

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

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

IN THE MATTER OF
KORBER HATS, INC., ET AL.

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

Docket 8190. Complaint, Nov. 28, 1960—Decision, June 12, 1964

Order modifying original desist order of March 28, 1962, 60 F.T.C. 642, in accordance with the direction of the First Circuit dated Dec. 31, 1962, 311 F. 2d 358 (7 S.&D. 611), to recognize that the word "Milan" has acquired a secondary meaning indicative of a type of weave or braid, in addition to its original use as descriptive of men's hats manufactured in Italy of wheat straw.

Mr. Terral A. Jordan for the Commission.

Mr. Isador S. Levin of *Levin and Levin*, Fall River, Mass; and
Weil, Gotshal & Manges, New York, N.Y., by *Mr. Ira M. Millstein*,
Mr. Marshall C. Berger, and *Mr. Irving Scher* for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 22, 1963

In the complaint, which was issued on November 28, 1960, the respondents are charged with mislabeling of hats manufactured and

Initial Decision

65 F.T.C.

sold by them in violation of the Federal Trade Commission Act. The complaint reads in part:

PARAGRAPH FOUR: In the course and conduct of their business, and for the purpose of inducing the sale of their said hats, respondents have imprinted certain representations on the tags, labels and sweatbands of men's straw hats respecting the origin, method of construction and material from which the said hats are made. Typical and illustrative of such representations are the following from separate hats:

1. On the label, "Genuine MILAN imported handblocked"; on the sweatband, "Genuine Milan".
2. On the sweatband, "Genuine Imported Milan".
3. On the label, "Genuine MILAN imported braid"; on the sweatband, "Genuine MILAN".

PARAGRAPH FIVE: Through the use of the aforesaid statements respondents have represented, directly and indirectly:

That said hats are manufactured in Italy and are of the same material, construction, design and workmanship as men's straw hats manufactured in Italy and designated by the term "Milan".

PARAGRAPH SIX: Said statements and representations are false, misleading and deceptive. In truth and in fact:

Said hats are not manufactured in Italy. Said hats are manufactured by respondents in the United States. Said hats are not of the same material, construction, design and workmanship as men's straw hats manufactured in Italy and designated by the term "Milan". Men's straw hats designated as "Milan" are made in Italy of wheat straw braid which is of a narrow width with a distinctive style of weave. Respondents' hats are made of a braid manufactured in Japan of Philippine hemp. The said braid is not of the same style and characteristic as the braid used in the manufacture of the "Milan" hats.

In the answer filed by the respondents with reference to the quoted portion of the complaint, it is said:

4. Respondent, Korber Hats, Inc., admits that in the course and conduct of its business, and for the purpose of inducing the sale of its said hats, it has imprinted certain representations on the tags, labels and sweatbands of men's straw hats, but denies that said representations have to do with the origin, method of construction and material of which the said hats are made.

Further answering, respondent, Korber Hats, Inc., admits that typical and illustrative of such representations are those numbered 1, 2, and 3 of paragraph four of the Complaint, excepting that the respondent has not used the word "handblocked" for sometime last past.

* * * * *

5. Respondents deny the allegations contained in paragraph five of the complaint.

6. Respondent, Korber Hats, Inc., admits that hats manufactured by it are manufactured in the United States, and that said hats are made of a braid manufactured in Japan and designated as Milan hemp braid.

Respondent, Korber Hats, Inc., denies all the other allegations contained in paragraph six of the Complaint.

It is further stated in the answer:

And further answering, respondents say that for the past 6 to 8 years it has become a widespread industry practice to attach the words "Milan" and/or "Imported Milan" and/or "Genuine Imported Milan" on the labels and sweatbands of straw hats made of braid imported from Japan and represented and designated as Milan Hemp Braid.

February 7, 1961, at Washington, D.C., was fixed as the time and place of hearings in the complaint. Respondents moved that the hearings be held in New York, N.Y., stating that the center of the hat trade and the respondents' witnesses are located in such city. They also requested additional time to prepare for the hearings. Agreeable to all concerned, hearings were scheduled and held at New York, N.Y., on April 18, 19 and 20, 1961, at which time the complaint counsel put in his case-in-chief and the respondents presented their defense. However, the record was not closed for the receipt of evidence until November 3, 1961, at which time there was presented and received a stipulation as to certain facts which had been entered into by counsel for the parties. On the same date, an order was entered fixing December 4, 1961 for the filing of proposed findings, and December 15, 1961 for the filing of replies thereto. Proposed findings were submitted by complaint counsel, but the respondents failed and neglected to file proposed findings.

On January 23, 1962, the Hearing Examiner filed an initial decision which, in effect, found that the respondents had violated the provisions of the Federal Trade Commission Act as alleged in the complaint and ordered the respondents to cease and desist from:

- (1) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not manufactured in Italy of wheat straw.

- (2) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not of the same construction, design and workmanship as that traditionally characteristic of men's straw hats manufactured in Italy and designated as "Milan".

- (3) Using any words or phrases which, directly or indirectly, represent that said products are manufactured in a given country or out of certain materials or in a particular manner or style unless such is a fact.

- (4) Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove inhibited.

On February 9, 1962, the respondents filed a petition for a review by the Commission of the initial decision, pursuant to the rules¹ of the Commission which were in effect at that time. In support of their petition, the respondents stated:

1. The issue involved in this case is whether the Respondent, Korber Hats, Inc. by using the words "Genuine Milan" or "Genuine Imported Milan" or other similar words on sweat bands or labels attached to hats manufactured by it misled or tended to mislead the public into believing such hats were imported from Italy.
2. The Respondents submit that the Hearing Officer erred in finding that the words "Genuine Milan" or "Genuine Imported Milan" or other similar words on sweat bands or labels attached to hats manufactured by the Respondent, Korber Hats, Inc., misled or tended to mislead the public into believing that such hats were imported from Italy, inasmuch as the findings of the Hearing Officer are based only on the testimony of witnesses engaged in the manufacture and sale of hats, and not upon the testimony of any of the buying public, so-called, and there was no evidence at the hearing that the labels misled or tended to mislead the buying public.
3. It is in the public interest for the Commission to review this decision because most of the manufacturers in the hat industry use labels or sweat bands with the words "Genuine Milan" or "Genuine Imported Milan", or similar words on hats which are not imported from Italy and sold to the general public.

The Commission, on March 28, 1962, after examining the petition and the entire record, and being of the opinion that a determination of the questions presented for review was neither necessary nor appropriate under the law to insure a just and proper disposition of the proceeding and to protect the rights of the respondents, denied the petition and ordered that the initial decision and the order of the Hearing Examiner be adopted as the decision and order of the Commission.

Thereafter, respondents filed their petition for review in the United States Court of Appeals for the First Circuit where the principal issues raised related to the substantiality of the evidence to support the findings of fact as to the falsity or deceptiveness of the labels and, secondly, to the scope of the order.

The Court of Appeals, on December 31, 1962 (311 F. 2d 358), held that substantial evidence supported the Commission's finding that use on hemp hats of terms "Milan", "Genuine Milan", or "Genuine Imported Milan" might tend to mislead a consumer into believing that he was obtaining a hat made of wheat straw and justified restriction of terms to hats manufactured of wheat straw. However, the case was returned to the Commission for determination of whether absolute

¹ § 4.20(b) reads: "Content. The petition for review shall concisely and plainly state (1) the questions presented for review, (2) the facts in abbreviated form, and (3) the reasons why review by the Commission is deemed to be in the public interest. Such petition shall not exceed ten pages in length."

proscription against use of any variation of term "Milan" on hats was required to protect public interest and insure against consumer deception, where evidence strongly indicated that term, apart from its primary market-place significance of "wheat straw", may have acquired secondary meaning in the hat industry denoting the type or class of hats embracing the hemp variety. The Court in its opinion also discussed paragraph (3) of the Commission's order and indicated the belief that the language of such paragraph may be entirely too broad.

The Commission, on March 29, 1963, remanded this matter to the Hearing Examiner for further proceedings in accordance with the opinion of the Circuit Court of Appeals for the First Circuit. On April 17, 1963, counsel for the parties met with the Hearing Examiner in an informal conference, at which time they agreed to a prehearing conference to be held on May 20, 1963. On May 6, 1963, respondents filed an application with the Commission for the initiation of proceedings for the establishment of Trade Practice Rules defining the application standards under which hat manufacturers may label hats with the term "Milan", either alone or in conjunction with qualifying language, and for suspension of further proceedings in this matter until the issuance by the Commission of such final Trade Practice Rules. Counsel supporting the complaint, in reply to respondents' aforesaid application, stated:

* * * that in view of the posture of the instant proceeding; the wide-spread, false and deceptive use by numerous hat manufacturers of "MILAN", "Genuine MILAN", "Genuine Imported MILAN", "Genuine MILAN Imported Hand-blocked" and similar terms to describe hats made in the United States of braid manufactured in Japan of Philippine hemp; and the need to treat the instant practices in a manner uniform and consistent with such corrective action as may be taken by the Commission with respect to other and related practices in the hat industry, the public interest may well be best served by suspending further proceedings in the instant matter and referring the industry-wide problem to the Bureau of Industry Guidance for appropriate treatment under the procedures available in that Bureau.

At the request of counsel for the parties, the prehearing conference scheduled for May 20, 1963, was cancelled to be reset on ten days' notice. The Commission, on June 21, 1963, entered an order placing the respondents' application for initiation of Trade Practice Rules on suspense and denied suspension of further proceedings in this matter. On July 12, 1963, the counsel for the parties met with the Hearing Examiner in a stenographically reported prehearing conference, at which time counsel in support of the complaint and respondents' counsel announced that they would rely on the record already made and had no desire to submit any additional evidence in this proceeding.

Thereupon the record was closed for the receipt of evidence and the time for filing proposed findings and replies thereto was fixed at September 4, 1963, and September 25, 1963, respectively. The Hearing Examiner has given consideration to the proposed findings filed by the parties hereto, and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

Respondent Korber Hats, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located at 420 Quequechon Street, in the city of Fall River, State of Massachusetts (Complaint, Para. 1; Answer, Para. 1).

Respondent Sidney Korber is an individual and is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the corporate respondent, including the acts, and practices hereinafter set forth. His address is the same as that of the corporate respondent (Complaint, Para. 1; Answer, Para. 1).

Respondents are now and for some time past have been, engaged in the manufacturing, offering for sale, sale and distribution of men's straw hats to distributors and jobbers (Record 6. Record hereinafter referred to as "R"). The gross sales for the year 1960 were slightly in excess of \$500,000 (R. 8).

In the course and conduct of their business, respondents now cause, and for some time past have caused, their said products, when sold, to be shipped from their place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein, have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act (R. 7).

In the course and conduct of their business, and for the purpose of inducing the sale of their said hats, respondents have imprinted certain representations on the tags, labels, and sweatbands of men's straw hats respecting the origin, method of construction and material from which the said hats are made. Typical and illustrative of such representations are the following from separate hats:

- (1) On the label, "Genuine MILAN Imported Hand Blocked"; on the sweatband "Genuine Milan".
- (2) On the sweatband, "Genuine Imported Milan".
- (3) On the label, "Genuine MILAN Imported Braid", on the sweatband "Genuine MILAN". (R. 9-16.)

As to the meaning of the word "Milan" when applied to men's straw hats, the record contains the testimony of four experts who were called as witnesses by complaint counsel.

Reginald Borgia has been employed by the Hat Corporation of America, its Dobbs, Knox and Cavanaugh Divisions, for fifteen years, and in that connection he has worked in their straw hat plant, in retail stores and on the road selling to the wholesale trade (R. 26). His company sells under the brand names of Dobbs, Knox, Cavanaugh, Champ, Berg, Byron, Crofut-Knapp and Dunlap. He stated that it was his understanding that the Milan braid comes from the vicinity of the Po River Valley in Italy, and probably exported from the City of Milan; that the term "Milan" has been used as descriptive of men's straw hats as long as he has known it (R. 30); that the Milan braid is made of wheat straw which is artistically woven by the Italians into a distinctive type of braid; that the wheat straw was obtained in Italy at one time, but for the past six or seven years it has been imported to Italy from China (R. 65); that the hats, which are made of this type of braid, are manufactured in Italy (R. 31); that his company sells this type of hat and labels them "Milan"; that the retail price starts at \$11.95 and goes to \$20.00 (R. 32); that, if he saw the word "Milan" on the sweatband or in some other part of the hat, it means to him a genuine Milan straw, a wheat straw; that the interpretation in the industry would be the same; that it is his opinion a customer is willing to pay up to \$20.00 for a Milan hat as compared with \$6.00 or \$7.00 for a hemp hat because the customer is getting a fine quality hat with a fine feel, the dyes are nice and it probably would retain its shape much longer than a cheaper hat (R. 33-34); that he is acquainted with hats made out of Japanese hemp braid, his company manufactures them and they retail at \$6.95 and \$7.95 (R. 32-33); that those hats bear no markings or identification whatsoever with respect to the fiber content; that, to the witness' knowledge, his company does not use "Milan" in hats made of Japanese hemp; that he has never sold at retail or wholesale a hemp hat identified as "Milan" (R. 60); that he can tell by the appearance and the feel, the difference between a Japanese hemp and an Italian wheat straw hat because of his experience in the hat business, but the average man in the street would not know what he knows (R. 46); that in the Dobbs Division when they are sending information to their salesmen regarding hemp hats, they use the term "Messina" or "Hemp Milan"; that in the Knox Division, they use the term "Lombardy" when referring to the hemp Milan braid; that such names are used to identify the braid and do not have any significance as far as any other concern (R. 33). There was received in evidence a

hat (RX 1) made of Japanese hemp with the label on the sweatband "Champ Milan Imported". This hat was made by Champ Hats, which is a subsidiary of the Hat Corporation of America (R. 52). Mr. Borgia was shown this hat on cross-examination and expressed surprise at such labeling, saying that he had called Champ to make sure what they were doing and he was told something different. The witness stated that a consumer seeing RX 1 with the words "Milan Imported" would be led to believe and take it for granted that it referred to "a fine hat, truthfully" (R. 60).

