

IN THE MATTER OF
HORIZON CORPORATION

Docket 9017. Interlocutory Order, Oct. 5, 1976

Commission affirms ALJ's order denying respondent's claim of "self-evaluative privilege" for certain internal corporate records.

Appearances

For the Commission: *Alan N. Schlaifer, Eugene Kaplan, Paul L. Chassy, Lemuel W. Dowdy, and John M. Tifford.*

For the respondent: *Basil Mezines, David U. Fierst, Joel P. Bennett, Stein, Mitchell & Mezines, Washington, D.C., and Samuel Pruitt, Jr., J. Michael Brennan, Gibson, Dunn & Crutcher, Los Angeles, Calif.*

ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S ORDER
RULING ON RESPONDENT'S CLAIM OF PRIVILEGE FOR
CERTAIN INTERNAL CORPORATE RECORDS

The administrative law judge on August 10, 1976, issued an order denying respondent's claim of a "self-evaluative privilege" for certain internal corporate documents responsive to a subpoena duces tecum issued on July 1, 1976. The documents concern internal corporate programs which investigated and evaluated the sales practices of respondent's sales offices and sales representatives. Respondent submitted the documents to the ALJ for *in camera* inspection and asked that the documents not be disclosed to complaint counsel. The ALJ subsequently authorized respondent to file an interlocutory appeal from his ruling pursuant to Section 3.23(b) of the Rules of Practice.

Respondent claims that disclosure would be contrary to the public interest because it would discourage efforts by firms to investigate and evaluate their compliance with the law. According to respondent,

A lack of confidentiality inevitably will result in serious cramping of the investigative process simply because the incentives for any institution or business entity to engage in self-evaluative investigations pale considerably with the knowledge that the results may be used against it. A company probably will initially decide not to investigate, or if an investigation is held, there will at least be an unconscious effort to tailor the findings with an eye toward eventual litigation.¹

While the public interest may justify a refusal to permit inquiry into particular matters of discovery, we believe that the public policy must be compelling before it can outweigh the interest in full disclosure. We agree with respondent that efforts by businessmen to monitor the

¹ Application for Review of Administrative Law Judge's Order Ruling on Respondent's Claim of Privilege for Certain Internal Corporate Records at 6.

Order

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legality of their practices are clearly in the public interest. However, we are not persuaded the possibility that internal corporate documents will be the subject of a discovery order would lead businessmen to cease taking steps necessary to assure themselves of the legality and propriety of their conduct and to avoid practices that would subject them to law enforcement action. Respondent's arguments are, therefore, too speculative to warrant the withholding of relevant documentary evidence.² Accordingly,

It is ordered, That the administrative law judge's Order Ruling on Respondent's Claim of Privilege for Certain Internal Corporate Records be, and it hereby is, affirmed.

Commissioner Dole did not participate by reason of absence.

² Even if a "chilling effect" could be demonstrated, we doubt that the public interest would require non-disclosure. In *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973), relied on by respondent, the court upheld a claim of privilege with respect to reports prepared by a hospital staff committee. The court held that confidentiality was essential to the effective functioning of hospital staff meetings and that these meetings were in turn necessary to continued improvement in the care and treatment of patients. In *Jolly v. Superior Court of Pinal County*, 540 P.2d 658 (Ariz. 1975) also relied on by respondent, the court declined to "judicially create" a privilege "absent an overriding matter affecting public interest as found in several of the hospital cases." *Id.* at 662.

Complaint

IN THE MATTER OF

SOUNDTRACK CHEVELL INDUSTRIES, INC., ET AL.

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

Docket 8998. Complaint, Nov. 5, 1974—Decision, Oct. 7, 1976*

Consent order requiring the dissolution of a Dallas, Texas, talent promoting agency, and, among other things, requiring two of its officers to cease engaging in the talent promotion business in the future. Further, the order requires respondents to cease misrepresenting the nature and extent of services provided; misrepresenting the means by which clients are selected, the sums spent on client promotion, respondents' ability to obtain financial gains for their clients, and the size and power of any company with which they are associated. Respondents must provide a ten-day cooling-off period for any future service contract; notify all advertising media utilized by them that they are under a Commission order; and take steps to assure that employees and salesmen abide by the provision of the order.

Appearances

For the Commission: *Richard H. Gateley* and *John J. Hemrick*.

For the respondents: *Thompson, Knight, Simmons & Bullion*, Dallas, Texas.

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 Soundtrack Chevell Industries, Inc., a corporation, and William F. Temple, Gene Temple, and Helen Temple, individually and as officers, or former officers, of said corporation, and Lonnie Temple and Tommie Tubb, individually and as former salesmen of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. RESPONDENTS

PARAGRAPH 1. Respondent Soundtrack Chevell Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its registered office located at

* Complaint dismissed as to respondent Tommie Tubb by order dated April 22, 1975, 85 F.T.C. 405. Disposition as to respondents Gene Temple and Lonnie Temple is still pending before the Commission.

Room 343, Western Building, 2525 Ridgmar Boulevard, Fort Worth, Texas, and formerly with its principal office and place of business located at 1904 Montgomery St., Fort Worth, Texas.

Respondents William F. Temple, Gene Temple, and Helen Temple are individuals and are or were officers of the corporate respondent. They formulated, directed and controlled the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. The address of respondents William F. Temple and Helen Temple is 941 Miller Road, Clarksdale, Mississippi. The address of respondent Gene Temple is 16400 East Truman, Independence, Missouri.

Respondent Lonnie Temple is an individual and former salesman for Soundtrack Chevell Industries, Inc. With the consent of the officers and stockholders of the corporate respondent, respondent Lonnie Temple represented himself to be a vice president of corporate respondent. He formulated policies and directed and controlled acts and practices of the corporate respondent, and he participated and cooperated in the acts and practices of the other respondents, including the acts and practices hereinafter set forth. His present address is 160 West Lake Lodge, Bessemer, Alabama.

Respondent Tommie Tubb is an individual and former salesman for Soundtrack Chevell Industries, Inc. With the consent of the officers and stockholders of the corporate respondent, respondent Tommie Tubb represented himself to be a vice president of corporate respondent. He formulated policies and directed and controlled acts and practices of the corporate respondent, and he participated and cooperated in the acts and practices of the other respondents, including the acts and practices hereinafter set forth. His present address is Route 1, Box 220, Aledo, Texas.

II. NATURE OF TRADE AND COMMERCE

PAR. 2. Respondents are now and for some time last past have been engaged in the inducing, offering for sale and sale of contracts for the management and promotion of persons desiring careers as professional singers or entertainers.

Respondents have caused advertisements to be broadcast by radio stations or placed in newspapers and have caused the dissemination of brochures, pamphlets and other written solicitations to the public.

By and through the use of such advertisements, respondents are now inducing and have induced persons to arrange for free auditions conducted by respondents. By and through both oral and written representations made during or subsequent to said auditions, persons are induced and have been induced to execute contracts with respondents in consideration of such sums as \$1,000, resulting in a substantial

volume of business for respondents. In the period from January 1973 through September 1973, this volume exceeded \$250,000.

III. JURISDICTION

PAR. 3. In the furtherance of their aforesaid business respondents have caused persons to travel from various States of the United States to respondents' place of business in the State of Texas for the purpose of doing business with respondents. Respondents solicit and receive consideration for contracts executed in the course and conduct of their business as aforesaid through the United States mail and otherwise from persons residing in various States of the United States. Respondents maintain and have maintained at all times mentioned herein a substantial course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business respondents now cause and for some time last past have caused the dissemination of advertisements over radio and in newspapers of general circulation in commerce as "commerce" is defined in the Federal Trade Commission Act.

IV. ACTS AND PRACTICES

PAR. 4. In the course and conduct of their business and for the purpose of inducing, offering for sale and the sale of contracts for future services, respondents are now making and have made numerous statements and representations to the public and prospective clients.

Typical and illustrative of written statements made in respondents' advertising, but not all inclusive thereof, are:

1. Among all the independent producers of master recordings in America, Mr. Temple knows the right people and has their confidence. His successful record of producing what the major companies will buy is a distinct asset to a new artist.
2. Bill Temple has the knowledge, the experience and the enthusiasm to work successfully with new talent and get enormous results.
3. Proven ability to lease to major labels.
4. We have strict guidelines and they help our odds by giving us the artist with a high potential to win.
5. Turn yourself over to us and let us cut your master and start your recording career.
6. Singing Talent Search—for amateur singers who want to be considered by major recording company. Country, Pop, Rock, Folk, Gospel, & Rhythm and Blues. Audition is free and recorded. Call at once — 817-261-6112.

PAR. 5. By and through the use of the above quoted advertisements and written representations, and others of similar import and meaning but not expressly set out herein, the respondents have represented and are now representing directly or by implication that:

1. Respondents' clients are assured of successful recording careers

because William F. Temple has a close working relationship with key personnel in the recording industry and has a successful record of producing talent for major recording companies.

2. There is a high probability that respondents' clients will become professional singers or entertainers because of William F. Temple's knowledge and experience in the industry.

3. Respondents have leased numerous tapes to major recording companies.

4. Respondents have strict guidelines and procedures for selecting those persons to be placed under contract.

5. Respondents initiate recording careers for their clients.

6. Soundtrack Chevell Industries, Inc. is a major recording company.

PAR. 6. By and through use of the following oral representations, and others of similar import and meaning but not expressly set out herein, the respondents have represented and are now representing directly or by implication that:

1. Songs will be selected especially to fit clients' voices.

2. The \$1,000 consideration for the contract is an investment, an expression of self-confidence and an assurance that clients will do their best, and that such consideration will be returned when the clients' tapes are leased to major recording companies.

3. Respondents will invest large sums of money in certain clients, such as \$6,000 and \$20,000 per client.

4. Only the most promising clients will be placed under contract and respondents have to audition up to 275 persons in order to find a promising client.

5. Eighty percent of respondents' clients become professional singers or entertainers.

PAR. 7. In truth and in fact:

1. Neither William F. Temple nor any other respondent has a close working relationship with key personnel in the recording industry or has a successful record of producing talent for major recording companies.

2. There is not a high probability that respondents' clients will become professional singers or entertainers since neither William F. Temple nor any other respondent has sufficient knowledge and experience in the industry to perform as they promise.

3. Respondents have leased few, if any, tapes to major recording companies.

4. Respondents do not have strict guidelines or procedures for selection of potential clients.

5. Respondents do not initiate recording careers for their clients.

6. Soundtrack Chevell Industries, Inc. is not a major recording company.

7. Respondents do not select songs especially to fit the clients' voices.

8. The \$1,000 paid by clients is not an investment but is consideration for the contract which is not returned to the clients.

9. Respondents do not invest \$6,000 to \$20,000 in any client.

10. Respondents do not generally offer a contract to only 1 out of 275 persons auditioned but offer a contract to virtually all persons who can pay the \$1,000 consideration, or a portion thereof, with a sufficient credit record to finance the balance.

11. Few, if any, of respondents' clients become professional singers or entertainers as a result of contracting with respondents.

Therefore, the respondents' statements, representations or implications, as set forth in Paragraphs Four, Five and Six hereof, are and were false, misleading and deceptive.

PAR. 8. By and through the representations alleged in Paragraphs Four, Five and Six and in the further course and conduct of their business as aforesaid, respondents represent that prospective clients or clients will become professional singers or entertainers achieving stardom and extraordinary financial gains. During such representations, respondents use intense, emotional sales techniques to persuade a prospective client or client to execute a contract. Respondents solicit and obtain signatures to the contract from persons who have not had a reasonable opportunity to seek assistance or counsel in understanding the contract provisions or determining whether they are equitable. The soliciting or obtaining of an agreement by respondents involving a substantial financial commitment by the prospective client or client where such person has been subjected to respondents' sales methods or denied the opportunity to seek assistance or counsel is an unfair act or practice.

PAR. 9. By and through the acts and practices described herein, respondents have engaged in a course of conduct when each of them knew or should have known that they possessed neither the expertise nor the capability to promote any client successfully. Therefore, respondents' continued participation in the business described in Paragraphs Two and Three in an unfair act or practice and a continuing violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C. §45).

PAR. 10. In the further course and conduct of their aforesaid business, respondents now induce and have induced clients to pay substantial sums of money to the respondents without disclosing to such clients facts concerning the probability that clients will receive a financial gain

as a result of contracting with respondents. Since few, if any, of respondents' clients ever receive financial gains, respondents fail to disclose material facts which, if known to certain prospective clients, would likely affect their decision as to whether to execute a contract with respondents. Respondents' failure to make such disclosures is an unfair or deceptive act or practice.

PAR. 12. Respondents as aforesaid, have been, and are now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money for contracts whose value to the said persons for promotional activities by respondents was and is virtually nil. Respondents have received the said sums and have failed to offer to refund and refuse to refund such money to such persons.

The use by respondents of the aforesaid practices and their continued retention of the said sums, as aforesaid, is an unfair act or practice and a continuing violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45).

PAR. 12. The use by respondents of the aforesaid unfair, false, misleading and deceptive acts and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the execution of contracts with respondents by reason of said erroneous and mistaken beliefs.

PAR. 13. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the management and promotion of members of the public desiring careers as professional singers or entertainers.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, have caused and are now causing substantial pecuniary losses to persons contracting for their services and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

DECISION AND ORDER AS TO RESPONDENTS SOUNDTRACK
CHEVELL INDUSTRIES, INC., WILLIAM F. TEMPLE AND HELEN
TEMPLE

The Commission having issued its complaint on November 5, 1974, charging the respondents named in the caption hereof with violations 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 motions certified to the Commission under Section 3.25 of the Commission's Rules of Practice that, in the circumstances presented, there was a likelihood of settlement and that the public interest would be served by withdrawing the matter as to respondents Soundtrack Chevell Industries, Inc., William F. Temple and Helen Temple, from adjudication; and respondents Soundtrack Chevell Industries, Inc., William F. Temple and Helen Temple and Counsel for the Commission having executed an agreement containing a consent order, an admission by respondents Soundtrack Chevell Industries, Inc., William F. Temple and Helen Temple of all 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 said 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 thereafter considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition in part of this proceeding, and having accepted said agreement, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order in disposition of the proceeding as to respondents Soundtrack Chevell Industries, Inc., William F. Temple and Helen Temple:

1. Respondent Soundtrack Chevell Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its principal office and place of business formerly located at 1904 Montgomery St., Fort Worth, Texas. The address of the corporate respondent is the same as the individual respondents.

Respondents William F. Temple and Helen Temple are individuals and are or were officers of the corporate respondent. They formulated, directed and controlled the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. The address of respondents is 4405 Orchard Hill Dr., West Carrollton, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Soundtrack Chevell Industries, Inc., William F. Temple and Helen Temple and the proceeding is in the public interest.

ORDER

I. *Definitions*

For purposes of this order the following definitions shall apply:

A. "Future Services" shall include any arrangement whereby one party pays or contracts to pay a sum of money in the belief that he may receive, as a result of such arrangement, the delivery or performance, at least partly in the future, of any service, benefit, promotion, course of instruction, sum of money, or similar thing of value; the term shall include, but shall not be limited to, any arrangement whereby one party pays or contracts to pay a sum of money in the belief that he may receive a financial gain as a result of such arrangement.

B. "Client" shall mean any person who has entered into an agreement with respondents requiring the payment of money to respondents.

II.

A. *It is ordered*, That the officers, and William F. Temple and Helen Temple, individually and as officers, or former officers, of said corporation, directly or through any corporation, subsidiary, division or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from offering to engage in or engaging in the management or promotion of persons desiring careers as professional singers or entertainers.

III.

A. *It is further ordered*, That respondents, William F. Temple and Helen Temple, individually and as officers, or former officers, of Soundtrack Chevell Industries, Inc., in connection with the advertising or offering of future services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing directly or indirectly, by any means, except as required by this order, that individual clients or prospective clients may obtain financial gains as a result of contracting with respondents.
2. Misrepresenting, directly or indirectly, by any means:
 - (A) Respondents' ability to obtain financial gains for their clients.
 - (B) The character, nature and extent of services actually provided by respondents.

