It is further ordered, That the complaint against the respondent, Dorothy Nitsch, be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's initial decision of September 20, 1965, as modified herein and as modified and supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the 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 set forth herein.

Commissioner Elman dissented and has filed a dissenting opinion.

IN THE MATTER OF

THE ATLANTIC COMPANY ET AL.

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

Docket 8677. Complaint, Jan. 11, 1966—Decision, Mar. 31, 1966

Consent order requiring three operators of retail grocery stores in the Chattanooga, Tenn., area, to cease coercing or intimidating retail outlets to refuse to deal with members of a beer wholesalers organization.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent The Atlantic Company, hereinafter sometimes referred to as Atlantic, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with principal business offices at 106 Washington Street, Viaduct, Atlanta, Georgia. Through its E–Z Food

Shops Division, respondent operates approximately 160 retail stores in an area encompassing the States of Mississippi, Alabama, Tennessee, Florida, Georgia, North Carolina, and South Carolina. Among the items sold by these stores are grocery products, beer, magazines and lawn and garden supplies. In 1963, respondent's net sales amounted to over $23,000,000.

Respondent Harold M. Lasater is a resident of the State of Tennessee with a business address located at 5013 Rossville Boulevard, Chattanooga, Tennessee. Respondent Lasater is engaged in the retail grocery business. Utilizing the trade style of "Willie's Supermarket," respondent Lasater owns and operates three supermarkets within the city of Chattanooga, Tennessee, and surrounding area thereof. The combined annual net sales of these stores exceed $2,500,000.

Respondent A. Clyde Pruett is a resident of the State of Tennessee with a business address located at 5738 Ringgold Road, Chattanooga, Tennessee. Respondent Pruett is engaged in the retail grocery business. Through various corporate and other business devices, and under the trade style "Pruett's Food Town," respondent owns and operates five supermarkets in the city of Chattanooga and surrounding area thereof. The combined annual net sales of these retail outlets exceed $1,000,000.

PAR. 2. In the course and conduct of its business, respondent Atlantic, from its corporate headquarters in Atlanta, Georgia, purchases food, beverage and other products manufactured in various States of the United States and causes said products to be shipped across State borders and sold through its retail outlets located in the States mentioned in Paragraph One. For the past several years, and at all times mentioned herein, respondent has been, and is now, engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents Lasater and Pruett, individually or through various corporate and other business devices, purchase food, beverage and other products that are manufactured in various States of the United States and cause said products to be shipped across State borders to their businesses located in the State of Tennessee. For the past several years, and at all times mentioned herein, said respondents have been, and are now, engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Since April of 1964, respondents Atlantic, Lasater and Pruett have been members of an unincorporated group called the

Chattanooga Beer Retailers Association. The members of this association are in competition with each other in the retail sale of beer, except insofar as such competition has been lessened and restrained by the practices alleged herein.

PAR. 5. Chattanooga Beer Wholesalers Association is an unincorporated association composed of the six largest beer distributors in Hamilton County, Tennessee. Members of this association purchase their beer from manufacturers located in various States of the United States and sell it on both the wholesale and retail level to customers in Chattanooga, Tennessee, and surrounding areas. In reference to retail sales, members of the Chattanooga Beer Wholesalers Association are in competition with the retail businesses operated by respondents herein and other members of the Chattanooga Beer Retailers Association, except insofar as such competition has been lessened and restrained by the practices alleged herein.

PAR. 6. In the course of their aforedescribed business in commerce, respondents Atlantic, Lasater and Pruett, acting between and among themselves, and with other members of the Chattanooga Beer Retailers Association, during the period from April of 1964 through September of the same year, entered into an understanding, agreement, combination and conspiracy to establish, and did establish, place into effect and carry out a planned common course of action to adopt and adhere to certain practices and policies for the purpose of or with the effect of hindering, lessening, restraining and eliminating competition in the sale and distribution of beer between respondents and members of the Chattanooga Beer Wholesalers Association in Chattanooga, Tennessee and surrounding areas.

Pursuant to and in furtherance of said understanding, agreement, combination, conspiracy and planned course of action, respondents Atlantic, Lasater and Pruett, together with certain members of the Chattanooga Beer Retailers Association, concertedly caused, or attempted to cause, a reduction or complete elimination of purchases from members of the Chattanooga Beer Wholesalers Association, and attempted to induce and did induce other retailers, some not members of the Chattanooga Beer Retailers Association, to refuse dealings with members of the Chattanooga Beer Wholesalers Association.

PAR. 7. The acts and practices of the respondents, as herein alleged, have had and do have the effect of hindering, lessening, restricting, restraining and eliminating competition among the

respondents and others in the sale and distribution of beer; are all to the prejudice of the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on January 11, 1966, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provision of Section 2.4(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; 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, 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 aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent The Atlantic Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with principal business offices at 106 Washington Street, Viaduct, Atlanta, Georgia.

Respondent Harold M. Lasater is a resident of the State of Tennessee and his address is 5013 Rossville Boulevard, Chattanooga, Tennessee.

Respondent A. Clyde Pruett is a resident of the State of Tennessee and his address is 5738 Ringgold Road, Chattanooga, Tennessee.

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 respondent The Atlantic Company, a corporation, its officers, representatives, agents, employees, successors and assigns, and respondents Harold M. Lasater and A. Clyde Pruett, individuals, their agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase or sale in commerce, as "commerce" is defined in the Federal Trade Commission Act, of food, beverage and other products customarily sold through retail grocery channels, do forthwith cease and desist from entering into, cooperating in, carrying out or continuing any planned common course of action, understanding, agreement or conspiracy, between or among any two or more of said respondents or among or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts and practices:

1. Coerce or intimidate in any manner or by any means, including boycott or threat of boycott, any manufacturer, wholesaler, distributor or competitor to engage in, cease to engage in, or refrain from engaging in, any acts or practices relating to the conduct of the latter's business.

2. Refuse to purchase or threaten to refuse to purchase from any manufacturer, wholesaler or distributor.

3. Induce or attempt to induce any purchaser to refuse to deal with any manufacturer, wholesaler or distributor.

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

IN THE MATTER OF

TURK-TUCKER FURS, INC., ET AL.

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

Docket C-1053. Complaint, March 31, 1966—Decision, March 31, 1966

Consent order requiring a New York City furrier to cease falsely invoicing its fur products by omitting required information, improperly identifying fur-producing animals, and misrepresenting the country of origin of furs.

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 Turk-Tucker Furs, Inc., a corporation, and Philip Turk and Hyman Tucker, individually and as officers of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

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

Respondents Philip Turk and Hyman Tucker 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 of fur products with their office and principal place of business located at 224 West 30th Street, city of New York, State of New York.

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 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 the country of origin of imported furs used in fur products.

PAR. 4. 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 "Sable" when, in fact, the fur contained in such products was "American Sable" or "American Marten" which are names used interchangeably to identify the same animal.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs used in such fur products, 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 invoiced to show the name of the country of origin of furs contained in such fur products as "Russia" when the country of origin of such furs was, in fact, "Canada."

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing

of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated said Acts, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Turk-Tucker Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 224 West 30th Street, in the city of New York, State of New York.

Respondents Philip Turk and Hyman Tucker 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 Turk-Tucker Furs, Inc., a corporation, and its officers, and Philip Turk and Hyman Tucker, 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 and 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:

Falsely and deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, 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 products.

3. Misrepresenting in any manner, on invoices directly or by implication, the country of origin of the fur contained in fur products.

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

IN THE MATTER OF

CHAMBERS & CHAMBERS, INC., ET AL.

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

Docket C-1054. Complaint, March 31, 1966—Decision, March 31, 1966

Consent order requiring a New York City retail furrier to cease deceptively invoicing and falsely advertising its fur products, and failing to maintain adequate records.

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 Chambers & Chambers, Inc., a corporation, and Harry J. Chambers and Wilmer C. Maurer, 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. Chambers & Chambers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Their office and principal place of

business is located at 370 Seventh Avenue, New York, New York.

Individual respondents Harry J. Chambers and Wilmer C. Maurer are officers of said corporation and formulate, direct and control the acts, practices and policies of said corporation including those herein set forth. Their address is the same as that of said corporation.

Respondents are retailers of fur products and operate two retail stores and leased departments in five department stores in various States of the United States.

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

PAR. 3. Certain of said fur products were falsely and deceptively 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 to show the true animal name of the fur used in the fur product.

PAR. 4. 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 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.

(c) 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.

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

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.

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 designation.

PAR. 6. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforementioned advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Providence Evening Bulletin and Journal, a newspaper published in the city of Providence, State of Rhode Island.

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

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

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

PAR. 7. By means of the aforesaid advertisement 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 that the term "Dyed Broadtail—processed Lamb" was not set forth in the manner required, in violation of Rule 10 of the said Rules and Regulations.

PAR. 8. 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 and deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a) (5) of the Fur Products Labeling Act.

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

PAR. 9. 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 when, 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. 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 violation of Section 5(a) (5) of the Fur Products Labeling Act in that the said advertisements represented through statements such as "Way Below Regular Cost" and "Save Up To $100.," either directly or by implication, that the fur products so advertised were being sold by respondents at prices which were reduced from the former bona fide prices at which the 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 amount of such purported reduction constituted savings to the purchasers of respondents' products, when in fact such fur products were not reduced in price and savings were not afforded purchasers of respondents' products as represented.

PAR. 11. In advertising fur products for sale as aforesaid res-

pondents represented through such statements as "½ *price*," that prices of fur products were reduced in direct proportion to the percentages stated and that the amount of said reduction afforded savings to the purchasers of respondents' products when in fact such prices were not reduced in direct proportion to the percentages stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 12. 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. 13. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said

agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Chambers & Chambers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 370 Seventh Avenue, New York, New York.

Individual respondents Harry J. Chambers and Wilmer C. Maurer 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 Chambers & Chambers, Inc., a corporation, and its officers, and Harry J. Chambers and Wilmer C. Maurer, 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 into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

2. Setting forth on the 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.

3. 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.

4. 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."

5. 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 the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

B. 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. 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."

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

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

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

7. Misrepresents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondents' fur products the percentage of savings stated.

C. 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.

IN THE MATTER OF

MANGEL STORES CORPORATION TRADING AS MANGEL'S, ETC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1055. Complaint, April 6, 1966—Decision, April 6, 1966

Consent order requiring a New York City operator of a chain of retail stores engaged in selling a medium line of wearing apparel, to cease misbranding and falsely advertising its textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mangel Stores Corporation, a corporation, trading as Mangel's, Salle Ann and Shopper's Fair, hereinafter referred to as respondent, has violated the provisions of the said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 Mangel Stores Corporation, trading as Mangel's, Salle Ann and Shopper's Fair, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 115 West 18th Street, New York, New York.

The respondent operates a large number of retail stores engaged in selling a medium line of wearing apparel to the general public. Some of the stores, in addition to retailing wearing apparel, also retail such items as hardware, toys, photographic equipment, sporting goods, costume jewelry and cosmetics.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondent has been and is now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products; and has sold, offered for sale, advertised, delivered, transported, and caused to be transported textile fiber products, which have been advertised or offered for sale in commerce; and has sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondent within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which contained terms which represented either directly or by implication, certain fibers as present in the said product when such was not the case. Among such terms, but not limited thereto, was the term "linen" used in such a phrase as "The luxury look of imported silk linen"

describing products labeled as "80% Dupioni silk, 20% imported rayon."

PAR. 4. Certain of said textile fiber products were misbranded by respondent in that they were not stamped, tagged, labeled, or otherwise identified to show any of the information required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products to which no labels whatever were affixed, and textile fiber products with labels which failed to show in words and figures plainly legible:

(1) The true generic names of the constituent fibers present in textile fiber products; and

(2) The percentage of each of such fibers; and

(3) The name, or other identification issued and registered by the Commission, of the manufacturer of the product, or one or more persons subject to Section 3 with respect to such product.

PAR. 5. Certain of said textile fiber products were further misbranded in that the information required to be disclosed under the Textile Fiber Products Identification Act was abbreviated, in violation of Rule 5 of the Rules and Regulations promulgated under the Textile Fiber Products Identification Act.

Among such textile fiber products, but not limited thereto, were those which had labels which described the fiber contents of said products as being "65 DC. Poly, 35 CMB Cot," whereas the required information as to fiber contents should have been set out as 65% Dacron Polyester, 35% Combed Cotton.

PAR. 6. Certain of said textile fiber products were falsely and deceptively advertised in that respondent in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and assist directly or indirectly in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were textile fiber products falsely and deceptively advertised by means of advertisements inserted in The Saginaw News, the Detroit News, the Columbus Dispatch and the Cleveland Press, published, respectively in Saginaw, Michigan, Detroit, Michigan, Columbus,

Ohio, and Cleveland, Ohio, all newspapers of interstate circulation and other newspapers, likewise having interstate circulation, in that such advertisements contained representations and implications of fiber content by means of the use of such terms, among others but not limited thereto, as "Lycra" and "Orlon," without the true generic names of the fibers contained in such textile fiber products being set forth.

Among such textile fiber products, but not limited thereto, were textile fiber products falsely and deceptively advertised by means of advertisements inserted in the Houston Chronicle, published in Houston, Texas, and other newspapers, in that such advertisements contained representations and implications that a textile fiber product was composed entirely of, *e.g.*, "Lycra Spandex," when such textile fiber product was not in fact wholly composed of such textile fiber, but only partly so composed.

PAR. 7. Certain of said textile fiber products were falsely and deceptively advertised in violation of the Textile Fiber Products Identification Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder.

Among such textile fiber products but not limited thereto, were textile fiber products which were falsely and deceptively advertised by means of advertisements inserted in the Saginaw News, the Detroit News, the Columbus Dispatch, the Cleveland Press, and the Houston Chronicle, published, respectively, in Saginaw, Michigan, Detroit, Michigan, Columbus, Ohio, Cleveland, Ohio, and Houston, Texas, newspapers of interstate circulation, and other newspapers; likewise of interstate circulation, in the following respects:

A. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by the said Act and the Rules and Regulations thereunder in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid Rules and Regulations.

B. A fiber trademark was used in advertising textile fiber products, containing more than one fiber and such fiber trademark did not appear in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

C. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate

proximity and conjunction with the generic name of the fiber in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid Rules and Regulations.

PAR. 8. The acts and practices of the respondent as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 does not constitute an admission by respondent 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 Mangel Stores Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 115 West 18th Street, New York, New York.

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

ORDER

It is ordered, That respondent Mangel Stores Corporation, a corporation, trading as Mangel's, Salle Ann and Shopper's Fair,

or under any other name, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products by representing, either directly or by implication, through the use of such terms as "Linen" or any other terms, that any fibers are present in a textile fiber product when such is not the case.

2. Failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

3. Using abbreviations in setting forth the information required to be disclosed under the Textile Fiber Products Identification Act.

B. Falsely and deceptively advertising textile fiber products by:

1. Making any representations, directly or by implication, as to the fiber contents of any textile fiber product in any written advertisement which is used to aid, promote, or assist, directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information required to be shown on the stamp, tag, label, or other means of identification under Section 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using a fiber trademark in advertisements without a full disclosure of the required content information in at least one instance in the said advertisement.

3. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

4. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber in plainly legible and conspicuous type.

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

IN THE MATTER OF

LIBBEY-OWENS-FORD GLASS COMPANY ET AL.

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

Docket 7643. Complaint, Oct. 30, 1959—Decision, April 7, 1966

Order modifying a cease and desist order of the Commission dated September 20, 1963, 63 F.T.C. 746, 785, in accordance with an order of the Court of Appeals, Sixth Circuit, dated December 16, 1965, by deleting the phrase "or otherwise misrepresenting the grade or quality of glass used in any window" from the Commission's order.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Sixth Circuit their petitions to review and set aside the order to cease and desist issued herein on September 20, 1963 [63 F.T.C. 746]; and the court on November 9, 1965 [7 S.&D. 1409], having rendered its decision and orders affirming and enforcing said order as to Libbey-Owens-Ford Glass Company and modify-

ing, and affirming and enforcing said order as modified as to General Motors Corporation; and respondents having filed in court petitions for rehearing; and the court on December 6, 1965, having issued its order modifying the order as to Libbey-Owens-Ford and having denied the petitions for rehearing in all other respects; and the court, on December 16, 1965, having issued its order affirming and enforcing the cease and desist order as modified as to Libbey-Owens-Ford Glass Company; and the time allowed for filing petitions for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the said orders of the court of appeals, to read as follows:

It is ordered, That Libbey-Owens-Ford Glass Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of its automotive glass products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) The automobile safety plate glass used in the side windows of General Motors Corporation automobiles is of the same grade and quality as that used in windshields of such automobiles.

(b) The automobile safety sheet glass used in automobiles other than General Motors Corporation automobiles is of the same grade and quality as the sheet glass used in home windows.

2. Using in advertising any picture, demonstration, experiment or comparison, either alone or accompanied by oral or written statements, to prove the quality or merits of any such products, or the superiority of any such products over competing products, when such picture, demonstration, experiment or comparison is not in fact genuine or accurate and does not constitute actual proof of the claim because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein.

3. Disparaging the quality or properties of any competing product or products through the use of false or misleading

pictures, depictions, demonstrations, or comparisons, either alone or accompanied by oral or written statements.

4. Misrepresenting in any manner the quality or merits of any such products, or the superiority of any such products over competing products.

It is further ordered, That General Motors Corporation, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of its automotive glass products, sold either as part of an automobile or separately, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) The automobile safety plate glass used in the side windows of its automobiles is of the same grade and quality as that used in windshields of such automobiles.

(b) The automobile safety sheet glass used in automobiles other than General Motors Corporation automobiles is of the same grade and quality as the sheet glass used in home windows.

2. Using in advertising any picture, demonstration, experiment or comparison, either alone or accompanied by oral or written statements, to prove the quality or merits of any such products, or the superiority of any such products over competing products, when such picture, demonstration, experiment or comparison is not in fact genuine or accurate and does not constitute actual proof of the claim because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein.

3. Disparaging the quality or properties of any competing product or products through the use of false or misleading pictures, depictions, demonstrations, or comparisons, either alone or accompanied by oral or written statements.

4. Misrepresenting in any manner the quality or merits of any such products, or the superiority of any such products over competing products.

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 set forth herein.

IN THE MATTER OF

MERCK & CO., INC., TRADING AS QUINTON COMPANY ET AL.

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

*Docket 8635. Complaint, Aug. 7, 1964—Decision, April 8, 1966**

Order requiring a New Jersey drug manufacturer and its advertising agency to cease falsely representing in its television commercials or other media that its "Sucrets" or "Children's Sucrets" have any therapeutic effect upon throat infections in excess of temporary relief of minor pain.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Merck & Co., Inc., a corporation, trading as Quinton Company, and Doherty, Clifford, Steers & Shenfield, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Merck & Co., Inc., trading as Quinton Company, is a corporation, organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 126 East Lincoln Avenue, in the city of Rahway, State of New Jersey.

Respondent Doherty, Clifford, Steers & Shenfield, Inc., is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 530 Fifth Avenue, in the city of New York, State of New York.

PAR. 2. Respondent Merck & Co., Inc., is now and has been for more than one year last past, engaged in the sale and distribution of two preparations which are drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by respondent Merck & Co., Inc., for said preparations, the formulas thereof and directions for use are as follows:

*Modified on July 20, 1966, 70 F.T.C. 45, to make Needham, Harper & Steers, Inc., successor advertising agency, subject to certain prohibitions of this order.

A. *Designation:* "Sucrets" throat lozenges

Formula: Each lozenge contains 2.4 mg. hexylresorcinol in a glucose-sucrose hard candy base with flavoring agent.

Directions: Use SUCRETS for minor sore throat and mouth irritations and smoker's throat. For best results let SUCRETS dissolve slowly—do not chew. SUCRETS bathe irritated tissue with hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact.

NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by physician.

B. *Designation:* "Children's Sucrets" throat lozenges

Formula: Each lozenge contains 2.4 mg. hexylresorcinol in a cherry flavored glucose-sucrose hard candy base.

Directions: Give Children's Antiseptic "Sucrets" for minor sore throat and mouth irritation. For best results tell child to let "Sucrets" dissolve slowly without chewing. "Sucrets" bathe irritated tissues with Hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact. These "Sucrets" contain a special cherry flavor which children love.

NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by a physician.

