time last past has been, engaged in the publication, promotion, sale and distribution of a book entitled, "Mirror, Mirror On The Wall," by Gayelord Hauser. (C 1 admitted AA 1, CF 3, see RF 3.)

4. Respondent Sussman is now, and at all times herein relevant, has been, the advertising agency of respondent Farrar. It prepared and placed for publication and dissemination the advertising and promotional material designated CX 2A, 2B, 3A, 3B, 4A, 4B, and 4C (S 3, RF 5, CF 4, see AA 1), to promote the sale of said book, "Mirror, Mirror On The Wall."

5. Respondent Farrar causes said book when sold to be transported from its place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. Respondent Farrar maintains and at all times mentioned herein has maintained a substantial trade in said book in commerce, as "commerce" is defined in the Federal Trade Commission Act and has been in substantial competition, in commerce with other corporations, firms and individuals in the publishing business. (AA 1, RF 3, CF 5.)

6. In the conduct of its business, and at all times relevant herein, respondent Sussman also has been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business. (RF 8, CF 6.)

7. In the course and conduct of their business, and for the purpose of inducing the purchase in commerce of said book, respondents have made certain statements and representations with respect thereto in advertisements inserted in newspapers and magazines, and in other promotional material having a general circulation throughout the various States of the United States and in the District of Columbia. (C 4 admitted by failure to deny A, AA; CX 4A, B, C and D, CX 5A, B.)

8. Among such statements are the following, contained in the dust jacket of the book, "Mirror, Mirror on the Wall":

(a) He shows that you can be more beautiful, almost instantly, by getting rid of tension, the Number One destroyer of otherwise lovely faces and figures. (CX 1A.)

(b) For the long suffering, *reducers* who try every new diet that comes along, Gayelord Hauser offers welcome and comforting relief with his shortest short cut to reducing—an easy-to-follow common-sense way of shedding weight gradually, without tears or calorie charts. In fact, he does not use the word 'calorie' at all in this book. (Emphasis in original.)

(c) Give your husband a new heart, a new waistline, a new life * * *.

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(Item (c) above is in quotation marks apparently from three sentences at page 247 of the book: "*Give him a new heart* * * *", "*Give him a new waistline*, * * *", "and * * * *Give him a new life* * * *."

9. It was not established that respondent Sussman was responsible for the publication of "Mirror, Mirror on the Wall," or the dust jacket accompanying it. That was the responsibility of Farrar. (RF 8, S, AA 1.)

10. Among the statements contained in an advertisement in both the October 1, 1961 "This Week" Magazine, pp. 11 and 12 (CX 2A and 2B) and the January 6, 1963 "Parade" Magazine, pp. 13 and 14 (CX 3A and 3B) are the following:

(a) A heading, "A Beautifying, Slimming Diet With No Mention of Calories * * *."

(b) * * * This, says Mr. Hauser, does not mean you must suffer the rigors of a low calorie diet. As a matter of fact, *there is not a mention of calories in this whole amazing book.*

(c) SPECIAL FOR YOUR HUSBAND. Teach him how to exercise the scalp to save his hair. Reveal to him the connection between diet and sexual potency. * * * Show him how he can protect his heart.

(d) WONDER WORKING NEW FORMULAS FOR BEAUTY. The fabulous face tightener. Apply it, wash it off, and watch droopiness disappear. A vinegar cure for stubborn dandruff. The 10 second slenderizer. An easy-to-prepare neck tightener that will help bring the beauty stream to those loose neck tissues. An old fashioned herb recipe to add brightness and clarity to your eyes.

(e) The wonder-working secret is that you will learn how to control the chemical balance of your body. Remember: the most beautiful woman in the world is made of the very same chemicals as you. The difference is in the way those chemicals are distributed throughout the body.

(f) * * * Mr. Hauser, who has already led thousands of people to better health and longer life, tells how you can achieve a deep and lasting loveliness through his wonderful new beauty plan. It is a plan based on the magic of beauty giving foods and simple skin-nourishing facials, and invigorating home beauty treatments.

(g) This is the way of *natural cosmetics*, and it can lead you to the kind of glowing good looks that *won't* come off at night.

(h) You will learn what foods to eat, what easy, never-tiring exercises to take, what simple, *nutritious* cosmetics to apply, and hundreds of other marvelous secrets which will result in an air of enviable loveliness.

(i) * * * you too must nourish yourself with beauty giving foods and cosmetic treatments * * *.

(j) Now, Gayelord Hauser reveals these surprising secrets: * * * What can Dr. Rudolf Virchow's experiment teach you about the order in which you eat your food? (Emphasis in original.) (CX 2A, B, 3A, B, S 2.)

11. Respondents prepared and published or caused to be prepared and published the advertising making all of the statements or representations contained in finding number 10. The publications in which they appeared are supplements to newspapers having a general circulation. They also advertised in other newspapers circulating

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throughout the various States of the United States and in the District of Columbia. (RF 6, 11, C 4 admitted by failure to deny, AA, CX 4-A and B, 5-A and B.)

12. Proof was not made concerning all of the statements alleged in paragraph five of the complaint to have appeared in advertising having a general circulation throughout the various States of the United States and in the District of Columbia and, in prehearing, respondents denied responsibility for publishing certain of the exhibits containing such statements TR 8 and 9, C 2, 5, RF 5).

13. Through the use of the advertisements respondents have represented directly and by implication:

1) That by following the dietary principles set forth in the book a woman will:

- (a) Lose weight without reducing her caloric intake.
- (b) Protect her husband's heart or restore it to normal.
- (c) Increase her husband's sexual potency.
- (d) Be able to control the chemical balance of the body and distribute chemicals within the body in a prescribed manner.

2) That by following certain formulas or instructions set forth in said book a woman will:

- (a) Tighten the skin of the face and neck and eliminate loose face and neck tissue.
- (b) Slenderize in 10 seconds.
- (c) Add brightness and clarity to the eyes.
- (d) Prevent baldness in her husband.
- (e) Cure stubborn dandruff.
- (f) Attain health and remain healthy.

3) That the order in which one eats food is important to health.

4) That the cosmetics described in the book are natural and nutritious.

5) That the book contains hundreds of marvelous secrets of health.

6) That the exercises described in the book will never be tiring to the one performing them. (CS 2A, B, 3A, B.)