- (C) The procedures used by respondents in selecting those persons who are offered contracts.
 - (D) The size, market position and capabilities of any company with which respondents are associated.
 - (E) Respondents' intent to invest in any client a sum of money greater than the sum of money paid or agreed to be paid by such client.
3. Failing to provide each client or customer with a written contract and two copies thereof at the time such contract is signed by the client or customer.
 4. Entering any transaction which shall become binding on the client or consumer prior to midnight of the tenth day, excluding Sundays and legal holidays, after the date of signing the contract.
 5. Failing to print clearly and conspicuously on the contract or other instrument in 12-point boldface type on the top of the first page of all contracts or other instruments required to be given the client or customer by paragraph 3 preceding the following language.

NOTICE REQUIRED BY THE FEDERAL TRADE COMMISSION.

YOU ARE ENTITLED TO RECEIVE TWO COPIES OF THIS CONTRACT. YOU HAVE TEN (10) DAYS, EXCLUDING SUNDAYS AND LEGAL HOLIDAYS, AFTER SIGNING THIS CONTRACT IN WHICH TO DETERMINE WHETHER TO CONTINUE THIS CONTRACT OR CANCEL IT WITH FULL REFUND. YOU MAY CANCEL THIS CONTRACT FOR ANY REASON DURING THAT TIME. IF YOU DO DECIDE TO CANCEL, YOU ARE ENTITLED TO RECEIVE A FULL REFUND WITHIN TEN (10) DAYS AFTER THE NOTICE OF CANCELLATION IS RECEIVED. YOU MAY USE ANY REASONABLE METHOD TO NOTIFY (*name of respondent*), BUT FOR YOUR OWN CONVENIENCE, YOU MAY WISH TO USE CERTIFIED MAIL WITH RETURN RECEIPT REQUESTED, OR A TELEGRAM. HOWEVER, YOU MAY ALSO CANCEL THE CONTRACT AND OBTAIN YOUR REFUND BY SIGNING AND DATING THIS NOTICE AND RETURNING IT TO (*name of respondent*) AT (*address*).

I HEREBY CANCEL THIS CONTRACT.

(DATE)

(YOUR SIGNATURE)

6. Failing to cancel any contract for which a notice of cancellation was sent by any reasonable means within the ten (10) day grace period above mentioned, or failing to refund any money paid by clients or customers within ten (10) days after the date of receipt of such notice of cancellation.
7. Negotiating any promissory note, installment payment agreement or other instrument of indebtedness to a finance company or other third party prior to midnight of the tenth day, excluding Sundays and legal holidays, after the date of execution of the contract by the client or customer.
8. Failing, in all pamphlets, brochures and other promotional materials used in connection with a respondent's business to make the following disclosures in the manner and form provided for herein.

At the time respondents submit advertising to any radio or television station, they shall provide a copy of the following notice to each such station:

"NOTICE

(Name of Respondent) IS UNDER A FEDERAL TRADE COMMISSION ORDER TO CEASE AND DESIST FROM UNFAIR AND DECEPTIVE ACTS AND PRACTICES. YOUR ATTENTION IS DIRECTED TO AN AGREEMENT BETWEEN THE FEDERAL TRADE COMMISSION AND THE FEDERAL COMMUNICATIONS COMMISSION DATED APRIL 27, 1972."

9. Failing to maintain for a period of three (3) years after any advertisements are disseminated, records disclosing:
 - (A) the date or dates each advertisement was published; and
 - (B) the name and address of the newspapers, other publications or broadcast media disseminating said advertisement.
- B. *It is further ordered*, That respondents and each of them:
 1. Disclose in writing to every client or prospective client in connection with any future service contract:
 - (A) The percentage of respondents' clients, who as a result of contracting with respondents, have received earnings greater than the consideration paid by such clients to respondents.
 - (B) The number of respondents' clients who, as a result of contracting with respondents, have received earnings

greater than the consideration paid by such clients to respondents.

Each disclosure hereinabove required shall be made clearly and conspicuously on a separate document. The disclosures shall be delivered to the relevant party or parties prior to the signing of any contract. Each disclosure shall include an appropriate place for the signature of all parties to the contract, including respondents. Prior to entering into a contract respondents shall submit each disclosure to any and all prospective parties to the contract and obtain the signature of any and all parties to the contract including respondents on each disclosure statement. Respondents shall retain a signed and dated copy of each such disclosure acknowledging receipt of said disclosures by any and all parties to the contract, other than respondents, and retain said disclosure statements for a period of three (3) years.

C. *It is further ordered*, That respondents cease and desist from:

1. Including in any contract or other document any waiver, limitation or condition on the right of a client to cancel an agreement or receive a refund under any provision of this order.
2. Misrepresenting the right of a client to cancel an agreement or receive a refund under any provision of this order or any applicable statute or regulation.
3. Making any representations or taking any action which is inconsistent with or detracts from the effectiveness of this order.

D. *It is further ordered*, That the individual respondents not engage in any course of conduct which contravenes the refund rights of clients or prospective clients provided by this order. The establishment and maintenance of escrow accounts with financial institutions insured by the Federal Deposit Insurance Corporation or a similar institution will be deemed to satisfy this paragraph of the order.

E. *It is further ordered*, That respondents, upon receipt of a complaint from a client alleging facts that indicate this order may have been violated and requesting a refund or cancellation of the contract, refund all monies paid by such clients where respondents determine, after a good faith investigation, that one or more of the paragraphs of this order may have been violated in connection with such client's transaction with respondents; *provided, however*, that in the event respondents refund any money pursuant to this paragraph of the order, the sole fact of such refund shall not be admissible against respondents in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order; and *further provided*, that this paragraph shall not be applicable to transactions in which the contract was entered into prior to the date this order became final.

F. *It is further ordered:*

1. That respondents deliver, by hand or by certified mail, a copy of this order to each of their present or future salesmen, independent brokers, employees or any other person who sells or promotes the respondents' future service arrangements;

2. That respondents provide each person so described in subparagraph 1 above with a form returnable to respondents, clearly stating an intention to be bound by and conform sales practices to the requirements of this order and retain such form for a period of three (3) years after employment of such person is terminated;

3. That respondents inform each person described in subparagraph 1 above that respondents shall not use any such person, or the services of any such person, until such person agrees to and files notice with respondents to be bound by the provisions contained in this order;

4. That in the event such person will not agree to file such notice with respondents and be bound by the provisions of this order, respondents shall not use such person, or the services of such person;

5. That respondents institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in subparagraph 1 conform to the requirements of this order; and

6. That respondents discontinue dealing with any person described in subparagraph 1 of this order who engages in the acts or practices prohibited by this order; *provided, however*, that violation of any provision of this order by persons described in subparagraph 1 shall not be deemed a violation of this order by respondents unless respondents, upon knowledge of such violation, fail to take within a reasonable time, a corrective action to insure that such acts or practices are terminated; and *provided further*, that in the event remedial action is taken, the sole fact of such action shall not be admissible against respondents in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order.

IV.

A. *It is further ordered*, That each individual respondent named herein promptly notify the Commission of discontinuance of any business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

B. *It is further ordered*, That respondents Soundtrack Chevell Industries, Inc., William F. Temple and Helen Temple 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.

Commissioner Dole did not participate by reason of absence.

Complaint

88 F.T.C.

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

Docket 9071. Complaint, Jan. 20, 1976—Decision, Oct. 12, 1976

Consent order requiring a Houston, Texas, funeral home chain, among other things to cease misrepresenting the prices of services obtained from third parties; failing to disclose the availability and price of immediate cremation services; misrepresenting the qualities or properties of caskets; and misrepresenting the legal requirements and characteristics of caskets. Further, respondent is required to locate and make proper refunds to customers overcharged during a prescribed time period; and to maintain appropriate records.

Appearances

For the Commission: *Arthur R. Angel.*

For the respondent: *Jay F. Lapin, Wilmer, Cutler & Pickering,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. §41, *et seq.*, as amended), and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Service Corporation International, a corporation, hereinafter sometimes referred to as "respondent" or "SCI," acting at various times directly or through certain of its funeral home subsidiaries, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and principal place of business located at 1929 Allen Parkway, Houston, Texas.

PAR. 2. Respondent SCI is now, and for some time last past has been, engaged in the sale and provision of funeral services and merchandise to the public, incident to the care and final disposition of deceased human beings, through various funeral home subsidiaries.

PAR. 3. SCI's funeral service operations in the United States consist, at the time of this complaint, of in excess of 135 funeral homes located in 16 States (California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Minnesota, North Carolina, New Jersey,

New York, Tennessee, Texas and Washington) and the District of Columbia. Said funeral homes are operated through more than 80 funeral home subsidiaries, almost all of which are wholly owned by respondent SCI. SCI also owns a casket supply company (Hy-Grade) which furnishes some of the caskets used in various of respondent's funeral homes.

PAR. 4. Respondent SCI has now and for some time past has had knowledge and supervision of and control over the business operations, policies and practices of its wholly-owned funeral home subsidiaries.

PAR. 5. In the course and conduct of its business as aforesaid, respondent SCI, and various of its funeral home subsidiaries and their duly authorized employees and agents, have:

- purchased caskets, burial vaults, and other merchandise and supplies from suppliers located in different States;
- used media of interstate communication including the United States mail and the telephone in connection with the provision and sale of, and the collection of payment for, funeral services and merchandise;
- sold funeral services, and merchandise to customers from different States;
- caused advertisements to be run in newspapers and magazines with interstate circulation and to be featured in radio broadcasts transmitted across State lines to potential customers in different States;
- shipped deceased human bodies by common carrier to funeral directors located in other States for burial and received bodies for burial which were shipped to respondent's funeral homes from funeral directors located in other States;
- transmitted information on policies and practices back and forth between SCI's headquarters in Houston and individual funeral home subsidiaries located in various States.

By and through such activities, the conduct of respondent Service Corporation International's business and its acts and practices have been and continue to be in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Customers of various of respondent's funeral homes are often grief-stricken members of the deceased person's family who, because of their bereavement, lack of information respecting funeral arrangements, time pressures and related factors, are highly susceptible to unfair and deceptive practices.

I

PAR. 7. One of the services typically provided by a funeral home is to arrange, on behalf of customers, for a variety of items furnished by a third party and not the funeral home itself. Such items include various combinations of the following: obituary notices, flowers, crematory charges, public transportation or shipping charges, limousines or flower cars, nurses, musicians or choirs, pallbearers, clergy honoraria, gratuities and charges of other mortuaries in shipping cases. (These items may hereinafter be referred to as cash advance items). Funeral homes typically advance money, or obligate themselves to pay later, for such items and then seek reimbursement from the customer for these expenses incurred on the customer's behalf. These items are typically listed on the customer's bill under a heading "cash advances," "accommodations" or words of similar import. Typically, compensation for the funeral home's services in making arrangements for cash advance items is included in the funeral home's charge for professional services.

PAR. 8. Respondent's funeral homes have made arrangements and incurred expenses for cash advance items in the manner described in Paragraph 7, above. Certain of respondent's funeral homes have used, for some time last past, a practice of listing on some customers' bills and collecting from such customers in the guise of reimbursement for sums actually advanced, amounts for cash advance items which exceeded the sums actually expended by respondent's funeral home on the customer's behalf. In some instances, respondent's funeral homes have applied a direct mark-up to the amount advanced. In other instances, respondent's funeral homes have received kickbacks, agent's commissions, volume discount or other rebates without disclosing or passing on to the customer the benefits of such price adjustments.

PAR. 9. The practices described in Paragraph 8, above of listing as cash advances or accommodation items sums in excess of the amounts actually paid out by certain of respondent's funeral homes was and is deceptive and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) (hereinafter referred to as "Section 5"), and the collection and retention of such excess sums by such deceptive means is an unfair and deceptive practice in violation of Section 5.

II

PAR. 10. In the further course and conduct of business as aforesaid various of respondent's funeral homes have sold to some of their customers certain caskets called "sealed" or "sealer" caskets which are equipped with a rubber gasket and/or other mechanisms which, when activated, are intended to seal the casket. Some funeral directors of

respondent's funeral homes have claimed or suggested to some customers, directly or by implication, that such sealer caskets would when closed be completely airtight and/or watertight when such was not the case. In some instances, funeral directors of some of respondent's funeral homes have also claimed or suggested to customers directly or by implication, that a sealer casket would preserve human remains and prevent their natural decomposition, when such was not the case.

PAR. 11. The claims and representations regarding the airtightness, watertightness, or preservation capability of sealer caskets, described in Paragraph 10 above have had and have the capacity and tendency to mislead and deceive consumer funeral buyers and to induce them to purchase merchandise which they might not purchase but for such deceptive claims. Such claims and representations were and are deceptive and unfair and in violation of Section 5.

III

PAR. 12. In the further course and conduct of business as aforesaid, some of respondent's funeral homes have induced or compelled some consumers who sought to arrange cremation services to purchase caskets, even if a casket was not desired by the consumer. Various of respondent's funeral homes have induced customers arranging cremations to purchase caskets by various means, including: a) claiming or suggesting to consumers, directly or by implication, that purchase of a casket was required by law, when such was not the case; or b) claiming or suggesting, to consumers, directly or by implication, that purchase of a casket was required by crematory rule, regulation or policy, when such was not the case; or c) requiring the purchase of a casket in cremation cases as a policy of the funeral home.

PAR. 13. The practice of claiming or suggesting to customers that purchase of a casket is required by law or by crematory rule, regulation or policy when such is not the case was and is deceptive and in violation of Section 5. Inducing or compelling consumers to purchase merchandise which is not desired and thereby incur additional and unnecessary expense either by such misrepresentations or by imposing a requirement that a casket be purchased constitutes an unfair practice in violation of Section 5.

IV

PAR. 14. In the further course and conduct of business as aforesaid, various of respondent's funeral homes have performed embalming and other services in connection with readying deceased bodies for burial

without first obtaining permission from the next of kin or other authorized person and without ascertaining whether such services were in fact desired by the customer.

PAR. 15. The practices described in Paragraph 14 above, of furnishing embalming or other services without the knowledge and permission of customers constitutes unfair and deceptive practices in violation of Section 5.

V

PAR. 16. In the further course of business as aforesaid, certain of respondent's funeral homes have made payments, as compensation, gifts or rewards, to medical examiners, morgue or hospital employees, or police who have notified respondent's funeral homes when certain deaths have occurred and have assisted respondent's funeral homes in acquiring business from such cases. Those of respondent's funeral homes which have made such payments have not informed the funeral buyers in such cases that such payments have been made.

PAR. 17. The practice of some of respondent's funeral homes of making payments to medical examiners, morgue or hospital attendants and police, as described in Paragraph 16, above, has had the effect of obstructing and restricting the consumer's ability to freely choose a funeral home and is an unfair practice, in violation of Section 5.

PAR. 18. The making of such payments by respondent's funeral homes as described in Paragraph 16, above, has had the effect of obtaining cases and revenues for respondent's funeral homes which might otherwise go to other funeral homes in the same geographic area as respondent's funeral homes, and constitutes an unfair method of competition, in violation of Section 5.

PAR. 19. The making of such payments by respondent's funeral homes as described in Paragraph 16, above, and the failure to inform the customers who make the funeral arrangements in such cases, constitutes a failure to disclose material facts which if known might affect the consumer's purchase decision. The non-disclosure of such material facts is a deceptive practice, in violation of Section 5.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for

the purpose of considering settlement by the entry of a consent order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1929 Allen Parkway, Houston, Texas.