Gerald Rolnick, vice president of the Byer-Rolnick Hat Corporation, grew up in the hat business and his father, the president of the company, had been in the business since 1919. His company has four or five subsidiaries and the brand names under which its hats are marketed include Resistol, Churchill, Kevin McAndrew, Bradford and Ecuadorian. It also put out hats under private labels (R. 108-9). Mr. Rolnick testified that his understanding of the term "Milan" means a type of weave of braid made of wheat straw; that the hats or hat bodies are made in Italy; that to his knowledge none are made in this country (R. 114); that his company offers for sale hats made of wheat straw, the bodies of which are imported from Italy; that wheat straw used in the hats is produced in Italy and China; that they cannot buy it in braid form, but can only buy it in bodies (R. 132-33); that such hats when labeled carry the words "Italian Milan" or "Genuine Italian Milan" (R. 115); that the range of the retail selling price for the Milan hats is \$11.95, \$15.00 and \$20.00 (R. 116-18); that the hats that his company obtains from Italy are in the form of bodies, most of which are dyed, but some are not; that the bodies received from Italy are blocked, sized, a sweatband placed in the inside and a trim band on the outside at one of their factories (R. 133-34); that his company manufactures men's hats made out of hemp braid, which is imported from Japan, Formosa and the Philippines; that they sew the braid into the body shape and then make a hat out of it; that the hemp hats, that are delivered to the customer, bear no words with respect to the braid or designation of the hat (R. 118); that, if someone asked them to put "Genuine Italian Milan" on a hemp hat, they would not do it; that the term "Kyoto Milan" is used on sample tickets on hemp hats carried by the company's traveling salesmen, but this description is not used, however, when such hats are displayed for sale to consumers (R. 118); that he would label hemp hats "Kyoto Milan" to accommodate a customer who requested it, but he could recall no instance where such a request was made (R. 155-56); that actually in their retail stores they do have people who come in and specify "a Milan hat", but that there are not a great number who do so specify (R. 123).

Ellis A. Campus, office manager of the Ecuadorian Panama Hat Company, has been with that company some forty years in many responsible capacities. He was in a similar line of business for six or seven years prior to that time. The Ecuadorian Panama Hat Company has been in business about 56 or 57 years and sells direct to retail stores. Recently the company was acquired by the Byer-Rolnick Hat Corporation, but is still operated as an independent concern (R. 160-65). Mr. Campus testified that the term "Milan", as used in connection with men's straw hats, means a hat which is sewed in Italy out of wheat straw; that "they are brought in as what is known as a hood; in other words, any kind of a body, without actually being shaped or sized or finished in any way" (R. 163); that the hats began to be known as Milan more than 50 years ago; that the Italians began using wheat straw, which is produced in China, in making Milan hats a great many years ago; that now such hats are of wheat straw grown in Italy and China; that years ago a lot of people, including his company, imported Chinese wheat straw braid, dyed it into various colors and sewed it here (R. 164); that his company labeled such hats as "Milan" (R. 174); that the reason those hats were marked that way is because that braid was made out of the same material (R. 176); that the practice of doing this continued to ten years ago, more or less, until our relations with China were broken off and people were forbidden to bring in anything of Chinese origin (R. 164-65); that his company brings in Milan hats in three different qualities, the finer the millimeter the better the quality; that such hats are described and labeled as "Milan", the lowest priced on, selling for \$11.95, the "Deluxe Quality Milan" and "Supreme Milan"; that their highest priced Milan hats sell for \$20.00; that they made such hats for a number of years up until 1936; then war came along and the supply being shut off and the demand being off, they stopped making them (R. 167); that they have been selling them continuously now for the last 15 or 16 years always labeling them the same (R. 168); that his company manufactures a hat out of hemp braid which is obtained from Japan (R. 167); that they don't use the word "Milan" on their hemp, or in their contracts, invoices and selling (R. 185); that their hemp hats are labeled with the word "Manay" which he thinks is the name of a town in Japan (R. 189-190); that the public knows a Milan comes from Italy (R. 197). Mr. Campus, when asked if their "Manay" had the label "Milan" on it, if it would make any difference to the average man on the street, replied that "I would think it would. He would think he was buying a Milan hat which comes from Italy" (R. 199). He went on further to say: "I think that when a man goes into a store and picks out a hat with any particular name, it is one thing. When he goes into a store and wants a

Panama hat or a Milan hat, he expects the hats to be what they are marked, Milan or Panama" (R. 200).

William R. Manning, manager of the straw hat division of the John B. Stetson Company, has been in the employ of the named company for 37 years. He is responsible for the procurement of all materials and the manufacture of the straw hats made in the Philadelphia plant of the Stetson Company. The brand names of the hats made in such plant are Stetson, Mallory, Lee and Disney (R. 210-11). Mr. Manning testified that the term "Milan", standing alone on the sweatband of a man's straw hat would mean to him "a hat made of either Italian Milan or China braid Milan straw in Italy, sewn in Italy"; that the Stetson Company "imports them in the sewn shell from Italy. We call it shell, like a body, unfinished" (R. 212); that after the shell is received in this country, they finish it; that the recommended retail price for the hats is \$10.95 to \$20.00; that his company does not now label any of such hats with the word "Milan" (R. 214); that they discontinued completely using the word "Milan" on any labels when it was determined that the straw is imported to Italy from China (R. 222-23); that they do not label them as Milan because it probably would be "legally or technically mislabelling" (R. 235); and that he would assume that, if a hat is labeled "Milan", ordinary customers would think it came from Italy (R. 228). Mr. Manning testified further that the Stetson Company manufactured a hat made out of hemp braid obtained from Japan, termed Bedford hemp braid (R. 214); that no kind of descriptive words are imprinted in the hemp hats; that recommended retail prices are \$5.00, \$5.95 and up to \$8.95 (R. 215); that he is familiar with the term "Milan hemp" indicating a type of braid; and that it was not unusual in the hat industry to refer to such braid as Milan (R. 224). After so testifying, Mr. Manning went on to say: "If you labelled the hat 'Milan' it would denote that it came from Italy" (R. 225).

Also called as a witness in support of the complaint was Morris Mantell, who has been in the employ of the United States Customs, Treasury Department, for 37 years, the last 15 or 16 years in the capacity as Customs Examiner, where his duties were to appraise and classify merchandise, including men's straw hats and braids used in making such hats (R. 69-72). Mr. Mantell testified that the word "Milan" appearing on invoices implied to him a wheat straw hat (R. 73); that straw hats are brought in from Italy, some of which are ready to wear and some are not (R. 81); that the unfinished hats are called bodies (R. 86); that a considerable amount of braid comes from Japan; that on the papers he gets "On some, yes, not the vast amount"

is described as "Milan hemp" (R. 96); and that he does not know how a hat made of hemp braid is described to customers (R. 106).

In addition to the respondent Sidney Korber, two witnesses were called by the respondents in connection with their defense.

Harry R. Lukaiser had a plant for Panama hat bodies in Ecuador and represented Japanese, Formosa and Philippine merchants, taking orders for a number of products including hemp braid and other materials imported by hat manufacturers into the United States. Mr. Lukaiser testified that the original Milan was made in Italy; that it was "A wheat straw, made of wheat straw. It was a weave * * * Woven by hand in Italy, out of wheat straw" (R. 238); that later the Swiss manufactured out of a Philippine hemp fiber by machine a product called "Swiss Milan hemp braid"; that "in 1924, I took it apart, sent a three-page letter to Japan, to the Kamilaki Corporation, that gave them the clue, the secrets of manufacturing Swiss braids. Then they started reproducing it in Japan at a much lower level"; that they called that material "Japanese Milan hemp braid" (R. 239). Mr. Lukaiser also testified that before the century, likely in the 1890's or so, there was woven on the mainland of China a braid called "China Milan braid"; that he "sold many thousands of bales, which was dyed and sold right here for hats"; that he did not know how those hats were labeled but the trade in general called them "China Milan hats" (R. 240); that the braid was of wheat straw (R. 241); that in more recent years there has been a change in the weaving of the hemp braid produced in Japan; that the new product is called Bedford hemp braid in Japan, but in this country the hats made of such braid are referred to in the trade as "Milan hemp hats" (R. 242); that "It looks very much similar to the Italian straw hat. It is very difficult to distinguish the difference after it is dyed and made up" (R. 243); that, to his knowledge, there are many Milans but he did not know how they market them to the trade (R. 244); and that he does not know how the manufacturers may label the hat when it is sold to the purchaser (R. 247). In the course of his examination, Mr. Lukaiser testified as follows:

Q. As far as you are concerned, the word "Milan" does not refer to a hat or a product manufactured in Italy today?

A. As I say, I would have to have both connected, as far as I am concerned, whether it is Italian Milan, Swiss Milan, Japanese Milan or China Milan. That is the way I sell them.

Q. You sell them particularly—

A. With respect to the country of origin.

Q. So that if a label stated "Italian Milan," you would understand it was from Italy?

A. Yes, sir (R. 244-45).

He testified further that now and for the past few years Milan hat shells have been sewed in Italy out of China Milan straw braid and imported to this country; that he has never imported them but lots of people bring them in (R. 249-50).

Horace E. Gould, an import and export sales representative, in that business for 33 years, among other things, import braids and hat bodies. He testified that he was familiar with the braids that have been coming in from Japan; that the hemp braids are described as Milan hemp, Bedford hemp and fancy hemp; that the "Milan hemp braid" was "a take-off on the Swiss hemp braid"; that "the Japanese sort of copied the Swiss model" and it is called "Jap Swiss Milan" (R. 255-57); that the word "Milan" on a hat would not indicate the country of origin unless he could see the material (R. 260); that he is not familiar with the retail operations of hats and he would not know whether the average man would get any impression upon seeing the word "Milan" with respect to origin of the hat or the material from which it might be made (R. 260-61).