PAR. 3. Respondent Merck & Co., Inc., causes the said preparations, when sold, to be transported from various places of its business located in the States of New Jersey, Massachusetts, Maryland, Pennsylvania, and elsewhere, to purchasers thereof located in various other States of the United States and in the District of Columbia. This respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

Respondent Doherty, Clifford, Steers & Shenfield, Inc., is now, and for some time last past has been, the advertising agency of Merck & Co., Inc., and now prepares and places, and for some time last past has prepared and placed, for dissemination, advertising material, including the advertising hereinafter referred to, to promote the sale of the said preparations.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the preparations referred to in Paragraph Two, above, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements disseminated by means of television broadcasts transmitted by stations located in the District of Columbia, and in various States of the United States, having sufficient power to carry such broadcasts across State lines, in which certain statements and oral and pictorial representations were made with respect to Sucrets throat lozenges and Children's Sucrets throat lozenges, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of Sucrets throat lozenges and Children's Sucrets throat lozenges; and have disseminated, and caused the dissemination of, advertisements, in which certain statements and oral and pictorial representations were made with respect to Sucrets throat lozenges and Children's Sucrets throat lozenges, by various means, including but not limited to the aforesaid medium, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. A. Among and typical of the oral statements and representations contained in said advertisements concerning Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

When sore throat strikes and brings fiery pain, what do you do for relief? Millions of people depend on SUCRETS for relief of minor sore throat pain. Individually foil wrapped, remarkable SUCRETS lozenges relieve sore throat pain fast and kill even Staph and Strep germs with a special pain relieving antiseptic, HEXYLRESORCINOL. So, when minor sore throat strikes and brings fiery pain, SUCRETS relieve sore throat pain and kill even Staph and Strep germs. SUCRETS are fast. Within minutes you can talk, swallow, even smoke in comfort. So, when sore throat strikes, relieve pain fast and kill even Staph and Strep germs.

B. Among and typical of the pictorial representations contained in said advertisements concerning Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

(1) Frames of film televised to the viewing public, appearing simultaneously with the making of certain of the oral statements referred to in Paragraph Five (A), hereinabove, which pur-

ported to depict the degree of fiery throat pain which Sucrets throat lozenges would relieve. An enlargement of one of such frames is attached hereto, marked Exhibit "A," and incorporated herein by reference.*

(2) Frames of film televised to the viewing public which purported to depict the extent to which Sucrets throat lozenges would relieve the fiery throat pain depicted in the frames of film referred to in the foregoing subparagraph (1) of Paragraph Five (B). An enlargement of one of such frames is attached hereto, marked Exhibit "B," and incorporated herein by reference.*

C. Among and typical of the oral statements and representations contained in said advertisements concerning Children's Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

When your child has a sore throat . . . It can make you feel helpless. What do you do to relieve the pain? If he's too young to gargle . . . and you want something more effective than candy cough drops . . . try new CHILDREN'S SUCRETS . . . specially flavored for youngsters . . . by the makers of regular SUCRETS. CHILDREN'S SUCRETS contain hexylresorcinol —the *gentle* antiseptic. And, CHILDREN'S SUCRETS relieve pain fast and help fight infection. These lozenges are made especially for children. Look: When minor sore throat strikes and brings burning pain . . . CHILDREN'S SUCRETS gently . . . safely . . . take care of the pain . . . and help fight infection. In no time at all . . . your child's like himself again. So next time your child has sore throat . . . if he's too young to gargle . . . and you want something more effective than candy cough drops . . . Relieve pain fast . . . help fight infection. Get new CHILDREN'S SUCRETS!

D. Among and typical of the pictorial representations contained in said advertisements concerning Children's Sucrets throat lozenges disseminated as set forth in Paragraph Four, hereinabove, are the following:

(1) Frames of film televised to the viewing public, appearing simultaneously with the making of certain of the oral statements referred to in Paragraph Five (C), hereinabove, which purported to depict the degree of burning throat pain which Children's Sucrets throat lozenges would relieve. An enlargement of one of such frames is attached hereto, marked Exhibit "C," and incorporated herein by reference.*

(2) Frames of film televised to the viewing public which purported to depict the extent to which Children's Sucrets throat lozenges would relieve the burning throat pain depicted in the frames of film referred to in the foregoing subparagraph (1) of

*Pictorial Exhibits "A," "B," and "C" were omitted in printing.

Paragraph Five (D). An enlargement of one of such frames is attached hereto, marked Exhibit "D," and incorporated herein by reference.*

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

1. That Sucrets throat lozenges and Children's Sucrets throat lozenges, by virtue of their hexylresorcinol content, will reach and kill the germs causing existing throat infections and thus are effective in the treatment of throat infections including those caused by the dangerous streptococcal and staphylococcal germs.

2. That Sucrets throat lozenges and Children's Sucrets throat lozenges are effective in relieving severe sore throat.

PAR 7. In truth and in fact:

1. Sucrets throat lozenges and Children's Sucrets throat lozenges will not, by virtue of their hexylresorcinol content, or otherwise, reach and kill the germs causing existing throat infections and are not effective in the treatment of any kind of throat infection. Furthermore, streptococcal and staphylococcal infections of the throat may be precursors of infections of the heart, kidney, blood, bones and other structures, and the failure to institute promptly adequate treatment of streptococcal and staphylococcal throat infections may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis.

2. Sucrets throat lozenges and Children's Sucrets throat lozenges have no beneficial effect on severe pain of sore throat, or on sore throat in excess of affording temporary relief of the pain of a minor sore throat.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR 8. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Mr. Berryman Davis and *Mr. Howard S. Epstein* for the Commission.

*Pictorial Exhibit "D" was omitted in printing.

Covington & Burling, Washington, D.C., and *Mr. John M. Stocker,* Rahway, N.J., for respondent Merck & Co., Inc.

Davis, Gilbert, Levine & Schwartz, New York, N.Y., for respondent Doherty, Clifford, Steers & Shenfield, Inc.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

This proceeding arises from a complaint issued by the Federal Trade Commission on August 7, 1964, charging respondents with falsely advertising "Sucrets" and "Children's Sucrets." The statutory theory is that such advertising participated in by Merck & Co., Inc., the manufacturing advertiser, and Doherty, Clifford, Steers & Shenfield, Inc., its advertising agent, constitutes unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act. The complaint is premised upon the further theory that both the principal and its advertising agent are equally responsible even though there was final approval of the advertising by the principal. Complaint counsel urges that appropriate relief should be applied to the advertising agent as well as the principal, since the advertising devices, from which misrepresentations may be imputed, were initially formulated by the advertising agency, although approved by respondent Merck, upon consultation. Respondents generally deny the charges of deceptive advertising, and respondent Doherty, Clifford, Steers & Shenfield, Inc., the advertising agents of Merck, aver that in any event no order should be issued against them since they were merely the agents of Merck, which approved the advertising they devised jointly with Merck. Furthermore, they assert that the advertising prepared by them for Merck, at its request, was premised upon facts given to them by the principal, Merck. The major issues, therefore, are as to the falsity of the advertising, either directly or by implication, and the participation of the respondents, jointly or severally, in producing the advertising which the Commission contends is deceptive.

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

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

FINDINGS OF FACT*

1. Respondent Merck & Co., Inc. (hereinafter sometimes referred to as "Merck"), trading as Quinton Company, is a corporation, organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 126 East Lincoln Avenue, in the city of Rahway, State of New Jersey.[1]

2. Respondent Doherty, Clifford, Steers & Shenfield, Inc. (hereinafter sometimes referred to as "DCSS"), is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 530 Fifth Avenue, in the city of New York, State of New York.[2]

3. Respondent Merck & Co., Inc., is now, and has been for more than one year last past, engaged in the sale and distribution of two preparations which are drugs as the term "drug" is defined in the Federal Trade Commission Act.[3]

4. The designations used by respondent Merck & Co., Inc., for said preparations thereof and directions for use are as follows:

A. *Designation:* "Sucrets" throat lozenges

Directions: Use SUCRETS for minor sore throat and mouth irritations and smoker's throat. For best results let SUCRETS dissolve slowly—do not chew. SUCRETS bathe irritated tissue with hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact.

NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by physician. Keep all medications out of the reach of children.

B. *Designation:* "Children's Sucrets" throat lozenges.

Formula: Each lozenge contains 2.4 mg. hexylresorcinol in a cherry flavored glucose-sucrose hard candy base.

Directions: Give Children's Antiseptic "Sucrets" for minor sore throat and mouth irritation. For best results tell child to let "Sucrets" dissolve slowly without chewing. "Suc-

*CX refers to Commission's exhibits, RMX to respondent Merck, and RDX to respondent Doherty.

[1] Admitted by respondent Merck's answer.

[2] Admitted by respondent DCSS's answer.

[3] Partially admitted by respondent Merck's answer. The preparations are drugs within the meaning of the Federal Trade Commission Act (sec. 15(c)), having been advertised for killing staphylococcal and streptococcal germs, and fighting infection in human beings (as shown in respondent's advertising).

rets" bathe irritated tissues with Hexylresorcinol, the antiseptic that relieves pain fast as it kills germs on contact. These "Sucrets" contain a special cherry flavor which children love.

NOTE: Persistent sore throat or sore throat accompanied by high fever, headache, nausea or vomiting usually indicates a severe infection and may be serious. Consult a physician promptly if sore throat persists more than 2 days. Do not administer to children under 3 years of age unless directed by a physician. Keep all medications out of the reach of children.[4]

5. The formulas of "Sucrets" and "Children's Sucrets" are as follows:

A. (*"Sucrets"*)

Hexylresorcinol	2.4 mg.
Menthol	less than .5 mg.
Anise Oil	less than .5 mg.
Cinnamaldehyde	less than .5 mg.
Methyl Salicylate	between 3 and 5 mg.
Oil of Peppermint	less than .5 mg.
Glucose—Sucrose Hard Candy Base to make a 2.5 gm. lozenge	

B. (*"Children's Sucrets"*)

Hexylresorcinol	2.4 mg.
Amaranth (Red No. 2)	less than 1 mg.
Sucaryl Sodium	between 10 and 15 mg.
Saccharin	less than 2 mg.
Citric Acid	between 20 and 30 mg.
Wild Cherry	between 10 and 15 mg.
Glucose—Sucrose Hard Candy Base to make a 2.5 gm. lozenge[5]	

6. Respondent Merck & Co., Inc., causes the said preparations, when sold, to be transported from various places of its business located in the States of New Jersey, Massachusetts, Maryland, Pennsylvania, and elsewhere, to purchasers thereof located in various other States of the United States and in the District of Columbia. This respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.[6]

7. Respondent Doherty, Clifford, Steers & Shenfield, Inc., is

[4] See complaint and answer.
[5] See Stipulation, Tr. 12 and 13.
[6] Admitted by respondent Merck's answer.

now, and for some time last past has been, the advertising agency of Merck & Co., Inc., and now prepares and places, and for some time last past has prepared and placed, for dissemination, advertising material, including advertising hereinafter referred to, to promote the sale of "Sucrets" and "Children's Sucrets." [7]

8. The aforesaid Doherty, Clifford, Steers & Shenfield, Inc., was retained to furnish and perform the regular services of an advertising agency pursuant to an agreement between Merck and Doherty, Clifford, Steers & Shenfield, Inc., which defines the duties of Doherty, Clifford, Steers & Shenfield, Inc., as including obligations to:

(a) Study the products assigned by Merck, and the market for those products.

(b) Examine marketing opportunities for new products.

(c) Make recommendations covering development and promotion of new products.

(d) Offer general marketing consultation for both new and existing products.

(e) Formulate advertising plans within the scope of the budget made available by Merck.

(f) Prepare layouts and copy for advertisements.

(g) Prepare merchandising plans if and when requested and authorized by Merck.

(h) Contract with advertising media "in behalf of" Merck in connection with the advertising for Merck. When responsibility for radio or television commercials is delegated to Doherty, Clifford, Steers & Shenfield, Inc., by Merck, then the agency is to prepare such commercials.

The advertising agency at all times acted in accordance with these requirements.[8]

9. Respondent Doherty, Clifford, Steers & Shenfield, Inc., could not act at any time or in any way which would bind Merck without Merck's prior approval. Paragraph 3 of the agreement between Merck and the agency specifically provides that before Doherty, Clifford, Steers & Shenfield, Inc., could exercise any idea, plan or program on behalf of Merck, it had to obtain from Merck general approval thereof. Thereafter, it must submit to Merck for specific approval copy, layouts, artwork, radio and television commercials, and all material to be used in connection with

[7] Admitted by respondents' answers. Merck retained Doherty, Clifford, Steers & Shenfield, Inc., as its advertising agent during the summer of 1961. A formal written advertising contract was entered into, dated and effective as of January 1, 1962 (CX 3).

[8] Tr. 219.

the advertising; also, schedules showing which media it is proposed to use; schedules showing the times and time periods during which the advertising is proposed to be published, displayed, broadcast, or presented; estimates of the cost of various items for the advertising, including costs of production, artwork, talent, films, time, and all other aspects incident to the advertising. Doherty, Clifford, Steers & Shenfield, Inc., could not proceed with any of these functions until Merck first approved.[9] However, their function was to originate advertising ideas; otherwise of course their retention would have served no purpose. The advertising at issue, therefore, is the product of both respondents jointly.

10. Merck, at all times, reserved the right "in its own discretion and for any reason deemed by it to be sufficient" to modify any and all plans submitted by Doherty, Clifford, Steers & Shenfield, Inc., and to direct it to cease work in connection with any or all of such plans; in such event the agency is required to notify all publishers, printers, engravers, artist, designers and other third parties engaged in working on the advertising, to cease all work thereon. On several occasions, Merck exercised its right and authority under this provision and the agency complied therewith and followed the directions of Merck.[10]

11. Final authority, and the final right to approve, disapprove or modify all advertising and all steps in the course of the preparation of all advertising, rested solely in Merck.[11]

12. Doherty, Clifford, Steers & Shenfield, Inc., at all times acted under the direction and control of Merck, and all services rendered by it for Merck were at all times "pursuant to directions, instructions, or conferences with" Merck. The agency was compensated for its services to Merck on a commission basis.[12]

13. During the course of the preparation of the commercials involved in this proceeding, Doherty, Clifford, Steers & Shenfield, Inc., and Merck jointly cooperated in the selection and development of ideas and concepts, and the advertising agency worked on the development of those ideas and concepts approved by Merck.[13]

14. Although the contracts in connection with the advertising for Merck, including the commercials involved in this proceeding, were entered into by Doherty, Clifford, Steers & Shenfield, Inc.,

[9] CX 3.
[10] CX 3, par. 10; Tr. 211.
[11] CX 3; Tr. 867, 845.
[12] Tr. 844, 219–220.
[13] CX 8; Tr. 109–110, 145, 148–149, 151, 165, 216, 228, 246.

specifically as agent for Merck,[14A] the relationship of principal and agent does not vitiate the responsibility of the agent for its participation in formulating and disseminating advertising the falsity of which, as here, should have been apparent. Regardless of intent, which is not in issue, the public interest is best protected by enjoining all participants significantly contributing to any deceptive device.

15. Doherty, Clifford, Steers & Shenfield, Inc., developed and put into final form the commercials involved in this proceeding.[14B] It is the final form of these commercials from which the falsity of the advertising may reasonably be imputed as hereinafter set forth.

16. In the course and conduct of their business, respondents have disseminated the aforesaid advertising at issue and caused the dissemination of such advertisements concerning the preparations identified herein by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements disseminated by means of television broadcasts transmitted by stations located in the District of Columbia and in various States of the United States, having sufficient power to carry such broadcasts across States lines, in which certain statements and oral and pictorial representations were made with respect to "Sucrets" and "Children's Sucrets"; and have disseminated, and caused the dissemination of, advertisements in which certain statements and oral and pictorial representations were made with respect to "Sucrets" and "Children's Sucrets," by the aforesaid medium, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.[15]

17. Among and typical of the oral statements and representations contained in said television advertisements concerning "Sucrets," disseminated as aforesaid, were the following:

When sore throat strikes and brings fiery pain, what do you do for relief? Millions of people depend on SUCRETS for relief of minor sore throat pain.

[14A] Tr. 229-231.

[14B] Proposed Finding 9 of respondent DCSS.

[15] Admitted by respondent Merck in its answer. As to respondent DCSS, it prepared the advertising copy in question (Tr. 107, 168, 196; CX's 20-22), and placed the advertising (in the form of sound films) with over 100 television stations throughout the United States for telecasting to the viewing public, which advertising was telecast by those stations (Tr. 199). "Ideas are *disseminated* when spread abroad for propagation," Webster's International Dictionary of the English Language, 2nd Ed. The dissemination that occurred in this instance was dissemination in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Individually foil wrapped, remarkable SUCRETS lozenges relieve sore throat pain fast and kill even Staph and Strep germs with a special pain relieving antiseptic, HEXYLRESORCINOL. So, when minor sore throat strikes and brings fiery pain, SUCRETS relieve sore throat pain and kill even Staph and Strep germs. SUCRETS are fast. Within minutes you can talk, swallow, even smoke in comfort. So, when sore throat strikes, relieve pain fast and kill even Staph and Strep germs.[16]

18. Among and typical of the pictorial representations contained in said advertisements concerning "Sucrets," disseminated as above stated, were frames of film televised to the viewing public, appearing simultaneously with the making of oral statements which purported to depict the degree of fiery throat pain which "Sucrets" would relieve.[17]

19. Among and typical of the oral statements and representations contained in said television advertisements concerning "Children's Sucrets," disseminated as aforesaid, were the following:

When your child has a sore throat . . . It can make you feel helpless. What do you do to relieve the pain? If he's too young to gargle . . . and you want something more effective than candy cough drops . . . try new CHILDREN'S SUCRETS . . . specially flavored for youngsters . . . by the makers of regular SUCRETS. CHILDREN'S SUCRETS contain hexylresorcinol—the *gentle* antiseptic. And, CHILDREN'S SUCRETS relieve pain fast and help fight infection. These lozenges are made especially for children. Look: When minor sore throat strikes and brings burning pain . . . CHILDREN'S SUCRETS gently . . . safely . . . take care of the pain . . . and help fight infection. In no time at all . . . your child's like himself again. So next time your child has sore throat . . . if he's too young to gargle . . . and you want something more effective than candy cough drops . . . Relieve pain fast . . . help fight infection. Get new CHILDREN'S SUCRETS![18]

20. Among and typical of the pictorial representations contained in said advertisements concerning "Children's Sucrets," disseminated as above stated, were frames of film televised to the viewing public, appearing simultaneously with the making of oral statements which purported to depict the degree of burning throat pain which "Children's Sucrets" would relieve.[19]

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[16] See Commission's Exhibit 21A, B, C, which is the print presentation of the audio portion of the film, CX 20, relating to "Sucrets" (Tr. 197). See also Tr. 198, 208–210 and 240–242.

Stipulated CX 20 (received without limitation) same as complaint.

[17] CX 20.

[18] See Commission's Exhibit 22A, B, C, which is the print presentation of the audio portion of the film, CX 20, relating to "Children's Sucrets" (Tr. 197). See also Tr. 198, 208–210 and 240–242.

Stipulated CX 20 (received without limitation) same as complaint.

[19] *Id.*

21. Through the use of said advertisements, respondents have represented, directly and by implication, that "Sucrets" and "Children's Sucrets," by virtue of their hexylresorcinol content, will unqualifiedly reach, kill, or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection. The evidence indicates to the contrary as hereinafter discussed.

22. Hexylresorcinol is the principal active ingredient in both products. Each lozenge has 2.4 mgs. in a 2.5 gram tablet. The concentration is thus approximately one part hexylresorcinol to 1,000 parts of other ingredients. Experiments performed at the Merck Institute of Therapeutic Research established that the concentration of "Sucrets" ingredients in saliva during normal use is between 5 and 20 percent, with the average being close to 10 percent. The concentration of hexylresorcinol in the saliva during normal use is, therefore, approximately one part hexylresorcinol to 10,000 parts other material.[20]

23. Hexylresorcinol in 1 to 10,000 concentration is highly bactericidal against organisms known to be pathogenic, including beta-hemolytic streptococci and staphylococcus aureus, and has antibacterial effects on other bacteria.[21]

24. Other ingredients in the products, such as menthol, anise oil and methyl salicylate, also have antibacterial effects [22] but not as extensively as the hexylresorcinol.