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

Definitions

The term "alternative container" means, with respect to each of respondent's funeral homes owned on May 26, 1976, any receptacle or enclosure, made of any material, which is of sufficient strength and retentiveness to hold and transport human remains, and which is made available to customers at a price that does not exceed 60 percent of the retail price charged for the lowest line casket regularly offered by that funeral home as of May 26, 1976; *provided*, that commencing July 1, 1977, and thereafter annually, the maximum prices for alternative containers that are initially established pursuant to this order shall be adjusted to reflect changes in the Bureau of Labor Statistics' Consumer Price Index subsequent to April 1976; *provided further*, that with respect to each of respondent's funeral homes that is acquired after May 26, 1976, (1) respondent shall establish a maximum price for alternative containers at a price not exceeding the mean maximum price for alternative containers chargeable in respondent's funeral homes as of

the date of acquisition, and (2) a maximum price established pursuant to (1) shall be adjusted to reflect changes in the Consumer Price Index subsequent to the date of acquisition as provided above.

The term "casket" means a rigid container which is designated for the encasement and burial of human remains and which is usually constructed of wood or metal, ornamented, and lined with fabric.

The term "customer" means the person making arrangements for the care and disposition of the body of a deceased person.

The term "discount" means, with regard to the sale of a particular item, a price adjustment, commission or allowance which is openly and regularly made available by third parties to respondent's funeral homes and to other similarly situated funeral homes and which would not regularly be made available to customers who sought to order that item directly from such third parties; *provided*, that a price adjustment, commission or allowance made available on the basis of prompt payment shall be considered a "discount" even if such an adjustment, commission or allowance would regularly be made available to customers.

The term "effective date of this order" means the date on which this order becomes a final order.

The term "funeral home" means an establishment primarily engaged in preparing the dead for final disposition and conducting funeral services.

The term "funeral services" means funerals in which the funeral home provides the customary services, necessary facilities and equipment, a casket and other selected merchandise.

The term "immediate cremation service" means the removal and disposition by cremation of the remains without embalming, viewing (except for purposes of identification) or visitation and without any pre-cremation service with the body present, which service is arranged by the funeral home.

The term "item" refers to both merchandise and services.

The term "mark-up" means the excess of the amount charged by respondent to a customer of one of respondent's funeral homes for crematory or cemetery services, pallbearers, public transportation, clergy honoraria, musicians or singers, nurses, gratuities, flowers, or obituary notices over the net amount actually advanced, paid or owed by respondent to the third party, when such items were furnished by the third party, and when the charges for such items were listed or described as "cash advances," "accommodations," or words of similar import on the contract, final bill, or other written evidence of agreement or obligation submitted to the customer by the funeral home; *provided*, that it shall not be considered a mark-up when one of respondent's funeral homes charges a customer an amount for an item which exceeds

the total amount of the additional or marginal costs to respondent and its subsidiaries for such item when the amount charged to the customer is a fixed and consistent amount for the entire item not exceeding \$20 and when the item consists of services rendered in whole or in part by employees of respondent or any of its subsidiaries while on duty and thereby earning other compensation from respondent or any of its subsidiaries that is not included in the additional or marginal cost described above; *provided further*, that any excess attributable to a discount shall not be considered a mark-up.

The term "prescribed time period" means the five-year period immediately preceding the effective date of this order or, with respect to any funeral home acquired by respondent or any subsidiary thereof during that five-year period, the period beginning with the date of acquisition of such funeral home and ending on the effective date of this order.

The term "public transportation" means nonlimousine (including as "limousines" hearses, flower cars and other funeral vehicles) transportation by common carriers for hire which is regulated by Federal or State regulatory agencies.

The term "respondent's funeral homes" refers to funeral homes owned or hereafter acquired and owned by respondent or a subsidiary thereof and located in the United States.

I

It is ordered, That Service Corporation International, a corporation, and its officers, representatives, agents and employees, its successors and assigns, directly or through any corporation, subsidiary, or other device in connection with the sale or offering for sale of funeral services and funeral merchandise by and through its funeral homes, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. When one of respondent's funeral homes arranges with a third party (including one of respondent's subsidiaries) on behalf of a customer for items to be furnished by such third party and not by the funeral home itself:

1. charging of the customer by the funeral home for items listed or described as "cash advances," "accommodation" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home, more than the amount actually advanced, paid or owed by the funeral home to such third party on behalf of the customer for such items;

2. misrepresenting to the customer in any other respect the actual amount advanced, paid, or owed by the funeral home to such third party

on behalf of the customer for items represented by the funeral home as having been furnished to the customer by such third party;

3. listing or describing items to be furnished by the funeral home itself (or any of its employees while on duty) as "cash advances," "accommodations" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home;

4. charging of the customer by the funeral home for the following items, when furnished by such third party and not by the funeral home itself, more than the amount advanced, paid or owed by the funeral home to such third party for such items:

- a. Cemetery or crematory charges
- b. Pallbearers
- c. Public Transportation
- d. Clergy Honoraria
- e. Musicians or singers
- f. Nurses
- g. Gratuities
- h. Flowers
- i. Obituary notices

Provided, that paragraphs A(1)-(4) shall not require any of respondent's funeral homes to pass on to a customer any discount received by the funeral home if the fact that the funeral home does or may receive such discounts is disclosed to the customer in writing before the customer becomes legally obligated to pay for the funeral arrangements.

B. (1) Requiring customers of respondent's funeral homes who express interest in an immediate cremation service to purchase a casket for such a service, and failing to make available to such customers an alternative container; and (2) failing to affirmatively disclose, at the time the arrangements are made and before agreement, the availability and price of an immediate cremation service and of an alternative container to customers who (i) express interest in an immediate cremation service, (ii) inquire as to the least expensive means of disposition available at the funeral home, or (iii) inquire as to the full range of options respecting disposition of the deceased unless such customer affirmatively expresses an interest in any merchandise or service inconsistent with an immediate cremation service or with the use of an alternative container either at the time of making the inquiry or after the alternative of cremation is presented. *Provided*, that where one of respondent's funeral homes complies with the foregoing requirements, any of respondent's funeral homes located within two miles of such complying funeral home need not comply with the foregoing

requirements if it (i) informs each customer who expresses an interest in an immediate cremation service of the availability and price of such a service at the complying funeral home, and (ii) if it has already received the body of the deceased, offers to arrange for the transfer of the remains to the complying funeral home at no extra charge to the customer for the transfer.

C. Suggesting to customers, directly or by implication, that purchase of a casket for cremation is required by State law or by crematory rule, if such is not the case.

D. Misrepresenting, by statements or suggestions, directly or by implication, the extent to which any casket, including a sealer casket, will be airtight or watertight or will prevent natural processes of decomposition or provide long-term preservation of human remains; *provided*, that this paragraph shall not prevent respondent's funeral homes from accurately describing, displaying or otherwise making available to customers the written warranty or claims of the manufacturer or supplier of such casket, to the extent that such may be required for compliance with Federal Trade Commission regulations or other applicable laws.

E. Furnishing embalming, or other services or merchandise in connection with readying deceased bodies for burial without obtaining prior written or oral authorization therefor; *provided*, that furnishing embalming or other services or merchandise to avoid irreparable deterioration of the remains or offensive odor (after having made a good faith effort to obtain permission) or to satisfy the requirements of applicable laws and regulations shall not be regarded as a violation of this order.

II

It is further ordered, A. That respondent shall obtain from its funeral home managers or such other persons as would reasonably be expected to be most knowledgeable of the billing practices of respondent's funeral homes a separate statement for each such funeral home which shall indicate whether during the prescribed time period the funeral home had any policy or practice of charging a mark-up, and if so, the time period during which any such policy was in effect or any such practice was utilized and the type(s) of items which were the subject of such policies or practices. For purposes of Part II of this order, a mark-up that is determined (based upon a consideration of other comparable transactions) to be attributable to an estimation error (including discrepancies attributable solely to a consistent practice of rounding off) shall not be considered to be the result of a policy or practice of charging a mark-up.

B. That respondent shall cause a firm of independent certified public accountants to perform a statistical evaluation of the accuracy of the information compiled pursuant to paragraph II(A), which evaluation shall be based on sufficient sampling(s) of respondent's documentation (including but not limited to customer contracts and funeral bills, invoices of cash advance vendors, regular and special checks paid to such vendors, "add-on and delete" forms, computer summaries of income from or expenses for individual cash advance items, if available, and computer summaries of amounts paid to specific vendors of cash advance items, if available) for funerals contracted for during the prescribed time period to permit said accountants to conclude, with a 98 percent confidence factor, that the information compiled pursuant to paragraph II(A) and the information obtained as a result of the sampling(s) made by said accountants in performing the statistical evaluation have identified not less than 98 percent of all funerals contracted for during the prescribed time period which involved the purchase of an item which was in fact the subject of a policy or practice of charging a mark-up.

C. That respondent shall thereafter examine its files and thereby identify each customer of its funeral homes who contracted for a funeral during the prescribed time period and purchased an item which was the subject of a policy or practice of charging a mark-up; *provided*, that respondent shall not be required to examine its files for any funeral home for which the information compiled pursuant to paragraphs II(A) and II(B) does not disclose a policy or practice of charging any mark-ups; *provided further*, that with respect to each of respondent's funeral homes for which the information compiled pursuant to paragraphs II(A) and II(B) discloses a policy or practice of charging a mark-up, respondent shall be required to examine only the documentation relating to the type(s) of items disclosed in said information as having been the subject of such a policy or practice, and, for each such type(s) of item, shall be required to examine such documentation only for the time period during which said information discloses that such type of item was the subject of such a policy or practice.

D. That respondent shall cause a letter to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified pursuant to paragraph II(C), which customer as of that date has paid or caused to be paid a bill or bills in which total mark-ups in excess of \$10 were included; said letter shall advise the customer of his right to a refund as set forth below, the approximate date when such a refund will be made, and the need to inform respondent of any future change of residence or address where such refund can be delivered; *provided*, that with respect to customers entitled to a refund

under this part of this order whose letters are returned to respondent undelivered, respondent's obligation to make refunds to such customers shall terminate six (6) months after the effective date of this order.

E. That respondent cause a revised bill to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified in paragraph II(C), which customer as of that date has not yet paid or caused to be paid the bill or bills in which a mark-up was included, deducting the amount of the mark-up from the amount owed respondent by the customer.

F. That six (6) months after the effective date of this order, respondent prepare a list of all the customers to whom letters were sent pursuant to paragraph II(D) who have paid or caused to be paid a bill or bills in which total mark-ups in excess of \$10 were included and whose letters have not at that time been returned to respondent undelivered. The amount of refund due each such customer shall be the total of:

(1) The amount of the mark-ups paid or caused to be paid by the customer; plus

(2) A fractional share of the total amount of mark-ups paid or caused to be paid by customers whose letters sent pursuant to paragraph II(D) were returned to respondent undelivered, and a fractional share of the total amount of mark-ups of \$10 or less paid or caused to be paid by the customers identified pursuant to paragraph II(C); the numerator of each such fractional share to equal the mark-ups paid or caused to be paid by the customer, and the denominator to equal the total amount of mark-ups paid by the customers whose letters were not returned to respondent undelivered.

G. That within ten (10) days following the completion of the list described in paragraph II(F), respondent shall cause to be mailed to each customer on that list a check in an amount computed in accordance with paragraph II(F). Such payments shall complete respondent's obligations with respect to restitution under this order.

III

It is further ordered, That respondent transmit copies of this order to all of respondent's funeral homes and notify, orally and in writing, all affected employees of the requirements of this order.

IV

It is further ordered, That respondent shall, within 60 days after the service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which respondent is complying and intends to comply with this order.

V

It is further ordered, That for a period of not less than three (3) years after the effective date of this order, respondent maintain records which are adequate to disclose respondent's compliance with this order, such records to be furnished by respondent to the Federal Trade Commission upon request after reasonable notice.

VI

It is further ordered, That respondent notify the Federal Trade Commission at least thirty days prior to any proposed change in Service Corporation International such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in corporate organization which may affect compliance obligations arising out of this order.

VII

It is further ordered, That respondent notify the Federal Trade Commission by the 10th day of each month as to the acquisition or sale of any funeral homes, occurring in the immediately preceding month.

VIII

It is further ordered, That in the event the Federal Trade Commission promulgates a trade regulation rule regarding funeral industry practices:

A. Each provision of Paragraphs A(4), B and E of Part I of this order that deals with a practice with respect to which there is no requirement or prohibition in the rule shall be automatically deleted from this order on the date the rule is promulgated, and after the rule is promulgated, each court order or Commission amendment that deletes from the rule a requirement or prohibition with respect to a practice dealt with in Paragraphs A(4), B and E of Part I of this order shall, on the date such order or amendment becomes effective, cause to be automatically deleted from this order the provision dealing with the practice with respect to which there is no requirement or prohibition in the rule;

B. Each provision of Part I of this order that deals with a practice for which there are differing requirements or prohibitions in the rule shall be automatically superseded and replaced by such differing requirements or prohibitions on the date the rule becomes effective, and after the rule becomes effective, each amendment to a requirement or prohibition of the rule dealing with a practice dealt with in Part I of this

order shall, on the date the amendment becomes effective, cause an identical amendment to be made to Part I of this order;

Provided, that if the trade regulation rule proceeding regarding funeral industry practices that was commenced on August 28, 1975 is concluded by the Federal Trade Commission without the adoption of the rule in any form, or if said proceeding is not concluded but the rule is not promulgated in any form within five (5) years after the effective date of this order, or if the rule is promulgated in some form but for any reason does not become effective within seven (7) years after the effective date of this order, the provisions of Paragraphs A(4), B and E of Part I shall, on the date the rule proceeding is concluded or at the close of the applicable time period, be automatically deleted from this order; *provided further*, that no exception or limitation to respondent's obligation to comply with any trade regulation rule hereafter made effective shall be implied from this order.

Commissioner Dole did not participate by reason of absence.

Order

88 F.T.C.

IN THE MATTER OF
TRW, INC., ET AL.

Docket 9084. Interlocutory Order, Oct. 13, 1976

Order denying respondents' request that the Commission reconsider its decision to issue the complaint in this matter.

Appearances

For the Commission: *John M. Mendenhall.*

For the respondents: *Richard W. Pogue, Robert H. Rawson, Jr., Jones, Day, Reavis & Pogue, Cleveland, Ohio, and Joseph D. McGrath, Shaker Heights, Ohio.*

ORDER

This matter is before us upon the administrative law judge's limited certification of various motions filed by respondents requesting that the Commission reconsider its decision to issue a complaint. According to the certification, the Commission's staff failed to honor a commitment that respondents' counsel would be notified if the staff decided to recommend to the Commission that a complaint issue so that counsel could immediately seek to make a presentation to the Commission as to why a complaint should not issue. According to the ALJ,

Although it is clear that respondents have no right to such an opportunity, the fact that the staff made such a commitment places the matter in a different light. At the least, * * * the various motions, memoranda, affidavits, and related papers [which respondents assert they would have submitted to the Commission had the alleged commitment been honored] should now be certified to the Commission so that it may give consideration to them for the limited purpose of deciding whether they would have affected the decision to issue a complaint* * *.¹

The Commission has repeatedly held that once a complaint issues, only in the most extraordinary circumstances will it review its determinations that it has reason to believe a person has violated the law and that a proceeding would be in the public interest. *E.g., General Motors Corp., Dkt. 9074 (July 7, 1976); Pepsico, Inc., 83 F.T.C. 1716 (1974).* We do not believe that such extraordinary circumstances are present here since there has been no showing of prejudice to any of respondents' rights resulting from the staff's alleged failure to notify respondents. Neither the Commission's Rules nor its practice provide for precomplaint presentations to the Commission, except for consent orders. The staff cannot create such a right by agreement with a

¹ Certification to the Commission for a Limited Purpose of Respondents' Motion of August 19, 1976, to Renew Motion for Reconsideration and Related Relief and Various Other Motions and Related Papers at 3.

respondent. Each Commissioner, in the exercise of discretion, determines whether to afford proposed respondents an opportunity to be heard before voting whether to issue a complaint.

Although we have found no prejudice to respondents' rights resulting from staff's alleged breach, we wish to emphasize that Commission counsel and all other attorneys practicing before this agency are under an ethical obligation to honor all valid commitments made.