14. Respondent has conceded "that if counsel supporting the complaint did present medical testimony, such testimony would support the following proposition * * * set forth and that respondents would not have presented medical testimony to the contrary." Accordingly, the hearing examiner finds that:

The statements and representations made in or implied by the advertising quoted in finding numbers 8 and 10 are false, misleading and deceptive. In truth and in fact:

1) A person following the dietary principles in the book:

- (a) Will not lose weight without reducing his caloric intake.

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(b) Will not protect his heart or restore it to normal, or have any other beneficial effect upon his heart.

(c) Will not increase his sexual potency.

(d) Will not control the chemical balance of his body or distribute chemicals within the body in a prescribed manner.

2) A person following the formulas and instructions in the book:

(a) Will not tighten the skin of his face and neck and will not eliminate loose face and neck tissue.

(b) Will not slenderize in 10 seconds or in any other period of time.

(c) Will not add brightness or clarity to his eyes.

(d) Will not prevent or retard baldness or excessive hair loss.

(e) Will not cure dandruff.

(f) Will not rid himself of tension, or reduce or relieve tension.

(g) Cannot rely upon attaining health or remaining healthy.

3) The order in which one eats food is not important to his health.

4) The cosmetics described in the book are not natural nor are they nutritious.

5) The book does not contain hundreds of secrets of health.

6) The exercises described in the book may produce fatigue in the person performing them. (C7, AA 4.)

15. Quite apart from the concession described in finding 14, the advertising contains at least one plain misstatement of fact. It states: "*As a matter of fact there is not a mention of calories in this whole amazing book.*" On page 53 the book not only uses but italicizes the word calories in a quotation from Dr. Margaret Mead. Mr. Hauser does not count calories in this book, it is true, but prevents high caloric intake in a different fashion. He makes it clear also in the book that he is in accord with the well recognized physical fact that weight must be controlled by food intake and its utilization in bodily activity. His method of reducing intake is placing emphasis on proteins and on eating and other habits which he claims will reduce the desire for too much food. The implication obtained from the advertising is to the contrary that no such reduction in intake is necessary if the regimen in the book is followed.

16. It is unnecessary to consider the effect of the dust jacket statements because the implications from the advertising in the newspaper supplements is an adequate basis for testing the advertising. The only element not present in the newspaper advertising which is in the dust jacket is the phrase quoted in finding 8(a) above. (CX 1A, 2A, 2B, 3A, 3B.)

17. While the dust jacket purports to quote from the book (see finding number 8(c)) respondent has not pointed out a place where the precise quotation appears. The quotation appearing in finding

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8(c) above is the closest to the statement on the dust jacket which was found by the hearing examiner. Considering the dust jacket as a whole the hearing examiner infers from its appearance and content that it is advertising matter and not an integral part of the book.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the persons of the respondents who are engaged in interstate commerce and over the subject matter of the advertising which took place in interstate commerce.

2. No question is properly raised concerning the First Amendment to the Constitution since there is no attempt to enjoin the publication of the book, "Mirror, Mirror on the Wall" itself, but merely to prevent the use of unfair and misleading methods of advertising to induce its sale.⁴

3. While it is improbable that a person who is reasonably well informed concerning diet and nutrition would believe the representations made or implied in the advertising, such representations are capable of, and would have a tendency to, mislead many persons who are exposed to the newspaper supplements and other media in which the advertising appeared. It has been made abundantly clear that the test with respect to false advertising is "unlike that abiding faith which the law has in the 'reasonable man'. (I)[i]t has very little faith indeed in the intellectual acuity of the 'ordinary purchaser' who is the object of the advertising campaign."⁵ (Parenthetical matter supplied in place of bracketed matter.)

The impression created in these advertisements is that respondents intended that they be taken seriously. Compare for contrast the Volkswagen advertisement attached to Commissioner Elman's dissent in *Mary Carter Paint Company, Inc.*, Docket 8290 dated June 28, 1962.

⁴ *Public Clearing House v. Coyne*, 194 U.S. 497 (1904); *Donaldson v. Read Magazine*, 333 U.S. 178 (1948); *E. F. Drew & Co., Inc. v. F.T.C.*, 235 F. 2d 735 (2 Cir. 1956), cert. denied 352 U.S. 969 (1957); *Murray Space Shoe Corporation v. F.T.C.*, 304 F. 2d 270 (2 Cir. 1962).

⁵ *Federal Trade Commission v. Sterling Drug, Inc.*, 317 F. 2d 669 (2 Cir. 1963), opinion by Judge Kaufman, p. 674; see also *Donaldson v. Read Magazine*, 333 U.S. 178, 188 (1948); *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116 (1937); *Exposition Press, Inc. v. Federal Trade Commission*, 295 F. 2d 869, 872 (2 Cir. 1961), cert. denied 370 U.S. 917; *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 342 (7 Cir. 1960), cert. denied 364 U.S. 883 (1960); *Book of the Month Club, Inc. v. Federal Trade Commission*, 202 F. 2d 486 (2 Cir. 1953), cert. dismissed 346 U.S. 883; *Moretrench Corp. v. Federal Trade Commission*, 127 F. 2d 792, 795 (2 Cir. 1942); *Charles of the Ritz Distributor Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (2 Cir. 1944); *Zenith Radio Corp. v. F.T.C.*, 143 F. 2d 29, 31 (7 Cir. 1944); *Handler, The Control of False Advertising Under the Wheeler-Lea Act*, 6 Law and Comp. Problems, 91, 98 (1939); *Colgate-Palmolive Co. v. Federal Trade Commission*, 310 F. 2d 89 (1st Cir. 1962); also second opinion 326 F. 2d 517 (1963) BNA. ATRR. No. 128, p. X-1, December 24, 1963.

From the cases we infer that the public interest requires protection of the credulous and hopeful beauty seekers to whom the advertising might be particularly attractive; even though no such protection is needed for their scholarly sisters who would not believe that any book could bring about the results implied from this advertising.