25. Consistent with the experiments performed with hexylresorcinol, and experience with other of the ingredients found in the products, laboratory tests performed at the Merck Institute of

[20] Mortimer, Tr. 686; Rammelkamp, Tr. 595; Formulae, Tr. 12; 2.4 mgs. x 1000 = 2.4 grams. The Merck Institute of Therapeutic Research is a separately incorporated research institution with a separate board of trustees and a board of scientific advisors. Three of the board of advisors are Nobel laureates in medicine and the other members are of comparable caliber. Robinson, Tr. 877. The Institute has a large staff of technically trained people, and the disciplines represented are comparable to those found in a medical school; there are endocrinologists, bacteriologists, parasitologists, pharmacologists, physiologists, biochemists, toxicologists, and other "ologists". Robinson, Tr. 877–878. These people are primarily engaged in basic research in all areas of human and animal diseases, including neoplastic disease (cancer), infectious diseases, anti-immune diseases, diseases of the gastrointestinal tract and the whole area of cardiovascular research. Robinson, Tr. 879–882. Most of this work is done *in vitro* or in experimental animals, but Institute personnel on occasion participate in and often help design clinical follow-up research. Robinson, Tr. 1140–1146, 1148–1150; Examiner. Tr. 1150. Among the drugs developed by the Institute or with which it has done pioneering work are the sulfa drugs, penicillin, streptomycin, cortisone, a measles vaccine and thiabendazole. Robinson, Tr. 876, 885–886, 1149, 1228–1230. Dr. Harry J. Robinson was Director of the Merck Institute at the time of the hearings. Robinson, Tr. 874, 895–896, 946–947; RMX 9, p. 17, Fig. 28. Concentration of hexylresorcinol in "Sucrets" (1:1000) x concentration of "Sucrets" in saliva (1:10) = 1:10,000.

[21] Robinson, Tr. 1078–1079, 1098, 1100–1102, 1108–1110; RDX 8, pp. 609, 611; RDX 9, pp. 31–32, 34; RDX 11, pp. 8–9; RMX 19.

[22] Ortenzio, Tr. 525; Rammelkamp, Tr. 595–598, 655–656.

Therapeutic Research using concentrations encountered in use establish that on contact the products will kill known pathogenic organisms, including beta-hemolytic streptococci and staphylococcus aureus, and have antibacterial effects upon other bacteria. Experiments performed by the Commission's witness, Dr. Ortenzio, support the same conclusion. The ability of the products to kill germs is confirmed by antibacterial tests performed on each lot of "Sucrets" or "Children's Sucrets" before it is released for sale.[23]

26. Human saliva normally contains .2% organic matter. The ability of hexylresorcinol and the products to kill germs is not affected by the presence of organic matter in more than twice the normal concentration.[24]

27. The products retain their antibacterial power when dissolved in saliva. This power exists even when abnormally large numbers of pathogenic organisms are used.[25]

28. Hexylresorcinol and the products retain their antibacterial activity when in contact with living animal and human tissue. This fact has been verified on the peritoneal lining of living rabbits and guinea pigs, and in the peritoneal and oral cavities of human beings.[26]

29. Consistent with the results obtained in laboratory experiments performed with "Sucrets," and experiments with, and clinical use of, hexylresorcinol and ST–37, *in vivo* experiments performed at the Merck Institute of Therapeutic Research establish that on contact the products kill pathogenic bacteria, including beta-hemolytic streptococci and staphylococcus aureus in the mouth and throat. This is corroborated by results obtained in two double-blind clinical studies of a total of 340 persons having sore throats in which the antibacterial effects of "Sucrets" were compared with those of a plain candy lozenge and a lozenge containing all of the ingredients of "Sucrets" except hexylresorcinol.[27]

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[23] Robinson, Tr. 984–987, 1135; RMX 9, pp. 3–6, Figs. 1–4, Tables 1–4; RMX 11, pp. 1–12; Ortenzio, Tr. 506–508, 534–535; Robinson, Tr. 1040–1041; Sinotte, Tr. 1355–1358; RMX 34, RMX 35, Exhibit VII.

[24] Robinson, Tr. 905–906, 911–912, 937, 908–912; RMX 9, pp. 7–8, Tables 5–6; RDX 8, pp. 610–611; RDX 9, pp. 32–34; RDX 11, pp. 9–10.

[25] Robinson, Tr. 932–933, 936–937, 965, 989–990, 995–997; RMX 9, pp. 13–18, Figs. 7–29, Table 7; RMX 11, pp. 13–16. These test results are consistent with those observed in experiments performed with "Sucrets" in saliva at the Sharp & Dohme Research Laboratories as early as 1937. RMX 36; Tr. 1370–1371; Robinson, Tr. 989–990.

[26] Robinson, Tr. 963–965, 1000–1001, 1004, 1008–1111, 1118–1121, 1123–1126; RMX 9, pp. 19–21, Figs. 30–31, Tables 8–9; RMX 11, pp. 30–39; RMX 20, p. 707; RMX 22, pp. 362–363; RDX 10, pp. 489, 491; RDX 11, pp. 8–9.

[27] ST–37 is a solution of 70% water and 30% gylcerine, containing 0.1% hexylresorcinol. RDX 8, p. 611; RDX 9, p. 34; RDX 11, p. 11; RMX 22, p. 362. ST–37 is a registered trademark of Merck. Robinson, Tr. 938–958, 1135, 1157, 1166–1168, 1170; RMX 9, pp. 15–18, Fig. 28; McDonnell, Tr. 1869–1870, 1913–1915; Ciminera, Tr. 1982, 1992–1993; Hamburger, Tr.

Although these studies were in some respects uncontrolled, since they were dependent in part upon outpatient subjective analysis, they have considerable probative weight as corroboration of the laboratory results.

30. "Sucrets" as statistically indicated are more effective in killing bacteria, including streptococci and staphylococci, in the human mouth and throat than are the two control products. Since reduction of the number of bacteria in the oral cavity may be useful in mitigating the likelihood of secondary infection, the reductions in bacteria counts observed may be medically significant [28] under certain conditions. Cognizance of such medical significance, however, cannot be taken without considerable qualification since mitigation may be unimportant in the presence of sub-tissue infection.

31. Because of the size of the "Sucrets" clinical studies (340 patients), and the use of double-blind randomization of test products, the various conditions experienced by the test patients were distributed among the three test products. Therefore, the studies establish that persons with the varieties of sore throats actually encountered under all conditions of use have more of the bacteria in their mouths and throats killed if they use "Sucrets" than if they use the control products.[29]

32. Because of its low surface tension, the hexylresorcinol in the products is partially effective in reaching and killing organisms within the tiny interstices interlacing the mucous and tonsillar tissues of the throat. Also, because of its low surface tension, a certain amount of hexylresorcinol in "Sucrets" can be expected to penetrate through the surface of the throat into the basal tissues themselves.[30] However, effective penetration deeper than the epithelial layer is unestablished.

2264; RMX 26, pp. 2–4; RMX 27, pp. 2–3; RMX 62, pp. 1–2; RMX 105, p. 2; RMX 108, p. 3; RMX 110, pp. 1, 3–5; RMX 111–A, pp. 1, 11–15; RMX 114, p. 1, Table III; RMX 116, p. 1, Table III.

[28] Ciminera, Tr. 1982, 1992–1993.

[29] Robinson, Tr. 1062–1063; McDonnell, Tr. 1868–1869, 1879–1884; Ciminera, Tr. 1969–1972, 1983–1984, 1986, 1988–1990, 1994; Rammelkamp, Tr. 661. Ciminera, Tr. 1983, 1986, 1994.

[30] RDX 8, p. 607; RDX 9, p. 26; RDX 11, p. 5; RMX 20, p. 712. Dr. Robinson described surface tension as a force exerted on a liquid, tending to pull a liquid towards the center of a sphere. Surface tension is what makes water, which has a high surface tension, form into balls, such as drops of dew on a leaf. When one adds a detergent, or other surface tension reducent, to water, or other liquids, the balls spread out because the surface tension has been reduced. Fluids of low surface tension penetrate into minute crevices and interstices impenetrable by water and other fluids of higher surface tension. Hexylresorcinol is a powerful surface tension reducent. Robinson, Tr. 1079–1080, 1094–1095; Robinson, Tr. 1095–1097; Gershenfeld, Tr. 2113–2118; RDX 8, pp. 604–611; RDX 9, pp. 22–24, 33–34; RDX 11, pp. 3–8, 10–11; RMX 17, pp. 163–164; RMX 20, pp. 704–705, 707, 711–712; Keefer, Tr. 1444–1445, 1498–1499; Gershenfeld, Tr. 2116–2118; Robinson, Tr. 1159–1160, 1232–1234; RMX 22, p. 362.

33. Although "Sucrets" and "Children's Sucrets" will, by virtue of their hexylresorcinol content, kill germs, including staphylococci and streptococci, on contact therewith, they will not normally reach, kill, or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection.[31]

34. Streptococcal and staphylococcal infections of the throat may be precursors of infections of the heart, kidney, blood, bones and other structures, and the failure to institute promptly adequate treatment of streptococcal and staphylococcal throat infections may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis. Aside from the evidence that respondents' advertising implies, "Sucrets" will kill germs in the throat tissues that are contributing to an existing throat infection (for which one should see a doctor), there is no substantial evidence that suggests respondents have made misrepresentations to the effect that taking "Sucrets" makes seeing a doctor unnecessary.[32]

35. "Sucrets" and "Children's Sucrets" temporarily relieve sore throat pain. However, they will not afford permanent relief of such pain. Hexylresorcinol is essentially an antiseptic having an anesthetic effect.

36. The principal active ingredient of the products, hexylresorcinol, is a potent local anesthetic.[33] Other ingredients in "Sucrets" and "Children's Sucrets" are counter-irritants,[34] and sugar, which constitutes the greatest bulk of both products in terms of volume. "Sucrets" and "Children's Sucrets" have a palliative and

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[31] The expert witness, Bernstein, Tr. 392–396, 400, 402–404, 406, 411–412, 432–433; the expert witness, Rammelkamp, Tr. 572–573, 579–581, 595, 606; the expert witness, Mortimer, Tr. 676, 679–782, 686, 688.

[32] Selected pages of the Merck Manual, CX's 27 through 32; the expert witness, Bernstein, Tr. 414–415, 423, 425, 427–430; the expert witness, Rammelkamp, Tr. 567, 601, 605, 614–615, 617; the expert witness, Mortimer, Tr. 678. Although this finding does not relate to the substantive issues regarding the truth or falsity of the respondents' misrepresentations by implication, or otherwise, it does relate to the question of the keen public interest in representations concerning drugs and the nature of the relief that should ensue in protecting such public interest. It also relates to the degree of care that must be exercised by drug manufacturers in advertising their products.

[33] This fact has been established by comparison of the effects of hexylresorcinol and known local anesthetics on animals, using standard tests. Mattis, Tr. 1638, 1640, 1644–1645, 1647; RMX 53, 54, 57. Hexylresorcinol produced a more lasting local anesthetic effect than did the well known topical anesthetic, benzocaine. Mattis, Tr. 1640; RMX 53. Expert witnesses had observed this effect of hexylresorcinol in the mouths and throats of human beings. Kane, Tr. 1606–1607, 1625; Keefer, Tr. 1460–1461; Mattis, Tr. 1651; McDonnell, Tr. 1925–1927.

[34] Kane, Tr. 1608–1609; Keefer, Tr. 1460.

soothing effect on inflamed tissues [35] and an anesthetic effect in reducing pain.

37. Because of their ingredients, the aforesaid products alleviate, as indicated, the pain of sore throat. This is corroborated in some degree by clinical studies on 300 patients that tested the pain-relieving effect of "Sucrets" in comparison with a plain sugar lozenge and a lozenge with all the ingredients of "Sucrets" except hexylresorcinol,[36] by personal observations of expert witnesses [37] and by the indication of the patients as to relief attained. The difficulty with such outpatient tests, however, is that controls are limited because of the subjectivity of results and because performance of instructions cannot be absolutely assured.

38. Nevertheless, the clinical studies have sufficient probative weight to establish that the pain relief given by the products at issue is material,[38] particularly in view of the overwhelming and uncontradicted evidence that hexylresorcinol is an analgesic having an anesthetic effect. "Sucrets" have therefore, as could be expected, afforded material relief of pain in a significantly greater number of cases than did a candy lozenge and "Sucrets" without hexylresorcinol,[39] as evidenced by the studies.

39. The clinical studies also establish that "Sucrets" give material relief of moderate as well as minor sore throat pain.[40]

40. The "Sucrets" clinical studies [41] and testimony of expert witnesses [42] further establish that "Sucrets" give material relief of pain in a significant percentage of cases of sore throat characterized by severe pain.[43]

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[35] Kane, Tr. 1608–1609; Keefer, Tr. 1425, 1471–1472; Weinstein, Tr. 1564.

[36] McDonnell, Tr. 1869, 1899–1900; Ciminera, Tr. 1982, 1992; RMX 27, p. 3; RMX 62; RMX 105, p. 2; RMX 108, pp. 2–3; RMX 110; RMX 111–A, pp. 5–7, 15; RMX 114, Table I; RMX 116, Table I.

[37] Keefer, Tr. 1459–1460; Garfield, Tr. 1020; Gershenfeld, Tr. 2091–2092; Lyght, Tr. 346; Goodwin, Tr. 1824.

[38] 84% of the patients treated with "Sucrets" were afforded two-step pain relief (on a five-step scale). RMX 111–A, Table 4, p. 6.

[39] Ciminera, Tr. 1982, 1992. Less than half the percentage of patients treated with sugar lozenges reported as much pain relief as was experienced by the patients treated with "Sucrets." RMX 111–A, Table 4, p. 6.

[40] 91% of the patients originally reporting moderate pain were afforded two-step pain relief (on a five-step scale) after being treated with "Sucrets." Only 38% of the patients with moderate pain treated with the sugar lozenge reported two-step pain relief. RMX 111–A, Table 6, p. 7. This difference in effect is statistically significant. RMX 116, Table I.

[41] McDonnell, Tr. 1870; RMX 111-A, pp. 5–7, 15. 83% of the patients with severe and very severe pain experienced two-step pain relief (on a five-step scale) after being treated with "Sucrets." RMX 111-A, Table 6, p. 7.

[42] Kane, Tr. 1610–1611; Keefer, Tr. 1461–1462; Garfield, Tr. 1021–1022; Gershenfeld, Tr. 2092.

[43] The amount of pain relief afforded cases of severe pain of sore throat by "Sucrets" was so much greater than that afforded by the sugar lozenge that the odds are less than 5 in 10,000 that the differences observed could have been due to chance. RMX 116, Table I. This

41. Whether the pain caused by a physical condition can be relieved by a given preparation is not controlled by the medical seriousness of the condition that is producing the discomfort. Since the products anesthetically, and therefore temporarily, relieve throat pain of mild, moderate, or severe degree caused by minor conditions,[44] it is reasonable to assume they should similarly relieve pain in some degree when caused by serious conditions. This effect may reasonably be inferred from the fact that "Sucrets," and similar products, are recommended by doctors for temporary relief of pain in cases of bacterial infections of the throat [45] regardless of the severity of the infection, which may also be treated by the use of other drugs.

42. Nevertheless, the aforesaid advertisements were and are misleading, and constituted and now constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, in that they deceptively impute "Sucrets" as aforesaid (a) will kill or render ineffectual [46] germs in the throat tissues that are contributing to an existing throat infection,[47] and (b) will afford permanent or long lasting relief [48] of sore throat pain.

CONCLUSIONS

It is apparent from the evidence that the representations made by respondents are literally true. Hexylresorcinol contained in "Sucrets" and "Children's Sucrets" does kill germs, including streptococci and staphylococci, on contact. Although the wording on the packages gives this forewarning, the representations considered herein reflected in TV commercials are without qualification. It is merely stated that "when minor sore throat strikes and brings fiery pain, 'Sucrets' relieves sore throat pain and kills even Staph and Strep germs," and that "Children's Sucrets" (unqualifiedly) "relieve pain fast and help fight infection." The difficulty is that infections within the tissues of the throat are not reached by the hexylresorcinol which can only make external contact in the throat. There is some evidence that hexylresorcinol does penetrate the epithelial layer, but certain infections involving germs,

difference in effect is well within the range of statistical significance used in biological work since results which might be due to chance in one case out of twenty are considered significant in such work. Ciminera, Tr. 1967.

[44] Sec. VII 4–7, *supra*.

[45] Rammelkamp, Tr. 639–640; Keefer, Tr. 1459, 1467, 1527; Garfield, Tr. 1030–1031; Bernstein, Tr. 433–434; CX 30, p. 411.

[46] It is assumed that nonreduction of germ virulence suggested by some medical evidence is used in this sense.

[47] This shall be construed to apply to major or minor sore throat conditions.

[48] *I.e.*, beyond the point of temporary relief normally afforded by an analgesic having an anesthetic effect in major or minor sore throat conditions.

including streptococci and staphylococci, are usually more deeply seated than in that layer. The penetration, therefore, at best is extremely limited and the evidence does not justify respondents' unqualified representations.

The fact that the advertising may be literally true in the sense that hexylresorcinol will kill germs on contact in the throat does not warrant a dismissal of the complaint. The implication from the language used in the advertising is that "Sucrets" or "Children's Sucrets" are materially curative because the germs are killed or rendered ineffectual. A person with a sore throat, upon hearing these representations, may reasonably assume that if such germs are killed, the product advertised is a cure for an existing throat infection. This is all the buyer of such a product is interested in, aside from relief of pain, which the evidence indicates "Sucrets" do afford, not permanently, but temporarily. It is well recognized that "words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." *Bockenstette, et al.* v. *F.T.C.*, 134 F.2d 369, 371; *D.D.D. Corporation* v. *F.T.C.*, 125 F.2d 679, 682. Furthermore, "advertisements are not to be judged by their effect on the scientific or legal mind which will dissect and analyze each phrase, but rather by their effect upon the average member of the public." *Ward Laboratories, Inc.*, v. *F.T.C.*, 276 F.2d 952.

Respondent Doherty, Clifford, Steers & Shenfield, Inc., urges that it was merely the agent of Merck, could not act without its approval, and that it initiated advertising subsequently reviewed and approved by Merck, which was reflective of its understanding of the facts that had been presented to it by Merck concerning "Sucrets." However, the advertising formulated by the advertising agent was clearly conceived to present to the public not only the advantages of the product sought to be sold as literally stated, but also to work upon the public imagination. It is common knowledge that those who are ill seek cures with hope. This stimulates their imagination into optimistically believing what they read without analytical caution. It is therefore important and in the public interest that extreme care be exercised to make sure that deception will not result from lack of caution in describing the effectiveness of drugs. Misrepresentation by implication may be as detrimental to the public welfare and health as direct misstatements. In the instant case the public interest is clearly contravened.

On the other hand, the inadvertence or lack of caution exer-

cised by the respondents herein should not in any way undermine the public confidence in highly ethical pharmaceutical companies and leaders in medical research such as the respondent Merck. It would appear to the hearing examiner that in reviewing the advertising prepared for Merck by its advertising agent, that Merck inadvertently approved an advertising format without thoroughly considering its implications, aside from its correct literal meaning. Every manufacturer has a subjective sense about his own product which makes objective analysis difficult where imaginative advertising is prescribed by an advertising agent. In this case, of course, it may be, although there is no evidence to this effect, that the advertising agent itself believed that there was no implied falsity in the advertising they disseminated on behalf of, and with the approval of, Merck & Co., Inc. Nevertheless, they were a participant in the preparation of the advertising and the same required caution must be imposed upon them as would be imposed upon their client or advertiser. The public interest and protection, therefore, clearly necessitates that an order be issued against the advertising agent as well as its client, the product manufacturer.

Although intent is not in issue in determining whether or not any cease and desist order should be issued, the evidence does not suggest that there was any sinister intent on the part of Merck & Co., Inc., or its advertising agent, to misrepresent its product, *i.e.*, "Sucrets" and "Children's Sucrets" to the public. A conservative order limited to restricting the implied misrepresentations is therefore justified.

With regard to the nature of the order to be issued, complaint counsel proposes that respondents be enjoined from representing that "Sucrets" or "Children's Sucrets":

(a) Will reach or kill streptococcal, staphylococcal, or other germs causing an existing throat infection, or otherwise that it is effective in the treatment of any kind of throat infection;

(b) Will have any beneficial effect on:

(1) Severe pain of a sore throat, or

(2) Sore throat in excess of affording temporary relief of the pain of a minor sore throat.

This order, however, appears to be ambiguous with regard to part (a), particularly in the use of the word "effective," which has devious meanings. Furthermore, this portion of the order is inconsistent with the evidence adduced, since the primary question is whether or not "Sucrets" are materially curative insofar as

throat infection is concerned. The generality of the language used also would make such an order difficult to apply because its construction leaves much to conjecture. The evidence establishes that "Sucrets" will not kill or render ineffectual germs in the throat tissues that are contributing to an existing throat infection. An order precluding the representation that "Sucrets" will kill or render ineffectual such germs which specifically relates to the deceptive practice would, therefore, appear to be more understandable and therefore preferable in the public interest.