Sidney Korber has been in the business of making men's straw hats since the age of 17 years, a total of thirty years. At the time he entered the business, his father was running the respondent corporation which he had organized in 1910. Prior to that, the father worked on hats in a factory (R. 329). Mr. Korber stated that there are approximately twelve major companies in the United States that are engaged in the manufacture and sale of men's straw hats. Based upon prices at which the hats are sold at the retail level, the companies can be classified into three groups, Group One dealing with the higher priced, Group Two dealing with the medium priced, and Group Three dealing with the cheaper or so-called popular priced products. In Group One there are three companies, together with their subsidiaries, which produce approximately 15% of the total men's straw hats manufactured in this country. They are Hat Corporation of America, John B. Stetson Company and Byer-Rolnick Hat Corporation. Group Two, which manufactures approximately 25% of the men's straw hats sold in this country, consists of Miller Brothers Hat Company, Langenburg Hat Company and Men's Hats, Inc. Group Three, which produced 60% of the men's straw hats, consists of six companies, namely, Pan American Hat Corporation, Good Value Hat Company, Bronstan Hat Company, International Hat Company, Trans-American Panama Hat Company and the corporate respondent herein, Korber Hats, Inc. (R. 271-75). Mr. Korber testified that the only companies which offered for sale the wheat straw hat that is imported from Italy were Hat Corporation of America, John B. Stetson Company, Byer-Rolnick Hat Corporation, Men's Hats, Inc., Ecuadorian Panama Hat Com-

pany and the Frank H. Lee Company (R. 306-07); that the wheat straw Milan is a hat of better quality than a hemp Milan; that it "has a number of desirable features by way of appearance and texture and feel and those things" (R. 314-15); that wheat straw Milans have been offered in this country for more than 50 or 60 years and have commanded a substantially higher selling price (R. 231); that all twelve companies manufacture and offer for sale hats that are made of Japanese hemp; that the Korber hats (CX 1, 2 and 3) labeled in the sweatband as "Genuine Milan" and "Genuine Imported Milan" were manufactured in respondents' factory in Fall River, Massachusetts, out of a hemp braid imported from Japan (R. 18); that the retail price range of such hats is anywhere from \$2.95 to \$4.95 (R. 315); that he is familiar with the hats manufactured by his competitors in Group Three and the labels used by them; that the hats made of hemp by said competitors are labeled "Genuine Imported Milan", "Imported Milan" and the like (R. 278-91); that it has become a custom in the straw hat industry to use the word "Milan" or "Genuine Milan" on hats made of Japanese Milan hemp and Japanese Bedford hemp; that such has been the recognized practice in the industry for some 16 years; that the word "Milan" refers to the type of the braid rather than the origin; that he personally has never made hats of wheat straw; that his father, in 1927, 1928 and 1929, made wheat straw hats of "Chinese patent Milan" when such braid was available in vast quantities (R. 293); that the industry labeled such hats with the word "Milan" (R. 295); that he does not remember how his father labeled such hats (R. 334); that such braid was imported directly from China in those years in the natural state, undyed (R. 294); that the Chinese patent Milan was made in a lower grade quality reaching the mass market at a price level which the public is now paying for Milan hems (R. 322); that, prior to the Communist regime in China, the industry imported wheat straw braid direct from China, but since that time the industry has been getting it exclusively from Italy; that Italy obtains it from Communist-dominated China, converts it into a shell, and exports it to this country (R. 296); that the hemp Milan, particularly in the Bedford braid, can be finished to look quite similar to the wheat straw Milan (R. 312). Mr. Korber was asked the question: "To your knowledge, has any retail buyer, a customer like myself, ever indicated to you or to any of your jobbers, to your knowledge, that they expected to get a hat made in Italy when they bought your hats?"; to which he replied: "Well, I primarily deal with wholesalers. My experience with retailers is strictly limited. What the consumer's reaction would be, I have no way of knowing" (R. 299).

On page 4 of this decision, reference is made to a stipulation entered into by counsel for the parties, which was received in evidence on November 3, 1961. It reads:

STIPULATION AS TO CERTAIN FACTS

IT IS HEREBY STIPULATED AND AGREED BY and between Levin & Levin by Isadore S. Levin, counsel for respondents and Terral A. Jordan, counsel supporting complaint in the above-captioned matter:

That this stipulation may be received in evidence as Commission Exhibit 7;

That the man's gray straw hat with the words "Dobbs Milan Bruce Hunt Inc., Washington, D.C." imprinted on the sweat band and the words "Dobbs Fifth Avenue New York" imprinted on the label attached to the crown may be admitted in evidence as Commission Exhibit 8, that said hat sold at retail for \$11.95 and that said hat is of the same kind as that described in the testimony of Reginald J. Borgia appearing on pages 31-2 of the record herein and is generally typical of certain of the styles of hats described in this proceeding as being made of wheat straw and imported into the United States from Italy in the shell or body.

The pertinent part of the testimony of Reginald J. Borgia, appearing on pages 31 and 32 of the record herein, which is referred to in the stipulation, is as follows:

Q. Of what raw material is the Milan braid made?

A. Wheat straw.

Q. Where is that braid woven?

A. In Italy.

Q. Where are the hats which are made of this type of braid manufactured?

A. In Italy.

Q. In what state are they imported into the United States, in what condition?

A. I don't really know on the fine Milans what state they are really brought in. They are brought in in bodies and I imagine some are sewn. They can be sewn in this country, I imagine.

Q. Does the Hat Corporation of America sell the hats made out of wheat straw which you have just described?

A. Yes, they do.

* * * * *

Q. Does it label those hats?

A. It labels them "Milan".

* * * * *

Q. Is the word "Milan" accompanied by any other descriptive word or term?

A. No, sir.

On the consideration of the entire record herein, including the testimony of the witnesses which has been heretofore set forth in some detail, it is found that the words "Milan", "Genuine Milan", or "Genuine Imported Milan" appearing upon men's straw hats mean and are understood by the trade and the public to refer to a particular style of hat made of wheat straw, the shell or body of which is sewn

in Italy; that the use of the words of "Milan", "Genuine Milan", or "Genuine Imported Milan" by the respondents on men's straw hats made of hemp by them in the United States was false, misleading and deceptive.

Through the aforesaid acts and practices respondents have thereby placed in the hands of retailers and dealers the means and instrumentalities through and by which the buying public may be misled and deceived concerning the origin, material, construction, design and workmanship of said hats.

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 men's hats of the same general kind and nature as those sold by respondents.

The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

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

The United States Court of Appeals for the First Circuit, in its opinion in remanding this case to the Commission, had this to say:

However, petitioners argue that the term "Milan" apart from its primary marketplace significance of a "wheat straw" has, in effect, acquired a secondary meaning in that the term is now generally indicative of a type of weave or a type of braid. They argue that the weave of its hemp hat fits within this generic category and that it should be allowed to use the term "Milan" to the extent that it can be qualified or modified to exclude the possibility that a consumer would be likely to believe that he was getting a genuine wheat straw. In short, petitioners urge that the Commission erred in ordering the blanket prohibition of any reference to "Milan" in conjunction with hemp hats without considering the possibility of qualifying or modifying language which would equally serve the public good.

* * * * *

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In short, as we read the record, the evidence strongly indicates that the term "Milan" may now have acquired a secondary meaning in the hat industry denoting a type or class of hats embracing the hemp variety of petitioners. If it could be demonstrated that a label bearing the legend "hemp—Milan" or "Imitation Milan," or some similar qualification, would be unlikely to deceive a consumer as to the true characteristics of the hat which he was purchasing, then we believe that petitioners should be allowed to market their hats under such a label.

However, there is nothing to indicate that the Commission considered whether labels which qualified or modified the term "Milan" would be likely to deceive a prospective hat customer. The hearing examiner wrote a perfunctory opinion and the Board adopted his decision without amplification. Accordingly, we believe that the case should be returned to the Commission for a determination of whether an absolute proscription against the use of any variation of the term "Milan" is required to protect the public interest and insure against consumer deception. See *Jacob Siegel Co. v. Federal Trade Commission*, *supra*.

In adopting the original initial decision of the hearing examiner herein, it would appear that the Commission did not give consideration "whether labels which qualified or modified the term 'Milan' would be likely to deceive a prospective hat customer." The issue was never raised before the Commission by the respondents. The first time this question was raised was before the Court of Appeals. In asking the Commission to review the initial decision of the hearing examiner, the respondents limited the issues to two points: One, that there was no consumer testimony to sustain the finding that the words "Genuine Milan" or "Genuine Imported Milan" on Korber hats misled or tended to mislead the public; and, Two, that most of the manufacturers are engaged in similar illegal practices.

The burden of establishing a secondary meaning of the word "Milan," if any exists, rests upon the respondent. The Court of Appeals in this matter had this to say:

We are fully aware that petitioners carry a heavy burden when they attempt to establish the currency of a dual meaning for a term having attained a specific primary meaning in the market place. *Federal Trade Commission v. Algoma Lumber Co.*, *supra*; *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273 (3rd Cir. 1952).

In *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 492, 493 (1922), Mr. Justice Brandeis said:

But it is contended that the method of competition complained of is not unfair within the meaning of the act, because labels such as the Winsted Co. employs, and particularly those bearing the word "Merino," have long been established in the trade and are generally understood by it as indicating goods partly of cotton; that the trade is not deceived by them; that there was no unfair competition for which another [493] manufacturer of underwear could maintain a suit against the Winsted Co.; and that even if consumers are misled because they do not understand the trade signification of the label, or because some re-

tailers deliberately deceive them as to its meaning, the result is in no way legally connected with unfair competition.

This argument appears to have prevailed with the Court of Appeals; but it is unsound. The labels in question are literally false, and, except those which bear the word "Merino," are palpably so. All are, as the commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. That deception is due primarily to the words of the labels, and not to deliberate deception by the retailers from whom the consumer purchases. While it is true that a secondary meaning of the word "Merino" is shown, it is not a meaning so thoroughly established that the description which the label carries has ceased to deceive the public; for even buyers for retailers and sales people are found to have been misled. The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Co. in the public interest.

In *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 80 (1934), Mr. Justice Cardozo said:

There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake, unless submission has gone so far that the occasion for misunderstanding, or for any so widespread as to be worthy of correction, is already at an end. Competition may then be fair irrespective of its origin. This will happen, for illustration, when by common acceptance the description, once misused, has acquired a secondary meaning as firmly anchored as the first one. Till then, with every new transaction, there is a repetition of the wrong.

In *H. N. Heusner & Son v. Federal Trade Commission*, 106 F. 2d 596-597 (3rd Cir. 1939), the Court stated:

Accordingly, the petitioner, a Pennsylvania manufacturer of cigars which contain only Pennsylvania tobacco, but are branded "Havana Smokers", has been ordered to cease and desist from using the word "Havana" to designate its product. We are asked to modify this order so as to permit the retention of the word "Havana" with an appropriate "qualification", i.e., the legend: "Notice. These Cigars are made in the United States and only of United States tobacco."

The difficulty of petitioner's position lies in the fact that the implication of the word "Havana" is totally false. The purchaser can be guided by either label or legend, but not by both. This circumstance came before the Court of Appeals for the District of Columbia in a recent case. After a carefully considered review of the authorities, the learned court concluded: "* * * But the phrase 'Army and Navy' in the name 'Army and Navy Trading Company' makes the single representation that at least the major portion of the merchandise offered for sale is in some sense Army and Navy goods. This single representation being untrue, it cannot be qualified; it can only be contradicted. The cases urged by the Trading Company and above discussed justify qualification of a trade name where qualification is possible; they do not justify contradiction." Federal Trade

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Commission v. Army & Navy Trading Co., 66 App. D.C. 394, 88 F. 2d 776, 780. We doubt if petitioner would accede to a true qualification—"Fake Havana Smokers".

In *C. Howard Hunt Pen Co. v. Federal Trade Commission*, *supra* (1952), it is said:

A high degree of proof was essential in establishing the defense of secondary meaning before the Commission. The very wording of petitioner's answer recognizes that, in the words of Mr. Justice Cardozo, it had to show that "* * * by common acceptance the description, once misused, has acquired a secondary meaning as firmly anchored as the first one." Federal Trade Commission v. Algoma Co., 291 U.S. 67, 80, 54 S. Ct. 315, 320, 78 L. Ed. 655. It could not prevail if its evidence was of a quality "* * * short of establishing two meanings with equal titles to legitimacy by force of common acceptance."

* * * * *

It may be that their testimony was sufficient to establish that in the pen trade, among manufacturers and distributors of pen points, the word "iridium" has in fact come to have a secondary meaning. But their knowledge is not to be imputed to the public and we cannot say that as to the public petitioner has proved to the requisite degree of certainty the secondary meaning for which it contended.

Under the guiding principles laid down by the Courts in the foregoing cited cases, the record herein fails to establish the fact of secondary meaning as contended for by respondents. Respondents rely particularly on the testimony of the four expert witnesses called by complaint counsel that the word "Milan" had acquired a secondary meaning:

Mr. Borgia of the Hat Corporation of America testified in part:

Q. Does the Hat Corporation of America manufacture such hats and offer them for sale?

A. We do.

* * * * *

Q. Do those hats carry any marking or identification with respect to the fiber content of the hat?

A. None whatsoever.

Q. In your dealings within the company and with members of the trade, how are these hemp hats referred to?

A. Well, we, in our Dobbs division, when we are sending information to our salesman regarding the hemp braid, we use the term "Messina" or "hemp Milan."

HEARING EXAMINER JOHNSON: What does the word "Messina" mean?

THE WITNESS: Well, it is a city in Italy and we just give it that identification to identify the braid, for our own purposes of identification, actually. It doesn't have any significance as far as any other concern. In other words, we would say "Messina" to our salesmen and they would automatically refer to that Messina braid as a hemp Milan braid. Our Knox division uses a term "Lombardy" when referring to the hemp Milan braid. It is just a name.

Q. Mr. Borgia, if you saw the word "Milan" alone appearing either on the sweatband or in some other part of the hat, what would that mean to you?

A. Well, it has always meant to me that is a genuine Milan straw, a wheat straw, according to my personal interpretation.

Q. When you say your personal interpretation, what would be, so far as your knowledge is concerned, the interpretation in the industry?