4. Respondent Farrar admits responsibility for the dust jacket of the book but claims it is a part of the book. The hearing examiner has found as a fact that the dust jacket is not an integral part of the book but rather advertising prepared for the purpose of its sale. The inference is properly drawn from an examination of the dust jacket and other matters of record in this case. *Witkower Press, Inc., et al.* 57 F.T.C. 145 (1960). In modifying the initial decision in an opinion by Commissioner Anderson, the Commission made the following observation at page 218, fn. 3 of that case: " * * * From our inspection of the jackets, we note them to be eye-arresting and attractive and clearly designed to attract the attention and interest of prospective purchasers. The covers have included laudatory expressions by reviewers and others for the obvious purpose of inviting and inducing sales in book stores and when made available at the close of the author's lectures in various cities. We think that the evidence received of record clearly supports inferences that the statements and representations appearing on the paper covers constituted advertising matter under any reasonable standards and interpretation applicable to that term." This decision was appealed to the Court of Appeals for the District of Columbia and dismissed by agreement November 30, 1960. (VI. S & D. 844 not otherwise reported.)

Respondents' citation of *Koussevitzky v. Allen Town & Heath*, 188 Misc. 479 (1947) *aff'd*, 272 App. Div. 759, is not apposite. That case was one arising under the civil rights law of New York. That statute⁶ protects the right of privacy of an individual against the publication of pictures without consent for the purpose of advertising and trade. It was held to have no application to biographies of a public figure. *Sidis v. F.R. Pub. Corp.*, 113, F. 2d 806 (2 Cir. 1940) and the advertising of such a biography was held to be included in the exception. Moreover, in his opinion the late Judge Shientag clearly recognized that a dust jacket on a book was advertising. He said: "The book contains pictures of him which he says are used without his permission, and it has the usual *puffing* or *advertising* cover jacket." (Emphasis supplied.) Later he said: "Since the biography does not fall within Sections 50 and 51, neither do the advertisements or announcements thereof." (*id* 484.)

⁶ § 50, 51 Civil Rights Law of the State of New York.

5. The use by the respondents of the false, misleading and deceptive advertising for which they were jointly responsible 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 the book, "Mirror, Mirror on the Wall" published by respondent Farrar. The dust jacket for which Farrar was responsible had and has the same tendency and capacity to deceive.

6. The aforesaid acts and practices of respondents as herein set forth in the foregoing findings of fact, were and are, all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

7. The Federal Trade Commission by joining respondent Sussman has made a determination that under the facts alleged in the complaint such advertising agency should be made a respondent along with respondent Farrar, the publisher. The difference between the facts alleged and those established is so slight that there is no reason to believe that the Commission, had it been aware of such divergence, would have failed to join respondent Sussman in the complaint in view of the concessions in the amended answer and stipulation. It is a matter of the sound discretion of the Commission to determine whether or not to join an advertising agency. The joint responsibility here conceded makes it appropriate to do so.⁷ Particularly in the case of a book which is available for all to read there is "no reason why advertising agencies, * * * should be able to shirk from at least prima facie responsibility for conduct in which they participate."⁸

8. Respondents attack the form of order proposed by the Commission and served with its complaint (see Respondents' Memorandum dated January 21, 1961, pp. 8-11 and Reply Memorandum dated January 29, 1964, pp. 5-7). In their first memorandum respondents allege that the order is too broad because: (1) there was only one offense with respect to one book, (2) the language preventing advertising of other books "of the same or approximately the same content, material and principles," is so vague it cannot be applied by respondents and, (3) as to Sussman it should be limited to books written by Hauser. In their Reply Memorandum respondents claim: (1) that any order with respect to Sussman should not include statements on the dust jacket

⁷ *Colgate-Palmolive Co. et al. v. F.T.C.*, 310 F. 2d 89 (1st Cir. 1962), see also later opinion dated December 17, 1963, BNA, ATRR No. 128 p. X-1; *C. Howard Hunt Pen Co. v. F.T.C.*, 197 F. 2d 273, 281; *Charles A. Brenner & Sons v. F.T.C.*, 158 F. 2d 74 (6th Cir. 1946); *Carter Products, Inc. v. F.T.C.*, 323 F. 2d 523 (5 Cir. 1963); *Bristol-Myers Co. et al.* 46 F.T.C. 162.

⁸ Opinion of Judge Aldrich, p. 12 of Slip Opinion. *Colgate-Palmolive Company v. F.T.C.* No. 6145, dated December 17, 1963. BNA. ATRR No. 128 P. X-1.

in which it did not participate, (2) the order should prevent *misrepresenting* and (3) the order should be restricted to the very book advertised or to books by the same author.

The Supreme Court in *Ruberoide*⁹ made it clear that the Commission in the exercise of the power which Congress envisioned could not be required to "confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." The First Circuit in its second *Colgate-Palmolive* opinion,¹⁰ although it expressed dissatisfaction with the Commission's order "continue[d] to believe that we should not comment on the precise terms of an order *in vacuo*." Thus we have a clear and current direction that the Commission must be permitted to determine what orders should issue to effectively prevent continuation of unlawful conduct. So long as they are "sufficiently clear and precise to avoid raising serious questions as to their meaning and application."¹¹ It has proposed an order with the complaint and that order should be entered if justified by the facts established and not subject to legal infirmities discovered after the issuance of the complaint.¹² With these principles in mind we consider respondents' objections.

The objections that would limit the order to advertisements of the same book or those by the same author cannot be sustained. Last year's best seller, like yesterday's newspaper affords little temptation to the advertiser. There would probably be no need for such an order at all. The next objection relating to the books whose advertising would be covered suggests that respondents are unable to determine whether they are "of the same or approximately the same content, material and principles." By reading the books publishers and advertising men should certainly be able to determine their similarity. Moreover, their obligation at most is to supply truthful advertising copy which they would in any event be bound to supply. The objections which would place Sussman in a favored position appear wholly unjustified. The fact that it did not happen to utilize the representations concerning "tension" in the advertising for which it was responsible does not make it likely that it would not do so in light of the dust jacket statement which it must have known about. This road also should be closed. To prepare honest advertising copy it must study the book and it should be no hardship to prepare honest advertising on the basis of such a study.

⁹ *F.T.C. v. Ruberoide Co.*, 343 U.S. 470, 473 (1952).

¹⁰ Opinion by Judge Aldrich, December 17, 1963, No. 6145, BNA, ATRR No. 128, p. X-1.

¹¹ *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360, 368 (1962); *Country Tuxedos, Inc. v. F.T.C.*, Slip Opinion p. 574 (2d Cir. January 3, 1964).