As regards the second part of the proposed order identified as (b), this also seeks relief inconsistent with the evidence. It has been well established that "Sucrets" containing hexylresorcinol, which is an antiseptic having an anesthetic effect, will not afford permanent relief of sore throat pain. Nevertheless, the evidence does establish that this product will afford temporary relief. The reference to a minor sore throat, under the proposed order, has the effect of creating an ambiguity and makes the order difficult to apply, since the evidence establishes there is no relationship between the amount of pain and a minor or major sore throat. In fact, the complaint counsel's evidence thoroughly establishes that severe pain may accompany a minor sore throat condition and minor pain may accompany a major sore throat condition such as streptococcal and staphylococcal infection. The proposed order, therefore, seems inappropriate. The respondents, however, should be enjoined from representing that "Sucrets" will afford premanent or long lasting relief of sore throat pain. Such relief would be entirely consistent with the evidence in this case.

In accordance with the limitations indicated, the dissemination by the respondents of the false advertising, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of sections 5 and 12 of the Federal Trade Commission Act. Accordingly, the following order shall issue:

ORDER

It is ordered, That respondents Merck & Co., Inc., a corporation trading as Quinton Company or under any other name, and Doherty, Clifford, Steers & Shenfield, Inc., a corporation, and their officers, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Sucrets" throat lozenges, or "Children's Sucrets" throat lozenges, or any other

preparation of similar chemical composition or properties, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that any of the aforementioned preparations, by virtue of their hexylresorcinol content, or otherwise:

(a) Will kill or render ineffectual, germs in the throat tissues that are contributing to an existing throat infection;

(b) Will afford permanent or long lasting relief of sore throat pain.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 hereof.

OPINION OF THE COMMISSION

APRIL 8, 1966

BY REILLY, *Commissioner:*

This matter is before the Commission on cross appeals of counsel supporting the complaint and respondent Merck & Co., Inc. (trading as Quinton Company), and an appeal by the respondent advertising agency, Doherty, Clifford, Steers & Shenfield, Inc., from an initial decision holding that respondents had violated Sections 5 and 12 of the Federal Trade Commission Act.

The complaint charges respondents with the dissemination of false advertisements in connection with the sale and distribution of Sucrets throat lozenges and Children's Sucrets throat lozenges (hereinafter sometimes referred to as Sucrets). More specifically, it charges that respondents falsely represented in television commercials (1) that these preparations reach and kill germs causing existing throat infections and thus are effective in the treatment of throat infections, including those caused by streptococcal and staphylococcal germs; and (2) that they are effective in relieving severe pain of sore throat.

The following facts are not in serious dispute: There is no substantial difference between Sucrets and Children's Sucrets inso-

far as the medical usefulness of these products is concerned. The principal active ingredient in each is an antiseptic, hexylresorcinol, and each contains this ingredient in the same proportion or concentration, *i.e.*, 2.4 mg. hexylresorcinol in a lozenge having a total weight of 2.5 grams. The concentration of hexylresorcinol in Sucrets is approximately 1 part to 1,000 parts other ingredients, and experiments have disclosed that in normal use of the product the concentration of hexylresorcinol in saliva is approximately 1 part hexylresorcinol to 10,000 parts other ingredients. Laboratory tests have also disclosed that this concentration of hexylresorcinol will kill certain organisms on contact and will have antibacterial effects on others.

The majority of sore throats are caused either by viruses or by physical or chemical trauma, such as those associated with excessive smoking, talking, shouting, exhaust fumes, or smog. The remainder are for the most part the result of bacterial infection caused by the beta-hemolytic streptococci. No known drug will directly affect the viruses which cause sore throat, and traumatic sore throats can be cured only by the removal of the physical or chemical cause of the irritation. No product, including antibiotics, will shorten the duration of an existing beta-hemolytic streptococcal throat infection. Such an infection may be followed by more serious infections and the failure to institute adequate treatment (which requires complete eradication of the streptococci) may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis. Penicillin, a drug which can only be prescribed by doctors, is the therapy of choice for the condition because it can eradicate the bacteria and thereby reduce the incidence of the more serious sequelae of such infections.

The television advertisements used in connection with the sale and distribution of the two products are very similar. The following oral representations are made in the Sucrets commercial:

When sore throat strikes and brings fiery pain, what do you do for relief? Millions of people depend on SUCRETS for relief of minor sore throat pain. Individually foil wrapped, remarkable SUCRETS lozenges relieve sore throat pain fast and kill even Staph and Strep germs with a special pain relieving antiseptic, HEXYLRESORCINOL. So, when minor sore throat strikes and brings fiery pain, SUCRETS relieve sore throat pain and kill even Staph and Strep germs. SUCRETS are fast. Within minutes you can talk, swallow, even smoke in comfort. So, when sore throat strikes, relieve pain fast and kill even Staph and Strep germs.

The following oral representations are made in the Children's Sucrets advertisement:

When your child has a sore throat . . . It can make you feel helpless. What do you do to relieve the pain? If he's too young to gargle . . . and you want something more effective than candy cough drops . . . try new CHILDREN'S SUCRETS . . . specially flavored for youngsters . . . by the makers of regular SUCRETS. CHILDREN'S SUCRETS contain hexylresorcinol —the *gentle* antiseptic. And, CHILDREN'S SUCRETS relieve pain fast and help fight infection. These lozenges are made especially for children. Look: When minor sore throat strikes and brings burning pain . . . CHILDREN'S SUCRETS gently . . . safely . . . take care of the pain . . . and help fight infection. In no time at all . . . your child's like himself again. So next time your child has sore throat . . . if he's too young to gargle . . . and you want something more effective than candy cough drops . . . Relieve pain fast . . . help fight infection. Get new CHILDREN'S SUCRETS!

Included in both advertisements and appearing simultaneously with the above representations are pictures of flame being extinguished in the throat of a person using Sucrets or Children's Sucrets, as the case may be. The video portion of each commercial also portrays a person recovering from sore throat. For example, the Children's Sucrets advertisement depicts an obviously ill child suffering from the pain of sore throat. After taking a lozenge he is shown to be feeling well again, playing normally without any indication of sore throat pain.

With respect to the first charge in the complaint, the hearing examiner held on the basis of his own observation of the advertisements that respondents had represented that Sucrets and Children's Sucrets are materially curative of existing throat infections, including those caused by staphylococcal and streptococcal germs. He specifically found in this connection that "The implication from the language used in the advertising is that 'Sucrets' or 'Children's Sucrets' are materially curative because the germs are killed or rendered ineffectual. A person with a sore throat, upon hearing these representations, may reasonably assume that if such germs are killed, the product advertised is a cure for an existing throat infection." He held this representation to be false and deceptive, finding in this connection that "although 'Sucrets' and 'Children's Sucrets' will, by virtue of their hexylresorcinol content, kill germs, including Staphylococci and Streptococci, on contact therewith, they will not normally reach, kill, or render ineffectual, germs, including Streptococci and Staphylococci in the throat tissues, that are contributing to an existing throat infection."

As to the second charge, the hearing examiner held that respondent's advertising conveys the impression that Sucrets and Children's Sucrets will afford permanent or long-lasting relief of sore throat pain.[1] He found this implied representation to be false since the evidence disclosed that the product would relieve only temporarily the pain of sore throat.

In its appeal from the initial decision, respondent Merck does not contest the examiner's medical findings, *i.e.*, that Sucrets will not cure or help cure an existing throat infection and will not afford permanent or long-lasting relief of sore throat pain. Its principal argument is that neither the hearing examiner nor the Commission may interpret the Sucrets advertising without the aid of consumer testimony. This argument is, of course, contrary to the well-established rule that the Commission "is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements," *E. F. Drew and Co., Inc.* v. *F.T.C.*, 235 F.2d 735 (2d Cir. 1956) and "is entitled to draw upon its experience in order to determine, in the absence of consumer testimony, the natural and probable result of the use of advertising expressions." *Id.* at 741. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Double Eagle Lubricants, Inc.* v. *F.T.C.*, 360 F.2d 268 (10th Cir. 1965); *Libbey-Owens-Ford Glass Co.* v. *F.T.C.*, 352 F.2d 415 (6th Cir. 1965); *Bakers Franchise Corporation* v. *F.T.C.*, 302 F.2d 258 (3rd Cir. 1962); *Exposition Press, Inc.* v. *F.T.C.*, 295 F.2d 869 (2d Cir. 1961); *New American Library of World Literature* v. *F.T.C.*, 213 F.2d 143 (2d Cir. 1954); *Rhodes Pharmacal Co., Inc.* v. *F.T.C.*, 208 F.2d 382 (7th Cir. 1953); *Zenith Radio Corporation* v. *F.T.C.*, 143 F. 2d 29 (7th Cir. 1944). In two of the above cases the courts upheld the Commission's finding as to the probable impression created by advertising and labeling on the public, even though there was consumer evidence to the contrary, *Rhodes Pharmacal, supra,* and *Double Eagle, supra,* the court holding in the latter case "If the Commission can find deception without evidence that the public was deceived, we believe that it can make the same finding on the basis of its visual examination of exhibits, even though numerous members of the public have testified that they were not deceived."

We note that in making its argument, Merck attempts to distin-

[1] The examiner failed to make any ruling on the allegation that respondents had represented, either directly or by implication through the advertisements, that the products are effective in relieving severe sore throat pain.

guish between advertisements containing implied representations and those containing express representations, contending that the Commission can make its own determination as to the meaning conveyed by the latter but must rely on public witnesses to ascertain the meaning of the former. However, neither the cases cited by Merck nor any other decisions support this novel view.[2] As a matter of fact, Merck's contention that the Commission may not draw its own inferences as to an advertisement's meaning is directly contrary to the Supreme Court's ruling in two recent cases. In *F.T.C.* v. *Colgate-Palmolive Co., supra,* respondents contended that the Commission had erred in finding that the television commercials under consideration impliedly represented that the viewer was seeing for himself an experiment which verified the claim that sandpaper could be shaved by respondents' product. The Court rejected this argument holding that ". . . since this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves, the Commission's finding should be sustained." And in sustaining the Commission's holding that the advertising was materially deceptive, the Court stated, "Nor was it necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead, for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy." Similarly, in *F.T.C.* v. *Mary Carter Paint Co., Inc.,* 379 U.S. 957 (1965) the Commission had found, without the aid of consumer testimony, that respondents' use of the word "free" in connection with one product in a combination offer constituted a representation as to the usual and customary price of the other product. In holding that the Circuit Court should have sustained the Commission's finding of deception based on this interpretation of respondents' advertising the Court stated, "There was substantial evidence in the record to support the Commission's finding; its determination that the practice here was deceptive was neither arbitrary nor clearly wrong."

We also reject Merck's contention that the hearing examiner

[2] The court decisions cited by Merck do not support its argument but stand only for the proposition that the conclusion of the Commission with respect to the meaning of an advertisement to the public may be reversed if, in the court's opinion, it is "arbitrary" or "clearly wrong." See *Rhodes Pharmacal Co., Inc.* v. *F.T.C., supra,* and *Gulf Oil Corporation* v. *F.T.C.,* 150 F .2d 106 (5th Cir. 1945). In the Matter of *American Music Guild, Inc.,* Docket 8550 (1965) [68 F.T.C. 13], the Commission simply disagreed with the hearing examiner's interpretation of parts of respondent's advertising.

erred in finding that the advertising in question contains the implied representations that Sucrets and Children's Sucrets (1) will kill or render ineffectual germs that are contributing to an existing throat infection and are thus materially curative of such an infection, and (2) that these products will afford permanent or longlasting relief of sore throat pain.[3] As to the first representation found by the examiner, the statement that Sucrets will relieve sore throat pain and "kill even Staph and Strep germs" is repeated three times in the Sucrets advertisement. Similar emphasis is placed on the statement "help fight infection" in the advertisement for Children's Sucrets. A person seeing and hearing these advertisements could certainly interpret the claims to mean that the products will kill germs causing an existing throat infection or will help fight the infection causing the throat pain. The consumer is told by the Sucrets advertisement that the product is to be used to alleviate the pain of sore throat and that it will also kill germs.[4] Hearing and seeing the "germ killing" claim in this context, therefore, he would logically believe that the germs referred to are those causing the condition of which the pain is symptomatic. It would be completely unreasonable to assume that a prospective purchaser would construe the advertising to mean that Sucrets will kill only staph and strep germs in laboratory tests or only staph and strep germs other than those which may be causing the sore throat which prompted him to purchase throat lozenges in the first place. The same reasoning would apply to the claim that Children's Sucrets "help fight infection." It is unlikely that a parent would think that the infection which a throat lozenge will help fight is an infection other than the one which may be causing a child's sore throat. And certainly, as to both claims, the consumer could reasonably believe that a product which will kill germs causing an infection or which will help

[3] In deciding whether an advertisement has the capacity to deceive, the issue is not whether the only meaning which it conveys or the implication that "jumps out from it" is the false one, as Merck seems to contend. It is whether the advertisement may reasonably be understood to have that meaning by consumers even though it may also be susceptible of a different interpretation. "Advertisements which are capable of two meanings, one of which is false, are misleading", *Rhodes Pharmacal Co., Inc.* v. *F.T.C.*, 208 F .2d 382 (7th Cir-1953), *rev'd. on other grounds*, 348 U.S. 940 (1955). And since it is not difficult to choose statements, designs, and devices which will not deceive, those which are susceptible of both a misleading and truthful interpretation will be construed against the advertiser. *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438 (1924); *Libbey-Owens-Ford Glass Co.* v. *F.T.C.*, *supra; Country Tweeds, Inc.* v. *F.T.C.*, 326 F .2d 144 (2d Cir. 1964).

[4] The fact that staph germs referred to in the advertisement cause sore throats only in rare instances does not help Merck's case. The claim that Sucrets "kill even Staph and Strep germs" when considered in the context of the advertisement constitutes a representation that these germs cause sore throats.

fight an infection will have an effect on the course of the infection or will cure or help cure the infection.

We also agree with the examiner's finding that the advertising conveys the impression that the product will afford permanent or long-lasting relief of sore throat pain. In the first place, the flame depicted in the advertisement, which certainly may be understood to represent pain, is shown to be extinguished when Sucrets are used. But more important, the advertising implies, as we have already stated, that Sucrets are effective in removing the cause of the pain, *i.e.*, kills the germs or helps fight infection. Consequently, the advertising as a whole may well lead the viewer to believe that the product will provide more than temporary relief of sore throat pain.

Respondent Merck also takes exception to that part of the examiner's order pertaining to the duration of pain relief afforded by the products, arguing that this prohibition goes beyond the issues raised in the pleadings. This argument is also rejected. The complaint alleges that Sucrets and Children's Sucrets "have no beneficial effect on severe pain of sore throat, or on sore throat in excess of affording temporary relief of pain of a minor sore throat." And the proposed order accompanying the complaint would prohibit representations that these products will have any benificial effect on "Sore throat in excess of affording temporary relief of the pain of a minor sore throat."

Counsel supporting the complaint have appealed from the examiner's order[2] and from certain findings and conclusions in the initial decision concerning the ability of respondents' products to kill germs in the throat and to relieve severe pain of sore throat. We will consider first that part of the appeal requesting modification of the order to cease and desist.

The first paragraph of this order would require respondent to stop representing that Sucrets or Children's Sucrets "[W]ill kill or render ineffectual germs in the throat tissues that are contributing to an existing throat infection." Complaint counsel contend that the examiner erred in limiting this prohibition to claims concerning the action of the products on "germs in the throat tissues," and in not prohibiting representations that the products will reach or have any effect on germs contributing to a throat infection or otherwise will be effective in the treatment of throat infection.

We agree with complaint counsel that the first paragraph of the order is inadequate to prevent the false representation found

by the examiner to be implicit in respondents' advertising, *i.e.*, that Sucrets and Children's Sucrets will kill or render ineffectual germs contributing to an existing throat infection and that they are materially curative of an existing throat infection. Since this claim is not limited to the effectiveness of the product in killing only those germs in throat tissues, an order prohibiting its use should not be so limited. While it is true that the claim was found by the examiner to be deceptive because the products will not kill germs in throat tissues, we cannot assume that the public is aware that germs causing an existing throat infection are in the throat tissues. In other words, consumers may be led to believe by claims that Sucrets will kill germs or fight infection, that the product will cure or help cure a throat infection even if they are not told that the product will kill germs in throat tissues.

Paragraph (a) of the order originally proposed by complaint counsel would prohibit respondents from representing that Sucrets or Children's Sucrets "[W]ill reach or kill Streptococcal, Staphyloccal, or other germs causing an existing throat infection, or otherwise that it is effective in the treatment of any kind of throat infection." The examiner found this portion of the order to be ambiguous "particularly in the use of the word 'effective' which has devious meanings," and further concluded that it was inconsistent with the evidence. We do not agree. This provision of the order is obviously intended to prevent respondents from claiming that Sucrets or Children's Sucrets are of any value whatsoever in curing an existing throat infection or in killing or eradicating the germs causing such infection. The evidence clearly supports such a prohibition. As a matter of fact, the evidence adduced by complaint counsel that Sucrets will not cure or help cure an existing throat infection is undisputed.

Complaint counsel also take exception to the second paragraph of the order contained in the initial decision, contending that the examiner should properly have restricted respondents' claims of pain relief to claims for the temporary relief of *minor* pain of sore throat. The examiner's order would prohibit only representations that Sucrets or Children's Sucrets "will afford permanent or long lasting relief of sore throat pain." He had found in this connection that the products relieve severe pain of sore throat irrespective of cause, and the principal issue raised by counsel's argument concerns the accuracy of this finding.

In reviewing the initial decision on this phase of the case, we note at the outset that the examiner failed to make any ruling on

the allegation that respondents had represented that Sucrets and Children's Sucrets are "effective in relieving severe sore throat." His only ruling as to the meaning of respondents' advertisements, insofar as pain relief is concerned, is that they "impute" that Sucrets "will afford permanent or long lasting relief of sore throat pain." While duration of pain relief is an issue in this case, as we have stated above, it is not the principal one raised by the above charge. The complaint specifically alleges, in this connection, that respondents had represented that "Sucrets throat lozenges and Children's Sucrets throat lozenges are effective in relieving severe sore throat."

Apparently, the examiner's failure to find that the advertising implies that Sucrets will relieve severe sore throat pain was an oversight since he has ruled on the efficacy of the product in relieving such pain. There would seem to be no doubt, in this connection, that the advertising conveys such an impression. The viewer is shown a fire being extinguished by Sucrets in the throat of the user. It is difficult to conceive of any other pictorial representation which would be more suggestive of the alleviation of extreme pain.

We are of the opinion that the evidence relied upon by the examiner fails to support his conclusion as to the efficacy of the products in relieving severe pain. The examiner specifically held in this connection that "the 'Sucrets' clinical studies and testimony of expert witnesses further establish that 'Sucrets' give material relief of pain in a significant percentage of cases of sore throat characterized by severe pain." We have examined this evidence and find that neither the testimony of the expert witnesses nor the clinical studies conducted by Merck establish that Sucrets or Children's Sucrets are effective in relieving severe sore throat pain or will substantially ease the severe pain of sore throat.[5] None of the experts whose testimony is cited in the initial decision testified that Sucrets or Children's Sucrets will substantially ease severe sore throat pain. Each of them was called by respondents and each was asked by Merck's counsel whether Sucrets would give some relief of moderate pain or pain in excess of mild pain—not whether the products would substantially relieve severe pain of sore throat.[6]

[5] In response to respondent Merck's motion to clarify the complaint and narrow the issues, complaint counsel advised that the phrase "effective in relieving" in subparagraph 2 or paragraph 6 of the complaint means that "it will either substantially ease the severe pain or beneficially affect the condition which seriously imperils health." (T-24)

[6] For example, Dr. Gershenfeld testified as follows on direct examination:

"Q. One of the Government's concessions—I think the only one—is that they don't contend

No reference is made in the initial decision to testimony which is squarely on point. Dr. Rammelkamp, recognized as one of the leading authorities on streptococcal throat infections, testified in support of the complaint that in cases of severe sore throat when it is painful for a patient to swallow "The pain usually won't be relieved materially without some compound like codeine." [7] He further testified that ". . . in these situations one has to use a compound that acts deep in the tissues because the inflammation is deep. You have to get some compound that will get into these areas, and even then it may not be successful." [8] He also testified as follows in response to the question whether Sucrets antiseptic throat lozenges provide any measurable relief of severe pain of sore throat:

Hearing Examiner Buttle: Well, you could say "measurable relief." Would that satisfy you, Doctor?