It is ordered, That respondents' request that the Commission reconsider its decision to issue the complaint in this matter be, and it hereby is, denied.

Commissioner Dole did not participate by reason of absence.

Order

88 F.T.C.

IN THE MATTER OF

LEONARD F. PORTER, INC., ET AL. — DOCKET 8964

INDIAN ARTS & CRAFTS, INC., ET AL. — DOCKET 8965

J.L. HOUSTON, INC., ET AL. — DOCKET 8966

WESTERN NOVELTY CO., ET AL. — DOCKET 8967

HERMAN KRUPP T/A OCEANIC TRADING COMPANY —
DOCKET 8968HEINZ LANGE T/A NORTHWEST ARTS AND CRAFTS —
DOCKET 8969DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION ACT*Complaints* Mar. 6, 1974 — Order, Oct. 19, 1976*

Order dismissing complaints, issued against six Seattle, Wash., and/or Portland, Ore., manufacturers and distributors of crafts and souvenir-type articles, alleging respondents misrepresented their products as being handmade in Alaska by Alaskan natives, rather than machine-made elsewhere by non-Alaskans. The Commission held that there was no adequate basis for warranting entry of orders prohibiting the alleged practices, and that the State of Alaska was in a far better position to gauge the extent of any harm and provide effective solutions.

Appearances

For the Commission: *David R. Pender, Thornton P. Percival, Thomas C. Armitage and Michael A. Katz.*

For the respondents: *Benjamin S. Asia, Franco, Asia, Bensussen & Coe, Seattle, Washington, for Leonard F. Porter, Inc., et al. and Heinz Lange. Carl Pruzan, Casey, Pruzan, Kovarik & Shulkin, Seattle, Washington, for Indian Arts & Crafts, Inc., et al. William K. McInerney, Jr., Short, Cressman & Cable, Seattle, Washington, for J.L. Houston, Inc., et al. Gary J. LeKas, Portland, Oregon, for Western Novelty Co., et al. Geoffrey P. Knudsen, Jones, Grey & Bayley, Seattle, Washington, for Herman Krupp. David Shimek, Matthews, Dunn & Baily, Anchorage, Alaska, for Intervenor Alaska Gift Retailers' Association.*

* Complaints reported as amended by administrative law judge's order dated September 5, 1974, which added the words "wood, beads, argillite" to subparagraph 6 of Paragraph 2; and added subparagraph 7 which defines the terms "etch and/or etching."

COMPLAINT AS TO LEONARD F. PORTER, INC., ET AL.

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 Leonard F. Porter, Inc., a corporation, and Leonard F. Porter and Vincent Abby, individually and as officers of said corporation, hereinafter sometimes 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 Leonard F. Porter, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 600 Prefontaine Building, Seattle, Washington.

Respondents Leonard F. Porter and Vincent Abby are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The addresses of the individual respondents are the same as that of the corporate respondent.

PAR. 2. For the purposes of this complaint and the accompanying order to cease and desist, the definitions below shall apply:

1. The term "machine" means any one or more of the following: pantograph, multiple carver, gang router, and router.

2. The term "pantograph" means any mechanical device used to reproduce a drawing, etching or any other design, on the same or on a different scale, by utilizing a pattern, mold, templet, master form or the like.

3. The terms "multiple carver" and "gang router" mean any mechanical device used to reproduce, by carving, multiple three dimensional objects in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

4. The term "router" means any mechanical device used to individually reproduce, by carving, a three dimensional object in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

5. Alaskan Native American means a person who has not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood.

6. Merchandise with an Alaskan Native American motif means any one or more of the following:

a. Any item made in whole or in part of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, or any material which simulates the appearance of any of the above;

b. Any item which depicts an image, by carving, etching or other means, of the Alaskan Native American way of life;

c. Any item which depicts an image, by carving, etching or other means, of mammals, wildlife, or wildflowers which can be found in, or associated with, Alaska;

d. Any item traditionally made by Alaskan Native Americans, including but not limited to totem poles, masks, moccasins, mukluks, and beadwork, or any item which has become associated with Alaskan Native American handiwork, such as the billiken.

PAR. 3. Respondents are now, and for some time last past have been engaged in the offering for sale, sale and distribution of carved and etched merchandise with an Alaskan Native American motif, as defined in Paragraph Two above, to retailers and dealers for resale to members of the purchasing public.

PAR. 4. In the course and conduct of their aforesaid business, the respondents now cause and for some time last past have caused, their merchandise when sold to be shipped to purchasers thereof located in various States of the United States other than the State of Washington, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their merchandise, have made use of signs, symbols, markings, depictions, signatures, etchings, carvings and materials that have an ethnic significance associated with Alaskan Native Americans, and have used certain words, phrases, statements and representations, directly or by implication, in labels, in the design and materials of their merchandise, and through other means, with respect to the source and production of said merchandise. Typical and illustrative of the same but not all inclusive thereof, are the following:

1. Merchandise with an Alaskan Native American motif.
2. Merchandise which appears to be hand-carved and/or hand-etched.
3. Labels reading "Genuine Ivory," "Genuine Baleen," and "Whale Baleen."
4. Carved and etched merchandise with the signature "Apodruk."

PAR. 6. By and through the use of said signs, symbols, markings, depictions, signatures, carvings, etchings, materials and said statements and representations, and others of similar import and meaning not specifically set out herein, respondents represent, and have represented, directly or by implication:

1. That certain of respondents' merchandise is made in Alaska.

2. That certain of respondents' merchandise is wholly made by Alaskan Native Americans; and that certain of respondents' other merchandise is partially made by Alaskan Native Americans.

3. That certain of respondents' merchandise is hand-carved and/or hand-etched.

PAR. 7. In truth and in fact:

1. Such merchandise is not made in Alaska. It is manufactured in whole or in part in the State of Washington.

2. In many instances, respondents' merchandise is not wholly made by Alaskan Native Americans; and in many instances, respondents' merchandise is not partially made by Alaskan Native Americans.

3. In many instances, respondents' merchandise is not wholly hand-carved and/or hand-etched, but is carved or etched in whole or in part by machine.

Therefore, the statements, representations and implications set forth in Paragraphs Five and Six hereof, were and are false, misleading, deceptive or unfair.

PAR. 8. In the absence of a clear and conspicuous disclosure that said merchandise sold by respondents is made outside of Alaska, and/or is carved or etched in whole or in part by use of a machine, and by the use of the signs, symbols, markings, depictions, signatures, etchings, carvings, materials, statements and representations as set forth in Paragraph Five hereof, the public is led to believe that said merchandise has been hand-made by Alaskan Native Americans in Alaska.

As to merchandise, such as that of respondents, which simulates the products and crafts of Alaskan Native Americans, a substantial portion of the purchasing public has an assumption that the same has been hand-made by Alaskan Native Americans in Alaska. Thus, respondents have failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such merchandise.

Therefore, the respondents' failure to make said disclosures and their affirmative false, misleading and deceptive statements and representations were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. By the aforesaid practices, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the source, nature and identity of respondents' merchandise.

PAR. 10. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of carved and etched baleen, carved soapstone, carved and etched ivory and other

merchandise with an Alaskan Native American motif as defined in Paragraph Two above, of the same general kind and nature as that sold by respondents.

PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive representations, statements, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations and statements were and are true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, including but not limited to Alaskan Native American craftspersons, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT AS TO INDIAN ARTS & CRAFTS, INC., ET AL.

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 Indian Arts & Crafts, Inc., a corporation, and Walter J. Lowen, Jeanette M. Lowen, and Howard Lowen, individually and as officers of said corporation, hereinafter sometimes 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 Indian Arts & Crafts, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1119 Mercer St., Seattle, Washington.

Respondents Walter J. Lowen, Jeanette M. Lowen, and Howard Lowen are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The addresses of the individual respondents are the same as that of the corporate respondent.

PAR. 2. For the purposes of this complaint and the accompanying order to cease and desist, the definitions below shall apply:

1. The term "machine" means any one or more of the following: pantograph, multiple carver, gang router, and router.

2. The term "pantograph" means any mechanical device used to reproduce a drawing, etching or any other design, on the same or on a different scale, by utilizing a pattern, mold, templet, master form or the like.

3. The terms "multiple carver" and "gang router" mean any mechanical device used to reproduce, by carving, multiple three dimensional objects in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

4. The term "router" means any mechanical device used to individually reproduce, by carving, a three dimensional object in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

5. Alaskan Native American means a person who has not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood.

6. Merchandise with an Alaskan Native American motif means any one or more of the following:

a. Any item made in whole or in part of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, or any material which simulates the appearance of any of the above;

b. Any item which depicts an image, by carving, etching or other means, of the Alaskan Native American way of life;

c. Any item which depicts an image, by carving, etching or other means, of mammals, wildlife, or wildflowers which can be found in, or associated with, Alaska;

d. Any item traditionally made by Alaskan Native Americans, including but not limited to totem poles, masks, moccasins, mukluks, and beadwork, or any item which has become associated with Alaskan Native American handiwork, such as the billiken.

PAR. 3. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of carved and etched merchandise with an Alaskan Native American motif, as defined in Paragraph Two above, to retailers and dealers for resale to members of the purchasing public.

PAR. 4. In the course and conduct of their aforesaid business, the respondents now cause, and for some time last past have caused, their merchandise when sold to be shipped to purchasers thereof located in various States of the United States other than the State of Washington, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their merchandise, have purchased for resale merchandise which has made use of signs, symbols,

markings, depictions, signatures, etchings, carvings and materials that have an ethnic significance associated with Alaskan Native Americans, and have used certain words, phrases, statements, and representations, directly or by implication, in catalogs, in labels, and in the design and materials of said merchandise, with respect to the source and production of said merchandise. Typical and illustrative of the same, but not all inclusive thereof, are the following:

1. Merchandise with an Alaskan Native American motif.
2. Merchandise which appears to be hand-carved and/or hand-etched.
3. Labels reading "Ivory."
4. The use of the company name "Indian Arts & Crafts" on certain of the merchandise.

5. Carved and etched merchandise with the signature "Nuguruk."

PAR. 6. By and through the resale of merchandise which has made use of said signs, symbols, markings, depictions, signatures, carvings, etchings, materials and said statements and representations, and others of similar import and meaning not specifically set out herein, respondents represent, and have represented, directly or by implication:

1. That certain of respondents' merchandise is made in Alaska.
2. That certain of respondents' merchandise is wholly made by Alaskan Native Americans; and that certain of respondents' other merchandise is partially made by Alaskan Native Americans.
3. That certain of respondents' merchandise is hand-carved and/or hand-etched.

PAR. 7. In truth and in fact:

1. Such merchandise is not made in Alaska. It is manufactured in whole or in part in Hong Kong, Taiwan and/or the State of Washington.
2. In many instances, respondents' merchandise is not wholly made by Alaskan Native Americans; and in many instances, respondents' merchandise is not partially made by Alaskan Native Americans.
3. In many instances, respondents' merchandise is not wholly hand-carved and/or hand-etched, but is carved or etched in whole or in part by machine.

Therefore, the statements, representations and implications set forth in Paragraphs Five and Six hereof, were and are false, misleading, deceptive, or unfair.

PAR. 8. In the absence of a clear and conspicuous disclosure that said merchandise sold by respondents is made outside of Alaska, and/or is carved or etched in whole or in part by use of a machine, and by the use of the signs, symbols, markings, depictions, signatures, etchings, carvings, materials, statements and representations as set forth in

Paragraph Five hereof, the public is led to believe that said merchandise has been hand-made by Alaskan Native Americans in Alaska.

As to merchandise, such as that of respondents, which simulates the products and crafts of Alaskan Native Americans, a substantial portion of the purchasing public has an assumption that the same has been hand-made by Alaskan Native Americans in Alaska. Thus, respondents have failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such merchandise.

Therefore, the respondents' failure to make said disclosures and their affirmative false, misleading and deceptive statements and representations were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. By the aforesaid practices, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the source, nature and identity of respondents' merchandise.

PAR. 10. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of carved and etched ivory, carved soapstone, totems, beadwork and other merchandise with an Alaskan Native American motif as defined in Paragraph Two above, of the same general kind and nature as that sold by respondents.

PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive representations, statements, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations and statements were and are true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, including but not limited to Alaskan Native American craftspersons, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT AS TO J.L. HOUSTON, INC., ET AL.

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 J.L. Houston, Inc., a corporation, and James L. Houston and Shirley Houston, individually and as officers of said corporation, hereinafter sometimes 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 J.L. Houston, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1408 Twelfth Ave., Seattle, Washington.

Respondents James L. Houston and Shirley Houston are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The addresses of the individual respondents are the same as that of the corporate respondent.

PAR. 2. For the purposes of this complaint and the accompanying order to cease and desist, the definitions below shall apply:

1. The term "machine" means any one or more of the following: pantograph, multiple carver, gang router, and router.

2. The term "pantograph" means any mechanical device used to reproduce a drawing, etching or any other design, on the same or on a different scale, by utilizing a pattern, mold, templet, master form or the like.

3. The terms "multiple carver" and "gang router" mean any mechanical device used to reproduce, by carving, multiple three dimensional objects in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

4. The term "router" means any mechanical device used to individually reproduce, by carving, a three dimensional object in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

5. Alaskan Native American means a person who has not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood.

6. Merchandise with an Alaskan Native American motif means any one or more of the following:

a. Any item made in whole or in part of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, or any material which simulates the appearance of any of the above;

b. Any item which depicts an image, by carving, etching or other means, of the Alaskan Native American way of life;

c. Any item which depicts an image, by carving, etching or other

means, of mammals, wildlife, or wildflowers which can be found in, or associated with, Alaska;

d. Any item traditionally made by Alaskan Native Americans, including but not limited to totem poles, masks, moccasins, mukluks, and beadwork, or any item which has become associated with Alaskan Native American handiwork, such as the billiken.

PAR. 3. Respondents are now, and for some time last past have been engaged in the offering for sale, sale and distribution of carved and etched merchandise with an Alaskan Native American motif, as defined in Paragraph Two above, to retailers and dealers for resale to members of the purchasing public.

PAR. 4. In the course and conduct of their aforesaid business, the respondents now cause, and for some time last past have caused, their merchandise when sold to be shipped to purchasers thereof located in various States of the United States other than the State of Washington, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their merchandise, have made use of signs, symbols, markings, depictions, signatures, etchings, carvings and materials that have an ethnic significance associated with Alaskan Native Americans, and have used certain words, phrases, statements, and representations, directly or by implication, in labels, in the design and materials of their merchandise, and through other means, with respect to the source and production of said merchandise. Typical and illustrative of the same, but not all inclusive thereof, are the following:

1. Merchandise with an Alaskan Native American motif.
2. Merchandise which appears to be hand-carved and/or hand-etched.
3. Labels reading "Genuine Ivory," "Carved Genuine Ivory," and "A Gift from Alaska."
4. Carved and etched merchandise with the signature "Nunuk."

PAR. 6. By and through the use of said signs, symbols, markings, depictions, signatures, carvings, etchings, materials and said statements and representations, and others of similar import and meaning not specifically set out herein, respondents represent, and have represented, directly or by implication:

1. That certain of respondents' merchandise is made in Alaska.
2. That certain of respondents' merchandise is wholly made by Alaskan Native Americans; and that certain of respondents' other merchandise is partially made by Alaskan Native Americans.

3. That certain of respondents' merchandise is hand-carved and/or hand-etched.

PAR. 7. In truth and in fact:

1. Such merchandise is not made in Alaska. It is manufactured in whole or in part in the State of Washington.

2. In many instances, respondents' merchandise is not wholly made by Alaskan Native Americans; and in many instances, respondents' merchandise is not partially made by Alaskan Native Americans.

3. In many instances, respondents' merchandise is not wholly hand-carved and/or hand-etched, but is carved or etched in whole or in part by machine.