¹² Compare *Winston Sales Co., Inc.*, Docket 8531, Order dated November 22, 1963 [63 F.T.C. 1456].

The final objection that only misrepresentation should be prohibited requires no change in the proposed order. It has been conceded that the representations prohibited constitute misrepresentations. They would be misrepresentations of any book "of the same or approximately the same content, material and principles." In the unlikely event that a book of the same content should effect a cure through some change in the human animal the order would clearly be subject to immediate revision.

9. The following order should be issued.

ORDER

It is ordered, That Farrar, Straus and Company, Inc., a corporation, and its officers, and Sussman and Sugar, Inc., and its officers, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of a book entitled "Mirror, Mirror on the Wall" or any other book of the same or approximately the same content, material and principles, whether sold under the same name or any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That by following the dietary principles set forth in the book a person will:

- (a) Lose weight without reducing his caloric intake.
- (b) Protect his heart or restore it to normal, or have any other beneficial effect upon his heart.
- (c) Increase his sexual potency.
- (d) Control the chemical balance of his body or distribute chemicals within his body in a prescribed manner.

2. That by following formulas or instructions set forth in said book a person will:

- (a) Tighten the skin in the face or neck, or eliminate loose face or neck tissue.
- (b) Slenderize in 10 seconds, or in any other period of time.
- (c) Add brightness or clarity to his eyes.
- (d) Prevent or retard baldness or excessive hair loss.
- (e) Cure dandruff.
- (f) Rid himself of tension, or reduced or relieve tension.
- (g) Become healthy or remain healthy.

3. That the order in which one eats food is important to health.

4. That the cosmetics described in the book are natural or nutritious.

5. That the book contains hundreds of secrets of health or that it contains any health secret.

6. That the exercises described in the book will never be tiring to the person who performs them.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

The Commission having considered the initial decision of the hearing examiner filed February 11, 1964, and

It appearing that the initial decision contains a number of errors, and

The Commission being of the opinion that these errors should be corrected:

It is ordered, That the initial decision be, and it hereby is, modified by striking the language in parentheses following paragraph 1 of the Findings of Fact and substituting the following: (C 1, admitted by failure to deny, AA; RF 1; see CF 1).

It is further ordered, That the language in parentheses following paragraph 2 of the Findings of Fact be stricken and the following substituted: (C 1, admitted by failure to deny, AA; RF 2; see CF 2).

It is further ordered, That the language in parentheses following paragraph 3 of the Findings of Fact be stricken and the following substituted: (C 1, admitted, AA 1; CF 3; see RF 3).

It is further ordered, That the language in parentheses following paragraph 7 of the Findings of Fact be stricken and the following substituted: (C 4, admitted by failure to deny, A, AA; CX 4A, B, C, and D; CX 5A, B).

It is further ordered, That the words "Respondent has" in the first sentence of paragraph 14 of the Findings of Fact be stricken and the words "Respondents have" be substituted therefor.

It is further ordered, That subsection 2(f) of paragraph 14 of the Findings of Fact be stricken and subsection 2(g) of paragraph 14 be redesignated 2(f).

It is further ordered, That paragraph 15 of the Findings of Fact be modified by striking the sentence beginning "Mr. Hauser does not count calories", and substituting therefor the following: "Mr. Hauser does not count calories in this book, it is true, but advocates the prevention of high caloric intake in a different fashion".

It is further ordered, That the first sentence of paragraph 17 of the Findings of Fact be modified by the insertion of the word "Farrar" following the word "respondent".

It is further ordered, That subsection 3 of paragraph 8 of the Conclusions in the initial decision be modified by striking the sentence beginning "The objections which would place Sussman" and the succeeding three sentences comprising the remainder of that subsection.

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It is further ordered, That paragraph 2 of the Order in the initial decision be modified by striking subsection (f), and that subsection (g) be redesignated (f).

It is further ordered, That the initial decision as modified by this order, be and it hereby is, adopted as the decision of the Commission.

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 to cease and desist.

IN THE MATTER OF

ADVANCED QUILTING AND BATTING CORP. ET AL.

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

Docket C-734. Complaint, April 9, 1964—Decision, April 9, 1964

Consent order requiring Brooklyn, N.Y., manufacturers of wool products to cease violating the Wool Products Labeling Act by such practices as labeling and invoicing as "90% Reprocessed Wool, 10% other Fibers" and "60% Reprocessed Wool, 40% Other Fibers", quilting materials which contained substantially different fibers and amounts than represented, and by failing to label certain materials with required fiber content.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Advanced Quilting and Batting Corp., a corporation, and Rubin Partel, Mark Zelkowitz, and Joe Rosenthal, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Advanced Quilting and Batting Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Rubin Partel, Mark Zelkowitz, and Joe Rosenthal are officers of said corporation and cooperate in formulat-

ing, directing and controlling the acts, policies and practices of corporate respondent including the acts and practices hereinafter referred to.

Respondents are manufacturers of wool products with their office and principal place of business located at 43-47 Bogart Street, Brooklyn 6, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were quilting materials stamped, tagged, or labeled as containing 90% Reprocessed Wool, 10% Other Fibers, and 60% Reprocessed Wool, 40% Other Fibers, whereas in truth and in fact, said quilting materials contained substantially different fibers and amount of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain quilting materials with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 percentum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 percentum or more; (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that information required under Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form in violation of Rule 9 of said Rules and Regulations.

Decision and Order

65 F.T.C.

PAR. 6. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, 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.

PAR. 7. Respondents in the course and conduct of their business, as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the fiber content of certain of their said products.

Among such misrepresentations, but not limited thereto, were statements representing the fiber content thereof as 90% Reprocessed Wool, 10% Other Fibers and 60% Reprocessed Wool, 40% Other Fibers, whereas in truth and in fact, said quilting materials contained substantially different fibers and amounts of fibers than represented.

PAR. 8. In the course and conduct of their business, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other states of the United States, and maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. The acts and practices set out in Paragraphs Seven and Eight have had and now have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof and to cause them to misbrand products sold by them in which said materials were used.

PAR. 10. 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 within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Wool Products Labeling Act of 1939 and the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

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

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

1. Respondent Advanced Quilting and Batting Corp. 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 43-47 Bogart Street, Brooklyn 6, New York.