The Witness: It would. I know of no antiseptic that would give measurable relief to sore throat as determined by proper studies, in my opinion.

Mr. McGlothlin: You are thinking of the severe sore throat of streptococcal infection?

The Witness: I was not. I was thinking of both. I know of no study of antiseptics that will show that it relieves sore throat that I would accept as the proper control published in the literature in any place that I know of.

* * * * * * *

Hearing Examiner Buttle: You were speaking of—

The Witness: what we call soreness of the throat.

Hearing Examiner Buttle: You were speaking of pain?

The Witness: Yes." [9]

None of the evidence adduced by respondents, including the Merck clinical studies relied upon by the examiner, tends to rebut Dr. Rammelkamp's testimony. The studies themselves have little probative value on the pain relief issue. They were not conducted for the purpose of showing that Sucrets substantially relieve the severe pain of sore throat but merely for the purpose of comparing the effectiveness of Sucrets with two placebos on the subjective relief of pain of uncomplicated sore throat.[10] While it

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that Sucrets do not relieve minor pain when produced by a minor cause. Would you tell us your experiences as to the ability of Sucrets to relieve pain of more than minor degree? I will define 'minor' for you as a tickle in the throat.

A. Well, I get more than a tickling. I get more than what they sometimes even call a scratchy throat if I talk too long or for any extended period of time. I find, as far as myself is concerned, I get relieved of the discomfort.

Q. With Sucrets?

A. With Sucrets." (T-2092)

[7] T-608.

[8] T-609.

[9] T-612.

[10] Patients with inflammation and infection of the throat were excluded from the studies.

is true that the studies indicated that patients with "severe" or "very severe" pain experienced "two-step" pain relief after being treated with Sucrets, they also indicated that patients who were treated with only a plain sugar lozenge experienced similar relief. Moreover, it is impossible to determine from the studies how much of the pain relief experienced by patients over the 48-hour testing period (whether treated with Sucrets or with the control products) can be attributed to the lozenges and how much can be attributed to the natural or spontaneous abatement of the symptoms of sore throat. The evidence is uncontradicted, in this connection, that the symptoms of viral sore throat or traumatic sore throat usually disappear within that time period. And even as to streptococcal throat infection Dr. Rammelkamp testified "Any compound you give after 24 hours will show improvement as far as the patient's report to you because everybody is getting better."[11]

Despite evidence that pain of infectious sore throat is caused by inflammation in the tissues which cannot be reached by a topical or surface application such as that provided by Sucrets, the examiner nevertheless assumed that Sucrets should "relieve pain in some degree when caused by serious conditions." [12] The examiner then bolstered this assumption by inferring that Sucrets should have this effect from testimony that Sucrets and similar products are recommended by doctors for temporary relief of pain in cases of bacterial infections of the throat. While it is true that doctors testified that they recommended lozenges for severe sore throat, this is no basis for finding that such products, which include cough drops, substantially relieve the severe pain of sore throat. Certainly, it is no basis for concluding that Sucrets will provide the degree of pain relief shown in the advertisements. We find in this connection that the advertisements conveyed the impression that Sucrets will promptly eliminate severe pain of sore throat. We further find on the basis of this record that the products will not provide substantial relief of such pain.

For the foregoing reasons, we are of the opinion that the examiner's findings and conclusions as to the efficacy of Sucrets and Children's Sucrets in relieving severe sore throat pain are erroneous and should be set aside. The order based on these findings will be modified as requested by counsel supporting the complaint.

[11] T-613.

[12] This statement falls far short of a finding that Sucrets substantially ease severe sore throat pain caused by a serious condition and seems to be only an observation that taking Sucrets in such cases is better than taking nothing at all.

Complaint counsel also take exception to the examiner's finding that Sucrets and Children's Sucrets kill pathogenic bacteria, including beta-hemolytic streptococci, in the throat. The evidence does not show that the products have the ability to kill any medically significant number of germs in the throat. Moreover, to the extent that this finding suggests that the products kill germs causing an existing throat infection and may therefore have some effect on the course of that infection, it is highly misleading. It will therefore be stricken.

The respondent advertising agency has filed a separate appeal from the initial decision contending that the hearing examiner erred in holding it equally liable with Merck for the advertising claims found to be deceptive and placing it under an order to cease and desist. The principal argument made by the agency is that in developing the advertising it acted in good faith in reliance upon information furnished by Merck, and that mere participation in the preparation of advertising claims is not a sufficient basis for imposing liability on an advertising agency.

The examiner found in effect that while the agency should have known that the advertising claims were deceptive (Initial Decision, par. 14) the record did not establish that the agency had actual knowledge of the falsity of these claims (Initial Decision, conclusion, pp. 544–545). His decision did not turn on the question of knowledge or intent, however. He specifically held that the agency was a "participant in the preparation of the advertising and the same required caution must be imposed upon them as would be imposed upon their client or advertiser."

We agree with the conclusion of the hearing examiner that the agency should be held but not solely because it was a mere "participant in the preparation of the advertising." We believe that the record in this case establishes that the agency was at least equally responsible with its principal for the deception found to be implicit in the advertising under consideration. Moreover, we believe that the agency should have been aware of the deceptive capacity of such advertising. Although the agency contends, in this connection, that it relied on information furnished by Merck, the deception found to exist stems not from the falsity of this information but from the use made of it by the agency. The advertising was based on two pieces of information, *i.e.*, laboratory tests established that Sucrets and Children's Sucrets by virtue of their hexylresorcinol content would under certain conditions kill germs, including staphylococcal and streptococcal germs, on contact and

that they would relieve the pain of minor sore throat. As used by the agency, these facts became at best half-truths and exaggerations. We refer particularly to the repeated use of the unqualified claims that the products "kill even staph and strep germs" and "help fight infection" in conjunction with the portrayal of a throat engulfed in flame and the prompt recovery of the user.[13] A false impression can be made by words and sentences which are literally and technically true but framed in such a setting as to mislead or deceive, *Bockenstette* v. *F.T.C.*, 134 F. 2d 369 (10th Cir. 1943), and as one writer has pointed out "The skillful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions." [14]

Nothing in the information supplied by Merck indicated that Sucrets or Children's Sucrets would have any effect on the course of either a viral or bacterial infection of the throat. Nor was there anything to indicate that these products would promptly eliminate severe pain, such as that symbolized by fire. To the contrary, the agency knew that the products were recommended only for the relief of minor sore throat pain, mouth and throat irritations.[15] Despite this knowledge, it developed advertising, which by the use of "exaggeration, innuendo, ambiguity and half truth" conveyed the false impression that the products would cure or help cure existing throat infections and would be effective in relieving severe pain of sore throat. As found by the examiner, the falsity of such advertising should have been apparent to its creator.

Nor is it a defense to the agency that the advertising was approved by Merck's legal and medical departments. The agency, more so than its principal, should have known whether the advertisements had the capacity to mislead or deceive the public. This is an area in which the agency has expertise. Its responsibility for creating deceptive advertising cannot be shifted to the principal who is liable in any event.

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[13] This advertising was aimed primarily at "self-medicating consumers" who, according to the agency, "depend upon advertising for product information, not upon the druggist or the physician." These consumers were regarded as "confused" and as "neither well-informed nor well-trained." The agency also believed that a " 'sore throat' is a real disease to consumers" and that "the potential seriousness should be exploitable." CX-4.

[14] Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 Law & Contemp. Prob. 91, 99 (1939).

[15] CX-1, CX-2, and CX-4.

All arguments made by respondents not specifically discussed herein are rejected.

The order proposed by counsel supporting the complaint, although quite similar to that which accompanied the complaint, is very narrow in that it prohibits misrepresentations only as to Sucrets and Children's Sucrets and products of similar chemical composition or properties. As so drafted, its prohibitions are in effect confined to the advertising of throat lozenges having hexylresorcinol as the principal ingredient. Although testimony adduced during the hearings reveals quite clearly the very limited efficacy of other non-prescription drugs sold as sore throat "remedies," the proposed order leaves respondents free to make whatever representations they please with respect to the therapeutic usefulness of such preparations. The probability that they will make claims as to the medical effectiveness of any such proprietary drug they may sell is great [16] and, on the facts of this record, the probability of misrepresentation is correspondingly real. Consequently, we believe that to be effective and to afford adequate protection of the public our order should be broadened to encompass false advertising by respondents of any proprietary throat preparation.[17]

The appeals of both respondents are denied. The hearing examiner's initial decision will be modified to conform with this opinion and, as so modified, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon cross appeals from the hearing examiner's initial decision and upon

[16] See the following comments of the respondent advertising agency emphasizing the importance of such claims:

"*The battleground for proprietary drugs is in the consumer's mind.* The consumer, through advertising, must be persuaded of a brand's unique advantages compared to competitive products which may be formulated to fulfill the same basic need. The product difference may be small. The advantage may be a real or an imagined difference. But, the consumer will only prefer one brand over another if he believes that it is really superior.

"Successful consumer products start with the consumer point of view. SUCRETS' potential can no longer be evaluated strictly through the eyes of the research and development group, the doctor, or the druggist. Its advantages and potential must be interpreted through the eyes of the consumer.

"Once these advantages are so viewed, then they must be expressed concisely and consistently in advertising which will be understandable and persuasive to the consumer." (Emphasis in the original.) CX-4

[17] As to the respondent advertising agency, this portion of the order will apply only to misrepresentations which the agency knows, or has reason to believe, are false or deceptive. See Opinion of the Commission on Remand, *Colgate-Palmolive Company*, Docket 7736, February 18, 1963. [62 F.T.C. 1269]

briefs and oral argument in support of and in opposition to said appeals; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted, that respondent's appeals should be denied, and that certain of the findings as to the facts and conclusions and the order to cease and desist contained in the initial decision should be modified to conform to the views expressed in said opinion:

It is ordered, That the initial decision be modified by striking finding number 21 and substituting therefor the following:

21. Through the use of said advertisements, respondents have represented, directly and by implication, that "Sucrets" and "Children's Sucrets," by virtue of their hexylresorcinol content, will unqualifiedly reach, kill, or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection, and that said products are effective in relieving severe sore throat pain.

It is further ordered, That the initial decision be modified by striking findings numbered 29 through 42 and substituting therefor the following:

29. Although "Sucrets" and "Children's Sucrets" will, by virtue of their hexylresorcinol content, kill germs, including staphylococci and streptococci, on contact therewith, they will not normally reach, kill or render ineffectual, germs, including streptococci and staphylococci in the throat tissues, that are contributing to an existing throat infection.

30. Streptococcal and staphylococcal infections of the throat may be precursors of infections of the heart, kidney, blood, bones and other structures, and the failure to institute promptly adequate treatment of streptococcal and staphylococcal throat infections may seriously imperil health. A special hazard of inadequate treatment of streptococcal sore throat is the subsequent development in certain persons, particularly children, of acute rheumatic fever or acute nephritis.

31. "Sucrets" and "Children's Sucrets" have no beneficial effect on severe pain of sore throat, nor will they provide relief of the pain of sore throat in excess of temporary relief of minor pain.

32. The aforesaid advertisements were and are misleading

in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

It is further ordered, That the initial decision be modified by striking therefrom that part of the section entitled "Conclusions" beginning on page 544 with the words "On the other hand" and ending on page 546 with the words "the following order shall issue" and substituting therefor the following:

The dissemination by the respondents of the false advertising, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

It is further ordered, That the initial decision be modified by striking the order on pages 546 and 547 and substituting therefor the following:

It is ordered, That respondent Merck & Co., Inc., a corporation trading as Quinton Company or under any other name, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of throat lozenges or any similar preparation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that "Sucrets" or "Children's Sucrets," or any other preparation of similar chemical composition or properties, by virtue of their hexylresorcinol content, or otherwise:

(a) Will reach, kill or have any effect upon germs contributing to an existing throat infection, or otherwise that they are effective in the treatment of throat infection.

(b) Will provide relief of the pain of sore throat in excess of temporary relief of minor pain.

2. Disseminating, or causing to be disseminated, by the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which misrepresents directly or by implication the efficacy or therapeutic value of any throat lozenge or similar preparation.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited by Paragraphs 1 and 2 hereof.

It is further ordered, That respondent Doherty, Clifford, Steers & Shenfield, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of throat lozenges or any similar preparation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that "Sucrets" or "Children's Sucrets," or any other preparation of similar chemical composition or properties, by virtue of their hexylresorcinol content, or otherwise:

(a) Will reach, kill or have any effect upon germs contributing to an existing throat infection, or otherwise that they are effective in the treatment of throat infection.

(b) Will provide relief of the pain of sore throat in excess of temporary relief of minor pain.

2. Disseminating, or causing to be disseminated, by the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which misrepresents directly or by implication the efficacy or therapeutic value of any throat lozenge or similar preparation: *Provided, however,* That it shall be a defense hereunder that respondent neither knew nor had reason to know of the falsity or deceptive capacity of such advertisement.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited by Paragraphs 1 and 2 hereof.

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

It is further ordered, That the 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 set forth herein.

IN THE MATTER OF

OVATION COSMETICS, INC., ET AL.

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

Docket C-1056. Complaint, April 8, 1966—Decision, April 8, 1966

Consent order requiring a California marketer of cosmetics and toiletries, to cease entering into agreements with its wholesalers, jobbers, and retailers to fix and maintain the resale prices of its products, and using other unfair practices.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C., Section 41 et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that parties listed in the caption hereof and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Ovation Cosmetics, Inc. (hereinafter referred to as Ovation), is a corporation organized on August 19, 1963, and is existing and doing business under and by virtue of the laws of the State of California. Respondent Ovation maintains its home office and principal place of business at 19720 Ventura Boulevard, Woodland Hills, California.

PAR. 2. Respondent J. Harry Ebbert, 4703 Louise Avenue, En-

cino, California, is president of corporate respondent Ovation. Together with others, respondent J. Harry Ebbert has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent Ovation.

In addition, respondent J. Harry Ebbert was formerly engaged in other marketing activities in commerce. As such, this respondent was in part responsible for establishing, supervising, directing and controlling business activities and a system of distribution involving applications and contracts, sales manuals and marketing plans, price lists and other literature similar to the present activities of respondent Ovation as alleged hereinbelow.

In October 1963 respondent J. Harry Ebbert became a principal managing officer of respondent Ovation and participated in the formulation of policies and practices as hereinafter described.

PAR. 3. Respondents are engaged in the purchase, distribution, offering for sale and sale of cosmetics, toiletries, and associated items such as brushes and sponges which are marketed under the tradename "Ovation Cosmetics" (sometimes hereinafter referred to as "cosmetics and toiletries" or "products") to wholesale distributors located in most of the States throughout the United States. The total net volume of sales of such products by respondent Ovation during its first year of operation was in excess of $390,000 and the total net volume of sales of such products in the first four months of 1965 appears to be in excess of $500,000.

PAR. 4. In the course and conduct of their business of distributing "Ovation Cosmetics" products, the respondents ship or cause such products to be shipped from the State in which they are warehoused to wholesale distributors located in various other States throughout the United States who engage in resale to dealers and to members of the public. There is now and has been for more than one year a constant and substantial flow of such products in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 5. Respondents, their wholesale distributors and dealers in the course and conduct of their business in distributing, offering for sale, and selling "Ovation Cosmetics" products are in substantial competition in commerce with one another and with other firms or persons engaged in the manufacture or distribution of similar products, except to the extent that such actual and potential competition has been lessened, hampered, restricted, and restrained by reason of the practices hereinafter alleged.

PAR. 6. Respondents have formulated a distribution system involving wholesale distributors, jobbers, and retailers and they have published policies or plans which are set forth in respondents' price lists, marketing manuals, sales bulletins, order forms, pamphlets, and other materials and literature. To effectuate and carry out the aforesaid distribution system, policies or plans, respondents together with their said distributors, jobbers, and retailers have entered into certain contracts, agreements, combinations and understandings pursuant to which respondents are enabled to, and do, establish, fix, or control the prices at which "Ovation Cosmetics" products are resold. More specifically:

1. Respondent Ovation has entered into a distributor agreement with each of its direct wholesale distributors in which the said distributor agrees to maintain the resale prices, discounts, rebates, and other terms or conditions of sale established and set forth by respondents.

2. Agents or officials of respondent Ovation have advised its direct wholesale distributors that failure to adhere to the marketing plan and to the prices, discounts, etc., contained therein is a basis for cancellation of their sales agreement.

3. Respondent Ovation has entered into a combination in which each of the direct wholesale distributors and his resale jobbers agree to maintain the resale prices, discounts, rebates, and other terms or conditions of resale established and set forth by respondents.

4. Respondent Ovation has entered into a combination in which each of the direct wholesale distributors, his resale jobbers, and the retailers purchasing from each of them agree to maintain the resale prices and other terms or conditions of resale established and set forth by respondents.

PAR. 7. The planned common course of action, combination, contracts, agreements, understandings and courses of dealing described herein constitute unfair acts or practices and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and

with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Ovation Cosmetics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its home office and principal place of business located at 19720 Ventura Boulevard, Woodland Hills, California.

Respondent J. Harry Ebbert is an officer of said corporation and his address is 4703 Louise Avenue, Encino, California.

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 respondent Ovation Cosmetics, Inc., a corporation, its officers, agents, representatives, employees, successors and assigns, and respondent J. Harry Ebbert, individually and as an officer of Ovation Cosmetics, Inc., his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of goods or commodities in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into, maintaining, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor of such goods or commodities to do or perform or attempting to do or perform any of the following acts, practices, or things:

(a) Fix, establish, or maintain the prices, discounts, rebates, or other terms or conditions of sale relating to

pricing upon which such goods or commodities may be resold;

(b) Require or coerce any person or firm to enter into a contract, agreement, understanding, marketing system, or course of conduct which fixes, establishes, or maintains the prices, discounts, rebates, or other terms or conditions of sale relating to pricing upon which such goods or commodities may be resold.

2. Engaging, either as part of any contracts, agreements, understandings, or courses of conduct with any distributor or dealer of any such goods or commodities, or individually and unilaterally, in the practice of:

(a) Publishing or distributing, directly or indirectly, any resale price, product price list, order form, report form, or promotional material which employs resale prices for such goods or commodities without stating clearly and visibly in conjunction therewith that said price or prices are only "suggested" or "recommended";

(b) Publishing or distributing, directly or indirectly, any sales manual or instructional material which employs sample resale prices for such goods or commodities for purpose of demonstration without stating clearly and visibly in conjunction therewith that said price, rate of discount, rate of rebate, or other terms or conditions of sale relating to pricing upon which such goods or commodities may be resold are not binding upon the distributor or dealer:

(c) Entering into, maintaining, enforcing, or threatening to enforce any contracts, agreements, rights, or privileges pursuant to or claimed by virtue of the Miller-Tydings Act, as amended, the McGuire Act, or any other similar legislation, for a period of three (3) years from the date of this order.

Provided, however, That nothing contained in this order shall be interpreted as prohibiting respondents from, directly or indirectly, refusing to sell to or enforcing or asserting their lawful contract or other rights against any wholesale distributor, jobber, retailer, or any other person or company for any legitimate reason unrelated to pricing.

It is further ordered, That respondent Ovation Cosmetics, Inc., within sixty (60) days from the date of service upon it of this order, shall mail a copy of the order to each person or firm res-

pondent has reason to believe may be engaged in the resale of any "Ovation Cosmetics" product.

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

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY ET AL.

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

Docket 7542. Complaint, July 14, 1959—Decision, April 11, 1966

Order reopening and modifying an existent cease and desist order of June 30, 1960, 56 F.T.C. 1623, against a major soap and detergent manufacturer by broadening the prohibitions against false advertising.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

The Commission, pursuant to Section 5(b) of the Federal Trade Commission Act and Section 3.28(b) of the Commission's Procedures and Rules of Practice, having served upon respondents an order to show cause, if any there be, why this proceeding should not be reopened and the order to cease and desist modified in the manner set forth in said Show Cause Order; and

The respondents and counsel for the Commission having thereafter executed an agreement consenting to the reopening of this proceeding and to a modification of the order to cease and desist; and

The Commission having considered the agreement, hereby accepts same, and enters the following order:

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the cease and desist order entered herein on June 30, 1960 [56 F.T.C. 1623], be, and it hereby is, modified by striking from said order the paragraph numbered 2 and substituting therefor the following:

> 2. (a) Representing, or causing the representation to be made, in any advertisement or commercial, either di-

rectly or by implication, that any manufacturer of appliances for washing clothes or dishes has made the determination or judgment that any of Respondents' soap, detergent, or bleach products is more suitable for use in its machines than a product or products of the same type produced or sold by others; or otherwise misrepresenting the nature or extent of any endorsement of Respondents' products by an appliance manufacturer or marketer: *Provided, however,* That it shall be a defense to any enforcement proceeding hereunder for Respondents to establish that such manufacturer or marketer has made such determination or judgment.