A. Well, it would be the same thing, I would imagine. (R. 32-34.)

The record shows that Champ division of the Hat Corporation of America labeled a hemp hat "Milan, Imported", but there is nothing to show the extent or time when such hat was marketed. However, such labeling does not make it proper because some one connected with the parent company testified on the call of complaint counsel.

Mr. Rolnick of Byer-Rolnick Hat Corporation testified in part:

Q. On your hemp hats, there is no designation with respect to the word "Milan" in any way or in any combination imprinted on that hat?

A. Except in our sample ticket that is in the hat, but that is for a travelling man to carry.

Q. But that is not imprinted on the hat itself?

A. No.

Q. And when the hats are delivered to the retailer, is that sample ticket still in the hat?

A. No. I would say that if the customer requested it, we would put the Kioto Milan in the hat, as I mentioned before.

Q. Do many of your customers request Kyoto Milan?

A. I really don't recall.

Q. Do you recall any specific instances of it?

A. No.

Q. That is, of a customer having requested Kioto Milan?

A. No.

Q. I believe you indicated that there the word "Milan" may have acquired some other meaning. I would like to get straight as to whether or not the word "Milan"—if the word "Milan" is imprinted in men's hats, what would that word mean?

A. In my opinion, the word "Milan" meant an Italian hat. (R. 155-56.)

Mr. Campus of the Ecuadorian Panama Hat Company on cross-examination testified in part:

Q. Does the Ecuadorian Panama Hat Company use any words to describe that hemp hat?

A. We have a name in the hat, yes.

Q. What is the name?

A. We call it Manay. I might say that this name has nothing to do with the braid. What I have usually done in years past, when we got a different braid or a different hat, I would like to get a short name for it that a salesman can write. Manay happened to be one of the small cities in China.

Q. So that all of the hemp hats offered for sale by Ecuadorian Panama Hat Company bear the name "Manay"?

A. And nothing else, except our name, of course. (R. 169.)

* * * * *

Q. Do you make a hat out of Japanese Milan hemp?

A. Not Milan hemp, just hemp.

Q. Just hemp?

A. We don't use the word "Milan." We don't use it in our contracts, our invoices or in our selling.

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Q. You never asked for Milan hemp?

A. No. sir, just hemp.

Q. Just hemp?

A. That's right. (R. 185.)

Mr. Manning of the John B. Stetson Company testified in part:

Q. Does the Stetson Company imprint any kind of designation in the Milan hats?

A. Nothing except our brand and the customer's die.

Q. What is the customer's die?

A. Their trade name. When I say die, they usually have a specific form in which their name is printed and their address.

Q. Do any of the customer dies bear the word "Milan"?

A. No.

Q. Does the Stetson Company manufacture a hat out of hemp braid?

A. Yes.

Q. Where is that braid secured from?

A. Japan.

Q. When ordering the hemp braid from Japan, how is it described in the order and in the invoices or various other papers that may relate to its purchase and importation?

A. Well, we use now what we term Bedford hemp braid. It is described as 4-4½ millimeter, or 5-5½ millimeter Bedford hemp braid. (R. 213-14.)

* * * * *

Q. Does the John B. Stetson Company imprint any kind of descriptive word or terms in the hemp hats?

A. No.

Q. Do they imprint their name?

A. That's right, they have a brand name and, of course, the customer's name or customer's die.

Q. Does that customer's die have any such word as "Milan" or any other word?

A. No. (R. 215.)

* * * * *

Q. * * * In any event, the Stetson Company makes these hats that sell for \$20 a hat and you don't use the word "Milan" in those hats, do you?

A. No.

Q. Is there any reason for that?

A. Only that I believe the Stetson Company, when it was determined that the braid was coming from China—they lean over backwards not to mislabel.

Q. And so they have discontinued completely using the word "Milan" on any of the labels?

A. That's right. (R. 223.)

* * * * *

Q. * * * Mr. Manning, would your reading of that exhibit indicate to you that there is such a thing as Japanese Milan hemp?

A. Well, sure, I am familiar with this. The term is used to indicate a type of braid.

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Q. That is what I am coming to. The term "Milan hemp" refers to a type of braid, is that right?

A. I would say so.

Q. Similar to what was originally made of wheat straw?

A. As far as construction is concerned, yes.

Q. That is what I mean. They would look alike?

A. Yes.

Q. So there is nothing unusual in the hat industry to refer to a braid as Milan?

A. No, I would say not.

Q. There is nothing unusual about that. In your opinion, would that indicate that a Japanese Milan hemp, with the label "Milan" on it, would indicate to anybody that it is of Italian origin?

A. I don't quite understand you.

Q. Well, would the mere use of the word "Milan" indicate that the hat or the material it is made out of originated in Italy?

A. I would say so. If you labelled the hat "Milan" it would denote that it came from Italy.

Q. You would think it came from Italy?

A. That would be my impression, yes. (R. 224-25.)

Mr. Lukaiser, called by the respondents, said in part:

Q. When you say "the original Milan," what do you mean by that?

A. A wheat straw, made of wheat straw. It was a weave.

Q. It was woven?

A. Woven by hand in Italy, out of wheat straw. Then the Swiss manufactured by machine a Swiss Milan hemp braid, manufactured of Philippine hemp fiber.

Q. And that was called what?

A. Swiss Milan hemp braid.

Q. And what did they call that material that they made in Japan?

A. Japanese Milan hemp braid.

Q. Do you know of your own knowledge whether hats were made originally of this China Milan braid?

A. Yes, I sold many thousands of bales, which was dyed and sold right here for hats.

Q. What were those hats labelled, do you remember?

A. I had nothing to do with them. The trade in general called it China Milan hats. (R. 238-40.)

Q. As far as you are concerned, the word "Milan" does not refer to a hat or a product manufactured in Italy today?

A. As I say, I would have to have both connected, as far as I am concerned, whether it is Italian Milan, Swiss Milan, Japanese Milan or China Milan. That is the way I sell them.

Q. In other words, on any of these hats, you don't know how the manufacturer may label the hat when it is sold to the purchaser?

A. I don't go into anything like that. That isn't my end of it. I only supply the material.

Q. And you don't have any concern with how the hats may be labelled?

A. I personally don't care how they label them. That is up to the manufacturer.

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Q. And you don't in any way make any effort to determine how they labeled those hats?

A. No. (R. 244-47.)

Mr. Gould, also called by the respondents, testified in part:

Q. Do you know where the name "Milan hemp braid" came from?

A. Well, as the last witness said, it was a take-off on the Swiss hemp braid.

Q. And the Swiss was called Swiss Milan braid?

A. That's right.

Q. And the Japanese sort of copied the Swiss model?

A. That's right. They call it Japanese Swiss.

Q. And then we call it Japanese Milan hemp braid?

A. Jap Swiss Milan was the name for it.

Q. Are you familiar with the hat industry as such?

A. Somewhat, yes.

Q. Let me show you Commission's Exhibit No. 3. Do you know what that material is?

A. I would say it is Bedford hemp.

Q. Bedford hemp?

A. That's right.

Q. Is the Bedford hemp known in the trade as a Japanese Milan hemp?

A. Most all of these seven-end hemp braids are roughly described as Milan.

Q. Milan hemp braid?

A. That's right.

* * * * *

Q. Can you tell us, if you know, whether the average man on the street, seeing the word "Milan" would get any impression as to the origin of the hat or the material of which it is made?

A. I wouldn't know.

Q. You wouldn't know?

A. No. (R. 256-61.)

Mr. Gould, on cross-examination, added:

Q. So you wouldn't purport to say what the purchaser at retail, the ultimate consumer, might think one word or another word would mean?

A. No, I would not. (R. 266.)

The respondent Mr. Korber had this to say in part:

Q. I show you Commission's Exhibit No. 3. Is this hat one of your hats?

A. Yes, it is.

Q. And what material is used in the making of this hat?

A. Japanese Milan hemp.

Q. Japanese Milan hemp?

A. Yes, now known as Bedford hemp.

Q. Is the braid called both Milan hemp braid and also Bedford hemp braid?

A. Yes. (R. 275-76.)

* * * * *

Q. Has it become a custom in the straw hat industry to use the word "Milan" or "Genuine Milan" on hats made of Japanese Milan hemp and of Japanese Bedford hemp?

A. Yes, sir.

Q. And is that a recognized practice in the straw hat industry?

A. Yes.

Q. You use that on your hats, don't you?

A. Yes.

Q. So far as you know, do all of your competitors use it?

A. Without exception, sir.

Q. Every one of them?

A. Yes, sir.

Q. For how long a period of time has the industry been using the word "Milan" in connection with Japanese Milan hemp or Japanese Bedford hemp?

A. Since the reintroduction of the popularity of Milan-type braid in this country, which dates back some 16 years.

Q. You just used the words "Milan-type braid." What is a Milan-type braid?

A. It is a distinctive type of braid with a bead which, when sewn, represents a unique article in the hat business, recognized as a Milan-type hat.

Q. So that the word "Milan" refers to the type of the hat or the type of the braid rather than the origin, is that correct?

A. Yes, sir.

Q. And is that the generally accepted standard in the straw hat industry?

A. It is. (R. 292-93.)

[Note: Mr. Korber testified that he considered only the manufacturers of the popular priced hats as his competitors.]

Mr. Korber identified labels used on hemp hats by The Good Value Hat Company with the words "Genuine Imported Milan" and "Genuine Milan, Imported, lightweight"; Pan-American Hat Corporation with the label marked "Imported Milan"; The Bronson Hat Company with the label "Genuine Milan" and The International Hat Company with the words "Genuine Milan".

Mr. Korber further testified:

Q. To your knowledge, has any retail buyer, a customer like myself, ever indicated to you or to any of your jobbers, to your knowledge, that they expected to get a hat made in Italy when they bought your hats?

* * * * *

A. Well, I primarily deal with wholesalers. My experience with retailers is strictly limited. What the consumer's reaction would be, I have no way of knowing.

Q. I am just trying to find out if you ever had or know of any reaction.

A. I have no experience in that field. (R. 299.)

Paraphrasing the language used by the Court in *C. Howard Hunt Pen Co. v. Federal Trade Commission*, *supra*, the Hearing Examiner comes to this conclusion:

It may be that the testimony was sufficient to establish that in the men's hat trade, among certain manufacturers, the word "Milan" has in fact come to have a secondary meaning. But their knowledge is not to be imputed to the public and it cannot be said that as to the public respondents have proved to the requisite degree of certainty the secondary meaning for which they contended.

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The Hearing Examiner will eliminate in the order herein paragraph 3 of the order of the original decision. With reference thereto, the Court of Appeals had this to say:

Finally, a word concerning paragraph (3) of the Commission's order may be warranted. Paragraph 3 orders petitioners to refrain from "Using any words or phrases which, directly or indirectly, represent that said products are manufactured in a given country or out of certain materials or in a particular manner or style unless such is a fact."

It would be difficult to imagine language broader in sweep or scope and, indeed, perhaps in vagueness and generality. We are aware that the Commission's orders traditionally have been accorded great deference on review and are upheld where the court finds a "reasonable relation" between the violations proved and the activities prohibited. See *Jacob Siegel Co. v. Federal Trade Commission, supra*; *Gellman v. F.T.C.*, 290 F. 2d 666 (8th Cir. 1961). However, the Supreme Court has recently indicated that broad orders of the Commission should be subjected to more critical review on appeal and suggested the need for more specificity in cease and desist orders in view of the recently amended provision contained in Section 11 of the Clayton Act, 73 Stat. 243 (1959), 15 U.S.C. § 21 (Supp. III, 1961), amending 38 Stat. 734 (1914).

In *Federal Trade Comm'n v. Broch & Co.*, 368 U.S. 360 (1962), after alluding to the more stringent and immediate penalties for violation of cease and desist orders, the Court stated: "the severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Id.* at 367-68.

The necessity for clearer, more definite and specific orders by the Commission has been recognized by a series of recent cases in the Second Circuit. *American News Co., v. F.T.C.*, 300 F. 2d 104 (2nd Cir. 1962); *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2nd Cir. 1962); *Swanee Paper Corporation v. F.T.C.*, 291 F. 2d 833 (2nd Cir. 1961). We have recently indicated our reservations about broad orders of the Commission where the Commission has proven only a single violation. *Colgate-Palmolive Company v. Federal Trade Commission* and *Ted Bates & Company, Inc. v. Federal Trade Commission*, 310 F. 2d 89, decided November 20, 1962.

Here the alleged violation involved a single product of the petitioners. There was no showing of past violations by them. *Labor Board v. Cheney Lumber Co.*, 327 U.S. 385 (1946); *N.L.R.B. v. International Hod Carriers, Etc.*, 285 F. 2d 397 (8th Cir. 1960); *N.L.R.B. v. Brewery & Beer Distributor Drivers, Etc.*, 281 F. 2d 319 (3rd Cir. 1960); see *Communication Workers of America v. N.L.R.B.*, 362 U.S. 479 (1960) (per curiam); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), or any lack of good faith on the petitioners part, *Labor Board v. Crompton Mills*, 337 U.S. 217, 226 (1949), in view of the previously cited understanding in the hat industry. Cf., *Grand Union Co. v. F.T.C.*, *supra*.