Individual respondents Rubin Partel, Mark Zerkowitz, and Joe Rosenthal are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Advanced Quilting and Batting Corp., a corporation, and its officers, and Rubin Partel, Mark Zerkowitz, and Joe Rosenthal, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment in commerce, of wool interlining material or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Setting forth information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder in abbreviated form on labels affixed to wool products.

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65 F.T.C.

It is further ordered, That respondents Advanced Quilting and Batting Corp., a corporation, and its officers, and Rubin Partel, Mark Zerkowitz, and Joe Rosenthal, individually and as officers of said corporation, and respondents' representatives, agents and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of interlining material or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in quilted interlining material or any other textile products on invoices or shipping memoranda applicable thereto or in any other manner.

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

IN THE MATTER OF

ESTEE SLEEP SHOPS, INC., ET AL.

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

Docket 8569. Complaint, May 9, 1963—Decision, April 11, 1964

Order requiring manufacturers and distributors of bedding and furniture of Chicago, Ill., to cease making deceptive savings claims in newspaper advertisements by use of retail price comparisons, and deceptively guaranteeing their mattresses.

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 the parties respondent named in the caption hereof, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the

*This complaint was amended by order of hearing examiner dated Oct. 7, 1963, by striking therefrom the following nine non-existent corporate respondents named herein and substituting therefor Estee Sleep Shops, Inc.: Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 21st Street Estee Sleep Shop, Inc., 63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., Hammond Estee Sleep Shop, Inc.

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 21st Street Estee Sleep Shop, Inc., 63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., and Estee Bedding Company are corporations organized existing and doing business under and by virtue of the laws of the State of Illinois, and are located in Chicago, Illinois. Their principal office is at 2400 West 21st Street in the city of Chicago, State of Illinois. All of the above-named corporate respondents except Estee Bedding Company also maintain an office in Room 845, 29 South La Salle Street, Chicago 3, Illinois. Estee Bedding Company also maintains an office at 2414 West 21st Street, Chicago, Illinois.

Respondent Hammond Estee Sleep Shop, Inc., is a corporation organized existing and doing business under and by virtue of the laws of the State of Indiana, and is located in Hammond, Indiana. Its principal office is at 2400 West 21st Street in the city of Chicago, State of Illinois. It also maintains an office at 1511 Merchants Bank Building, Indianapolis 4, Indiana.

Respondents Samuel Trossman, Marvin Trossman, Harold Trossman and Norman Trossman are individuals and officers of each corporate respondent herein named. Their address is 2400 West 21st Street, in the city of Chicago, State of Illinois. They formulate, direct and control the acts and practices of all the corporate respondents, including the acts and practices hereinafter set forth. They dominate and control each corporate respondent to such an extent that each corporation is unable to formulate policy independently and each corporation's separate corporate identity is no more than a sham.

PAR. 2. Respondent Estee Bedding Company manufactures bedding and assembles furniture. Each of the other corporate respondents sells bedding and furniture at retail. They take orders for furniture and forward such orders to the executive office at 2400 West 21st Street, Chicago, Illinois. The merchandise ordered is then sent from the sole warehouse, which occupies the same premises as the factory, 2400 West 21st Street, Chicago, Illinois, to the customer.

The corporate respondents, other than the Estee Bedding Company also sell at retail furniture not manufactured by the Estee Bedding Company, but which is ordered from other manufacturers by the executive office at 2400 West 21st Street, Chicago, Illinois. They take orders from customers for this furniture and forward such orders to the

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65 F.T.C.

executive office. The merchandise ordered is then sent from the warehouse to the customer. None of the corporate respondents, except the Estee Bedding Company, stock bedding or furniture, except for samples. They function as showrooms.

PAR. 3. Each of the corporate respondents has accepted orders from customers who reside outside the state where it is located and has caused the executive office to ship the merchandise ordered or cause it to be shipped from the factory and warehouse located in Illinois to the customer located outside the State of Illinois. In the case of the Hammond Estee Sleep Shop merchandise has also been shipped from the factory and warehouse in Illinois to customers located in Indiana. This continues to be the manner in which sales and shipments are made by the corporate respondents. Thus each of the corporate respondents maintains, and at all times mentioned herein has maintained, a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In reality the corporate respondents have not operated and do not operate as independent individual corporations but are components of one business entity operated as a vertically integrated operation dominated and controlled by the respondents, Samuel, Marvin, Harold and Norman Trossman, which maintains, and at all times mentioned herein has maintained, a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of said bedding and furniture, respondents have placed or caused to be placed advertisements in newspapers of general circulation. The following statements from the advertisements are typical but not all inclusive:

Kroehler Foam Cushioned Sofa and Chair Save \$60 Decorator designed * * *
 Get yours today at Estee, only \$149.88
 3-Pc Bedroom Suite * * * At Estee, yours for only \$149.88. Save \$60
 Handsome Decorator Living Room 2-Piece Sofa and Chair Suite \$139.95.
 Save \$45
 Imported Danish Style Room
 Group for Easy Relaxation—
 Foam Lounge..... \$79.95
 Armchair 39.95
 Rocker 49.95
 60" Slat Bench..... 19.95
 Total \$189.80
 You pay only..... 119.88
 Save \$69.92
 All for only \$119.88

PAR. 5. Through the use of the aforesaid statements the respondents have represented, directly or indirectly, that:

1. The respondents usually and customarily sold the Kroehler foam cushioned sofa and chair for \$209.88 in the recent regular course of their business and that a saving would be made of \$60.

2. The respondents usually and customarily sold the three piece bedroom suite for \$209.88 in the recent regular course of their business and that a saving would be made of \$60.

3. The respondents usually and customarily sold the two piece sofa and chair suite for \$184.95 in the recent regular course of their business and that a saving would be made of \$45.

4. The respondents usually and customarily sold the Danish style room group for \$189.80 in the recent regular course of their business and that a saving would be made of \$69.92.

PAR. 6. In truth and in fact the respondents have not regularly sold the items listed in Paragraph Five at the prices stated therein and the savings stated therein would not be made. Therefore the statements and representations referred to in Paragraphs Four and Five are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business the respondents have made the following guarantee statements in their newspaper advertisements of their mattresses:

- *5 Year Guarantee

- *5 Year Written Guarantee

- *15 Year Guarantee

- *10 Year Guarantee

- *10 Year Written Guarantee

A footnote to these statements in each advertisement explains, "should mattress become unserviceable to original purchaser from normal use, free repairs will be made".