2.(b) Representing, or causing the representation to be made, directly or by implication, in any advertisement or commercial prepared and furnished by Respondents under an agreement between Respondents and any manufacturer or marketer of appliances for washing clothes or dishes, that such manufacturer or marketer endorses or recommends the use of, or packs a sample of, Respondents' soaps, detergent or bleach products in its appliances, unless Respondents clearly, conspicuously and explicitly disclose that pursuant to an agreement, Respondents have (1) supplied sample products to such manufacturer or marketer for packing in its appliances; (2) agreed to feature or mention such appliances, in commercials or advertisements, or (3) agreed to pay such manufacturer or marketer other valuable consideration, as the case may be.

2.(c) Representing, or causing the representation to be made, in any advertisement or commercial, either directly or by implication, that one or more manufacturers or marketers of appliances for washing clothes or dishes packs a sample of Respondents' product in its appliances unless Respondents clearly, conspicuously and explicitly disclose the fact that such sample products are supplied by Respondents.

It is further ordered, That the respondents, The Procter & Gamble Company, a corporation, and The Procter & Gamble Distributing Company, a corporation, 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 aforesaid order as modified hereby.

IN THE MATTER OF

SUN ELECTRIC CORPORATION

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

Docket 8659. Complaint, April 26, 1965—Decision, April 14, 1966

Order dismissing a complaint against a Chicago, Ill., manufacturer of automotive testing equipment, charging that it had illegally suppressed competition in the repair of such equipment, the allegations not sustained by evidence.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation named in the caption hereof, and more particularly described and referred to hereafter as respondent, has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent, Sun Electric Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its general office and place of business located at 6323 Avondale Avenue, Chicago, Illinois.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, distribution and sale of automotive and aircraft testing equipment, electronic equipment, and parts and accessories necessary thereto. Respondent sells automotive testing equipment manufactured by it directly to garages, service stations and others engaged in the repair of automobiles through its general office in Chicago, Illinois, and through numerous branch offices located in various States of the United States. Respondent is the dominant manufacturer of automotive testing equipment in the United States, and its sales of such equipment in the United States are substantial. During the period 1959–1963, respondent's sales of automotive testing equipment ranged from $5,000,000 to $7,000,000 annually.

PAR. 3. Respondent is also engaged in the repair of automotive testing equipment manufactured by it. Respondent maintains re-

pair facilities at its factory located in Chicago, Illinois, and has established and maintains approximately twenty-six factory branches located in various States of the United States. Such factory service branches are the only places operated, maintained or authorized by respondent for the repair of its automotive testing equipment.

PAR. 4. Respondent, in the course and conduct of its business as described above, is now and for many years has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent causes its automotive testing equipment, parts and accessories to be transported from its manufacturing plant located in Chicago, Illinois, to users of such equipment located in various States of the United States and the District of Columbia; and causes its automotive testing equipment, parts and accessories to be transported from its manufacturing plant to its sales offices and factory service branches located in various States of the United States for sale to customers and to users of respondent's equipment located in various States of the United States and the District of Columbia.

PAR. 5. Respondent, in the course and conduct of its business as described above, has been and is now in substantial competition with others in the manufacture, distribution and sale of automotive testing equipment, and, except to the extent that competition has been hindered and suppressed by virtue of the acts and practices described below, has been and is now in substantial competition with others in the repair of respondent's automotive testing equipment.

PAR. 6. Respondent, in the course and conduct of its business as described above, has refused and continues to refuse to sell parts and accessories for its automotive testing equipment to persons and firms engaged in the business of repairing automotive testing equipment. Respondent has also refused and continues to refuse to furnish to persons and firms engaged in the repair of automotive testing equipment diagrams, schematics or similar documents showing the make-up of its automotive testing equipment.

PAR. 7. The effects of the acts and practices of respondent as hereinabove alleged, among others, are as follows:

1. Independent repairmen have been prevented and hindered from engaging in the business of repairing respondent's automotive testing equipment.

2. The ability of independent repairmen to compete with res-

pondent in the repair of respondent's automotive testing equipment has been injured, lessened, prevented or destroyed.

3. Respondent has obtained, or attempted to obtain, a monopoly in the repair of its automotive testing equipment.

4. Owners and users of respondent's automotive testing equipment have been deprived of their freedom of choice in the selection of a repair agency.

5. The ability of small businessmen, as represented by the independent repairmen referred to herein, to flourish and grow has been hindered, lessened or destroyed.

PAR. 8. The aforesaid acts and practices of respondent have a tendency to unduly hinder competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition in the repair of respondent's automotive testing equipment, and have created, or may tend to create, a monopoly in the repair of respondent's automotive testing equipment. Said acts and practices, therefore, are to the prejudice and injury of the public and respondent's competitors in the field of automotive testing equipment repair and constitute unfair methods of competition in commerce or unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lowell E. Miller and *Mr. John Ohanian* for the Commission.

Sonnenschein, Levinson, Carlin, Nath & Rosenthal, Chicago, Ill., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

NOVEMBER 9, 1965

The complaint herein was issued by the Federal Trade Commission on April 26, 1965. Answer was filed by respondent on May 25, 1965. A prehearing conference was held in Washington, D.C., on June 29, 1965. Hearings commenced in New York City on July 14, 1965, and concluded in Chicago, Illinois, on July 22, 1965.

The complaint charges respondent, a corporation engaged in the business of manufacturing and selling automotive testing equipment, parts and accessories, and the business of repairing automotive testing equipment manufactured by it, refuses and has refused to sell repair parts and accessories for its automotive testing equipment to persons and firms engaged in the business of

repairing automotive testing equipment, and refuses and has refused to furnish to such repairmen diagrams, schematics or similar documents showing the make-up of its automotive testing equipment. It is alleged that the effects of such acts and practices, among others, are to hinder and prevent automotive testing equipment repairmen from engaging in the business of repairing respondent's automotive testing equipment; to injure, lessen, prevent or destroy the ability of such repairmen to compete with respondent in the repair of its automotive testing equipment; to deprive owners and users of respondent's automotive testing equipment of their freedom of choice in the selection of a repair agency; and that respondent has obtained, or attempted to obtain, a monopoly in the repair of its automotive testing equipment.

FINDINGS OF FACT

1. Sun Electric Corporation, respondent herein, is a corporation organized and existing under the laws of the State of Delaware, with its general office and place of business located at 6323 Avondale Avenue, Chicago, Illinois.[1]

2. Respondent, inter alia, is now and for many years has been engaged in the manufacture, distribution and sale of automotive and aircraft testing equipment, electronic equipment, and parts and accessories necessary thereto.[2]

3. The automotive testing equipment manufactured and sold by respondent consists primarily of electronic equipment designed for the purpose of determining the operating conditions of automobile engines and automotive fuel, ignition, starting and charging systems. It is used by persons and firms, such as automobile dealer repair shops, automobile motor tune-up shops and service stations, engaged in the business of repairing and servicing automobiles.[3]

4. Automotive testing equipment is manufactured by respondent in the United States at factories located in Chicago, Illinois, and Bellwood, Illinois, and is sold in all areas of the United States and the District of Columbia through twenty-seven (27) sales offices located in various states of the United States and approximately two hundred and fifty (250) sales representatives located in all states of the United States.[4]

[1] Admitted, Answer, par. 1; also stated to be unobjectionable by respondent at page 10 of its memorandum in response to complaint counsel's "Proposed Findings, Conclusions, Order and Argument of Law in Support Thereof."

[2] Admitted, Answer, par. 2.

[3] See CX 4, 5; Tr. 123, 156.

[4] See Tr. 138–9, 743; CX 4, 5, 7.

5. In addition to its two manufacturing plants in the Chicago, Illinois area, respondent operates two manufacturing plants in foreign countries. Respondent's automotive testing equipment is sold in foreign countries through authorized distributors located in all principal countries of the world.[5]

6. Respondent additionally is and has been engaged in the business of repairing automotive testing equipment manufactured by it. In the conduct of such repair business, respondent operates and maintains, as part of Sun Electric Corporation, twenty-six (26) factory service branches located throughout the United States.[6]

7. Respondent, in the course and conduct of its business of selling automotive testing equipment and repairing automotive testing equipment manufactured by it, causes its automotive testing equipment, parts and accessories to be transported from its manufacturing plant in Chicago, Illinois, to its various sales offices and factory service branches. Respondent, in the course and conduct of its business of selling automotive testing equipment and repairing such equipment, is and has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.[7]

8. During the period 1960–1964, respondent's sales within the United States of automotive testing equipment manufactured by it were substantial and were as follows:

Fiscal	1960—	$4,816,169.18
"	1961—	4,355,820.30
"	1962—	5,338,168.16
"	1963—	6,228,034.44
"	1964—	6,875,903.17

Respondent's sales increased by more than thirty (30) per cent within this five-year period.[8]

9. Respondent concedes it is a major manufacturer of automotive testing equipment.[9]

10. The total dollar volume of repair work, including parts and labor, done at respondent's service branches for the years 1963 and 1964, respectively, were as follows:

[5] See Tr. 161; CX 5.

[6] Admitted, Answer, par. 3; CX 7; Tr. 146, 743.

[7] Admitted, Answer, par. 4.

[8] See CX 10; Tr. 127–8, 734. Battery chargers are included in the line of automotive testing equipment manufactured and sold by respondent. Tr. 173; CX 4, 5; RX 18. Respondent's sales of battery chargers, which are included in these sales figures, were: 1960–$377,817; 1961–$381,188; 1962–$397,735; 1963–$385,418; 1964–$295,415. Tr. 735.

[9] See page 10 of respondent's reply to complaint counsel's proposed findings; also see Tr. 427, 464; CX 5, pp. 2–13; CX 15, pp. 134–135; CX 17, 23; Tr. 152–153, 427, 462–463; CX 24; Tr. 478, 464, 346, 372.

Fiscal 1963—$789,519.08
Fiscal 1964— 703,945.26 [10]

11. The revenue received by respondent from its business of repairing automotive testing equipment manufactured by it is substantial and constitutes an important source of revenue to Sun.[11]

12. Sun concedes that it refuses, and has refused, to sell repair parts and accessories for its autmotive testing equipment to persons and firms engaged in the business of repairing automotive testing equipment who do not own the equipment. However, Sun does not refuse to sell such repair parts and accessories to owners of the equipment for which the part is ordered, irrespective of the occupation of the owner. For example, Sun sells repair parts to companies engaged in reconditioning automotive testing equipment as long as they own the equipment.[12]

13. Refusal to sell repair and replacement parts to automotive testing equipment repairmen and repair shops inhibits, to a degree unestablished by the evidence, repairmen and repair shops from repairing automotive testing equipment manufactured by respondent. As hereinafter indicated, the inconvenience proved does not appear to be unsurmountable or competitively material. Respondent does not compete for repair work other than on its own equipment.[13]

14. From its inception, Sun's method of distributing automotive testing equipment has been by direct sales to the users of the equipment, that is, the automotive service trade.[14]

15. In that connection, Sun employs approximately 250 sales representatives located throughout the United States. The full time of these representatives is devoted to sales and promotion of Sun automotive testing equipment.[15]

16. As part of their duties, Sun sales representatives conduct training sessions to instruct customers (and their personnel) in the use of the equipment. Because of the complexity of some of this equipment, Sun regards such training sessions as essential to achieve customer satisfaction.[16]

17. Sun has established repair facilities at its various branches throughout the United States for several reasons evidenced:

(a) The repair facilities are essential in order to achieve qual-

[10] See CX 11, CX 12.
[11] See Tr. 744–745.
[12] See Tr. 753, 204, 256, 510, 533, 550, 619, 692, 720.
[13] See Tr. 180; CX 8, CX 9.
[14] Answer, par. 2; Tr. 138–139, 742–743.
[15] See Tr. 139, 743; CX 5, p. 1.
[16] See Tr. 139, 178–179; CX 5, p. 1.

ity control of Sun's automotive testing equipment. Special expertise and training are necessary to repair such equipment. In addition, such equipment must be calibrated when it is repaired, and special calibrating equipment is required for this purpose. Sun has designed special calibration equipment, which is calibrated to standards of the United States Bureau of Standards, for its repair facilities to use in repairing Sun automotive testing equipment. Such special calibration equipment, in Sun's view, is essential for the proper repair of automotive testing equipment.

(b) Sun assumes that the loyalty of a repairman is important in protecting the quality reputation of the company. Therefore, Sun does not encourage repairs of Sun equipment by persons who are affiliated with concerns handling competitive equipment, and who therefore owe their allegiance to someone other than Sun.

(c) Sun pioneered the one-year warranty in this field. In order to provide meaningful warranty service with the least delay to the customer, Sun deems it necessary to locate repair facilities reasonably close to the owners of the equipment.

(d) In order to gain repeat sales, Sun decided to maintain customer contact after the sale and to assure customer satisfaction. As the president of Sun testified:

> In the course of repairs, it sometimes becomes evident that there might be an advantage to approach the owner of the equipment and induce him to purchase new equipment. We, of course, would like to have these particular sales leads. If Sun equipment would be repaired by an organization which owes its allegiance to another brand line, the sales leads would not come to Sun Electric Company. So there is another good reason why we feel that the repairs form an important part of our marketing function.

(e) The repair facilities provide a feed-back of information concerning possible weaknesses in design to engineering personnel for evaluation and guidance in designing and improving future models.

(f) The repair facilities are an important source of revenue to Sun, not only in helping to defray the costs of maintaining factory service branches to facilitate the handling of in-warranty repairs, but also as an independent source of business.[17]

18. Sun's policy is to sell repair parts and accessories to any owner of Sun equipment whether he purchased the equipment from Sun or bought it secondhand. In accordance with that policy, when a request is received for parts from someone (such as a re-

[17] See Tr. 440, 826, 746–747, 181, 441, 542, 618, 711, 746–747, 752–753, 182, 755, 758, 756, 744, 180, 744, 757, 744–745, 180, 744–745.

pairman) who is not an owner of Sun equipment, he is advised that Sun's policy is to sell parts to the owner of the equipment.[18]

19. Sun does in fact sell a substantial volume of repair parts and accessories to owners of Sun automotive testing equipment. Included among the owners of Sun equipment to whom Sun sells repair parts are companies engaged in reconditioning automotive testing equipment.[19]

20. Sun does not require that Sun personnel install the parts which are sold to owners of Sun equipment. Sun does not require that any other repair services pertaining to such equipment must be performed by Sun personnel.[20]

21. Sun's policy with respect to the sale of repair parts and accessories, like its practice of establishing and maintaining its own repair facilities, is based partly on its desire to develop and maintain the quality reputation of the company's products. Moreover, this policy is also an integral part of Sun's basic marketing policy to sell directly to the ultimate user of the product.

Sun also concedes that, to the extent that repairmen could, and do, compete with Sun, Sun would be aiding its competitors and "cutting its own throat" by selling repair parts to such repairmen. Such competition exists only in a limited sense, however, since Sun repairs only Sun automotive testing equipment and neither solicits nor performs repair services on automotive testing equipment of any other manufacturer.[21] Sun provides "schematics" for its own use exclusively and "pictorials" as guides incident to equipment repair.

22. Sun's "schematics" are the drawings which Sun prepares for the purpose of manufacturing its various products. Sun's research and development program in its automotive division costs over $300,000 a year. Each "schematic" reflects the result of all of Sun's engineering and research on the particular product. The schematics contain complete information necessary to manufacture the product, and are in such detail that an existing or potential competitor would be enabled to build equipment identical to the Sun product. Sun automotive testing equipment is virtually unprotected by patents. As a result, Sun equipment is often copied and reproduced by other manufacturers. Sun considers that any disclosure of its "schematics" would be "handing on a silver platter to all existing and potential competitors the net result of our

[18] See Tr. 156, 753; Answer, par. 6; CX 9, CX 27; Tr. 753–754.

[19] See RX 8, 9, 10; Tr. 200–201, 753.

[20] Answer, par. 6; Tr. 754.

[21] See Tr. 182, 755, 758; Answer, par. 6; Tr. 743, 180–181, 745.

research and engineering program. . . ." Therefore, Sun considers its schematics to be proprietary and confidential information which they do not distribute outside of the company.[22]

23. In contrast to Sun "schematics," Sun "pictorials" consist of a photograph of the particular unit and its internal components, showing their physical location and identifying marks, a bill of materials or parts list, a detailed wiring diagram, and test and calibration procedures. The pictorials are prepared from certain portions of the schematics for the same product—namely, the wiring diagram and the list of materials. The pictorials are prepared specifically for the purpose of enabling Sun personnel at Sun repair branches to repair the equipment and are complete with respect to any information that repairmen might need. These pictorials are also distributed to owners of equipment upon request and without charge. They are not, however, distributed to nonowners.[23]

24. The principal difference between Sun's schematics and its pictorials is that the schematics indicate how the unit and its parts are made, whereas the pictorials identify the parts and how to place them. On the other hand, the pictorial is more detailed than the schematics from a servicing standpoint. The pictorial shows voltage measurements and sign waves; in addition, the pictorials clarify polarity of component parts, what the controls are, their function in the circuit, and switch positions.[24]

Automotive Testing Equipment Defined

25. Sun does not manufacture all types of "automotive testing equipment." However, Sun considers each of the products described in its catalog as "automotive testing equipment." Complaint counsel stated that in their opinion there are certain items in CX 5 which are not automotive testing equipment, but never identified such items. Presumably, however, complaint counsel's reference was to battery chargers.[25]

26. On the basis of both the evidence of record and the stipulations of counsel, battery chargers are properly included in the category of "automotive testing equipment."

Complaint counsel represented at a prehearing conference, which was held to narrow and clarify the issues, that "the bat-

[22] See Tr. 766; RX 15; Tr. 767, 766, 789, 790–791, 767, 768.

[23] See RX 16; Tr. 798–799, 768–769, 796; cf. RX 15; 766, 796, 768, 796–797; Answer, par. 6; Tr. 772.

[24] See Tr. 769, 800.

[25] See CX 5; Tr. 127, 110, 91–92.

tery charger . . . normally in the trade, as I understand it, is included in this field." Subsequently, however, complaint counsel stated that he "did not consider battery chargers personally as automotive testing equipment." Nevertheless, he offered CX 10 in evidence and stipulated to its accuracy. That document, prepared by complaint counsel, sets forth sales of "Automotive Testing Equipment" by Sun and includes (as complaint counsel presumably knew when he offered it in evidence) sales of battery chargers by Sun. It was subsequently stipulated that "the total sales figures appearing upon Commission Exhibit 10 are total sales by Sun Electric Corporation of automotive testing equipment within the United States." It was also stipulated that two other Commission exhibits (CX 11 and CX 12) represented "the repair work done by Sun Electric Corporation on automotive testing equipment at the places indicated." These exhibits include repairs of battery chargers. Similarly, it was stipulated that another exhibit, Commission Exhibit 13, "includes all the repair parts for automotive testing equipment which are sold by Sun" as of June 18, 1965. This document contains the repair parts for Sun battery chargers.

Other evidence also shows that battery chargers are regarded as "automotive testing equipment" in the industry. For example, a catalog published by Snap-On Tools Corporation identifies battery chargers as "test equipment." Another Commission witness, Mr. Mayers, testified that he repaired nothing but automotive testing equipment, that he repaired battery chargers, and that he recongized battery chargers as part of the automotive testing equipment line.

The evidence also shows that battery chargers are actually used for testing purposes.[26]

27. Complaint counsel initially took the position that Sun tachometers mounted in automobiles were automotive testing equipment. Shortly thereafter, however, complaint counsel reversed his position, and stated that such tachometers should not be included. This is in accord with the testimony of a Sun witness, who took the position that its tachometers mounted on automobiles were not automotive testing equipment, but that other tachometers manufactured by Sun are considreed as automotive testing equipment.[27]

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[26] See Tr. 54–55, 91–92, 127–128, 734, 135; CX 13; Tr. 136–137; CX 13, pp. 57, 61, 66, CX 15, inside front cover; Tr. 405–406, 216, 458; RX 3, 5, 18.

[27] See Tr. 86, 107, 102; CX 5, p. 21; Tr. 102.