Therefore, the statements, representations and implications set forth in Paragraphs Five and Six hereof, were and are false, misleading, deceptive, or unfair.

PAR. 8. In the absence of a clear and conspicuous disclosure that said merchandise sold by respondents is made outside of Alaska, and/or is carved or etched in whole or in part by use of a machine, and by the use of the signs, symbols, markings, depictions, signatures, etchings, carvings, materials, statements and representations as set forth in Paragraph Five hereof, the public is led to believe that said merchandise has been hand-made by Alaskan Native Americans in Alaska.

As to merchandise, such as that of respondents, which simulates the products and crafts of Alaskan Native Americans, a substantial portion of the purchasing public has an assumption that the same has been hand-made by Alaskan Native Americans in Alaska. Thus, respondents have failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such merchandise.

Therefore, the respondents' failure to make said disclosures and their affirmative false, misleading and deceptive statements and representations were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. By the aforesaid practices, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the source, nature and identity of respondents' merchandise.

PAR. 10. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of carved and etched baleen, carved and etched ivory and other merchandise with an Alaskan Native American motif as defined in Paragraph Two above, of the same general kind and nature as that sold by respondents.

PAR. 11. The use by the respondents of the aforesaid false, misleading

and deceptive representations, statements, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations and statements were and are true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, including but not limited to Alaskan Native American craftspersons, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT AS TO WESTERN NOVELTY CO., ET AL.

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 Western Novelty Co., a corporation, and Donald F. Moehring and Donald L. Collis, individually and as officers of said corporation, hereinafter sometimes 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 Western Novelty Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 120-124 West Burnside, Portland, Oregon.

Respondents Donald F. Moehring and Donald L. Collis are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The addresses of the individual respondents are the same as that of the corporate respondent.

PAR. 2. For the purposes of this complaint and the accompanying order to cease and desist, the definitions below shall apply:

1. The term "machine" means any one or more of the following: pantograph, multiple carver, gang router, and router.

2. The term "pantograph" means any mechanical device used to reproduce a drawing, etching or any other design, on the same or on a different scale, by utilizing a pattern, mold, templet, master form or the like.

3. The terms "multiple carver" and "gang router" mean any

mechanical device used to reproduce, by carving, multiple three dimensional objects in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

4. The term "router" means any mechanical device used to individually reproduce, by carving, a three dimensional object in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

5. Alaskan Native American means a person who has not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood.

6. Merchandise with an Alaskan Native American motif means any one or more of the following:

a. Any item made in whole or in part of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, or any material which simulates the appearance of any of the above;

b. Any item which depicts an image, by carving, etching or other means, of the Alaskan Native American way of life;

c. Any item which depicts an image, by carving, etching or other means, of mammals, wildlife, or wildflowers which can be found in, or associated with, Alaska;

d. Any item traditionally made by Alaskan Native Americans, including but not limited to totem poles, masks, moccasins, mukluks, and beadwork, or any item which has become associated with Alaskan Native American handiwork, such as the billiken.

PAR. 3. Respondents are now, and for some time last past have been engaged in the offering for sale, sale and distribution of carved and etched merchandise with an Alaskan Native American motif, as defined in Paragraph Two above, to retailers and dealers for resale to members of the purchasing public.

PAR. 4. In the course and conduct of their aforesaid business, the respondents now cause, and for some time last past have caused, their merchandise when sold to be shipped to purchasers thereof located in various States of the United States other than the State of Oregon, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their merchandise, have made use of signs, symbols, markings, depictions, etchings, carvings and materials that have an ethnic significance associated with Alaskan Native Americans, and have used certain words, phrases, statements, and representations, directly or by implication, in labels, in the design and materials of their merchandise, and through other means, with

respect to the source and production of said merchandise. Typical and illustrative of the same, but not all inclusive thereof, are the following:

1. Merchandise with an Alaskan Native American motif.
2. Merchandise which appears to be hand-carved and/or hand-etched.
3. Labels reading "Ivory."

PAR. 6. By and through the use of said signs, symbols, markings, depictions, carvings, etchings, materials and said statements and representations, and others of similar import and meaning not specifically set out herein, respondents represent, and have represented, directly or by implication:

1. That certain of respondents' merchandise is made in Alaska.
2. That certain of respondents' merchandise is wholly made by Alaskan Native Americans; and that certain of respondents' other merchandise is partially made by Alaskan Native Americans.
3. That certain of respondents' merchandise is hand-carved and/or hand-etched.

PAR. 7. In truth and in fact:

1. Such merchandise is not made in Alaska. It is manufactured in whole or in part in Hong Kong, Japan or the State of Oregon.
2. In many instances, respondents' merchandise is not wholly made by Alaskan Native Americans; and in many instances, respondents' merchandise is not partially made by Alaskan Native Americans.
3. In many instances, respondents' merchandise is not wholly hand-carved and/or hand-etched, but is carved or etched in whole or in part by machine.

Therefore, the statements, representations and implications set forth in Paragraphs Five and Six hereof, were and are false, misleading, deceptive, or unfair.

PAR. 8. In the absence of a clear and conspicuous disclosure that said merchandise sold by respondents is made outside of Alaska, and/or is carved or etched in whole or in part by use of a machine, and by the use of the signs, symbols, markings, depictions, etchings, carvings, materials, statements and representations as set forth in Paragraph Five hereof, the public is led to believe that said merchandise has been hand-made by Alaskan Native Americans in Alaska.

As to merchandise, such as that of respondents, which simulates the products and crafts of Alaskan Native Americans, a substantial portion of the purchasing public has an assumption that the same has been hand-made by Alaskan Native Americans in Alaska. Thus, respondents have failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such merchandise.

Therefore, the respondents' failure to make said disclosures and their affirmative false, misleading and deceptive statements and representations were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. By the aforesaid practices, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the source, nature and identity of respondents' merchandise.

PAR. 10. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of carved and etched ivory products, and other merchandise with an Alaskan Native American motif as defined in Paragraph Two above, of the same general kind and nature as that sold by respondents.

PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive representations, statements, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations and statements were and are true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, including but not limited to Alaskan Native American craftspersons, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT AS TO HERMAN KRUPP T/A OCEANIC TRADING
COMPANY

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 Herman Krupp, an individual doing business as Oceanic Trading Company, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Herman Krupp is an individual doing business under and by virtue of the laws of the State of Washington, under the name of Oceanic Trading Company with his office and

principal place of business located at 84 University St., Seattle, Washington.

PAR. 2. For the purposes of this complaint and the accompanying order to cease and desist, the definitions below shall apply:

1. The term "machine" means any one or more of the following: pantograph, multiple carver, gang router, and router.

2. The term "pantograph" means any mechanical device used to reproduce a drawing, etching or any other design, on the same or on a different scale, by utilizing a pattern, mold, templet, master form or the like.

3. The terms "multiple carver" and "gang router" mean any mechanical device used to reproduce, by carving, multiple three dimensional objects in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

4. The term "router" means any mechanical device used to individually reproduce, by carving, a three dimensional object in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

5. Alaskan Native American means a person who has not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood.

6. Merchandise with an Alaskan Native American motif means any one or more of the following:

a. Any item made in whole or in part of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, or any material which simulates the appearance of any of the above;

b. Any item which depicts an image, by carving, etching or other means, of the Alaskan Native American way of life;

c. Any item which depicts an image, by carving, etching or other means, by carving, etching or other means, of mammals, wildlife, or wildflowers which can be found in, or associated with, Alaska;

d. Any item traditionally made by Alaskan Native Americans, including but not limited to totem poles, masks, moccasins, mukluks, and beadwork, or any item which has become associated with Alaskan Native American handiwork, such as the billiken.

PAR. 3. Respondent is now, and for some time last past, has been engaged in the offering for sale, sale and distribution of carved and etched merchandise with an Alaskan Native American motif, as defined in Paragraph Two above, to wholesalers, retailers, and dealers for resale to members of the purchasing public.

PAR. 4. In the course and conduct of his aforesaid business, the respondent now causes, and for some time last past has caused, his merchandise when sold to be shipped to purchasers thereof located in various States of the United States other than the State of Washington,

and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent, in the course and conduct of his business, and for the purpose of inducing the purchase of his merchandise, has made use of signs, symbols, markings, depictions, signatures, etchings, carvings and materials that have an ethnic significance associated with Alaskan Native Americans, and has used certain words, phrases, statements, and representations, directly or by implication, in labels, in the design and materials of his merchandise, and through other means, with respect to the source and production of said merchandise. Typical and illustrative of the same, but not all inclusive thereof, are the following:

1. Merchandise with an Alaskan Native American motif.
2. Labels reading "Genuine Ivory," "Genuine Indian Made," "Eskimo Made," and "Billiken."
3. Carved and etched merchandise with the signature "Nuguruk."

PAR. 6. By and through the use of said signs, symbols, markings, depictions, signatures, carvings, etchings, materials and said statements and representations, and others of similar import and meaning not specifically set out herein, respondent represents, and has represented, directly or by implication:

1. That certain of respondent's merchandise is made in Alaska.
2. That certain of respondent's merchandise is wholly made by Alaskan Native Americans; and that certain of respondent's other merchandise is partially made by Alaskan Native Americans.

PAR. 7. In truth and in fact:

1. Such merchandise is not made in Alaska. It is manufactured in whole or in part in the State of Washington.
2. In many instances, respondent's merchandise is not wholly made by Alaskan Native Americans; and in many instances, respondent's merchandise is not partially made by Alaskan Native Americans.

Therefore, the statements, representations and implications set forth in Paragraphs Five and Six hereof, were and are false, misleading, deceptive, or unfair.

PAR. 8. In the absence of a clear and conspicuous disclosure that said merchandise sold by respondent is made outside of Alaska, and by the use of the signs, symbols, markings, depictions, signatures, etchings, carvings, materials, statements and representations as set forth in Paragraph Five hereof, the public is led to believe that said merchandise has been hand-made by Alaskan Native Americans in Alaska.

As to merchandise, such as that of respondent, which simulates the products and crafts of Alaskan Native Americans, a substantial portion of the purchasing public has an assumption that the same has been

hand-made by Alaskan Native Americans in Alaska. Thus, respondent has failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such merchandise.

Therefore, the respondent's failure to make said disclosure and his affirmative false, misleading and deceptive statements and representations were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. By the aforesaid practices, respondent places in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the source, nature and identity of respondent's merchandise.

PAR. 10. In the conduct of his business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of carved and etched ivory, carved soapstone, totem poles, and other merchandise with an Alaskan Native American motif as defined in Paragraph Two above, of the same general kind and nature as that sold by respondent.

PAR. 11. The use by the respondent of the aforesaid false, misleading and deceptive representations, statements, acts and practices, and respondent's failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations and statements were and are true and complete, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, including but not limited to Alaskan Native American craftspersons, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT AS TO HEINZ LANGE T/A NORTHWEST ARTS AND
CRAFTS

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 Heinz Lange, an individual doing business as Northwest Arts and Crafts, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof

would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Heinz Lange is an individual doing business under and by virtue of the laws of the State of Washington, under the name of Northwest Arts and Crafts, with his office and principal place of business located at 2408 - 7th St. West, Seattle, Washington.

PAR. 2. For the purposes of this complaint and the accompanying order to cease and desist, the definitions below shall apply:

1. The term "machine" means any one or more of the following: pantograph, multiple carver, gang router, and router.

2. The term "pantograph" means any mechanical device used to reproduce a drawing, etching or any other design, on the same or on a different scale, by utilizing a pattern, mold, templet, master form or the like.

3. The terms "multiple carver" and "gang router" mean any mechanical device used to reproduce, by carving, multiple three dimensional objects in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

4. The term "router" means any mechanical device used to individually reproduce, by carving, a three dimensional object in a predetermined form by utilizing a pattern, mold, templet, master form or the like.

5. Alaskan Native American means a person who has not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood.

6. Merchandise with an Alaskan Native American motif means any one or more of the following:

a. Any item made in whole or in part of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, or any material which simulates the appearance of any of the above;

b. Any item which depicts an image, by carving, etching or other means, of the Alaskan Native American way of life;

c. Any item which depicts an image, by carving, etching or other means, of mammals, wildlife, or wildflowers which can be found in, or associated with, Alaska;

d. Any item traditionally made by Alaskan Native Americans, including but not limited to totem poles, masks, moccasins, mukluks, and beadwork, or any item which has become associated with Alaskan Native American handiwork, such as the billiken.

PAR. 3. Respondent is now, and for some time last past has been engaged in the offering for sale, sale and distribution of carved and etched merchandise with an Alaskan Native American motif, as defined

in Paragraph Two above, to wholesalers, retailers and dealers for resale to members of the purchasing public.

PAR. 4. In the course and conduct of his aforesaid business, the respondent now purchases and for some time last past has purchased the raw materials used in his merchandise from foreign countries and states other than Washington, and now causes and for some time last past has caused his merchandise to be sold to wholesalers who then ship the merchandise to purchasers thereof located in various States of the United States other than the State of Washington, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent, in the course and conduct of his business, and for the purpose of inducing the purchase of his merchandise, has made use of signs, symbols, markings, depictions, etchings, carvings and materials that have an ethnic significance associated with Alaskan Native Americans, and has used certain words, phrases, statements, and representations, directly or by implication, in the design and materials of his merchandise, and through other means, with respect to the source and production of said merchandise. Typical and illustrative of the same, but not all inclusive thereof, are the following:

1. Merchandise with an Alaskan Native American motif.
2. Merchandise which appears to be hand-carved and/or hand-etched.

PAR. 6. By and through the use of said signs, symbols, markings, depictions, carvings, etchings, materials and said statements and representations, and others of similar import and meaning not specifically set out herein, respondent represents, and has represented, directly or by implication:

1. That certain of respondent's merchandise is made in Alaska.
2. That certain of respondent's merchandise is wholly made by Alaskan Native Americans; and that certain of respondent's other merchandise is partially made by Alaskan Native Americans.
3. That certain of respondent's merchandise is hand-carved and/or hand-etched.

PAR. 7. In truth and in fact:

1. Such merchandise is not made in Alaska. It is manufactured in whole or in part in the State of Washington.
2. In many instances, respondent's merchandise is not wholly made by Alaskan Native Americans; and in many instances, respondent's merchandise is not partially made by Alaskan Native Americans.
3. In many instances, respondent's merchandise is not wholly hand-

carved and/or hand-etched, but is carved or etched in whole or in part by machine.

Therefore, the statements, representations and implications set forth in Paragraphs Five and Six hereof, were and are false, misleading, deceptive, or unfair.

PAR. 8. In the absence of a clear and conspicuous disclosure that said merchandise sold by respondent is made outside of Alaska, and/or is carved or etched in whole or in part by use of a machine, and by the use of the signs, symbols, markings, depictions, etchings, carvings, materials, statements and representations as set forth in Paragraph Five hereof, the public is led to believe that said merchandise has been hand-made by Alaskan Native Americans in Alaska.

As to merchandise, such as that of respondent, which simulates the products and crafts of Alaskan Native Americans, a substantial portion of the purchasing public has an assumption that the same has been hand-made by Alaskan Native Americans in Alaska. Thus, respondent has failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether or not to purchase such merchandise.

Therefore, the respondent's failure to make said disclosures and his affirmative false, misleading and deceptive statements and representations were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. By the aforesaid practices, respondent places in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the source, nature and identity of respondent's merchandise.

PAR. 10. In the conduct of his business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of carved soapstone, carved and etched ivory, and other merchandise with an Alaskan Native American motif as defined in Paragraph Two above, of the same general kind and nature as that sold by respondent.