PAR. 8. In truth and in fact the guarantee card which accompanies a mattress bears the statement that the purchaser must:

1. Fill out and mail in the guarantee stub portion of the card to the Estee Sleep Shops within thirty days of purchase.

2. Use the mattress on an Estee foundation.

3. Pay all costs of transportation and handling.

These statements are not disclosed in the respondents' advertising. Therefore the statements and representations referred to in Paragraph Seven are false, misleading and deceptive.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of bedding and furniture of the same general kind and nature as that sold by respondents.

Initial Decision

65 F.T.C.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William A. Somers and Mr. Robert A. Mattina supporting the complaint.

Ruskin and Rosenbaum of Chicago, Ill., by *Harry H. Ruskin* for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

This proceeding was commenced by the issuance of a complaint on May 9, 1963, charging ten named corporate respondents and four named individual respondents, individually and as officers of said corporations, with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act by making deceptive pricing, savings and guarantee claims for their bedding and furniture.

After being served with the said complaint, the four individual respondents and one of the corporate respondents, Estee Bedding Company, appeared by counsel and thereafter filed their joint answer admitting a number of the specific allegations in the complaint, but denying generally the illegality of the practices charged in the complaint. In addition, the respondents specifically denied the existence of the other nine corporations named in the complaint and affirmatively alleged "that the business heretofore carried on by said respective corporations (herein called Estee retail store corporations) is now carried on by Estee Sleep Shops, Inc., an Illinois corporation."

A prehearing conference was held in this matter on August 26, 1963, at which such matters as the stipulation of uncontested facts, exchange of lists of documents, and witnesses, authentication of documents, amendment of the complaint, etc., were discussed.

On September 10, 1963 complaint counsel filed a motion to amend the complaint to strike therefrom the first nine corporations named

in the caption and substituting therefor the Estee Sleep Shops, Inc. In support thereof and attached thereto, complaint counsel supplied documentary evidence including certificates of the State of Illinois, Office of the Secretary of State, establishing that the first five and the seventh through ninth corporations named in the caption of the complaint merged into 21st Street Estee Sleep Shop, Inc. (the sixth corporation named in the complaint) on March 1, 1963 and on March 19, 1963 the name of the surviving corporation "21st Street Estee Sleep Shop, Inc.," was changed to Estee Sleep Shops, Inc. Since the proposed amendment did not enlarge the scope of the proceedings, but merely deleted non-existent corporate respondents, the hearing examiner on October 7, 1963 granted the Motion to Amend the Complaint.

At the commencement of the hearing held at Chicago, Illinois on November 19, 1963, counsel for respondents indicated that respondents were willing to enter into a stipulation of all the material facts involved in this proceeding in order to avoid further hearings. Accordingly, the hearing was temporarily adjourned to permit the parties to prepare and execute a stipulation of facts. On November 20, 1963, the parties presented to the hearing examiner an executed Stipulation of Facts which was approved and ordered by the hearing examiner to be copied into the record. The record was then closed and the parties were afforded an opportunity to submit proposed findings, conclusions and order.

Thereafter, respondents' counsel submitted a proposed order and brief in support thereof and complaint counsel submitted proposed findings following in *haec verba* the paragraphs contained in the "Stipulation of Facts," proposed conclusions and a brief in support of the order set forth in the complaint.

Consideration has been given to the proposed findings, conclusions and briefs submitted. Findings Nos. 1 through 9 hereinafter adopted follow the exact language of the "Stipulation of Facts" and are not in dispute. Finding No. 10 is a conclusionary finding made by the hearing examiner based upon Findings Nos. 1 through 9 and reasonable inferences to be drawn therefrom.

FINDINGS OF FACT

1. At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 21st Street Estee Sleep Shop, Inc.,

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63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., were corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, and were located in Chicago, Illinois. Their principal office was located at 2400 West 21st Street in the city of Chicago, State of Illinois. All of the above-named corporations also maintained an office in Room 845, 29 South LaSalle Street, Chicago 3, Illinois.

At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter, Hammond Estee Sleep Shop, Inc., was a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, and was located in Hammond, Indiana. Its principal office was at 2400 West 21st Street in the city of Chicago, State of Illinois. It also maintained an office at 1511 Merchants Bank Building, Indianapolis 4, Indiana.

At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter Estee Bedding Company was, and at present still is, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 2400 West 21st Street, in the city of Chicago, State of Illinois. Estee Bedding Company also maintained and still maintains an office at 2414 West 21st Street, Chicago, Illinois.

Samuel Trossman, Marvin Trossman, Harold Trossman, and Norman Trossman are individuals and at the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter, were officers of each corporation named above. Their address was and still is 2400 West 21st Street, in the city of Chicago, State of Illinois. They formulated, directed and controlled the acts and practices of all of the corporations named above, including the acts and practices set forth in the complaint in this matter and in the case of Estee Bedding Company still do. They dominated and controlled each of the above corporations to such an extent that each corporation was unable to formulate policy independently and all of the above corporations were in fact operated as one entity.

On March 1, 1963, Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., and Hammond Estee Sleep Shop, Inc., merged into 21st Street Estee Sleep Shop, Inc., and on March 19, 1963, the name of the surviving corporation, 21st Street Estee Sleep Shop, Inc., was changed to Estee Sleep Shops, Inc. The surviving corporation succeeded to all of the rights and

obligations of the corporations merged into it. The Articles of Incorporation and By-Laws of the surviving corporation and the officers, namely Samuel Trossman, Marvin Trossman, Harold Trossman, and Norman Trossman remain the officers of the surviving corporation and formulate, direct, and control the acts and practices of the surviving corporation, including acts and practices of the type set forth in the complaint.

2. At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint Estee Bedding Company manufactured bedding and assembled furniture and does so at present. Each of the other corporations that existed prior to the above described merger sold bedding and furniture at retail. They took orders for furniture and forwarded such orders to the executive office at 2400 West 21st Street, Chicago, Illinois. The merchandise ordered was then sent from the sole warehouse, which occupies the same premises as the factory, 2400 West 21st Street, Chicago, Illinois, to the customer.