For all of these reasons we believe that the language of paragraph 3 of the order may be entirely too broad. However, since we are returning the case to the Commission for further findings we need not pass upon this question at this point.

As the Court stated, the alleged violation involved a single product of the petitioners. There was no showing of past violations by them. In

his appearances at the hearings, the respondent Sidney Korber gave the definite impression of being honest and frank. It is the opinion of the Hearing Examiner that he has the desire to respect the law and he would not have knowingly violated the law.

ORDER

It is ordered. That respondents Korber Hats, Inc., a corporation, and its officers and Sidney Korber, individually and as an officer 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 hats or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not manufactured in Italy of wheat straw.

(2) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not of the same construction, design and workmanship as that traditionally characteristic of men's straw hats manufactured in Italy and designated as "Milan".

(3) Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove inhibited.

OPINION OF THE COMMISSION

JUNE 12, 1964

By Reilly, *Commissioner*:

This matter involving alleged violation of Section 5 of the Federal Trade Commission Act is before us on appeal by respondents from an initial decision of the hearing examiner filed after proceedings held pursuant to remand order of the United States Court of Appeals for the First Circuit dated December 31, 1962. *Korber Hats, Inc. v. Federal Trade Commission*, 311 F.2d 358.

The matter originally arose out of the use by respondents of such terms as "Genuine Milan" and "Genuine Imported Milan" to describe men's straw hats manufactured of materials other than wheat straw.

The original order prohibited:

(1) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not manufactured in Italy of wheat straw.

(2) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not of the same construction, design and workmanship as that traditionally characteristic of men's straw hats manufactured in Italy and designated as "Milan".

(3) Using any words or phrases which, directly or indirectly, represent that said products are manufactured in a given country or out of certain materials or in a particular manner or style unless such is a fact.

(4) Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove inhibited.

The Court of Appeals held that the record disclosed substantial evidence supporting the Commission's finding that use of the term "Milan" to describe a hat made of materials other than wheat straw, for example, hemp, might well tend to mislead the consumer into believing he was obtaining a hat made of wheat straw. In this respect the court affirmed the Commission's order.

In regard to Paragraph 3 of our order, the court held that the prohibition was too broad and the examiner on remand struck it from his proposed order. We are in accord with that action of the hearing examiner.

In regard to the use of "Milan" to describe the construction, weave or braid of a man's hat, the court was of opinion that respondents "have made a strong showing" that "Milan", apart from its primary market significance of a wheat straw, has in effect acquired a secondary meaning in that the term is now generally indicative of a type of weave or type of braid.

Noting that there was no indication the Commission had considered this aspect of the case and pointing out that the respondents carry a heavy burden in regard to secondary meaning, the court returned the case to the Commission "for a determination of whether an absolute proscription against the use of any variation of the term 'Milan' is required to protect the public interest and insure against consumer deception".

The examiner on remand left undisturbed the order he had originally issued and which we had adopted except that he expunged Paragraph 3 in accordance with the court's direction.

With regard to use of the word "Milan" to describe the construction, weave or braid of a hat, he found that the burden of establishing a secondary meaning is upon respondents and that they had not dis-

charged their burden by showing that the word had acquired a secondary meaning "as firmly anchored as the first", or that the word had acquired two meanings "with equal titles to legitimacy by force of common acceptance," *Federal Trade Commission v. Algoma Lumber Company*, 291 U.S. 67, 80 (1934); citing also *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 492, 493 (1922), *H. N. Heusner & Son v. Federal Trade Commission*, 106 F. 2d 596, 597 (1939), and *C. Howard Hunt Pen Company v. Federal Trade Commission*, 197 F. 2d 273 (1952).

In considering the question of secondary meaning, we believe the hearing examiner failed to follow the court's instruction. The court directed that consideration be given not to whether the term "Milan" had acquired a secondary meaning so firmly entrenched that its unqualified use to designate a type of weave or braid would be non-deceptive but whether the secondary meaning of the term as indicative of design, or construction was sufficiently well established that it would be non-deceptive when *properly qualified*. Notwithstanding the examiner's reference to *Heusner* wherein the court alluded to the question of modification or qualification, he appears to have been solely preoccupied with the question of secondary meaning as to the unqualified word "Milan".

In his search for precedents the hearing examiner fished the wrong waters. In the cases cited there was inevitable conflict between the two purported meanings of the same word because both describe the substance of the thing in question. In *Algoma*, yellow pine was called "white pine"; in *Winsted*, a wool and cotton blend was called "gray wool", "natural wool", "merino", etc.; in *Heusner*, cigars manufactured wholly of Pennsylvania tobacco were called "Havana Smokers"; in *Hunt*, pens tipped with a synthetic alloy were described as "Iridium tipped".

Inasmuch as both meanings claim to describe the same substance, the question as to which claim takes precedence must necessarily be disposed of where possible deception is involved and, as the courts have held, if both are to enjoy acceptability, the one coming subsequent in time bears a heavy burden to prove that it has "equal title[s] to legitimacy by force of common acceptance". *Federal Trade Commission v. Algoma Lumber Company*, *supra*.

The matter at hand does not involve two meanings mutually opposed. Here we have two meanings, one describing a substance, wheat straw, and the other describing a form, weave, braid or construction. We think the controlling precedent in this situation is *N. Fluegelman & Co., Inc. v. Federal Trade Commission*, 37 F. 2d 59 (1930). That case involved the use of the words "Satinmaid" and

"Satinized" to describe cotton fabric having the glossy appearance characteristic of satin-woven silk. The court held that since "satin" described silk in a characteristic weave producing a glossy appearance the word could properly be used to describe cotton having a glossy appearance created by a satin weave. The court said at p. 61:

But the evidence * * * shows that "satin" among other things means the weave of the cloth, and therefore may be used * * * to describe fabrics or cloths woven in the satin weave. * * *

This is precisely the case before us. "Milan" describes (1) wheat straw (2) having a characteristic "Milan" weave. And there is ample evidence in the record showing that when material such as hemp is woven into a characteristic "Milan" braid or weave, it is understood to be a "hemp Milan" hat.

As between the two meanings, however, we are of the opinion that use of the word "Milan" to designate material takes precedence by long trade usage, and to that extent "Milan" may be used standing alone to designate wheat straw. When used to designate braid, weave or construction, "Milan" must be properly qualified such as "hemp Milan" or "Milan weave" in order to make it clear that the "Milan" reference is to the hat's construction rather than the material of which it is made.

Accordingly, respondents' appeal is granted and the hearing examiner's initial decision is vacated to the extent it conflicts with the foregoing. We have revised his order to conform with this opinion.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

The Commission by order dated March 29, 1963 [62 F.T.C. 1531], having reopened this matter and remanded it to the hearing examiner for further proceedings in accordance with the opinion of the United States Court of Appeals for the First Circuit, entered December 31, 1962 [7 S.&D. 611], for the taking of additional relevant evidence if necessary, and for the preparation of a new initial decision; and

The hearing examiner having filed his initial decision pursuant to said order of March 29, 1963; and

Respondents having filed an appeal from the initial decision, and the matter having been heard on briefs and oral argument; and the Commission, for the reasons stated in the accompanying opinion, having granted respondents' appeal, and having modified the initial decision to the extent it is contrary to the views expressed in said opinion:

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

It is ordered, That respondents Korber Hats, Inc., a corporation, and its officers and Sidney Korber, individually and as an officer 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 hats or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of the material of men's straw hats not manufactured in Italy of wheat straw.

(2) Using the terms "Milan", "Genuine Milan", "Imported Milan", "Genuine Imported Milan" or any other substantially similar representation as descriptive of men's straw hats not of the same construction, design and workmanship as that traditionally characteristic of men's straw hats manufactured in Italy and designated as "Milan", or using said terms to designate hats of such construction, design and workmanship without clearly and conspicuously disclosing in immediate conjunction therewith either the material from which such hats are made or that the word "Milan" is intended to describe the weave, braid or construction of such hats.

(3) Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove inhibited.

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

It is further ordered, That 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.

Complaint

65 F.T.C.

IN THE MATTER OF

HUGH J. McLAUGHLIN & SON, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 8529. Complaint, Aug. 28, 1962—Decision, June 12, 1964**

Order requiring a Crown Point, Ind., manufacturer of new golf balls and reconditioner of used ones to cease failing to disclose on its boxes, wrappers, and the balls themselves that such balls are rebuilt and not new, and to cease placing in the hands of others means to mislead the buyer as to the true nature of the balls.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by the said Act, the Federal Trade Commission, having reason to believe that Hugh J. McLaughlin & Son, Inc., a corporation and J. V. McLaughlin, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of the 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 Hugh J. McLaughlin & Son, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 614 North Indiana Avenue, Crown Point, Indiana.

Respondent J. V. McLaughlin is an officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of previously used golf balls which have been rebuilt or reconstructed to dealers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of Indiana to purchasers thereof located in various other

*This order was made effective on July 31, 1964, 66 F.T.C. 387.

States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents rebuild or reconstruct golf balls using in said process, portions of the ball which have been used and reclaimed.

Respondents do not disclose either on the ball itself, on the wrapper or on the box in which the balls are packed, or in any other manner, that said golf balls are previously used balls which have been rebuilt or reconstructed.

When such previously used gold balls are rebuilt or reconstructed, in the absence of any disclosure to the contrary, or in the absence of an adequate disclosure, such golf balls are understood to be and are readily accepted by the public as new balls, a fact of which the Commission takes official notice.

PAR. 5. By failing to disclose the fact as set forth in Paragraph Four, respondents place in the hands of uninformed and unscrupulous dealers means and instrumentalities whereby they may mislead and deceive the public as to the nature and construction of their said golf balls.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 7. The failure of the respondents to disclose on the golf ball itself, on the wrapper or on the box in which they are packed or in any other manner, that they are previously used balls which have been rebuilt or reconstructed has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said golf balls were, and are, new in their entirety and into the purchase of substantial quantities of respondents' products by means of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are, all to the prejudice and injury of the public and of the 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. Roy B. Pope for the Commission.

Mr. Constantine N. Kangles of *Kangles, Getto & Bunge*, Chicago, Ill., for respondents upon original presentation; and

Mr. J. V. McLaughlin, pro se and for the corporate respondent upon reopening.

Initial Decision

65 F.T.C.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

DECEMBER 16, 1963

The Federal Trade Commission, on August 28, 1962, issued and subsequently served its complaint charging the respondents named in the caption hereof with violating Section 5 of the Federal Trade Commission Act by selling to dealers for resale to the public rebuilt or reconstructed golf balls without making adequate disclosure on the balls or packaging that they are previously used balls which have been rebuilt or reconstructed. Answer was filed by the respondents on November 5, 1962, admitting, in effect, the production and sale of such golf balls, but otherwise denying the essential allegations of the complaint.

A prehearing conference was held in Washington, D.C., on December 5, 1962, the transcript of which, by agreement of counsel, was made a part of the public record herein. Hearings in support of and in opposition to the complaint were held in Chicago, Illinois, beginning on February 4, 1963. On February 8 both sides rested, and the record was closed for the reception of evidence. Proposals and replies thereto were thereafter filed by the parties.

On August 27, 1962, the Commission also issued its complaint in Docket No. 8528, *Metropolitan Golf Ball, Inc., et al.* [66 F.T.C. 378], containing substantially the same charges. Counsel supporting the complaint and counsel for respondents were the same in both cases, and the same hearing examiner presided. By agreement of counsel, a joint prehearing conference was held in both cases; and all of the witnesses, except an official of the corporate respondent in each case, and an employee of the corporate respondent in this case, testified jointly in both cases. At the request of counsel, the hearing examiner ordered, in effect, that the testimony of the official of the corporate respondent who testified in each case, may be officially noticed in the other case (Tr. 624-7). All references in this decision to the transcript and exhibits refer to the record in this case, except as otherwise specifically noted.

After careful study and analysis of the evidence presented during the original proceedings, the hearing examiner concluded that, as then constituted, the record did not provide an adequate basis for informed determination of whether or not the rebuilt golf balls here in issue have the appearance of new balls; and whether or not, in the absence of adequate disclosure to the contrary, they "are understood to be and are readily accepted by the public as new balls". For the purpose of affording the parties an opportunity to present additional evidence

so that all of the issues involved in the case may be properly disposed of on their merits, the hearing examiner on May 6, 1963, entered his order reopening the proceeding for the reception of further evidence. Neither side sought permission to appeal from that order.