28. Mr. McCreery, the witness for Snap-On Tools Corporation, testified that the only items that he termed testing equipment were the items contained on pages 128–135 of the Snap-On catalog. He defined testing equipment in terms of how big a sale it is, and not the function it performs; and he also limited his definition to "electrical testing equipment." Nevertheless, it is clear that other items contained in Commission Exhibit 15 must also be regarded as automotive testing equipment: for example, wheel alignment equipment consists entirely of gauges for determining the alignment of wheels on automobiles, and constitutes "automotive testing equipment"; battery chargers and growlers are characterized by the company itself as "test equipment"; likewise, leak testers and similar "hand tools" are probably automotive testing equipment, although not so considered by Mr. McCreery. It should also be noted that Mr. McCreery acknowledged that "each company may have a particular concept of what it regards as testing equipment." [28]

29. Mr. Potter, of Marquette Corporation, stated that the Marquette catalog did not include all types of automotive testing equipment manufactured by Marquette. Growlers are included as automotive testing equipment by Marquette, but apparently not by Snap-On Tools.[29] The variability in manufacturers classification of testing equipment is uncontradicted.

Relevant Markets

30. The record is completely devoid of any evidence showing any industry, or relevant market, in terms of dollar volume. Complaint counsel stated that there are no industry-wide figures available, and did not even attempt to establish what such figures might be.[30]

31. However, the record does contain evidence as to the large number of manufacturers of automotive testing equipment.

Mr. Glendon, of Sun, testified, without contradiction, that there are upwards of 200 manufacturers of automotive testing equipment in the United States.

Mr. Trent, a Commission witness, testified that he repairs auto-

[28] See CX 15; Tr. 400, 402, 401–402; CX 15, inside front cover; Tr. 404–406, 402. It is also noted that CX 15 shows other items which test various parts of automobiles. For example, a battery cell tester on page 127 is designed for various tests; wheel balancers on pages 124–125 determine whether and where a wheel is unbalanced; circuit and spark testers are shown on page 87; a leak tester is shown on page 86; a tension gauge on page 81 is said to be used for "testing the tension of distributor points . . . and for a pulling test . . ."; oil pressure gauge sets on page 53 are stated to be to "reveal inside troubles . . . spot oil leaks, pressure leaks, faulty Servo pistons, clogged screens, etc."

[29] See CX 23; Tr. 462–463, 490–492, 399; cf. CX 15, p. 127.

[30] See Tr. 470.

motive testing equipment bearing 26 specified different brand names, and stated that "there are so many I can't be expected to answer, or write down a list . . ."

Mr. Donahue, a Commission witness, testified that there are many companies selling automotive testing equipment of a type similar to that sold by Allen.

Mr. Potter, a Commission witness, testified that, in addition to the companies that manufacture oscilloscope equipment, "there are many others that have hand-held [automotive testing] equipment . . . too numerous to mention." [31]

32. Mr. Glendon also testified that Sun probably has thousands of competitors in the sale of automotive testing equipment; and that these competitors include *inter alia* Ford Motor Company, Esso, American Oil Company, Sears Roebuck, Montgomery Ward, and thousands of others.

Mr. McCreery, a Commission witness, testified that Snap-On Tools has 1100–1200 dealers who sell automotive testing equipment to the garage trade.

Mr. Potter testified that Marquette automotive testing equipment is sold to the garage and service station trade by 1500–2000 distributors.

Mr. Malik testified that there are literally thousands of companies who sell automotive testing equipment to the garage trade.[32]

33. Mr. Donahue testified that there are about 100 repairmen of automotive testing equipment that have been authorized to repair Allen equipment.

Mr. Potter testified that there are some 50 repair depots authorized by Marquette, in addition to Marquette's 15 factory service centers.

Mr. Malik, of Sun, testified that there are so many companies engaged in repairing automotive testing equipment that a comprehensive survey is impossible.[33]

34. The record contains no probative evidence of the volume of retail sales of any other manufacturer of automotive testing equipment. The uncorroborated summaries of sales by Snap-On, Allen and Marquette were admitted only for the limited purpose of showing that Sun is a major manufacturer of automotive testing equipment. In any event, those figures do not evidence the size or relative position of any concern that sells in a market which is

[31] See Tr. 172, 283–287, 427, 464.
[32] See Tr. 149, 164–166, 386, 484, 749–750.
[33] See Tr. 437, 751.

relevant in this case. Sales by those manufacturers are to the wholesale market; the sales of Sun are to the retail market.[34] Moreover, the sales figures submitted by Snap-On and Marquette are inadequate to show their size or market position, since they do not include sales of all automotive testing equipment manufactured by the company. Marquette's figures do not even purport to be sales of automotive testing equipment, but only sales of "engine analyzing equipment." Comparisons therefore have dubious probative weight.

Mr. Donahue testified that Allen is the world's leading manufacturer of automotive testing servicing equipment; that no other manufacturer has as complete a line as Allen; that Ford and Lincoln-Mercury have equipped about 90% of their new car dealers with the Allen engine analyzer; and that all of the companies are stronger in one area than another.

Mr. Potter testified that Marquette claims to be the industry's number one in the battery charger line.[35]

35. The record does not contain any probative evidence showing the degree of concentration in any relevant market. Without evidence of total size of an industry, or the number of concerns and their relative market position, including the position of Sun, in the industry, the degree of concentration cannot be determined. To the extent that any evidence on the subject was adduced, the record strongly suggests a lack of concentration (whatever market is conjectured to be relevant).

36. Similarly, no finding can be made as to Sun's position in any relevant market without evidence of the size of the market.

37. The parties do agree, however, that Sun is engaged in substantial competition with others in the manufacture, distribution, sale and repair of automotive testing equipment.[36]

Availability of Repair Parts

38. Approximately 90% of the repair parts for Sun automotive testing equipment are available from other sources.

Mr. Glendon testified that it was his understanding that 80% to 90% or 95% of the parts that go into Sun equipment, with the exception of Sun meters, can be purchased from an electrical supply distributor.

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[34] In this regard, it is noted that complaint counsel took the position that comparative data, relating the wholesale sales to Sun's retail sales, was irrelevant to the case. (Tr. 448, 486.)

[35] See Tr. 399–407, 462–463, 489–492; CX 24; Tr. 453, 427, 451, 428–429, 490.

[36] Complaint, par. 5; Answer, par. 5.

Mr. McCreery of Snap-On Tools testified that many of the component parts are standard units that can be purchased from any electronic supply company.

Mr. Turner admitted that "there is a good share of parts that can be purchased locally from supply houses."

Mr. Bender admitted that resistors and condensors used in the repair of Sun equipment are standard items.

Mr. Weston testified that approximately 90% of the parts used in the repair of Sun equipment can be secured elsewhere. He testified, for example, that in the SS 60 scope, one of the most sophisticated units of automotive testing equipment made by Sun, only eight of the 284 parts in the unit could not be readily purchased from other sources; and of these eight parts, seven (all except the transformer) could be fabricated if a replacement were necessary.[37]

39. Parts are available from various other sources, in addition to electronic supply houses:

(a) Some parts are obtained from the manufacturer that supplies Sun with the part.

(b) Parts obtained from other manufacturers of automotive testing equipment can be substituted in Sun equipment.

(c) Parts are obtained through the owner of Sun equipment or by using the letterhead of an owner.

(d) Case parts can be fabricated.[38]

40. The only parts not generally available from other sources are meters, transformers and two lead terminations. Less than 10% of all repair jobs require the use of these parts. Moreover, defective meters can be repaired and need not be replaced in every instance; there might be a replacement on the market for a transformer; and the unique lead terminations are only two out of several hundred leads used on Sun equipment.[39]

41. In 1963 Sun reduced its prices on repair parts for its automotive testing equipment by approximately 25%. The purpose of this reduction was to make Sun's prices competitive; that is, to bring them in line with prices available to the public from other suppliers of equivalent parts.[40] This is also indicative of the competitive market in which Sun finds itself.

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[37] See Tr. 183, 391, 512, 701, 805; RX 15, 16, 17 for id.; Tr. 805.

[38] See Tr. 254, 549, 256–257, 550, 714–715, 805.

[39] See Tr. 807, 810–812; cf. Tr. 531, 805, 819.

[40] See Tr. 760–761.

Necessity For and Availability of Schematics and Pictorials

42. Schematics or pictorials are not always essential in order to repair automotive testing equipment, although they do simplify and expedite such repairs.

Mr. Mayers, a Commission witness, testified that you can make repairs without the use of schematics, "but it is the long way around. . . ."

Mr. Trent, a Commission witness, testified that he has been able to make repairs to Sun equipment without the use of pictorials or schematics, at a cost in time; that he could make the repairs if he got the parts, but it would take longer without the schematics or pictorials.

Mr. McCreery, a Commission witness, testified that schematics were not necessary in order to make repairs to testing equipment, and that the values of components are not necessary.

Although Mr. Turner, a Commission witness, testified that a schematic is "very necessary to know what the different parts are, where they belong, and the capacity of them," he also testified that until the latter part of 1964 he was able to repair Sun equipment without schematics or pictorials.

Mr. Bender, a Commission witness, testified that schematics "make it easier is the main thing." Anyone with time can trace out a print and repair the equipment.[41]

43. The lack of requests to other manufacturers for schematics also demonstrates that they are not necessary to repair automotive testing equipment. Mr. McCreery testified that, to the best of his knowledge, Snap-On Tools has never been requested to provide a schematic to an independent repairman, and they evidently have never done so. Mr. Donahue, also a Commission witness, similarly testified that Allen has never had a request for a schematic from a repairman.[42]

44. The comparable repair guide issued by Sun—which it calls a "pictorial"—contains the information Commission witnesses suggested was necessary to make repairs in that it also contains calibration procedures and voltage measurements and sign waves. Sun's "pictorial" is more detailed and contains more information than an equivalent Marquette "schematic." [43]

45. Sun "pictorials" can be obtained by any "independent" re-

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[41] See Tr. 225, 265, 267, 389–393, 514, 521, 703.

[42] See Tr. 394, 441.

[43] See Finding 23, *supra;* Tr. 206–207, 262–263, 514, 524, 389–390, 439–440, 459, 481, 703; RX 16; Tr. 799, 800; RX 6, 16; Tr. 800–803.

pairman from the owner of the equipment. No witness testified that he was unable to obtain a "pictorial" in this manner.[44]

Effect of Sun's Policy on Independent Repairmen

46. Many of the so-called independent repairmen represent one or more manufacturers of competitive automotive testing equipment as their "authorized service representative." [45]

47. The principal portion of the business of these repairmen comes through jobbers, who sell other brands of automotive testing equipment in direct competition with Sun.

Mr. Trent testified that he obtains his business through approximately 20 distributors of automotive testing equipment who sell their products to garages, service stations, and truck fleets.

Mr. Ury testified that he repairs automotive testing equipment "for the jobbers" and for customers to whom he has sold automotive testing equipment.

Mr. Turner testified that 90% of his business is with jobbers, and that he rents part of his building to an Allen factory representative and does repair work for the customers of that representative.[46]

48. Many of the repairmen testified that they also sell competitive brands of automotive testing equipment themselves.

Mr. Mayers testified that his sales of new automotive testing equipment—principally Allen equipment—comprise 25% of his entire business. He also testified that he takes in Sun equipment as trade-ins on new Allen equipment. The remaining 75% of his business is in repairs.

Mr. Trent testified that he sells equipment on occasion, but that it is not his practice because that would put him in competition with his customers and affect his repair business.

Mr. Shapiro testified that he sells automotive electrical equipment to garages, service stations, automobile dealers, and industrial outfits.

Mr. Ury testified that he sells automotive testing equipment of many different brands.

Mr. Myers testified that he sells Allen and Marquette equipment.[47]

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[44] See Tr. 772.

[45] The only possible exception, Mr. Shapiro, testified that he repairs numerous makes of automotive testing equipment (Tr. 292) but did not specifically state that he is an "authorized service representative" of those manufacturers. (Tr. 291–293.) Mayers, Tr. 204; Trent, Tr. 252–253; Ury, Tr. 294; Turner, Tr. 507; Scherrer, Tr. 534; Myers, Tr. 541–544; Alpert, Tr. 617–618; Bender, Tr. 690; Foulk, Tr. 710–711.

[46] See Tr. 252–253, 294, 526, 525.

[47] See Tr. 214, 222, 206, 279, 291, 310–310A, 565–566.

49. So-called "independent" repairmen do repair Sun automotive testing equipment to an undetermined extent.

Mr. Trent testified that he repairs Sun timing lights and tach-dwell testers.

Mr. Ury testified that other companies engage in repairing Sun automotive testing equipment, that ATECO is the principal one in the New York metropolitan area, and that ATECO has been able to repair all Sun equipment sent to them.

Mr. Myers testified that he repairs some Sun automotive testing equipment.

Mr. Bender testified that he does minor repairs of Sun automotive testing equipment where parts are not required.

Mr. Foulk repairs Sun equipment where it takes a standard industrial part which can be substituted. He has also obtained parts for Sun equipment through the owner of the equipment, and repaired the equipment in that manner.[48]

50. There also appears to be some question whether persons engaged in the repair of automotive testing equipment would solicit repairs of Sun equipment even if they were able to obtain parts and pictorials from Sun, unless they were also able to purchase the parts at a discount.

Mr. Turner, for example, testified that he did not solicit—and in fact turned down—repairs of Sun equipment, even during the period that he was able to get Sun parts, because they could only be purchased by him at list price. Profit in the repair business, according to Mr. Turner, depends upon being able to make a profit on the sale of parts, which he could not make since he bought the parts at retail.

Mr. Ury also testified that he would be interested in repairing Sun equipment only if he could get a discount on the parts and a wiring diagram. The evidence is clear, however, that the unavailability of repair parts and pictorials to nonowners of Sun's automotive testing equipment creates an inconvenience for independent repairmen. Such inconvenience, however, has not been shown by substantial evidence to be materially inhibitive of competition, or injurious thereto.[49]

SUN OWNERS FREE CHOICE

51. Complaint counsel called as witnesses three persons to testify concerning their experiences as owners or users of Sun auto-

[48] See Tr. 254, 296, 305–306, 546, 692, 718–719, 714–715.

[49] See Tr. 509, 516–517, 561–562, 303.

motive testing equipment. The testimony of these three witnesses lends no support whatever to the allegation of the complaint that owners are deprived of freedom of choice in the selection of a repair agency, aside from the conceded policy of the respondent, which does not materially encumber free choice.

52. Among the foregoing witnesses Mr. Shirk is the service manager of one division of a Volkswagen dealership in Milwaukee. Mr. Shirk does not own the equipment about which he testified and did not testify on behalf of the owner, his employer. The crux of his testimony is that he has left a machine valued at $885 "setting against the wall" because it would cost $60 to have the unit repaired by Sun. But he also testified that he had never tried to have the unit repaired by anyone else.[50]

53. Mr. Besasie, also not an owner of Sun automotive testing equipment at the present time testified that at one time he bought a used Sun motor tester, which included a battery charger unit, and that he sent the battery charger to Sun for repairs. Prior to sending the battery charger to Sun, he called two other concerns who said "they don't care to repair them." [51]

54. Mr. Langlois is the only witness called by complaint counsel who testified that he currently owns Sun automotive testing equipment. He testified that an independent repair firm has repaired Sun equipment for him. His testimony was simply that he decided that he wanted to deal with Mr. Turner, and did. There is no testimony that Mr. Langlois has been deprived of a free choice; on the contrary, he exercised his free choice and sent the equipment to Turner. In addition, he has exercised his free choice by repairing Sun equipment himself whenever he can, and in that connection he has purchased numerous repair parts from Sun.[52]

CONCLUSIONS

The crux of the theory of complaint counsels' case is concisely, clearly, and well stated at pages 33–35 of their reply to respondent's Proposed Findings of Fact, Conclusions of Law and Brief. It is as follows:

> The evidence in this record shows that respondent has established a substantial monopoly in the service and repair of Sun brand automotive testing equipment throughout the United States. Respondent's monopoly was established through the imposition of unreasonable trade restraints on both

[50] See Tr. 675, 669–670, 672, 671.

[51] See Tr. 643–646.

[52] See Tr. 594–595, 599, 601; RX 8, 9, 10.

independent repairmen engaged in the repair of automotive testing equipment of all types and brands and, in addition, upon owners of Sun brand automotive testing equipment who have been deprived of any choice in selecting a repair facility, and have been forced to send their defective equipment to the respondent for repair. The unreasonable restraints established by the respondent were created by respondent's refusal to sell repair parts and to provide pictorials to independent repairmen. Without respondent's exclusionary practices, independent repairmen would be able to service and repair Sun brand automotive testing equipment and to compete with the respondent in this line of commerce. Owners and users of Sun brand equipment would be free to select a repair facility of their choice on the basis of a competitive market considering cost, service, convenience, etc.

Counsel supporting the complaint believe that the factual and legal issues in the present matter are analogous to those in *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 334 U.S. 392 (1952). While that case relates to the use of long-term exclusive dealing contracts to restrain competition and impose a monopoly and the present case relates to a refusal to deal, which forecloses competition by independent repairmen and compels owners of Sun brand automotive testing equipment to send their equipment to the respondent for service and repair, the same legal considerations are applicable to both cases. In the cited case the Supreme Court said:

. . . The vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly in violation of the Sherman Act. And when the Sherman Act is involved the crucial fact is the impact of the particular practice on competition not the label that it carries. See *United States* v. *Masonite Corp.*, 316 U.S. 265, 280, 62 S. Ct. 1070, 1078, 86 L. Ed. 1461.

The Commission found in the present case that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. Those findings are supported by substantial evidence. This is not a situation where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices. The number of outlets for the films is quite limited. And due to the exclusive contracts, respondent and the three other major companies have foreclosed to competitors 75% of all available outlets for this business throughout the United States. It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an "unfair method of competition" within the meaning of §5 of the Federal Trade Commission Act.

. . . The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.

The "Unfair methods of competition", which are condemned by §5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 814. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.*, 291 U.S. at pages 310–312, 54 S. Ct. at pages 425–426. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act, see *Federal Trade Commission* v. *Beechnut Co.*, 257 U.S. 441, 453, 42 S. Ct. 150, 154, 66 L. Ed. 307—to stop in their incipiency acts and practices which, when full blown, would violate those Acts, see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 463, 466, 61 S. Ct. 703, 706, 707, 85 L. Ed. 949, as well as to condemn as 'unfair method of competition' existing violations of them. See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 691, 68 S. Ct. 793, 798, 92 L. Ed. 1009.

The difficulty with the foregoing "Conclusion" reached by complaint counsel is they assume to begin with that proof of monopoly power has been established. If this were so, the potentiality of monopolization might possibly result in the imposition of a competitive effect, even from a minor restraint such as inconvenience relating to a small segment of the over-all automotive testing equipment repair market. The evidence adduced with regard to the alleged restraint here is not only barren of proof by implication or otherwise that a monopoly was established by respondent's restraint, but it is also barren of proof that the restraint, if any, standing alone was of such materiality as to justify a conclusion that competitive injury or monopolization could conceivably result therefrom.

The case involves a naked unilateral refusal to sell, as enunciated by Sun's policy, without more. It is not alleged that respondent has conspired or combined with anyone, or acted other than unilaterally, in refusing to sell its parts and accessories to persons other than its customers.

Nor is there any issue concerning any alleged refusal to deal with price cutters. Nor is it alleged that Sun has refused to deal with one member of a class while discriminatorily continuing to engage in business with other members of the class; Sun has simply limited its market to only one class of customer—namely, the users of its equipment.

Further, no issue of monopoly is presented here. Complaint counsel has not even defined a relevant market in which any monopoly might exist.

Whatever relevant market might conceivably be drawn in this

case, there is completely lacking any evidence with respect to monopolization. There is no evidence of the size of any industry, except that there are upwards of 200 manufacturers of automotive testing equipment in the United States and thousands of distributors selling such equipment.[53] There is no relevant evidence of the size of any concerns in any industry (except Sun).[54] There is no evidence of the degree of concentration of any industry. There is no evidence of Sun's position in any industry. The record does not "reveal even the most basic information concerning the structure of the industry." *Rural Gas Service Inc.* 59 F.T.C. 912, 918 (1961); *cf U.S.* v. *Charles Pfizer Co., Inc.*, 1965 Trade Cases, par. 71, 445 (E.D. N.Y.).

The allegation of the complaint that Sun is the "dominant" manufacturer of automotive testing equipment is not supported by the evidence. Moreover, the allegation of "dominance" is not an allegation of monopoly power. As pointed out in *Bailey's Bakery, Ltd.* v. *Continental Baking Company*, 235 F. Supp. 705, 718 (D. Hawaii 1964): "The possession of monopoly power is something other than the status in a market of a dominant firm. The dominant firm may have neither the power to exclude competitors, nor the power to fix prices."