PAR. 11. The use by the respondent of the aforesaid false, misleading and deceptive representations, statements, acts and practices, and respondent's failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations and statements were and are true and complete, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of

respondent's competitors, including but not limited to Alaskan Native American craftspersons, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE
LAW JUDGE

FEBRUARY 18, 1976

[3] I. PRELIMINARY STATEMENT

A. HISTORY OF THE PROCEEDINGS

Six separate complaints were issued by the Commission on June 3, 1974 charging the corporate and individual respondents named in the caption with violations of Section 5 of the Federal Trade Commission Act. The complaints challenged as false, misleading, deceptive and unfair certain alleged direct and implied representations by respondents as to the origin and production of merchandise with an "Alaskan Native American motif," a phrase which was defined in each of the complaints. Administrative Law Judge Harry R. Hinkes was assigned by Chief Judge Hanscom to take testimony and receive evidence in all six proceedings.

On July 15, 1974, respondents in Leonard F. Porter, Inc., et al., Dkt. 8964 (hereafter "Porter"), filed an answer in which they contended that the definition of "Alaskan Native American motif" was arbitrary, vague, confusing and untrue, denied a substantial course of trade in commerce, denied that they made any representations by implication and denied making any false representations.

The respondents in Indian Arts & Crafts, Inc., et al., Dkt. 8965 (hereafter "IAC"), filed their answer on July 15, 1974. They admitted that they sold merchandise with an Alaskan Native American motif as defined in the complaint but denied the validity of the complaint's definition of that phrase. They asserted that any statements which they may have made concerning the source and production of their merchandise were true and denied making the representations concerning source and production of their merchandise alleged in the complaint.

The answer of J.L. Houston, Inc., et al., Dkt. 8966 (hereafter "Houston"), was filed on July 19, 1974 and denied the validity of the definition of "Alaskan Native American motif;" it also denied that the merchandise which respondents sold had such a motif. As affirmative defenses, respondents claimed that they did not expressly or impliedly misrepresent their merchandise.

Western Novelty Co., et al., Dkt. 8967 (hereafter "Western"), filed their answer on August 5, 1974, alleging [4] that the definition of "Alaskan Native American motif" did not have any basis in law, fact, custom or common usage and was, in any event, so vague that it could not be applied or enforced under the Federal Trade Commission Act. They denied making any representations by implication and denied that any statements or representations alleged in the complaint were false, misleading, deceptive, or unfair.

Herman Krupp, d/b/a Oceanic Trading Company, Dkt. 8968 (hereafter "Oceanic"), filed his answer to the complaint on July 17, 1974 in which he denied that the definition of "Alaskan Native American motif" in the complaint had any basis in fact, custom, or common usage. Respondent admitted that he used certain words, phrases and statements with respect to the source and production of his merchandise when required by State or Federal authority, stated that labels used by him and challenged in the complaint made only truthful representations and denied that he made the representations alleged in the complaint.

The respondent Heinz Lange, d/b/a Northwest Arts & Crafts, Dkt. 8969 (hereafter "Northwest"), filed his answer on July 15, 1974. He contended that the definition of "Alaskan Native American motif" was arbitrary, vague, confusing and untrue, denied a substantial course of trade in commerce, denied that he made any representations by implication and denied making any false representations.

On August 2, 1974, the Alaska Gift Retailers' Association filed a motion to intervene in all six proceedings, alleging that it was a real party in interest because the notice order attached to each complaint would require each of the Association's member-retailers to sign and agree to be bound by the provisions of any order which might be entered. On August 28, 1974, Judge Hinkes issued an order allowing the Association to intervene.

On August 7, 1974, all respondents in Dkts. 8964-69 moved to consolidate the proceedings on the grounds that they involved common questions of law and fact and that consolidation would avoid expense, duplication of testimony and delay. On the same date, Judge Hinkes ordered that the six proceedings be consolidated at least for the presentation of complaint counsel's case-in-chief.

[5] On August 30, 1974, complaint counsel moved to amend Paragraph Two of the complaints, the paragraph which defined certain terms in the complaints and the proposed cease and desist orders. Specifically, complaint counsel moved to amend subparagraph 6 of Paragraph Two, the definition of "merchandise with an Alaskan Native American motif" and to add a new subparagraph 7 to Paragraph Two to define the terms "etch" or "etching."

On September 5, 1974, Judge Hinkes ordered the complaint amended in certain respects. However, he refused to order the following amendment to the "motif" definition and certified that portion of complaint counsel's motion to the Commission:

* * * or any material which becomes associated with Alaskan Native American handiwork * * *.

On September 24, 1974, the Commission issued an order rejecting the amendment, but indicated that complaint counsel could argue that the proposed orders should be broadened to include material which becomes associated with Alaskan Native American handiwork.

A prehearing conference presided over by Judge Hinkes was held in Seattle, Washington on October 10, 1974. Attorneys representing all respondents and the intervenor, the Alaska Gift Retailers' Association, and complaint counsel attended the conference.

On or about October 11, 1974, Judge Hinkes, at the request of complaint counsel, issued subpoenas *duces tecum* to all respondents. Respondents moved to quash or limit these subpoenas, but on December 26, 1974, Judge Hinkes overruled all objections and set a return date for the subpoenas of January 20, 1975.

On February 3, 1975, because of Judge Hinkes' inability to hear these matters due to his crowded schedule, Chief Judge Hanscom appointed me to take testimony and receive evidence in his place.

On February 24, 1975, at the joint request of complaint counsel and respondents, I dismissed respondent Vincent Abbey as a party in Dkt. 8964.

[6] All of the respondents except those in Western, Dkt. 8967, complied to the satisfaction of complaint counsel with the discovery subpoenas issued by Judge Hinkes. On January 29, 1975, complaint counsel filed a notice of Western's failure to comply with Judge Hinkes' order denying their motion to quash or limit the subpoena *duces tecum*. The motion stated that Western's attorney advised Mr. Percival, one of complaint counsel, that respondents would make no return on the subpoena.

On February 27, 1975, complaint counsel moved in the Western matter, because of respondents' refusal to produce documents and physical exhibits pursuant to Judge Hinkes' subpoena, for either a decision of the proceeding, adverse rulings and summary decision or adverse rulings and partial summary decision. Respondents vigorously opposed this motion and, because of its importance, I held oral argument thereon in Seattle, Washington on April 1, 1975, the day after a prehearing conference, which was attended by complaint counsel and counsel for respondents. On April 28, 1975, I issued an order pursuant to

Section 3.38 of the Commission's Rules of Practice making certain inferences that some of the documents withheld by respondents would have been adverse to respondents (see Section 3.38(a)(1)). I held that the effect of these inferences would be as if complaint counsel had proved the inferred facts by reliable and substantial evidence and that with respect to those inferences, the burden of coming forward with rebuttal evidence had shifted to respondents.¹

Consolidated evidentiary hearings at which complaint counsel presented the case-in-chief were held in Seattle, Washington on June 16-20 and 23-27, 1975. Consolidated defense hearings were held in Seattle on September 2, 3 and 4, 1975. Complaint counsel and respondents in each docketed matter filed proposed findings on or about November 24, 1975 and replies thereto on or about December 16, 1975. At the request of respondents, oral argument was held on December 17, 1975.

[7] While each of the six complaints contain factual allegations unique to each group of respondents, Judge Hinkes' order of consolidation recognized that the most important allegations in the complaints presented questions of law and fact common to all respondents. These common issues have their inception in the complaints' definition of "Alaskan Native American motif." If respondents' merchandise does have such a motif, then other common issues arise.

B. THE COMPLAINTS' ALLEGATIONS

The complaints, as amended, define "Merchandise with an Alaskan Native American motif" in subparagraph 6 of Paragraph Two as

* * * any item made in whole, or in part, of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, wood, beads, argillite or any material which simulates the appearance of any of the aforementioned and which:

- a. depicts an image, by carving, etching or other means, of the Alaskan Native American way of life; or
- b. depicts an image, by carving, etching, or other means, of mammals, wildlife, or wildflowers which can be found in, or associated with Alaska; or
- c. is traditionally made by Alaskan Native Americans, including but not limited to totem poles, masks, moccasins, mukluks, and beadwork; or
- d. is associated with or has become associated with, Alaskan Native American handiwork, such as the biliken.

The complaints allege that respondents sell and distribute carved and etched merchandise with an Alaskan Native American motif (hereafter "ANA motif") and allege that respondents "for the purpose of inducing the purchase [8] of their merchandise have made use of signs, symbols, markings, depictions, signatures, etchings, carvings and materials that have an ethnic significance associated with Alaskan Native Americans,

¹ Factual findings in Dkt. 8967 made hereafter pursuant to this ruling will be referred to as "4/28/75 order."

and have used certain words, phrases, statements and representations, directly or by implication, in labels, in the design and materials of their merchandise, and through other means, with respect to the source and production of said merchandise” (Paragraph Five). Paragraph Five lists, for each respondent, typical statements and representations.

It is alleged in all six cases that respondents make implied statements and representations with respect to the source and production of their merchandise through the sale of merchandise with an ANA motif. In five cases (Dkts. 8964, 8965, 8966, 8967 and 8969), it is alleged that further statements and representations with respect to the source and production of their merchandise are made by the sale of merchandise “which appears to be hand-carved and/or hand-etched.”

Paragraph Five also alleges that the respondents make the following additional representations:

In Porter, Dkt. 8964, representations are made through the use of labels reading “Genuine Ivory,” “Genuine Baleen,” and “Whale Baleen,” and through the sale of carved and etched merchandise with the signature “Apodruk.”

In IAC, Dkt. 8965, representations are made through the use of labels reading “Ivory” and the sale of carved and etched merchandise with the signature “Nuguruk.”²

In Houston, Dkt. 8966, representations are made through the use of labels reading “Genuine Ivory,” “Carved Genuine Ivory,” and

[9] “A Gift from Alaska” and by the sale of carved and etched merchandise with the signature “Nunuk.”

In Western, Dkt. 8967, representations are made through the use of labels reading “Ivory.”

In Oceanic, Dkt. 8968, representations are made through the use of labels reading “Genuine Ivory,” “Genuine Indian Made,” “Eskimo Made,” and “Billiken” and through the sale of carved and etched merchandise with the signature “Nuguruk.”

Each complaint alleges that through the representations in Paragraph Five, respondents represent, directly or by implication, that certain of their merchandise is made in Alaska, and that their merchandise is either wholly or partially made by Alaskan Native Americans (hereafter “ANAs”). Five of the complaints, Dkts. 8964,

² Complaint counsel agreed to drop the charge that false representations were made through the use of the company name “Indian Arts & Crafts” on certain merchandise (Tr. 254), and I find that there is no evidence that IAC adopted its name or used that name with the intent to deceive consumers or that consumers were deceived by the use of that name.

8965, 8966, 8967 and 8969 further allege that respondents represent, directly or by implication, that certain of their merchandise is hand-carved and/or hand-etched.³

The complaints allege that in fact respondents' merchandise is not made in Alaska, is not wholly or partially made by ANAs and is not wholly hand-carved or hand-etched but that a substantial portion of the purchasing public believes this to be the case, makes purchasing decisions which are affected by such belief and that respondents' failure to disclose the true origin of their merchandise and actual production methods is false, misleading and injurious to the consuming public and respondents' competitors. The complaints also allege that respondents place in the hands of retailers the means by which the purchasing public may be deceived as to the source, nature and identity of respondents' merchandise.

The following findings of fact are based upon the whole record and my analysis of the proposed findings of [10] fact and conclusions of law and the replies thereto filed by complaint counsel and respondents. The intervenor filed no proposed findings. Those findings of fact which are not adopted herein either verbatim or in substance are rejected either because they are irrelevant or because they are not supported by the record.

II. FINDINGS OF FACT

A. RESPONDENTS' BUSINESS ACTIVITIES AND SALES IN COMMERCE

1. Porter is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 600 Prefontaine Building, Seattle, Washington (Porter Ans., p. 1).⁴

2. Leonard F. Porter is an officer of Porter and formulates, directs and controls all of the acts and practices of the corporation (Porter Ans., p. 1).

3. Porter sells and distributes carved and engraved products to wholesalers, retailers and dealers engaged in the curio trade for

³ By Judge Hinkes' order of September 5, 1975 amending the complaint, the term "etching" was expanded to include the processes of etching and engraving.

⁴ Abbreviations used in this decision are:

Cplt. — Complaint.

Ans. — Answer.

CPF — Complaint counsel's proposed findings.

PF — (Preceded by respondent's name) - Respondents' proposed findings.

Tr. — Transcript of hearings.

CX — Commission's exhibit.

RX — Respondents' exhibit.

Adm. — Respondents' answers to complaint counsel's requests for admissions.

eventual resale in Alaska to the purchasing public (Porter Ans., p. 1; Tr. 100). Prior to 1974, Porter sold most of its products to customers in Alaska (Tr. 130). During the period January 1, 1971 to December 31, 1971, it sold approximately \$130,000 worth of its products to customers located outside the State of Washington (Porter Adm. 74; CX 39) and from July 1, 1973 to September 1, 1974, sold at least \$24,000 to customers located outside of that State (Porter Adm. 73; CX 34D-0).

[11] 4. Since some time in 1974, Porter has been selling its products to the Johnson Company which is located in Seattle (Tr. 129). Johnson, in turn, resells all of the products it purchases from respondent to customers in Alaska (Tr. 130; Porter Adm. 76).

5. IAC is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1119 Mercer St., Seattle, Washington (IAC Ans., p. 1).

6. Walter J. Lowen, Jeanette M. Lowen and Howard Lowen are officers of IAC. They formulate, direct and control all of the acts and practices of the corporation (IAC Ans., p. 1).

7. IAC sells and distributes carved and engraved products to retailers and dealers for resale to the purchasing public and through such sales maintains and has maintained a substantial course of trade in commerce, as "commerce" is defined in the F.T.C. Act (IAC Ans., p. 1; IAC PF 3). IAC purchases its carved and engraved ivory products from two of the respondents, Oceanic and Northwest (Tr. 135, 163).

8. Houston is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1408 12th Ave., Seattle, Washington (Houston Ans., p. 1).

9. James L. Houston and Shirley Houston are officers of Houston, own 100 percent of the corporation and formulate, direct and control all of its acts and practices (Tr. 5).

10. Houston sells and distributes carved and engraved products to retailers for resale to the purchasing public and through such sales maintains and has maintained a substantial course of trade in commerce, as "commerce" is defined in the F.T.C. Act (Houston Ans., p. 1; Houston PF 3).

11. Western is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 120-124 West Burnside, Portland, Oregon (Western Ans., p. 1).

[12] 12. Donald F. Moehring is an officer of Western and formulates, directs and controls all the acts and practices of the corporation (Western Ans., p. 1). Any cease and desist order that may be entered

against Western and Mr. Moehring shall be entered against Mr. Donald L. Collis (Stipulation between Mr. Collis and complaint counsel, dated August 26, 1974).

13. Western sells and distributes carved and engraved products to retailers and dealers for resale to the purchasing public (Western Ans., p. 2; 4/28/75 order; Tr. 2038, 2040, 2178). All of these sales are to retailers in Alaska (Tr. 1710). Since January 1, 1974, these sales have exceeded \$10,000 (CX 192; Tr. 1557, 1562-63). Western maintains, and has maintained, a substantial course of trade in its merchandise in commerce, as "commerce" is defined in the F.T.C. Act (4/28/75 order).

14. Herman Krupp is an individual doing business as Oceanic Trading Company under and by virtue of the laws of the State of Washington. Oceanic's office and principal place of business is located at 84 University St., Seattle, Washington (Oceanic Ans., p. 1).

15. Oceanic sells and distributes carved and engraved products to wholesalers, retailers and dealers for resale to the purchasing public (Oceanic Adm. 16). During the period January 1, 1971 to July 1, 1973, Oceanic sold approximately \$80,000 of its merchandise to customers located outside the State of Washington (Oceanic Adm. 20; CX 85-86); during the period July 1, 1973 to September 1, 1974, such sales amounted to \$41,070 (Oceanic Adm. 19; CX 83B). During the period July 1, 1973 to September 1, 1974, Oceanic sold \$110,409 of its products to IAC (Oceanic Adm. 23; CX 83A). IAC sold approximately 75 percent of this merchandise to Alaska retailers (CX 101).