The corporations that existed prior to the merger, other than the Estee Bedding Company, also sold at retail furniture not manufactured by the Estee Bedding Company, but which was ordered from other manufacturers by the executive office at 2400 West 21st Street, Chicago, Illinois. They took orders from customers for this furniture and forwarded such orders to the executive office. The merchandise ordered was then sent from the warehouse to the customer. None of such corporations, except the Estee Bedding Company, stocked bedding or furniture, except for samples. They functioned as showrooms.

3. Each of the corporations that existed prior to the merger accepted orders from customers residing outside the state where it was located and caused the executive office to ship the merchandise ordered or cause it to be shipped from the factory and warehouse located in Illinois to the customer located outside the State of Illinois. In the case of the Hammond Estee Sleep Shop merchandise was also shipped from the factory and warehouse in Illinois to customers located in Indiana. This is the manner in which sales and shipments were made by the corporations that existed prior to the merger and is the manner in which sales and shipments are made at present by the surviving corporation, Estee Sleep Shops, Inc., and Estee Bedding Company through the same retail locations that were employed prior to the merger. Thus each of the corporations that existed prior to the merger maintained a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act and since the merger Estee Sleep Shops, Inc., and Estee Bedding

Company have maintained and still maintain, a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In reality the corporations that existed prior to the merger did not operate as independent individual corporations, but were components of one business entity that was operated as a vertically integrated operation dominated and controlled by the respondents, Samuel, Marvin, Harold, and Norman Trossman, which maintained a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Since the merger the surviving corporation, Estee Sleep Shops, Inc., and Estee Bedding Company have been and at present are operated as a vertically integrated operation dominated and controlled by the respondents, Samuel, Marvin, Harold, and Norman Trossman, which maintains a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, and for the purpose of inducing the sale of said bedding and furniture, respondents have placed or caused to be placed advertisements in newspapers of general circulation. The following statements from the advertisements are typical, but not all inclusive:

Kroehler Foam Cushioned Sofa and Chair Save \$60 Decorator designed * * * Get yours today at Estee, only \$149.88
 3-Pc Bedroom Suite * * * At Estee, yours for only \$149.88. Save \$60
 Handsome Decorator Living Room 2-Piece Sofa and Chair Suite \$139.95. Save \$45

Imported Danish Style Room

Group for Easy Relaxation—

Foam Lounge-----	\$79.95
Armchair -----	39.95
Rocker -----	49.95
60" Slat Bench-----	19.95

Total ----- \$189.80

You pay only----- 119.88

Save ----- \$69.92

All for only \$119.88

5. Through the use of the aforesaid statements, the respondents have represented, directly or indirectly, that:

1. The respondents usually and customarily sold the Kroehler foam cushioned sofa and chair for \$209.88 in the recent regular course of their business and that a saving would be made of \$60.

2. The respondents usually and customarily sold the three piece bedroom suite for \$209.88 in the recent regular course of their business and that a saving would be made of \$60.

3. The respondents usually and customarily sold the two piece sofa and chair suite for \$184.95 in the recent regular course of their business and that a saving would be made of \$45.

4. The respondents usually and customarily sold the Danish style room group for \$189.80 in the recent regular course of their business and that a saving would be made of \$69.92.

6. In truth and in fact, the respondents have not regularly sold the items listed in Paragraph 5 at the prices stated therein and the savings stated therein would not be made. Therefore, the statements and representations referred to in Paragraphs 4 and 5 are false, misleading, and deceptive.

7. In the course and conduct of their business the respondents have made the following guarantee statements in their newspaper advertisements of their mattresses:

*5 Year Guarantee

*5 Year Written Guarantee

*15 Year Guarantee

*10 Year Guarantee

*10 Year Written Guarantee

A footnote to these statements in each advertisement explains, "should mattress become unserviceable to original purchaser from normal use, free repairs will be made."

8. In truth and in fact the guarantee card which accompanies a mattress bears the statement that the purchaser must:

1. Fill out and mail in the guarantee stub portion of the card to the Estee Sleep Shops within thirty days of purchase.

2. Use the mattress on an Estee foundation.

3. Pay all costs of transportation and handling.

These statements are not disclosed in the respondents' advertising. Therefore the statements and representations referred to in Paragraph 7 are false, misleading and deceptive.

9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of bedding and furniture of the same general kind and nature as that sold by respondents.

10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, as 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

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quantities of respondents' products by reason of said erroneous and mistaken belief.

CONCLUSIONS

1. 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 of the Federal Trade Commission Act.
2. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.
3. The complaint herein states a cause of action, and this proceeding is in the public interest.

DISCUSSION OF APPROPRIATE ORDER

As heretofore found, respondents' deceptive pricing practices consist in part of the use in newspaper advertisements of a dual pricing system, that is, a higher undesignated price in juxtaposition with respondents' lower selling price followed by the term "save" together with a figure representing the difference between the higher and lower prices. Similarly, in newspaper advertisements, respondents set forth their selling price followed by the term "save" together with a dollar amount. Although the higher undesignated price is not spelled out in the latter type of situation, it is patently clear that the higher inferred price is the amount of the saving added to respondents' selling price. In short, although respondents employ several variations of their deceptive pricing practice, it boils down to the age old dual pricing technique, which, if accurate and truthful, is not deceptive. However, as employed by respondents, it was deceptive, since a substantial segment of the purchasing public was led to believe that the higher undesignated price was respondents' usual and customary price, when in fact respondents had not regularly sold such items at the higher price.

Paragraph 5 of the complaint as drafted as well as the form of order contained in the complaint, hereinafter set forth, which complaint counsel now requests the hearing examiner to adopt, are predicated on the theory that a higher undesignated price in juxtaposition with a lower selling price or the term "Save —" in conjunction with respondents' selling price, universally means in the minds of the purchasing public that the higher undesignated price is respondents' usual and regular price. The hearing examiner does not agree. The use of a higher undesignated price in juxtaposition with a lower sell-

ing price or the term "Save —" in conjunction with respondents' selling price is at least ambiguous. The ambiguity arises over the fact that the use of a higher price without designating what it stands for or the use of the term "Save —" without indicating from what the saving is derived, is susceptible of several interpretations by the purchasing public.