In the instant case, there is no evidence whatever that Sun has the power to exclude competition in any market or to control prices in any market. Indeed, the complaint itself expressly acknowledges that there is "substantial competition" in the manufacture, distribution and sale of automotive testing equipment.[55]

Nor is there any evidence of any intent to monopolize any market. As the Supreme Court said in *Times Picayune Publishing*

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[53] See Tr. 172, 149. In addition, there are probably thousands of concerns engaged in the repair of automotive testing equipment. Allen Electric alone has approximately 100 authorized repair agencies (Tr. 437), and Marquette has 50 authorized service depots in addition to its own factory service centers (Tr. 479–480). But there is no evidence of the size of any market in terms of dollar volume.

[54] The sales figures of Allen, Marquette, and Snap-On prove nothing. First, the testimony in respect thereto showed that there is a complete lack of consistency and certainty as to what is or is not automotive testing equipment; in respect to both Snap-On and Marquette the sales figures do not even include sales of all products considered by the company itself to be test equipment (Tr. 339–407, 462–3, 489–492). Marquette's figures do not purport to be their sales of automotive testing equipment, but only sales of "engine analyzing equipment" (CX 24). Secondly, the figures do not show sales in the same market as that in which Sun sells; all three of those companies sell at *wholesale* to distributors whereas Sun sells exclusively at *retail* to the users of the equipment. Thirdly, the amounts of their wholesale sales (at substantial discounts from list) are not related to the amounts of Sun's retail sales (at list) and cannot be compared. Indeed, complaint counsel stated that such comparative data would be irrelevant (Tr. 448, 486). Finally, the sales data is of no relevance except for purposes of comparison with *total* industry sales, and no such comparative data was presented.

[55] See Complaint, par. 5.

Company v. *United States*, 345 U.S. 594, 626 (1953): "An insufficient showing of specific intent vitiates this part of the government case . . . . A specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged."

Complaint counsel has taken the position that the illegality of Sun's policy can be established by simply proving the refusal to sell and showing that it has some effect on independent repairment. At the prehearing conference, during the discussion of Sun's policy of selling only to owners of its equipment, the following colloquy took place:[56]

HEARING EXAMINER BUTTLE: And this is the only market they are willing to seek insofar as their repair parts are concerned. In other words, you have to have their testing equipment to get the repair parts. Mr. Pollock says that this is perfectly proper. There is nothing illegal about it. And you say it is illegal for them to restrict the market in this respect insofar as that issue is concerned. Is that your position?

Mr. Miller: Because of the effects, yes, sir . . .

The Alleged Effects Have Not Been Proved

Reiterating complaint counsel's position, the crucial factual issues, aside from unproved monopolization, are (1) whether the effect of the policy has been to preclude independent repairmen from repairing Sun's automotive testing equipment, and (2) whether the effect has been to deprive the owners of Sun equipment of a freedom of choice as to repairmen that they wish to utilize.[57]

As to the first issue, complaint counsel has failed to prove its allegation that independent repairmen have been precluded from repairing Sun equipment, and the evidence is directly to the contrary.

Some independent repairmen still repair all types of Sun equipment; others repair some but not all types. Parts needed for the repair of Sun equipment can be and are obtained from various sources: the owner of the equipment can procure the part from Sun for the repairman; some repairmen have obtained parts by using the letterhead of an owner; equivalent parts from other manufacturers of automotive testing equipment can be substituted; parts can be obtained from the source from which Sun procures the part; parts can be obtained from electronic supply houses; and certain parts can be fabricated.[58]

[56] See Tr. 12–13.

[57] See Tr. 8–9.

[58] See Tr. 296, 305–306, 254, 546, 692; Answer, par. 6; RX 8, 9, 10; Tr. 182–184, 254, 257, 391, 512, 536, 549–550, 559–560, 714–715, 804–819.

The record is equally clear that Sun's policy of refusing to distribute its "pictorial" to independent repairmen has not precluded them from repairing Sun equipment. The pictorials can be obtained from or through an owner of Sun equipment. Moreover, Sun equipment can be and is repaired without the pictorials; pictorials are not necessary but simply expedite the tracing of the problem.[59]

In addition, one of the Commission's own witnesses testified that he did not solicit repairs of Sun equipment even when he was purchasing parts from Sun. Repairmen are interested in repairing Sun equipment only if the parts can be purchased from Sun at a discount and only if the parts can be stocked, since without the profit on parts, and considering the time necessary to send for and get the parts, the repairs are not profitable.[60]

In short, the repairman's objection is not inability, but inconvenience. The testimony is that it is possible to repair Sun equipment, but not profitable. Because of Sun's policy, the independent repairman must exert a minimal extra effort to obtain parts for and locate problems in Sun equipment. But this does not demonstrate that Sun's policy is unlawful. Sun is not obligated to change its traditional marketing methods just for the purpose of making it more convenient for its competitors to compete with Sun.

As to the second issue, the owners of Sun equipment are free to select whomever they choose to repair their equipment. There is no dispute that owners of Sun equipment may and do purchase repair parts and accessories from Sun. Sun imposes no requirement that the parts and accessories sold to owners must be installed by Sun personnel, or that any other repair services must be performed by Sun personnel. The owner may install the parts himself or he may have them installed by anyone he chooses.[61]

Moreover, as previously observed, independent repairmen can obtain parts for the repair of Sun equipment from various sources, and they can and do repair Sun equipment. Thus, even without availing themselves of the opportunity to purchase parts from Sun, owners can send their equipment to independent repairmen for repair if the repairman will accept the work. Again, however, the problem is not that repairmen are unable to repair

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[59] See Tr. 265, 521, 703, cf. 389. Mr. Bender testified that schematics "make it easier is the main thing" (Tr. 703).

[60] See Tr. 509, 517, 303, 701, 717–718.

[61] See Answer, par. 6; RX 8, 9, 10; Tr. 10–11, 754.

Sun equipment; they simply "don't care to repair them," since it is less convenient and less profitable to repair Sun equipment if they have to get the parts from another source than Sun. But this does not establish that owners are deprived of freedom of choice.[62]

The position taken by complaint counsel is that Sun should be deprived of its right to sell to whomever it chooses so that independent repairmen may have a right to buy from whomever they choose; that Sun should be deprived of its freedom of choice as to the customers to whom it will sell parts so that a customer can have a freedom of choice as to the person from whom it will buy parts.

Complaint counsel's position ignores the fact that a lawful activity is not made unlawful merely because its effect is to make competition inconvenient or more difficult. Nor does such an effect convert the exercise of a fundamental right—the right to select one's customers, the right to determine one's method of distribution—into an unfair method of competition.

It would indeed be a revolutionary concept if, as complaint counsel suggest, a private businessman loses his right to select his own customers merely because some potential customer is inconvenienced or otherwise "injured" by the refusal to sell. For example, no doubt an automobile dealer selling Ramblers might be "injured"—in the sense of losing potential profit—if he were denied a Chevrolet franchise by General Motors. But it certainly does not follow that GM's denial to him of a Chevrolet franchise is unlawful.

As the Commission stated in *Doubleday & Co.*, 50 F.T.C. 263, 266 (1953):

> The question for decision is whether this competitive situation results from practices which are violative of law. Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail bookseller has lost sales to a book club or cannot successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent. "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair." *Federal Trade Commission* v. *Paramount Famous-Laskey Corp.*, (C.A. 2 1932), 57 F.2d 152, 157.

This principle is particularly appropriate when the allegedly unfair act consists merely of declining to sell to one's competitors.

[62] See Tr. 646.

A decision directly in point is *Chamber of Commerce of Minneapolis* v. *F.T.C.*, 13 F.2d 673 (8th Cir. 1926).

That case involved the refusal of the Chamber of Commerce to furnish its market quotations to competitors. The court held that the Commission's order, which required the furnishing of market quotations to the competitors, was invalid because the refusal was not shown to be an unfair method of competition.[63]

The court went on to say: [64]

> It would be a strange situation, logically or legally, where one could be compelled to furnish its own property to a competitor to be used as a major weapon of its own destruction . . . . Competition is by no means legally free from proper restraint, and it is beyond all reason to require anyone to furnish the means of his own destruction to another who is bent upon accomplishing such destruction.

Similarly, in *F.T.C.* v. *Sinclair Refining Co.*, 261 U.S. 463, 475–476 (1923), the Supreme Court stated:

> The powers of the Commission are limited by the statutes. It has no general authority to compel competition to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.

Complaint counsel's "public utility" concept[65] of free enterprise as applied to the facts of this case, has no support in law. "We have not yet reached the stage where the selection of a trader's customers is made for him by the government." (either directly or indirectly), *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, 48 (2d Cir. 1915),[66] unless the exercised business policy at issue is (1) reflective of an illegal monopolistic tendency, (2) discriminatory and injuriously affects competition, (3) inherently unconscionable or (4) otherwise violative of public policy. See also *F.T.C.* v. *Raymond Brothers-Clark Co.*, 263

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[63] See p. 687.

[64] See p. 688.

[65] Requiring the doing of business in an enlarged or universal market.

[66] In that case, the defendant refused to sell its products to retailers or consumers, and sold exclusively to wholesalers. The court said (p. 47): "There is nothing unusual about such a course of business, and certainly it is no offense against common law, statutes, public policy, or good morals for a trader to confine his sales to persons who will buy from him in large quantities." Sun, by comparison, refuses to sell to wholesalers and retailers and sells exclusively to consumers. This is obviously no more offensive than the policy approved in the *Cream of Wheat* case.

U.S. 565 (1924); *Timken Roller Bearing Company* v. *F.T.C.*, 299 F.2d 839 (6th Cir. 1962), *cert. denied*, 371 U.S. 861 (1962); *Naifeh* v. *Ronson Art Metal Works*, 218 F.2d 202 (10th Cir.1954); *Nelson Radio & Supply Co.* v. *Motorola*, 200 F.2d 911 (5th Cir. 1952); *Chicago Seating Co.* v. *S. Karpen & Bros.*, 177 F.2d 863, 866 (7th Cir. 1949); *Brosious* v. *Pepsi-Cola Co.*, 155 F.2d 99 (3d Cir. 1946); *Mennen Company* v. *F.T.C.* 288 Fed. 744, 780 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923); *Journal of Commerce Publishing Co.* v. *Tribune Co.*, 286 Fed. 111 (7th Cir. 1922).

Numerous cases have recognized the right of a private business to select its customers without governmental interference.

The right to select one's customers existed at common law,[67] is recognized by statute,[68] and is limited only if the selection is concerted or monopolistic.

In *Times-Picayune Publishing Company* v. *United States*, 345 U.S. 594, 625 (1953), the Supreme Court stated:

> Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1 . . . different criteria have long applied to qualify the rights of an individual seller.

And in *South End Oil Company* v. *Texaco, Inc.*, 237 F. Supp. 650, 653 (N.D. Ill. 1965), the court said:

> In order to maintain a treble damage action for refusing to deal, plaintiff must show either (1) that the refusal is accompanied by unlawful conduct or agreement or (2) that the refusal is designed to create or maintain a monopoly. Absent such a showing, a manufacturer is free to "exercise his own independent discretion as to parties with whom he will deal" and "may announce in advance the circumstances under which he will refuse to sell".

Sun's marketing philosophy of dealing directly with the user is motivated in part, by Sun's desire to protect its reputation for quality, and in part to protect its limited market. Sun's reputation suffers when Sun equipment is repaired by persons unfamiliar with the equipment or unqualified to repair due to lack of proper

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[67] *Green* v. *Victor Talking Mach. Co.*, 24 F.2d 378 (2d Cir. 1928). *Cf. Dart Drug Corporation* v. *Parke, Davis & Company*, 221 F. Supp. 948, 949 (D. D.C. 1963) ("At common law any manufacturer or trader had a right to deal or refuse to deal with anyone that he chose, unless indeed he was engaged in a public calling . . . ."); *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, 49 (2d Cir. 1915) ("Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him . . . . Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular.").

[68] Section 2(a) of the Clayton Act (15 U.S.C. 13(a) states: "[N]othing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

equipment or training, or unconcerned with the reputation of the company.[69]

A somewhat analogous problem was presented in *Pick Manufacturing Co.* v. *General Motors Corporation,* 80 F.2d 641 (7th Cir. 1935), *aff'd,* 299 U.S. 3 (1936). There the court held that a requirement that GM dealers use "genuine" GM repair parts exclusively did not violate section 3 of the Clayton Act. The court held that such a requirement is "entirely appropriate and legitimate . . . and is proper and reasonable in the furtherance and protection of its business." Defective and insufficient repairs, causing unsatisfactory operation, result in blame to the manufacturer and loss of sales. "The preservation of the good will of the public is directly involved." [70]

Refusals to sell in order to protect the quality reputation of the product have also been expressly approved in *Coca-Cola Co.* v. *J. G. Butler & Sons,* 229 Fed. 224 (E.D. Ark. 1916); *Brosious* v. *Pepsi-Cola Co.,* 155 F.2d 99 (3d Cir. 1946); and *G. D. Searle & Co.* v. *Institutional Drug Distributors,* 151 F. Supp. 715 (S.D. Cal. 1957).

Furthermore, according to the complaint,[71] independent repairmen are engaged in "substantial competition" with Sun. Thus, under complaint counsel's "public utility" theory, Sun would be required to sell to its competitors the materials for competing against Sun. Through such sales, Sun would be "cutting its own throat." [72] As the court said in *Chamber of Commerce of Minneapolis* v. *F.T.C.,* 13 F.2d 673, 688 (8th Cir. 1926): "It would be a strange situation, logically and legally, where one would be compelled to furnish its own property to a competitor to be used as a major weapon of its own destruction."

There is also substantial evidence in this case to the effect that the so-called "independent repairman" is not always independent. Witnesses testifying herein, engaged in the business of repairing automotive testing equipment, indicated they were the "authorized service representative" for one or more manufacturers of products competitive with Sun products. Furthermore, the principal portion of the business of these repairmen comes through jobbers who sell automotive testing equipment in competition with

[69] See Tr. 182, 753, 756.

[70] See also the recent decision by the Commission in *Carvel Corporation,* Docket 8574 (July 19, 1965). A requirement in a franchise agreement prohibiting the sale of non-Carvel products was held to be ancillary to Carvel's purpose of protecting the company's good will and trademark image.

[71] Complaint, par. 5.

[72] See Tr. 180.

Sun. In addition, most of the witnesses also sell competitive testing equipment themselves. Thus, the loyalty of these repairmen is to manufacturers other than Sun; their interest is in promoting the sale of testing equipment manufactured by others. In the circumstances, it is scarcely surprising that Sun does not choose to have its equipment repaired by the agents and representatives of such other manufacturers.[73]

The reasonableness of such a position has been pointed out in a number of cases. In *Deltown Foods, Inc.* v. *Tropicana Products, Inc.*, 219 F. Supp. 887 (S.D. N.Y. 1963), defendants discontinued using plaintiff as a distributor for defendant's orange juice when plaintiff began packaging and selling its own brand of orange juice. In upholding the refusal to sell, the court pointed out "the damage plaintiffs could do to defendants' product by treating it as second best," and accepted defendants' argument that it would be "business suicide" if they continued to sell their orange juice to a distributor who had become a competitor. See, also, *e.g.*, *Blue Bell Co.* v. *Frontier Refining Co.*, 213 F.2d 354, 358–359 (10th Cir. 1954) ("a mere declination to sell to competitors or to supply retail outlets in a competitive market is not illegal"); *Journal of Commerce Pub. Co.* v. *Tribune Co.*, 286 Fed. 111, 112 (7th Cir. 1922); *Andrew Jergens Co.* v. *Woodbury, Inc.*, 271 Fed. 43, 44 (D. Del. 1920); *Camfield Mfg. Co.* v. *McGraw Electric Co.*, 70 F. Supp. 477, 481 (D. Del. 1947).

With regard to the charge that Sun has refused "to furnish to persons and firms engaged in the repair of automotive testing equipment diagrams, schematics or similar documents showing the make-up of its automotive testing equipment," the evidence is that Sun does not sell any such "diagrams, schematics or similar documents" to anyone. Further more, Sun does not give its schematics to anyone; these consist of manufacturing drawings which Sun regards as highly confidential. Furthermore, Sun does distribute its so-called "pictorials" (which are prepared for use by Sun repair branches) to owners of Sun equipment upon request and without charge. Such a "pictorial" contains a detailed wiring diagram and guide for repair of the particular item of equipment. The illegality of this policy is not apparent.[74]

As heretofore stated, although complaint counsel urge that the factual and legal issues in this case are analogous to "the use of

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[73] See Tr. 204, 252, 294, 507, 534, 542–544, 617–618, 690, 710–711, 253, 294, 526, 214, 279, 291, 310–310A, 565–566.

[74] See Complaint, par. 6; Tr. 763–768, 770–771; Answer, par. 6; Tr. 772.

long term exclusive dealing contracts to restrain competition and impose a monopoly," they overlook the fact that the acts and policies of the respondent are unilateral and that evidence of monopoly, probable monopolization from the alleged restraint or even an intent to monopolize, is absent. It is therefore not apparent to the hearing examiner that the facts in the case of *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 334 U.S. 392 (1952) are analogous as complaint counsel contend.

SUMMARY CONCLUSIONS

1. Sun Electric Corporation is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Counsel supporting the complaint have the burden of proving the allegations of the complaint. (Rules of Practice, section 3.14(a).) The burden has not been met.

3. No monopoly or attempt to monopolize any market has been proved. The record does not reveal even the most basic information concerning the structure of any relevant market. Respondent is engaged in substantial competition with others in the manufacture, distribution and sale of automotive testing equipment and, to the extent that Sun repairs automotive testing equipment, is engaged in competition with others in the repair thereof.

4. Respondent's refusal to sell repair parts and supplies, and to furnish "pictorials," to persons other than owners of respondent's equipment, according to the evidence, is unilateral in nature and without any established intent to monopolize any market.

5. Absent proof of conspiracy or monopolization, respondent has the right to select the class of customers to whom it will sell, and to refuse to sell to persons who are not owners of respondent's equipment. *F.T.C.* v. *Raymond Brothers-Clark Co.*, 263 U.S. 565 (1924); *Timken Roller Bearing Company* v. *F.T.C.* 299 F.2d 839 (6th Cir. 1962), *cert. denied*, 371 U.S. 816 (1962); *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915); *South End Oil Company* v. *Texaco, Inc.*, 237 F. Supp. 650 (N.D. Ill. 1965); *Best Advertising Corporation* v. *Illinois Bell Telephone Company*, 229 F. Supp. 275 (S.D. Ill. 1964), *aff'd.* 339 F.2d 1009 (7th Cir. 1965).

6. Subject to the foregoing, the effect on competitors of the exercise of this right by respondent does not create illegality. *Doubleday & Co.*, 50 *F.T.C.* 263 (1953); *Chamber of Commerce of Minneapolis* v. *F.T.C.*, 13 F.2d 673 (8th Cir. 1926).

7. Respondent, under the facts evidenced in this case, is not re-

quired to further justify its refusal to sell to persons other than the owners of equipment. *Journal of Commerce Pub. Co.* v. *Tribune Co.*, 286 Fed. 111 (7th Cir. (1922); *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915).

8. Moreover, as evidenced herein, Sun's refusal is based in part on recognized reasonable grounds, *i.e.*, to protect the quality reputation of its products, and to avoid "cutting its own throat" competitively. *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936); *Deltown Foods, Inc.* v. *Tropicana Products, Inc.*, 219 F. Supp. 887 (S.D. N.Y. 1963).

9. Respondent's policy, as evidenced herein, with respect to the distribution of schematics and pictorials is not an unfair trade practice. Respondent is not required to disclose its trade secrets contained in its schematics, or to furnish pictorials to its competitors to guide them in competing with respondent.

10. Respondent's traditional method of marketing, as evidenced herein, is not an unfair method of competition, or an unfair act or practice in violation of section 5 of the Federal Trade Commission Act. Accordingly, it is

ORDER

Ordered, That the complaint is herein and hereby dismissed.

ORDER DISMISSING COMPLAINT

This matter is before the Commission on the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint.

The complaint charges respondent, a manufacturer of automotive testing equipment, with refusing to sell parts and accessories for such equipment to persons engaged in the business of repairing automotive testing equipment and with refusing to furnish to such persons diagrams, schematics or similar documents showing the make-up of its equipment, and further charges that the effect of this practice has been to injure the ability of independent repairmen to compete with respondent in repairing respondent's automotive testing equipment and generally to injure, suppress or eliminate actual and potential competition in the repair of such equipment. The hearing examiner has filed an initial decision dismissing the complaint, finding that the allegations concerning the effects of respondent's refusal to deal have not been sustained by the evidence, and further finding that the evidence does not estab-