16. Heinz Lange is an individual doing business as Northwest Arts and Crafts under and by virtue of the laws of the State of Washington. Northwest's office and principal place of business is located at 2408 Seventh St. West, Seattle, Washington (Northwest Ans., p. 1).

17. Northwest sells and distributes carved and engraved products to wholesalers, retailers and dealers for resale to the purchasing public (Northwest Ans., p. 1). [13] During the period July 1, 1973 to September 1, 1974, Northwest sold \$11,759 of its products to customers located outside the State of Washington (Northwest Adm. 61; CX 59A). During the period July 1, 1973 through September 1, 1974, Northwest sold \$132,086 of its products to IAC (Northwest Adm. 63; CX 59A). IAC sold approximately 75 percent of this merchandise to Alaska retailers (CX 101).

B. THE NATURE OF PRODUCTS SOLD BY RESPONDENTS

18. The record of these consolidated proceedings contains physical exhibits which are representative of the type of products sold by respondents. These exhibits are:

a. Porter:

CX 42 — Rough carved Ivory Eskimo hunter and polar bear carved by multiple carver.

CX 43 — Ivory Eskimo hunter and polar bear carved by multiple carver and then hand-finished (finished version of 42).

CX 44 — Rough engraved baleen done by pantograph with signature "Apodruk" (scene of Eskimo in umiak hunting whale).

CX 45 — Engraved baleen with basic design done by pantograph and then hand-finished (with signature "Apodruk" and label "Genuine Baleen") (finished version of 44).

CX 46 — Engraved baleen cuff links with label describing whale baleen, done by pantograph and then hand-finished (Eskimo hunting walrus).

CX 47 — Carved soapstone seal (signed "John Alurac").

[14] CX 48 — Ivory earrings with label "GENUINE IVORY" (Eskimo face) done by multiple carver and then hand-finished (bear hunting walrus).

CX 49 — Engraved ivory "story bracelet" done by pantograph and then hand-finished.

CX 50 — Rough engraved ivory scene of walrus, that goes on link bracelet (49 after hand-finishing).

CX 51 — Rough carved ivory scene of cache (one link of earring as it comes off multiple carver) (see 48).

CX 52 — Rough carved, hand-finished ivory scene of cache.

CX 53 — Rough engraved baleen with basic design done by pantograph, with signature "Apodruk" and Eskimo hunter.

CX 54 — Rough engraved, hand-finished baleen (finished model of 53).

CX 55 — Rough engraved baleen with basic design done by pantograph, Eskimo hunting walrus.

CX 56 — Rough engraved, hand-finished baleen (finished model of 55).

CX 57 — Hand-carved walrus jaw bone.

b. IAC:

CX 103 — Wooden totem pole stamped “Genuine Indian Made Hand Carved by Chief White Eagle” (8” high).

CX 105 — Carved soapstone figure with the signature “Luke” on the bottom of a foot.

[15] CX 106 — Ivory charm in the form of a bear with a fish in its mouth, carved by router, hand-finished (Northwest).

CX 107 — Ivory charm in the form of an Eskimo carved by router, hand-finished (Northwest).

CX 108 — Ivory charm in the form of an Eskimo face, carved by router, hand-finished (Northwest).

CX 109 — Ivory charm in the form of a snow goose carved by router, hand-finished (Northwest).

CX 110 — Ivory keychain in the form of a polar bear, carved by router, hand-finished (Northwest).

CX 111 — Ivory charm in the form of a ram's head, carved by router, hand-finished.

CX 112 — Beaded medallion purchased at Host International Gift Shop, SEA-TAC Airport (no label).

CX 113 — Beaded necklace with tag, “Made in Hong Kong.”

CX 114 — Colored beaded bracelet with tag, “HANDMADE IN HONGKONG.”

CX 115 — Ivory carving of Eskimo woman holding child.

CX 116 — Spoon with engraved ivory handle with label, “Genuine Ivory” — “This tag is your guarantee that this article is genuine ivory” (Eskimo sled being pulled by reindeer).

CX 117 — Eskimo figure, holding fish, material unknown (Thorn Arts Ltd.).

[16] CX 122 — 6” wood totem pole with label, “MADE IN TAIWAN REPUBLIC OF CHINA.”

CX 123 — 6” wood totem pole, identical to 122 without label.

c. Houston:

CX 2 — Piece of engraved baleen with the signature “Nunuk” and scene of a cache.

CX 3 — Rough engraved ivory bolo tie clasp done by a pantograph. Dogs pulling dogsled with house in back.

CX 4 — Ivory bolo tie clasp with the basic design done by pantograph and then hand-finished with signature “Nunuk.” Eskimo dogsled.

CX 5 — Ivory bolo tie clasp with the basic design done by pantograph and then hand-finished (dogsled, dog team).

CX 6 — Ivory cutlery handle with basic design done by pantograph and then hand-finished. The signature “Nunuk” appears (Whale hunting).

CX 7 — Rough carved ivory polar bear charm pendant done by multiple carver.

CX 8 — Ivory polar bear charm pendant done by multiple carver and then hand-finished.

CX 9 — Rough carved ivory polar bear charm carved in relief by multiple carver (link for bracelet).

CX 10 — Ivory polar bear charm carved in relief by multiple carver and then hand-finished (finished version of 9).

CX 11 — Rough carved ivory billiken charm done by hand.

[17] CX 12 — Ivory billiken charm done by hand.

CX 13 — Rough carved ivory dogwood flower done by multiple carver.

CX 14 — Ivory dogwood flower pin done by multiple carver and then hand-finished (with gold nugget).

CX 15 — Rough carved ivory ram's head done by multiple carver.

CX 16 — Ivory ram's head done by multiple carver and then hand-finished.

CX 17 — Rough carved ivory snow goose done by multiple carver.

CX 18 — Ivory snow goose earring done by multiple carver and then hand-finished.

CX 19 — Ivory billiken cuff links done by hand (with label “Genuine Ivory”).

CX 20 — Ivory snow goose pin done on a multiple carver and then hand-finished (with label “Genuine Ivory”).

CX 21 — Ivory mountain goat pin, with basic design done by pantograph and then hand-finished (with label “Genuine Ivory”) (finished version of 22).

CX 22 — Rough engraved ivory mountain goat done by pantograph.

CX 23 — Ivory mukluk earrings done by multiple carver and then hand-finished (with label “Carved Genuine Ivory”).

CX 24 — Carved and engraved ivory link bracelet done by multiple carver and pantograph and then hand-finished (with label “Genuine Ivory”).

[18] CX 25 — Ivory Eskimo hunter and seal done by a multiple carver and then hand-finished on base.

CX 26 — Carved ivory walrus bolo tie clasp done by multiple carver and hand-finished (with label “Carved Genuine Ivory”) (finished version of 27).

CX 27 — Rough carved ivory walrus done by multiple carver.

CX 28 — Ivory totem pole tie-pin done by multiple carver and then finished (with label “Genuine Ivory”).

CX 29 — Ivory billiken keychain done by multiple carver and then hand-finished.

CX 30 — Carved fossil ivory billiken.

d. Western:

CX 128 — Carved ivory seal as it is received from Japan, except for tag on base “JAPAN” which is removed by respondents.

CX 129 — Carved ivory seal after it is hand-finished by Western Novelty Co.

CX 131 — Ivory seal pin with label “IVORY.”

CX 132 — Ivory animal (polar bear) with label “IVORY.”

CX 133 — Ivory billiken with labels “GENUINE IVORY,” “ALASKA GOLD NUGGET,” and “LUCKY BILLIKEN, Genuine Ivory.”

CX 134 — Ivory whale pin with label “IVORY.”

CX 135 — Ivory billiken earrings.

CX 136 — Ivory flower pendant with label “GOLD NUGGET HAND CARVED IVORY.”

[19] CX 137 — Ivory flower earrings with label “GENUINE IVORY.”

CX 138 — Engraved ivory pin (polar bear) with labels “HAND ETCHED,” “GENUINE IVORY” and “HAND ETCHED BY EDDIE OMNICK, AN ESKIMO From Pt. Hope, Alaska.”

CX 139 — Carved ivory dog with label “GENUINE IVORY.”

e. Oceanic:

CX 89 — Ivory engraved walrus keychain.

CX 90 — Ivory billiken keychain with label attached titled, “LUCKY BILLIKEN, Genuine Ivory.”

CX 91 — Engraved ivory pin, Eskimo fishing with label titled, “GENUINE IVORY” and pictures of a walrus, a bear, a husky and an Eskimo.

CX 92 — Engraved ivory necklace, husky, with label “Genuine Ivory.”

CX 93 — Engraved ivory spoon handle of Eskimo hunting scene with label “Genuine Ivory” and a picture of the sun setting behind mountains.

CX 94 — Engraved ivory spoon handle of Eskimo hunting scene, with signature “Nuguruk” and label “Genuine Ivory” and a picture of the sun setting behind mountains.

CX 95 — Engraved ivory letter opener handle of polar bear chasing seal, with label “Genuine Ivory” and a picture of the sun setting behind mountains.

CX 96 — Engraved ivory bolo tie of polar bear with label “Genuine Ivory” and a picture of the sun setting behind mountains.

[20] CX 97 — Carved soapstone walrus with signature Ben Saclamana.

f. Northwest:

CX 65 — Rough carved ivory eagle, carved by router.

CX 66 — Ivory eagle, carved by router, hand-finished (finished version of 65).

CX 67 — Rough carved ivory snow goose carved by hand.

CX 68 — Ivory snow goose carved by hand (finished version of 67).

CX 69 — Ivory walrus head carved by router, hand-finished.

CX 70 — Ivory seal carved by router, hand-finished.

CX 71 — Ivory billiken carved by router, hand-finished.

CX 72 — Ivory Eskimo charm carved by router, hand-finished.

CX 73 — Ivory bear carved by router, hand-finished.

CX 75 — Ivory husky cuff links with label “GENUINE IVORY,” carved by router, hand-finished.

CX 76 — Ivory walrus head pendant, carved by router, hand-finished.

CX 77 — Ivory ram’s head necklace, carved by router, hand-finished.

CX 78 — Carved soapstone seal (signed “Luke”).

CX 79 — Carved soapstone Eskimo, kneeling with harpoon (signed “Luke”).

[21] CX 80 — Carved soapstone Eskimo, standing (signed “Kayutak”).

CX 81 — Carved soapstone Eskimo, kneeling.

C. THE DEFINITION OF ANA MOTIF

19. The precision of the complaints’ definition of ANA motif is the

chief issue in this proceeding. Paragraph Five alleges that "representations" are made through the sale of merchandise with an ANA motif,⁵ specifically, in Paragraph Six, that the merchandise is made in Alaska, that it is wholly or partially made by ANAs⁶ and that it is hand-carved or hand-etched.⁷ Furthermore, the prohibitions of the proposed order would apply only to merchandise with an ANA motif.

20. Complaint counsel rely to a great extent on the expert testimony of Dorothy Jean Ray, a noted anthropologist, as well as that of two "Alaskan Native Americans, [and] two written reports" (CPF 17) to establish that ANAs have created products using certain raw materials and which have depicted images of the ANA way of life, or of mammals, wildlife or wildflowers which can be found in or associated with Alaska, or which are traditionally made by ANAs or which are associated with or have become associated with ANA handiwork.

21. Mrs. Ray testified that ANAs first carved and engraved materials over two thousand years ago (Tr. 383-84) and have engraved whalebone since at least the Thule culture, between the 12th and 17th century A.D. (Tr. 381). ANAs depict in their ivory products the land animals and sea mammals in their environment and Eskimo figures (Tr. 379-80, 383-85). Mr. Paul Tiulana, an ANA artist, now carves, in walrus ivory, polar bears, walruses, birds and land animals with which he is familiar (Tr. 935-36) and has engraved seals, walruses, bears, men and women, and scenes of walrus and seal hunts on ivory (Tr. 937).

[22] 22. ANAs began carving ivory "billikens"⁸ in 1909 (Tr. 394-95) and now produce carved ivory pickle forks, paper knives, cocktail picks, cribbage boards, crochet hooks, kayaks, and book marks (Tr. 938; RX 29, pp. III-17, 33, 51).

23. ANAs have carved billikens in soapstone since the 1950's and have also depicted sea mammals in their environment, as well as Eskimo figures using soapstone (Tr. 385-86). Wooden masks and figures of sea mammals, humans and land animals made by ANAs have been collected since the early 1800's (and may have been made even before this time) (Tr. 387-88).

24. ANAs have used beads since at least 1791 as decorations on other material, but have only begun producing bead necklaces and earrings within the past 10 years (Tr. 388-89).

25. ANAs have made sealskin mukluks and used seal and reindeer skin for clothing since at least the 18th century (Tr. 389-91).

26. On the basis of Mrs. Ray's testimony, it can be concluded that ANAs have made and are making products using ivory, soapstone,

⁵ Other representations through labeling and signatures are also alleged.

⁶ Defined as "a person who has not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood." (Cplt., PAR. 2. 5.)

⁷ With the exception of respondent Oceanic.

⁸ See finding 112.

beads, sealskin, reindeer skin and wood which depict certain images or figures of land animals and sea mammals found in Alaska, Eskimos, birds, and scenes of walrus and seal hunts. ANAs also produce what can only be described as "souvenir" items — the pickle forks, knives, cocktail picks, etc. now made by such craftsmen as Mr. Tiulana (Tr. 938).

27. But Mrs. Ray's expert testimony and the written reports do not establish that the complaints' definition of products with an ANA motif is sufficiently accurate so that one can distinguish between those products of respondents which would be covered by the definition and those which would not.

28. In fact, whereas the definition attempts to recite with particularity those products with an ANA motif by relating them to particular subject matters, Mrs. Ray, in her article, *Graphic Arts of the Alaska Eskimo* (CX 169, p. 6), emphatically declared that this approach, at least as far as Eskimo art is concerned, is invalid:

[23] All Alaskan Eskimo Art—not graphic art alone —has been characterized by such a variety of ideas, styles, forms, and use of materials over so many centuries that the only consistent theme throughout is change. The only other common component is manufacture by an Eskimo. Nothing else—not subject matter or materials—ties them together.

29. The extreme fluidity of Eskimo art became apparent when Mrs. Ray and Mr. Pruzan, IAC's counsel, began discussing the phrase "traditionally made by Alaskan Native Americans." The upshot of the discussion was that, insofar as Eskimo artists are concerned, "new" becomes "traditional" because "their tradition is to try everything new." (Tr. 618)

30. An example of the Eskimos' penchant for "trying everything new" is the "story bracelet." Complaint counsel contend that the story bracelet has an ANA motif (CX 49) apparently because it contains scenes of ANA life (CPF, Appendix A, description of CX 49), yet the story bracelet was designed by Howard Weyahok, a native employed by Houston, and was introduced into Alaska by Mr. Houston, a respondent in these proceedings (Tr. 2234-36). Mrs. Ray agreed that if that were the case, an Eskimo copy of Mr. Houston's bracelet would be an imitation (Tr. 656). The Houston company introduced ivory jewelry with dogwood flower and wild rose designs into Alaska. Even though these flowers are not native to the Eskimo part of Alaska, Eskimo carvers produce, in Mr. Houston's opinion, poor copies of his jewelry (Tr. 2236-39). Although Eskimos had made some cutlery souvenir items in the early 1900's and have produced some since then (Tr. 394), Houston introduced ivory-handled cutlery into Alaska because the Eskimos were not producing it

in the 1930's (Tr. 2239; 1530). Eskimos now make ivory-handled cutlery (Tr. 2240). Respondent Porter also introduced a new item into Alaska about 10 years ago, etched baleen jewelry (Tr. 2240).