Admittedly, a substantial segment of the purchasing public interprets the higher undesignated price to be respondents' usual and regular price, and when it is not, as in the instant case, they are deceived. It is also true that an equally substantial segment of the purchasing public will interpret the higher undesignated price to be the usual and regular price in the trade area, *i.e.*, the price charged by respondents' competitors. In the latter situation, such purchasers will be deceived and trade will be unfairly diverted from respondents' competitors, if the higher undesignated price is not the usual and regular price in the trade area. The fact that the higher price is respondents' usual and regular price will not cure the deceptive impression created in the minds of this segment of the purchasing public.

Under these circumstances, the continued use of a higher undesignated price, directly or by implication, whether it be respondents' usual and regular price or the usual and regular price in the trade area is ambiguous and consequently a substantial segment of the purchasing public will be misled at all times.

Complaint counsel's proposed form of order directs that respondents cease and desist from:

1. Representing, directly or by implication that:

(a) Any amount is the usual and customary price of the respondents' merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail by the respondents.

(b) Any saving is afforded in the purchase of merchandise from the respondents' price unless the price at which it is offered is lower than the price at which said merchandise is usually and customarily sold at retail by the respondents.

As the hearing examiner reads this order, it does not clearly and precisely prohibit respondents from using a higher undesignated price in juxtaposition with a lower selling price when the higher undesignated price is the usual and customary retail price of respondents. In fact paragraphs 1(a) and 1(b) would seem to sanction the very practice provided the higher undesignated price is respondents usual and customary price. As demonstrated above the continued use of an undesignated higher price in juxtaposition with a lower selling price is ambiguous and will lead to the deception of a substantial segment

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of the purchasing public. This is the very essence of the matter. Since complaint counsel's form of order does not cure this deceptive practice, the hearing examiner finds the proposed form of order to be unacceptable. Furthermore, paragraph 1(b) of the proposed order would prohibit respondents from representing that any saving is afforded in the purchase of an item unless the advertised price is lower than respondents' usual price. This is unjust and unreasonable and not called for by the facts of the case. Respondents may desire to sell merchandise at lower prices than their competitors. This paragraph of the order would have the effect of preventing respondents from representing that a saving is afforded in the purchase of an item whose selling price is below the trade area price solely because the selling price is not also below respondents' usual price.

In view of the foregoing the hearing examiner has drafted his own order which would eliminate the use of undesignated dual prices with their resultant ambiguity, while preserving to respondents the right to compare their lower selling prices to their usual and regular prices, or the usual and regular prices in the trade area. The order as framed is restricted to dual pricing practices, since this is the only area of deceptive pricing in which the respondents have engaged. The hearing examiner finds no basis in respondents' past conduct from which it may fairly be anticipated that they will engage in other deceptive pricing practices in the future. *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 435 (1941). Consequently, paragraph 2 of the proposed order directing respondents to refrain from misrepresenting "in any manner" the savings available to purchasers of their merchandise is "couched in more sweeping language" than the circumstances of the matter require. *Country Tweeds, Inc., et al. v. Federal Trade Commission*, Trade Reg. Rep. (1964 Trade Cas.) ¶ 70,985 (C.A. 2, Jan. 3, 1964).

The order as drafted follows an affirmative approach to retail price comparisons contained in advertising, *i.e.*, a clear and truthful description to the public of the higher and lower prices. In a recent address before the 53rd Annual Convention of the National Retail Merchants Association, Chairman Dixon of the Federal Trade Commission said:

Whether the ad is truthful or deceptive therefore depends upon how honestly and accurately the "higher" price has been described—whether the alleged "reduction" is real or whether it's a figment of the advertiser's imagination.

The Federal Trade Commission in the introduction to its *Guides Against Deceptive Pricing*, effective January 8, 1964, states:

The basic objective of these Guides is to enable the businessman to advertise his goods honestly, and to avoid offering the consumer non-existent bargains or bargains that will be misunderstood. Price advertising is particularly effective

because of the universal hope of consumers to find bargains. Truthful price advertising, offering real bargains, is a benefit to all. But the advertiser must shun sales "gimmicks" which lure consumers into a mistaken belief that they are getting more for their money than is the fact.

In the opinion of the hearing examiner the order is tailored to cure the ill effects of the illegal conduct and to assure the public freedom from its continuance. *United States v. United States Gypsum Co.*, 340 U.S. 76, 88; *All-Luminum Products, Inc., et al.*, Docket No. 8485, November 7, 1963.

With respect to paragraphs 3 of the proposed form of order dealing with the guarantee violation, there is no disagreement by the parties and the hearing examiner adopts it.

ORDER

It is ordered, That respondents Estee Sleep Shops, Inc. and Estee Bedding Company, corporations and their officers and Samuel Trossman, Marvin Trossman, Harold Trossman, and Norman Trossman, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of bedding and furniture or other similar products, 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 any saving is afforded in the purchase of such products by use of a direct or indirect dual price representation without using words or other descriptive means that clearly and truthfully describe both the higher and lower prices.
2. Representing, directly or by implication, that any of such products are guaranteed unless the nature and extent of the guarantee are clearly and conspicuously disclosed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, effective August 1, 1963, the initial decision of the hearing examiner shall on the 11th day of April 1964, become the decision of the Commission and accordingly:

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

Modified Order to Cease and Desist

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IN THE MATTER OF

GIANT FOOD, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 6459. Complaint, May 8, 1957—Decision, Apr. 13, 1964*

Order modifying, in accordance with the direction of the District of Columbia Circuit of June 14, 1962, 307 F. 2d 184 (7 S.&D. 483), desist order dated June 1, 1961 (58 F.T.C. 977), requiring a large supermarket chain with retail outlets in Maryland, Virginia and the District of Columbia, cease "knowing inducement and receipt of, receipt of, or contracting for the receipt of discriminatory display and promotional allowances."

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the District of Columbia Circuit a petition to review and set aside the order to cease and desist issued on June 1, 1961; and the court on June 14, 1962, having filed its decision, and on September 18, 1962, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the United States Supreme Court having denied a petition for certiorari filed by respondent;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the Court of Appeals, to read as follows:

It is ordered, That Giant Food, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing and receiving, receiving, or contracting for the receipt of, anything of value from any supplier as compensation or in consideration for display or promotional services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondent knows or could reasonably have learned that such compensation or consideration is not af-