After postponements for the convenience and necessity of counsel for respondents, and for the purpose of affording counsel an opportunity to negotiate for a possible stipulation which would make further hearings unnecessary, further hearings were held in Chicago, Illinois, on September 16 and 17, 1963. Respondents were not represented by counsel at those hearings, having relieved their counsel of further responsibility because of the costs involved; and the individual respondent appeared at those hearings pro se and for the corporate respondent. Additional evidence was presented in support of the complaint, but no further defense evidence was presented.

The record was again closed for the reception of evidence on September 17, 1963. A supplemental brief was filed by counsel supporting the complaint on October 17, 1963. A letter from the individual respondent, dated October 14, 1963, addressed to the Secretary and received on October 17, 1963, constitutes the supplemental presentation on behalf of respondents. Reply thereto was filed by counsel supporting the complaint on October 28, 1963.

After having carefully considered the entire record in this proceeding, including the record subsequent to reopening, and the proposals and contentions of the parties, the hearing examiner issues this initial decision. The limited specific references to the transcript of testimony (abbreviated Tr.) and to the exhibits (abbreviated CX or RX) are intended to be convenient guides to the principal items of evidence in the record supporting particular findings, and do not represent complete summaries of the evidence which was considered. Findings proposed by the parties which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record, or as involving immaterial matter.

FINDINGS OF FACT

1. Respondent Hugh J. McLaughlin & Son, Inc., is a corporation organized in October, 1961, and existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 614 North Indiana Avenue, Crown Point, Indiana (Tr. 113, 169-70).

2. Respondent J. V. McLaughlin is an individual, and is president, treasurer and a member of the board of directors of said corporate respondent (Tr. 113, 170). He has primary responsibility in formulating, directing and controlling the acts and practices of the corporate

respondent, including those hereinafter found to have been used by the corporate respondent (Tr. 118-9). Since all of the acts and practices of the respondents relevant to this proceeding are those of the corporate respondent, for which the individual respondent has primary responsibility, any references hereinafter to the respondent, in the singular, are intended to refer to the corporate respondent.

3. Respondent is engaged in the business of manufacturing new golf balls and rebuilding used golf balls, and in selling such balls and golfing accessories, including clubs and other equipment. Its gross sales amount to approximately \$300,000 annually, approximately \$225,000 of which are in interstate commerce (Tr. 137-8). Its sales are made throughout the United States (Tr. 302), and are represented primarily by golf balls (Tr. 138).

4. Approximately half of respondent's sales of golf balls are new balls (Tr. 304), and the remainder are rebuilt balls (Tr. 149-50). Approximately one-third of its rebuilt balls are sold to golf driving ranges (Tr. 150-1), and the remaining two-thirds to distributors, jobbers and retailers for resale to the golfing public (Tr. 151). No sales are made directly to the golfing public by respondent (Tr. 151).

5. Rebuilt golf balls sold to driving ranges by respondent are for use in the operation of the businesses of such ranges, and are not for resale (Tr. 147-8). There is no contention that the purchasers of such balls are deceived or are likely to be deceived, and, accordingly, such balls will not be included in further references herein to rebuilt golf balls.

6. The issues herein relate to sales by the respondent of rebuilt golf balls to distributors, jobbers and retailers for resale to members of the golfing public (Paragraph 2 of Complaint; Third proposed finding of counsel supporting complaint). Respondent's sales of such balls amount to approximately \$45,000 annually, and approximately \$35,250 of such sales are in interstate commerce (Tr. 306). Respondent's interstate sales of such balls, although relatively small, are substantial.

7. Respondent purchases golf balls which have been previously used, sorts them into two grades according to their condition and their original price and quality, rebuilds them, and sells them at two price levels based upon the grades into which they were originally sorted (Tr. 212, 351-2). Both grades are rebuilt by the same processes, and with the same grade and quality materials, and, when finished, have the same appearance except for the brand name used on them. Any differences in the performance of the finished rebuilt balls depend upon the quality of the balls from which they were rebuilt (Tr. 352-3). For the purposes of this proceeding, no further distinction need be made between the two grades of rebuilt balls produced by respondent.

8. The rebuilding operation of respondent consists of removing the cover and part of the rubber winding; rewinding what remains with rubber thread to the original size of the ball without a cover; and adding a new cover (Tr. 212, *et seq.*). Before being applied to the rewound ball, the cover material is molded by respondent into half spheres. Two such half spheres, which form the cover, are placed around the ball and compressed in a mold under heat and pressure to bind the cover to the winding material and to bind the two halves of the cover together. As used herein, the terms "rebuilt" and "recovered" are intended to refer interchangeably to balls so processed.

9. The standard pattern of dimples is also molded into the cover. This standard pattern, which is used on substantially all covers of new and rebuilt golf balls, is characterized by a uniform spacing of the dimples, except for an interruption at the poles, the two points on the cover equi-distant from the line at which the halves are joined. These interruptions of the dimples, approximately $\frac{3}{32}$ of an inch wide and one inch long, provide two smooth areas, referred to as "name blanks", on each ball for marking the name brand (Tr. 194-6, 223).

10. When the ball is removed from the mold, the excess material of the cover, which has flowed out of the mold, is trimmed or buffed to produce a smooth finish at the equator of the ball, the line at which the two halves of the cover are joined. The ball is then washed, rinsed, dried and painted (Tr. 224-33). After the painting process has been completed, the ball is marked on the name blanks with the brand name by pressing a die against a ribbon with an appropriate coloring agent (Tr. 204-6, 232-3).

11. The processes followed by respondent in placing new covers on used balls are essentially the same as its processes in placing covers on new balls except for the quality of the material used for the covers, the quality and number of coats of paint used, the care used in finishing and the number of inspections and standards employed in inspecting the finished product (Tr. 217-367). It should also be noted that after the brand name has been marked on the balls, new balls are then finished by respondent with a clear coat of enamel, but that it omits this finishing coat on rebuilt balls (Tr. 201-5, 232-3).

12. Some of respondent's rebuilt golf balls which are resold to members of the golfing public are sold by respondent in bulk, or wrapped in cellophane, but a substantial portion are wrapped in cellophane and packaged in cardboard boxes, each box containing one dozen balls (Tr. 152-3). No printed matter appears on the box, on the cellophane wrapping of the balls or on the balls, themselves, to indicate that they are rebuilt or are not new (Tr. 136). On the invoices which respondent

sends to its customers and in its catalog and price list, its golf balls are specifically identified as "Rebuilt" or "Rewound" (Tr. 281-95).

13. Counsel supporting the complaint contends, in effect, that because of respondent's failure to disclose "either on the ball itself, on the wrapper or on the box in which the balls are packed" that the balls are rebuilt, or are not new, its rebuilt balls "are understood to be and are readily accepted by the public as new balls"; that "a substantial segment of the consuming public has a preference for merchandise which is composed of new and unused materials"; and that respondent thus places in the hands of dealers "means and instrumentalities whereby they may mislead and deceive the public" (Sixth, Seventh and Ninth proposed findings of counsel supporting the complaint).

14. Among the rebuilt golf balls produced and sold by respondent are white golf balls with brand names, such as "Glasgow", "Champion", and others, including private brands of its customers, of the type ordinarily used by the public in playing golf. Whether or not such balls are readily accepted by the public as new balls requires consideration of the appearance of the balls, individually and packaged as they are sold to the public, and whether or not their appearance is sufficiently different from new balls to identify them as balls which are not new.

15. The only balls originally presented in evidence representative of respondent's rebuilt golf balls of the type ordinarily sold to the consuming public (CX 1 and 2) had flaws and blemishes, such as small cuts or chipped paint, which are not characteristic of the balls as they are sold by respondents (Tr. 157-62, 343-4), and those exhibits were not packaged in the manner in which the balls are sold to the public. For reasons stated in detail in his order of May 6, 1963, the hearing examiner concluded that the record did not provide an adequate basis for informed determination of whether or not the rebuilt golf balls here in issue have the appearance of new balls. He, accordingly, reopened the proceeding for the reception of further evidence.

16. The evidence presented subsequent to the reopening included a number of respondent's rebuilt golf balls of the type ordinarily used in playing golf, packaged in the manner in which they are sold to the consuming public. Such balls consisted of two dozen bearing the name "Champion" (CX 19 and 20, Tr. 759-65), one of the brand names used by respondent; one dozen bearing the name "Al Payne" (CX 23, Tr. 765-7, 773, 784-9, 806-13), a private brand of one of respondent's customers; and one half dozen bearing the name "Pro Blue" (CX 25, Tr. 774, 790-3, 847-50), a private brand of another of respondent's customers.

17. The Champion golf balls (CX 19 and 20) are packaged by respondent in cardboard trays, each containing three balls, and wrapped in clear cellophane. Four such trays are packaged in a box suitable for display of the balls. The name Champion on each of the balls is visible through the cellophane wrapping, and the box also features that name together with the words "Long Life * * * Tough Vulcanized Cover * * * Liquid Center * * * Quality Golf Balls." The two dozen Champion balls in evidence as CX 19 and 20 were purchased by an investigating attorney of the Federal Trade Commission for 39¢ each (Tr. 817) in a retail store where they were displayed on the counter in the same display with other golf balls, including new balls, with no sign or other printed material identifying them as re-covered or as not new (Tr. 832-3).

18. "Al Payne" is the private brand of one of respondent's customers. The golf balls in evidence marked with that trade name are re-covered balls produced in the regular course of business by respondent, and specially stamped with the brand name for that customer (Tr. 806). They are packaged by respondent in cardboard trays, each containing three balls, and wrapped in clear cellophane, and they are shipped to the customer in that form (Tr. 766). The customer is a manufacturer of golf equipment, and 80% to 90% of the Al Payne balls are sold by that customer by including a tray of three balls with golf equipment—clubs, bag, and balls—sold as a packaged set. The balance of such balls are packaged by the customer in boxes, each containing four trays, or one dozen balls, and sold in that form (CX 23). Both the Al Payne balls in boxes of one dozen each, and those included in packaged sets of golf equipment, are sold by respondent's customer to retailers for resale to consumers (Tr. 808-811).

19. "Pro Blue" is the private brand of another of respondent's customers. The golf balls in evidence marked with that trade name are rebuilt golf balls produced by respondent and stamped with the brand name for that customer. They are packaged by respondent in cardboard trays, each containing three balls, and wrapped in clear cellophane, and they are shipped to the customer in that form (CX 25; Tr. 790-3).

20. The evidence presented subsequent to the reopening also included a number of golf balls of the type ordinarily used in playing golf, packaged in the manner in which they are sold to the consuming public, which were purchased by an investigating attorney of the Federal Trade Commission as new balls. Such balls consisted of:

(a) one dozen Wilson K-28 golf balls in cardboard trays containing three balls each, wrapped in cellophane, and packaged in a gift con-

tainer, purchased at the retail price of \$1.25 each (CX 21, 29; Tr. 770-1, 817, 829-30);

(b) one dozen George Fazio golf balls in four cellophane wrapped trays, packaged in a cardboard box featuring the trade name, purchased at the retail price of 49¢ each (CX 22, 29; Tr. 771-2, 783, 817, 820-7);

(c) one dozen Hoksins Dyna Arrow golf balls (made in Japan), individually wrapped in opaque cellophane (two were unwrapped for examination) and packaged in a cardboard box featuring the trade name, purchased at the retail price of 59¢ each (CX 24, 29; Tr. 773, 817, 831-5);

(d) three M.F. & Co. Field "50" golf balls (CX 26), three King golf balls (CX 27), and three Falcon golf balls (CX 28), each group of three balls being packaged in a cardboard tray and wrapped in clear cellophane, and each of these three brands being purchased at the retail price of 50¢ per ball (Tr. 774-6, 836-41, 845-7);

(e) one dozen MacGregor Super M golf balls in four cellophane wrapped trays, packaged in a cardboard box featuring the trade name, purchased at the retail price of approximately 75¢ each (CX 39; Tr. 975-83).

21. The Wilson K-28 balls were conceded by the respondent to be new balls. The George Fazio, Hoksins, Field "50", King, Falcon and MacGregor balls were not conceded, nor proved by direct evidence, to be new balls, but all of them were affirmatively represented by the retail salespersons to be new balls. These balls represent a variety of packaging, including a gift package, boxes containing a dozen balls, cellophane wrapped in trays of three, a box containing a dozen balls individually wrapped in cellophane, and separate packages each containing three balls in trays wrapped in cellophane. They also represent a variety of price levels, including balls retailing at 49¢, 50¢, 59¢, 75¢ and \$1.25.

22. With the exception of the George Fazio brand, all of the balls which were purchased as and represented to be new have a white, glossy appearance and, as they are packaged, disclose no apparent marks or blemishes. Upon close examination the hearing examiner is unable to detect any appreciable difference in the outward, visual characteristics of these balls, including the least expensive and the most expensive, except the George Fazio balls, which have a relatively dull, yellowish finish. Even the George Fazio balls were purchased as and represented to be new.

23. The hearing examiner is of the opinion that the balls, above referred to, which were purchased as new balls and received in evidence subsequent to reopening, are fairly representative of the appear-

ance of various grades, qualities and packaging of golf balls which are ordinarily sold to the consuming public as new balls.

24. Distributors and retailers are generally familiar with the process of re-covering golf balls, and are aware that re-covered golf balls are sold at retail to the purchasing public for use in playing and practicing golf. There is, however, a serious question concerning the extent to which the purchasing public is aware of the process of re-covering golf balls or of the fact that re-covered golf balls are sold at retail to consumers.

25. Some of the golfer witnesses who testified had some familiarity with re-covered golf balls, but they were not selected at random from the golfing public. They were selected as witnesses in this proceeding, and they cannot be considered as generally representative of the purchasing public for golf balls. Even so, however, the testimony of one of the defense witnesses, who was a non-golfer, and who bought top grade new balls as a gift, made it clear that he knew little about golf balls generally and nothing about re-covered golf balls (Tr. 588-702, at 600-1); and one of the rebuttal witnesses, who was a sporadic golfer, and who had a preference for new golf balls, testified that he had never to his knowledge seen a rebuilt golf ball although a retail salesman had once told him that a low-priced ball was rebuilt (Tr. 748). The testimony of witnesses received subsequent to the reopening indicated generally that they were unfamiliar with the fact that golf balls are rebuilt and sold at retail until they were interviewed by the Commission's investigating attorney (Tr. 852, 871, 878, 887, 898, 909-10, 926-7, 940, 951).

26. On the basis of the record as a whole, it cannot be concluded that the purchasing public generally is aware of the commercial practice of rebuilding and re-covering used golf balls, or of the availability of such balls at retail. That segment of the purchasing public which is not aware of the process of re-covering golf balls, or of the availability of such balls on the retail market, has no basis for identifying any golf balls as having been rebuilt or re-covered. The essential question to be considered, therefore, is whether or not respondent's rebuilt golf balls are generally accepted by the public as new golf balls or as golf balls which are not new.

27. Subsequent to the reopening, nine members of the consuming public appeared as witnesses. Each of those witnesses examined the golf balls received in evidence subsequent to the reopening (CX 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28), except the McGregor Super M (CX 39), and expressed their opinions as to which appeared to them to be new, rebuilt or not new.

28. One of the witnesses (Engler, Tr. 850-68) was in the hearing room when the balls were identified and received in evidence, and accordingly his opinion concerning their appearance, consciously or unconsciously, may have been influenced by the knowledge then acquired. Another of those witnesses (Lindmark, Tr. 868-76) was in the hearing room during part of the time when the balls were identified and received in evidence, and his opinion is, at least in part, subject to similar considerations. The testimony of those two witnesses concerning the appearance of the balls is, therefore, subject to obvious disabilities and will be disregarded.

29. The other seven witnesses who testified concerning the appearance of the balls received in evidence subsequent to reopening, were not in the hearing room when the balls were identified and received (Lightner, Tr. 876-83; Meyer, Tr. 884-90; Barnett, Tr. 896-907; Hutchinson, Tr. 907-23; O'Brien, Tr. 924-38; Studell, Tr. 938-49; and Smith, Tr. 950-64). Each of them, however, had been interviewed previously by an investigating attorney of the Federal Trade Commission for the purposes of this proceeding. At such interviews they were shown representative balls from all of the groups of balls subsequently received in evidence, except CX 39, and expressed their opinions as to whether or not the balls appeared to them to be new (Tr. 966-73).

30. These were not witnesses selected at random from members of the public to give their opinions concerning the appearance of golf balls which they saw for the first time when they testified. On the contrary, they were selected as witnesses because their opinions were in accord with the contentions of counsel supporting the complaint. The hearing examiner observed these witnesses as they testified and is convinced that they attempted to testify honestly and to give their genuine views. He is also convinced that when they testified they were not able to identify the balls specifically as the ones previously shown to them (Tr. 973).

31. The hearing examiner sees no ethical impropriety in the method by which these witnesses were selected. He is of the opinion, however, that the fact that they were selected on the basis of their previously expressed opinions substantially destroys the value of their testimony as being representative of the spontaneous reactions of members of the consuming public to the appearance of the golf balls here in question. Their testimony with respect to this issue, accordingly, will be disregarded.

32. The hearing examiner has examined respondent's rebuilt golf balls which were received in evidence subsequent to the reopening, and has compared them, both in the appearance of the balls themselves, and in the manner in which they are packaged and sold to the

consuming public with the balls in evidence which were purchased as new. Respondent's Champion, Al Payne, and Pro Blue rebuilt balls all have the characteristic white, glossy appearance of new balls and balls which are sold as new; and they disclose no apparent mars or blemishes. They are packaged by respondent and resold by its direct or indirect customers to consumers in the same manner as new balls.

33. It is the opinion of the hearing examiner, based upon his examination and comparison of the balls received in evidence subsequent to the reopening that respondent's rebuilt golf balls have the appearance of new golf balls. The evidence discloses that they are sold to the consuming public through the same channels and in the same manner as new balls. It is, therefore, the opinion of the hearing examiner that in the absence of any disclosure to the contrary, or in the absence of an adequate disclosure, respondent's rebuilt golf balls are understood to be and are readily accepted by the public as new balls.

34. Upon the motion of counsel supporting the complaint, the hearing examiner, by his order of December 20, 1962, took official notice "that a substantial segment of the consuming public has a preference for merchandise which is composed of new and unused materials". This "is, of course, common knowledge and obtains in virtually all fields of merchandising" (*Federal Cordage Co., Inc., et al.*, 49 F.T.C. 1312, 1321). The order granted to the parties the opportunity "to disprove the officially noticed fact, or to prove that it does not apply to the merchandise involved in this proceeding".

35. Two witnesses offered by the respondent testified concerning their understanding of public preference on the basis of their experience in the retail sale of new and re-covered golf balls to the public. One of them expressed the opinion that price is a factor, and that "in many instances" the public would prefer a re-covered ball over a low-priced new ball, but that "If they wanted a \$1.25 ball, of course they would want an all-new ball; * * *." (Tr. 509). The other expressed the opinion that the public would prefer a re-covered golf ball to an inexpensive new ball (Tr. 535).

36. Three golfer witnesses offered by respondent preferred re-covered balls because of the lower price (Tr. 411-3, 428-9, 584-5). Another defense witness, who was an occasional golfer, preferred re-covered balls because "they do not seem to cut up as bad" as new \$1.25 balls. As between a re-covered ball at 45¢ and a new ball at 60¢, he "would buy one of each to find out if the 60 cents one cut" because he had never purchased a 60¢ new ball (Tr. 606, 612-4). Another defense witness, who was a non-golfer, testified concerning his purchase of golf balls as a gift for his brother. He did not know anything about golf balls, and did not want to be humiliated, so he said to the salesman,

"make sure they are good balls, brand new balls, and everything" (Tr. 595).

37. Three rebuttal witnesses offered by counsel supporting the complaint testified that they preferred new golf balls to re-covered balls. Two of them stated that their preference was based primarily upon brand names which they specifically identified and which retail at the top prices (Tr. 720-5, 727-35), and the other, who was a former employee of the Federal Trade Commission, had never seen a re-covered golf ball to his knowledge (Tr. 746-8).

38. The testimony clearly is to the effect that the public prefers new golf balls when it buys balls in the higher price ranges; but that "in many instances" the public may prefer a re-covered ball to a low-priced new ball because of an impression that the low-priced new ball may be of inferior quality. The evidence, accordingly, instead of disproving, actually lends substantial support to the applicability to golf balls of the officially noticed fact "that a substantial segment of the consuming public has a preference for merchandise which is composed of new and unused materials".

39. Even members of that segment of the public which may prefer re-covered golf balls to low-priced new balls because they consider the re-covered balls to be of better quality, or for other reasons, are entitled to know whether or not golf balls offered for sale to them are new or re-covered. Whatever the preference of the public may be, re-covered golf balls should be offered for sale on a basis which will enable the public to exercise that preference freely and accurately without the necessity for meticulous inspection or critical analysis.

40. Testimony was offered that reclaimed rubber is frequently one of the ingredients used in the cores of new golf balls, and that, to a lesser extent, it is also used in the covers of new golf balls. There was also some testimony concerning the process involved in producing reclaimed rubber, the characteristics of that product, the effects of its use in golf balls, and the understanding and preference of the public with respect to the presence of reclaimed rubber in new golf balls (Tr. 184, 315-21, 344-7, 357-62, and in D. 8528, Tr. 248, 527-31, officially noticed herein at Tr. 624-7).

41. Respondent contends that almost all of the golf balls on the market which are sold to the public as new, but without an affirmative representation that they are all new, actually contain previously used material in the form of reclaimed rubber; and that in the absence of an affirmative representation that they are all new, the public understands that golf balls may contain used material, including reclaimed rubber.

42. The testimony with respect to the production and characteristics of reclaimed rubber, the extent to which it is used in new golf balls, and the understanding and preference of the public with respect to its use in golf balls was very limited and was given by witnesses with very limited qualifications. Such testimony is inconclusive, and it does not provide a satisfactory basis for definitive findings on this subject.

43. The issue here is whether or not failure adequately to disclose that respondent's re-covered golf balls contain previously used materials "may mislead and deceive the public as to the nature and construction of their said golf balls" (Comp. ¶ 5). That issue has not been substantially affected by the evidence now in the record concerning the practices in the industry with respect to the use of reclaimed rubber in new golf balls, and the understanding of the public with respect to such practices.

44. There is testimony that one of the manufacturers of new golf balls identifies some of its balls on the box and on the wrapping, but not on the ball itself, with the word "New" (Tr. 249-51 in D. 8528, officially noticed Tr. 624-7). From the testimony as a whole, however, and particularly from the evidence received subsequent to the reopening, it is clear that it is not the general practice of manufacturers of new golf balls to describe them as "new" on the balls or on the boxes or wrapping in which they are sold to the consuming public. There can be no doubt that the public generally buys golf balls having a new appearance as new balls, without regard to whether or not they are affirmatively represented as new.

45. An effort was also made to show that golf balls fall into sharply defined price classes, and that the purchasing public can recognize re-covered balls by the prices at which they are offered for sale at retail.

46. Testimony of this nature was given by an official of the corporate respondent in Docket No. 8528, whose testimony was officially notice in this proceeding (Tr. 624-7). He was qualified to a limited extent as an expert on the retail prices of golf balls, and the public's understanding of the significance of such prices. His interest in the outcome of this proceeding, however, manifestly prevents his testimony being received as that of an objective and unbiased expert. He testified with conviction, and his testimony was consistent with the testimony of other witnesses whose qualifications were also sharply limited. Subject to its obvious infirmities, his testimony may have some value, and it will be considered.

47. He testified to the effect that the public is sufficiently familiar with the characteristics and retail prices of golf balls to identify balls retailing at prices ranging from 35¢ to 45¢ each as used balls which

have been re-covered (Tr. 209-11, 214-20, 533, 551 in D. 8528). He would not say, however, that the prices of re-covered golf balls never go higher than that range, but said only that 35¢ to 45¢ represent the average price (Tr. 512 in D. 8528). He also testified that some re-covered golf balls carry a suggested retail price of 75¢ each (Tr. 513 in D. 8528).

48. Similar testimony, subject to the same limitations and infirmities, was also given by the individual respondent in this proceeding (Tr. 246-57, 265, 270-2, 348-9). His testimony also disclosed that the corporate respondent in this case suggests a retail selling price for its re-covered balls of 75¢ each (Tr. 334-5), but there is no evidence that such balls actually retail at that price (Tr. 365-7).

49. Ten witnesses called by the respondents who testified jointly in this case and in Docket No. 8528, were not officials or employees of the corporate respondent in either case. Five of these defense witnesses gave some testimony on price and price classes of golf balls. No rebuttal testimony was offered on this subject.

50. Two defense witnesses, who operated sporting goods stores in which they sold golf balls at retail, including re-covered balls, testified on this subject. On the basis of their experience in selling to consumers, both testified, in effect, that re-covered balls were usually sold to the consumer at 35¢ to 45¢ each, and that the price was significant to the consumer in identifying re-covered balls (Tr. 444-7, 536-7).

51. Three defense witnesses testified on this subject as members of the golfing public. They were occasional golfers whose scores averaged from 90 to 105 strokes for 18 holes of play, and who had purchased re-covered golf balls for use in playing golf. One purchased re-covered balls because of their lower price (Tr. 428-9); another testified that the average retail price of re-covered balls is 35¢ to 40¢ each, and of new golf balls, \$1.25 to \$1.30 each (Tr. 571); and the other thought the average price of re-covered balls was about three for \$1.00, and he was familiar only with the \$1.25 price of new golf balls (Tr. 604-5). None of these golfer witnesses testified that price was significant in assisting him in identifying a re-covered golf ball.

52. The testimony discloses that re-covered golf balls retail at average prices of 35¢ to 45¢ each, but that they sometimes retail at higher prices; and that new golf balls ordinarily retail at prices ranging from 50¢ to \$1.25 each. In some instances, re-covered golf balls carry a suggested retail price of 75¢ each, and there is the clear inference that they sometimes retail at 75¢ each or are fictitiously advertised at that price. It is clear, therefore, that the retail prices of re-covered golf balls are not so consistent, and are not so distinct from the prices of new balls, as to provide a reliable basis for the identification by the public of re-covered balls.

53. The purchasing public for golf balls includes the most skillful golfers who will play only with new balls meeting tournament-play specifications, but who will practice with balls in any other category. It also includes all other golfers with varying degrees of skill and experience, down to beginners who purchase balls for the first time, as well as non-golfers who purchase golf balls as gifts. The testimony tending to indicate that the purchasing public generally can identify re-covered golf balls by their retail prices, attributes a degree of experience and judgment in such matters to this broad and varied segment of the public which is not supported by the record. It is the opinion of the hearing examiner that the retail price does not constitute a significant factor in enabling the purchasing public to distinguish a re-covered golf ball from a new ball.

54. There is also some testimony that an unfamiliar brand name serves to identify re-covered golf balls and to distinguish them from new balls (Tr. 466-9, 491-2). Many nationally advertised brand names are used on new golf balls, and there are many unadvertised and private brands which are also used on new golf balls (Tr. 472-9). Some of the witnesses who testified indicated a very limited familiarity with brand names.

55. It is inconceivable that members of the purchasing public generally can be so familiar with all of the brands used on new balls that they will interpret a brand name which they do not recognize as identifying a re-covered ball or a ball which is not new. The testimony to the effect that an unfamiliar brand name means to the consuming public that the ball is re-covered is wholly unpersuasive.

CONCLUSIONS

1. It is concluded that respondent's rebuilt golf balls have the appearance of new golf balls, that they are sold to the consuming public through the same channels and in the same manner as new balls; and that in the absence of any disclosure to the contrary, or in the absence of an adequate disclosure, respondent's rebuilt golf balls are understood to be and are readily accepted by the public as new balls.

2. No printed matter appears on the boxes or wrappings of respondent's rebuilt golf balls, or on the balls themselves, to indicate that they are rebuilt or are not new.

3. It is not the practice of manufacturers of new golf balls to describe them as "new" on the balls or on the boxes or wrappings in which they are sold to the consuming public. The public generally buys golf balls having a new appearance as new balls, without regard to whether or not they are affirmatively represented as new. That substantial segment of the purchasing public which is not aware of the

practice of rebuilding and re-covering used golf balls, or of the availability of such balls at retail, must necessarily accept golf balls as new or not new on the basis of appearance, and has no reason to expect balls having a new appearance to be otherwise than new.

4. The retail prices of re-covered golf balls are not so consistent, and are not so distinct from the prices of new balls, as to constitute a significant factor in enabling the purchasing public to distinguish re-covered golf balls from new balls or to identify them as not new. The purchasing public is not materially assisted in distinguishing recovered balls, or balls which are not new, from new balls by its unfamiliarity with the brand names appearing on re-covered balls.

5. It is concluded, therefore, that there is no disclosure to the consuming public, either directly, or by trade custom or practice, or otherwise, that respondent's rebuilt golf balls are not new; and that such balls are understood to be and are readily accepted by the public as new balls.

6. It is further concluded that a substantial segment of the consuming public has a preference for merchandise which is composed of new and unused materials, and that such preference applies specifically to golf balls.

7. By failing to disclose on the box or on the wrapping of its rebuilt golf balls, or on the balls themselves, that they are rebuilt or are not new, respondent places in the hands of dealers means and instrumentalities whereby they may mislead and deceive the public as to the nature and construction of said golf balls.

8. 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 products of the same general kind and nature as those sold by respondent.

9. The failure of respondent to disclose on its rebuilt golf balls, or on the boxes or wrappings in which they are sold to the consuming public, that they are previously used balls which have been rebuilt or reconstructed has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said golf balls were, and are, new in their entirety and into the purchase of substantial quantities of respondent's products by means of said erroneous and mistaken belief.

10. The aforesaid acts and practices of the corporate respondent, for which the individual respondent had primary responsibility, were and are, all to the prejudice and injury of the public and of the 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 of the Federal Trade Commission Act.

11. Respondent contends, in effect, that it would be unfair to require it to make affirmative disclosures with respect to its rebuilt golf balls while leaving other producers of the same type of balls to continue their present practices; and that such other producers should promptly be required to comply with whatever decision is rendered herein. The hearing examiner in this proceeding has no authority with respect to the practices of other producers of rebuilt golf balls. It is his opinion, however, that the public interest requires proper disclosure of the nature and construction of respondent's rebuilt golf balls, and "that the public interest far outweighs the private considerations urged by respondents". (*The Clinton Watch Company, et al.*, Docket No. 7434, 57 F.T.C. 222 at 231, 7/19/60.)

ORDER

It is ordered, That the respondent Hugh J. McLaughlin & Son, Inc., a corporation, and its officers, and respondent J. V. McLaughlin, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of used, rebuilt or reconstructed golf balls in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing clearly to disclose on the boxes in which respondents' rebuilt or reconstructed golf balls are packaged, on the wrapper and on said golf balls themselves, that they are previously used balls which have been rebuilt or reconstructed.
2. Placing any means or instrumentality in the hands of others whereby they may mislead the public as to the prior use and rebuilt nature and construction of their golf balls.

DECISION OF THE COMMISSION

This matter is before the Commission on the appeal of respondents to the initial decision of the hearing examiner filed December 16, 1963, and the answer of counsel in support of the complaint in opposition thereto.

The Commission has determined that the order contained in the initial decision should be modified with a provision permitting respondents to omit markings disclosing prior use on their golf balls themselves if respondents establish that the disclosure on the boxes and/or wrappers of such golf balls adequately informs retail customers at the point of sale of that fact. The Commission has further determined, in the light of related cases not yet decided, that compliance

with the terms of the order should not be required at this time. The appeal of respondents will be denied except to the extent indicated. Accordingly,

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

It is ordered. That the respondent Hugh J. McLaughlin & Son, Inc., a corporation, and its officers, and respondent J. V. McLaughlin, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of used, rebuilt or reconstructed golf balls in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing clearly to disclose on the boxes in which respondents' rebuilt or reconstructed golf balls are packaged, on the wrapper and on said golf balls themselves, that they are previously used balls which have been rebuilt or reconstructed. Provided, however, that disclosure need not be made on the golf balls themselves if respondents establish that the disclosure on the boxes and/or wrappers is such that retail customers, at the point of sale, are informed that the golf balls are previously used and have been rebuilt or reconstructed.

2. Placing any means or instrumentality in the hands of others whereby they may mislead the public as to the prior use and rebuilt nature and construction of their golf balls.

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

It is further ordered, That the enforcement of the provisions of the order and respondents' duty to comply therewith be, and they hereby are, suspended until further order of the Commission.

IN THE MATTER OF

FURBOW MANUFACTURING COMPANY, INC., TRADING
AS KING FURS ET AL.

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

Docket C-758. Complaint, June 15, 1964—Decision, June 15, 1964

Consent order requiring manufacturing retailers of furs in Memphis, Tenn., to cease violating the Fur Products Labeling Act by representing fictitious amounts as bona fide former prices of fur products on labels and in advertising; failing to show, in invoicing and advertising, the true animal name

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of fur, the country of origin of imported furs, when fur was artificially colored and when secondhand or waste fur was used, and to use the terms "Dyed Mouton Lamb," "Dyed Broadtail-processed Lamb," and "natural" as required; using the word "Broadtail" improperly on invoices and in advertising; failing to keep adequate records as a basis for pricing claims; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Furbow Manufacturing Company, Inc., a corporation, trading as King Furs, and Harry Lazerov and Stanley Zellner, individually and as officers of said corporation, hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Furbow Manufacturing Company, Inc., trading as King Furs is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee.

Respondents Harry Lazerov and Stanley Zellner are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers and retailers of fur products with their office and principal place of business located at 144 Union Avenue, city of Memphis, State of Tennessee.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in violation of Section 4(1) of the Fur Products Labeling Act in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified in that labels affixed to fur products, contained representa-

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tions, either directly or by implication that the prices of such fur products were reduced from respondents former prices and the amount of such purported reduction constituted savings to purchasers of respondents fur products. In truth and in fact, the alleged former prices were fictitious in that they were not actual, bona fide prices at which respondents offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and savings were not afforded purchasers of respondents said fur products, as represented.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show that the fur product contained or was composed of used fur, when such was the fact.
3. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
4. To show the country of origin of imported furs used in fur products.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that respondents set forth on invoices pertaining to fur products the name of an animal other than the name of the animal that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

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

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Dyed Mouton Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 9 of said Rules and Regulations.

(c) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(d) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(e) The disclosure that fur products were composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur, where required, was not set forth on invoices, in violation of Rule 20 of said Rules and Regulations.

(f) The disclosure "secondhand", where required, was not set forth on invoices, in violation of Rule 23 of said Rules and Regulations.

(g) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 8. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering of sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Memphis Commercial Appeal, a newspaper published in the city of Memphis, State of Tennessee.

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

1. To show the true animal name of the fur used in the fur product.
2. To show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
3. To show the country of origin of imported furs contained in the fur products.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that certain of said fur products were falsely or deceptively identified with respect to the name or designation of the animal or animals that pro-

duced the fur from which the said fur products had been manufactured, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

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

PAR. 10. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that certain of said advertisements contained the name or names of an animal or animals other than those producing the fur contained in the fur product, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 11. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Persian Lamb" was not set forth in the manner required, in violation of Rule 8 of the said Rules and Regulations.

(b) The term "Dyed Broadtail-processed Lamb" was not set forth in the manner required, in violation of Rule 10 of the said Rules and Regulations.

(c) The term "blended" was used as part of the information required under Section 5(a)(5) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs contained in fur products in violation of Rule 19(f) of the said Rules and Regulations.

(d) The term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

(e) The disclosure "second-hand", where required, was not set forth, in violation of Rule 23 of the said Rules and Regulations.

(f) All parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder were not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of the aforesaid Rules and Regulations.

PAR. 12. By means of the aforesaid advertisements and other advertisements of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements represented that the prices of fur products were reduced from respondents former prices and that the amount of such price reductions afforded savings to the purchasers of respondents fur products. In truth and in fact the alleged former prices were fictitious in that they were not actual, bona fide prices at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 13. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented either directly or by implication that prices of such fur products were reduced from respondents former prices and the amount of such purported reduction constituted savings to purchasers of respondents fur products. In truth and in fact, the alleged former prices were fictitious in that they were not the actual, bona fide prices at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 14. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

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DECISION AND ORDER

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

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

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

1. Respondent Furbow Manufacturing Company, Inc., trading as King Furs, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 144 Union Avenue, in the city of Memphis, State of Tennessee.

Respondents Harry Lazerov and Stanley Zellner 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 Furbow Manufacturing Company, Inc., a corporation trading as King Furs, and its officers, and respondents Harry Lazerov and Stanley Zellner, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are

defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing, directly or by implication on labels, that any price, when accompanied or not by descriptive terminology is the respondents former price of fur products when such amount is in excess of the actual, bona fide price at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business.

2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondents' products.

3. Falsely or deceptively representing in any manner, directly or by implication, on labels or other means of identification that prices of respondents' fur products are reduced.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Setting forth on invoices pertaining to fur products the name or names of any animal or animals other than the name of the animal producing the fur contained in the fur product as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

4. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

5. Failing to set forth the term "Dyed Mouton Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

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

7. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not

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pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

8. Failing to disclose on invoices that fur products are composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

9. Failing to disclose that fur products contain or are composed of secondhand used fur.

10. Failing to set forth on invoices the item number or mark assigned to fur products.

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

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

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

3. Sets forth the name or names of any animal or animals other than the name of the animal producing the furs contained in the fur products as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

4. Fails to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

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

6. Sets forth the term "Blended" or any term of like import as part of the information required under Section 5(a) of the Fur Products Labeling Act.

7. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

8. Fails to disclose that fur products contain or are composed of secondhand used furs.

9. Fails to set forth all parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

10. Represents directly or by implication, that any price, when accompanied or not by descriptive terminology is the respondents former price of fur products when such amount is in excess of the actual bona fide price at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business.

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

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

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

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