31. The implication of the complaints' use of "traditional" is obvious. If one of the respondents (assuming orders were entered) were to introduce a truly unique item into Alaska which was then copied by an ANA, [24] that respondent could be subject to monetary penalties for "deceiving" consumers.⁹

32. A further difficulty with complaint counsel's proof of the definition is their excessive reliance on the testimony of native artists and Mrs. Ray, while the real issue is whether consumers believe that respondents' products have an ANA motif and are confused as to their true origin.¹⁰

33. Complaint counsel try to remedy this defect by referring to vague testimony about consumers' beliefs when they shop in Alaska.

Q. "Are certain perceptions expressed by a substantial number of consumers you talk to?"

A. Yes; those perceptions being that they believe * * * *every item* they see in shops, regardless of the price, *if it is made of ivory*, and that is what we are talking about I believe, *or soapstone*, is a product of an Alaskan native craftsman" (emphasis added). (Tr. 1056)

[25] This testimony seems to disprove the ANA motif definition because not only must the handicraft be made of a listed raw material, such as ivory or soapstone, but it must *also* depict an image of the ANA way of life or depict an image of sea mammals, etc. which can be found in or associated with Alaska or it must be traditionally made by ANAs.

34. Complaint counsel did call three consumer witnesses, Mr. Noonan, Miss Allen and Mrs. Tordoff, but Mr. Noonan's testimony does not establish what the typical consumer believes are products with an ANA motif because he assumed when he first came to Alaska that everything he saw in gift shops, regardless of the image depicted, was an ANA product (Tr. 1369-72, 1380-81).¹¹ Not even complaint counsel make such a claim. And, while Miss Allen was more precise in

⁹ This is not a fanciful hypothesis, for Mrs. Ray testified that if an Eskimo depicted a scene in a traditional Eskimo way, that depiction would be "traditional" the first time it was done (Tr. 619-20).

¹⁰ Paragraph Eight of the complaint states:

"As to merchandise, such as that of respondents, which simulates the products and crafts of Alaskan Native Americans, a substantial portion of the purchasing public has an assumption that the same has been hand-made by Alaskan Native Americans* * *."

See also the University of Alaska report on native arts and crafts where the author recognized that the definition of "native" depended upon what the buyer believed, not upon what the producer or expert conceived of as native (RX-39, p. 26).

¹¹ Nor are Mr. Noonan or Mrs. Tordoff typical consumers. Mr. Noonan came to Alaska "to become a part, or to

expressing her initial assumptions upon entering Alaska gift shops and referred to particular types of products she purchased in the belief they were made by ANAs (Tr. 1438-42), her testimony does not prove that most of respondents' products have an ANA motif.

35. Nevertheless, it is apparent that some of respondents' products have an ANA motif because most consumers would undoubtedly connect them with Alaska and the Alaskan way of life. For example, the following exhibits are so traditionally thought of as "Alaskan" that one would not need testimony to conclude that consumers associate these products with Alaska:

- | | |
|-------------------|--|
| CX 43 (Porter) | -- Ivory figure of Eskimo hunter and polar bear. |
| [26]CX 115 (IAC) | — Ivory carving of Eskimo woman holding child. |
| CX 25 (Houston) | — Ivory figure of Eskimo hunter and seal. |
| CX 139 (Western) | — Carved ivory husky dog. |
| CX 97 (Oceanic) | — Carved soapstone walrus. |
| CX 70 (Northwest) | — Ivory seal. |

36. Yet complaint counsel offered in evidence many more of respondents' products as to which there is no evidence of consumer belief and I can make no findings regarding these products. I cannot find, for example, that an ivory scene of a "cache" (CX 52) or an ivory charm in the form of a ram's head (CX 111) or an ivory dogwood flower pin (CX 14) or ivory "billiken" earrings (CX 135) or an ivory eagle (CX 66) are thought of by consumers as having an ANA motif. There is no evidence that consumers know what a "cache" is; nor is there evidence that consumers associate the dogwood flower, the eagle or the ram with Alaska or know that the billiken is an ANA artifact.¹² Mrs. Ray associates these products with the ANA motif because of her expertise, but her knowledge that the ram, the eagle, the dogwood flower and the billiken traditionally have been depicted by ANAs in their products

become involved and to see first-hand what I thought was a dying culture" (Tr. 1338), and his first experiences in Alaskan gift shops may have been influenced by his romantic impression of Alaska. Mrs. Torloff, who has been a resident of Alaska for 25 years, claimed that she assumed for that period of time that all ivory products sold in Alaska were made by ANAs (Tr. 1620). This is hardly credible and casts doubt on the weight to be given her testimony.

¹² For example, the only proof complaint counsel offer in support of their proposed finding that " . . . consumers in Alaska assume that carved billikens have been made by Alaskan Native Americans" (CPF 51) is testimony by Mrs. Ray that to her the billiken has become associated with ANA handiwork (Tr. 335-396), and an article by her about the billiken (CX 171A-H). Even though the last sentence of this article discusses consumer beliefs about billikens, Mrs. Ray stated that she was not knowledgeable in this area (Tr. 377).

does not prove that consumers believe that these products have an ANA motif. There is thus no reliable proof that all or even most of respondents' products which complaint counsel claim have an ANA motif are believed by consumers to have such motif. [27]

D. THE ORIGIN OF RESPONDENTS' PRODUCTS AND THEIR
METHOD OF PRODUCTION

1. *Origin*

37. Porter's products are made in Seattle, Washington (Porter Adm. 23, 30; Tr. 93) and in some instances are not wholly made by ANAs (Porter Adm. 37, 40; Tr. 120-21). However, its engravings are all done by an Eskimo and its hand-made carvings are done primarily by Eskimos (Tr. 120).

38. Virtually all products sold to Alaska retailers by IAC are not made in Alaska (IAC Adm. 22), but are made either in Seattle (Northwest Adm. 23) or in a foreign country (Tr. 232, 271). In some instances, IAC's products, which are purchased from Oceanic and Northwest, are not made by ANAs (Oceanic Adm. 37; Northwest Adm. 37).

39. Houston's products are made in Seattle, Washington (Houston Adm. 23; Tr. 6) and none of them are made by ANAs (Houston Adm. 34, 39, 40).

40. Western's merchandise is made in whole or in part in Hong Kong, Japan or Oregon (4/28/75 order). Western had five full-time employees in its assembly line, none of whom were ANAs. Two part-time employees were ANAs (Tr. 1713). In view of the number of non-ANA employees engaged in production, it is reasonable to infer that some of Western's products are not made by ANAs.

41. Oceanic's products are made in Seattle (Oceanic Adm. 31) and in some instances are not made by ANAs (Oceanic Adm. 37).

42. Northwest's products are made in Seattle (Northwest Adm. 23) and some of its ivory and soapstone merchandise is not made by ANAs (Northwest Adm. 37).

2. *Method Of Production*

43. All of the respondents except Oceanic (Tr. 2280-81) and IAC use either pantographs or duplicating carvers in the production of some of the merchandise described in Finding 18 (Tr. 10-13, 102-03, 139-40; 4/28/75 order). While IAC does not use machines, it purchases merchandise from Northwest, which does (CX 59A).

[28] 44. A pantograph duplicates ivory or baleen engravings by tracing over a pattern and producing a one dimensional outline on other

material. The pantograph does not, however, produce finished products; they are only rough-engraved and must be finished by hand. A multiple carver is a duplicating machine not unlike a pantograph which reproduces, by carving, one- two- or three-dimensional objects by using a master form (Tr. 10-13, 15, 102-04, 139-40; Houston Adm. 3; Northwest Adm. 3; Porter Adm. 3).

45. Conversion of rough-carved or rough-engraved products into saleable ones requires further work, either skilled hand carving or engraving (Tr. 10, 15-16, 150-51). For example, all of Houston's products which are initially rough-engraved by a pantograph are individually finished by hand (Tr. 15, 90), a process which consumes in some cases 90 percent of the time required to produce them (Tr. 85, 87). All rough-carved products are also finished by hand (Tr. 85). Porter uses both a pantograph and a multiple carver. Neither of these machines operate automatically; both are hand-controlled (Tr. 125-126A). Products which are rough-engraved or rough-carved by the pantograph or multiple carver are finished by hand operations using other machines (Tr. 126). Northwest uses an "engraving machine" which rough-carves one piece at a time (Tr. 139-40). The machine reproduces only a basic outline. A worker then finishes the product by hand, carving and polishing its entire surface (Tr. 153-54).

46. According to §46.65.070(2) of the Alaska Statutes, an " 'authentic Native article of handicraft' means an article made in the state which is * * * fashioned by a Native¹³ without the use of a pantograph, a multiple carver, or a similar mass production device." But this definition does not exclude the use of hand-held tools and does not compel the conclusion that respondents' products are machine-made.

47. ANAs do use power tools such as hand drills, routers, saws, and shaping drills (Tr. 1201-02). The ANAC¹⁴ [29] warehouse at the Anchorage airport contains power tools which are used to teach natives their use (Tr. 2258-59). While ANAC sells what it considers to be hand-made products (Tr. 672), powered hand tools (but not duplicators) such as high speed drills and buffers and a drill press may be used in their production. They are nevertheless considered hand-made because the free hand has an influence in the "outcome" or final shape of the product (Tr. 673-74; see also Tr. 787, 813-14).

48. There is other evidence of the use of power tools by ANAs in producing their souvenir products. The *Final Report State of Alaska Arts & Crafts Program* (1973) states that there are non-native production shops and native production shops in Alaska which produce

¹³ Defined in §45.60.070(1) as a "resident having not less than one-quarter Eskimo, Aleut, or Indian blood * * *."

¹⁴ The Alaskan Native Arts and Crafts Cooperative, a company which sells "authentic" native handicrafts in Alaska (Tr. 669).

ivory and soapstone products partially with power equipment (RX 32, pp. 40-41). Mr. Wolff, who wrote a report commissioned by Alaska's Department of Economic Development on certain aspects of native handicrafts (CX 173), testified that while he was in Alaska some ANAs used small hand drills, routers, saws, and various shaping drills (Tr. 1201-02). Mr. Paul Tiulana, a "one-hundred percent Eskimo" and a native counselor in ivory carving who has himself been carving for 40 years, now uses an electric hand drill and an electric router (Tr. 934-37). The artists Peter Mayac and Erick Tetpon, Jr. and other natives in the Anchorage area use hand-held power tools (Tr. 813).

49. ANAs are even importing "blocked out" ivory carvings and hand finishing them without disclosing their foreign origin (RX 32, p. 42; CX 173, p. 14) and apparently without disclosing that they are "machine-made." This kind of activity would be expanded if the 1964 recommendations of the University of Alaska were followed:

"In general, the organization of regional craft production workshops would provide the principal means of improving the organization or production of traditional handicrafts by removing some from the present highly inefficient 'cottage industry' type production * * *.

"The production of souvenirs on a self-sustaining basis will require establishment of small factory production in a number of additional shops separated from the art, fine crafts and handicrafts production." (RX 39, pp. 15-16)

[30] It is unlikely that these products would be labeled "machine-made" if these recommendations were carried out. They would undoubtedly be considered "genuine native handicrafts" by their makers (see RX 29, p. I-8).

50. There is, at least at the present, one difference between some of respondents' products and ANA products—the initial use of a duplicating device to produce a rough engraving or carving. But many ANAs and the respondents use individually hand-held tools at some point in the production process. And, just as the ANA uses his hands to produce the final product, respondents' employees use their skill to hand-finish their products.

51. Visual inspection of respondents' rough and finished products confirms their claim that the duplicating machines produce only an approximation of the finished product and that most of the work which is required to produce a saleable product is done by hand (compare CX 42 with CX 43 (Porter); CX 15 with CX 16 (Houston); CX 65 with CX 66 (Northwest)).

52. Some of respondents' products which are not jewelry or cutlery items but which look truly "Alaskan" are actually hand-made, and in some cases by ANAs (although in Seattle, not Alaska). These products include a carved soapstone seal (CX 47), a hand-carved seal made from walrus jawbone (CX 57; Tr. 110-14) (Porter); carved soapstone Eskimos (CXs 79, 80, 81; Tr. 144-45) (Northwest); a carved soapstone figure (CX 105), a carved Eskimo figure (CX 117) (IAC); and a carved soapstone walrus (CX 97; Tr. 194, 213) (Oceanic). There is no evidence that these products are any less "authentic" in their method of production than similar products made by ANAs in Alaska.

E. DECEPTION BY APPEARANCE

1. *Preliminary*

53. None of the respondents explicitly represent through labels, signatures or advertisements that their products are made in Alaska, or are hand-made, or are made by ANAs.¹⁵ However, complaint counsel claim that because [31] respondents' products appear to be ANA "handicraft-type products," they have an inherent capacity to deceive consumers who prefer ANA products and assume that they are purchasing those products when they are purchasing respondents' products (CPF, p. 3).

54. Complaint counsel's claims concerning consumer assumptions about and preferences for ANA products are made without taking into account several facts which affect those assumptions and preferences. Before discussing the testimony of complaint counsel's witnesses, it is therefore appropriate to describe the circumstances under which actual purchases of respondents' and ANA products take place.

2. *Respondents And ANAs Make Souvenir Products*

55. The so-called "handicraft-type" ANA products (CXs 142-149; 152-166, 168) which complaint counsel say are comparable to respondents' "imitation" products, include such items as a tie clip (CX 143), a replica of a wooden totem pole (CX 152), bolo ties (CXs 155-156), a letter opener (CX 160), bracelets (CXs 161-162, 166), a billiken pin (CX 164), a snow goose brooch (CX 165) and handles for cutlery (CXs 158, 163, 168).

56. While these products, all of which come from the ANAC

¹⁵ Prior to issuance of these complaints, some respondents placed on some of their products signatures of what complaint counsel claim are Eskimo-sounding names. The capacity of these signatures and certain labels attached to their products to deceive consumers is discussed below in Findings 101 through 135.

cooperative, are apparently made by ANAs (Tr. 674-81) and may be “hand-made,”¹⁶ they are not “handicrafts,” but are souvenirs designed specifically for the tourist and military trade (RX 39, p. 22). The term “handicraft” implies some attempt by the craftsman to reproduce, imitate or comment on an aspect of native culture, yet, according to Wolff, *Native Handicraft Identification* (hereafter “Wolff Report”):

[32] “As has been pointed out in most studies of Alaskan handicraft, the history of design of most of the craft products produced by Alaskan Natives is related more to consumer demand than to ‘Native culture’ ” (CX 173, p. 8; see also Tr. 1249).

57. A study of *Alaska Arts And Crafts Potential For Expansion* by the University of Alaska (hereafter “U of A Study”) discussed totem poles sold by the Alaska Native Arts and Crafts Clearing House in its 1962 catalog and commented that they fell “far below the standards of a true handicraft, despite being guaranteed to be ‘hand-made,’ and can qualify only as a tourist souvenir or curio” (RX 39, pp. 30-31). Other commentators have noted the poor quality of the so-called “handicraft” items made by ANAs. On cross-examination, Mr. Wolff testified that the differences in quality between ANA and non-ANA products do not favor the native product and that some non-ANA products are probably more acceptable to the retailer and the average consumer (Tr. 1243-44). Mrs. Ray’s book, *Graphic Arts of the Alaskan Eskimo*, states that engravings “often look as if stamped out with a machine” (Tr. 447, 463-64). A report by Ernst & Ernst, *Alaska Native Handicraft Development* (hereafter “E & E Report”), noted the undependable quality of products sold by ANAC (RX 29, p. II-12) and the inferiority of Alaskan handicrafts in their “workmanship, form, designs and general artistic expression * * *.” (RX 29, p. I-13).

58. An apt summarization of the ANA products with which these proceedings are concerned appears in the 1973 *Final Report State of Alaska Arts and Crafts Program* (RX 32, p. 102):

“It is well known that the village craftsman has been locked into the tourist/souvenir market and has not been able to express the creative energy that he possesses.”

59. These comments suggest the true nature of the issues in this proceeding. We are not involved here with a cynical attempt by

¹⁶ The words “apparently” and “may” are used because ANAC’s definition of authenticity may not coincide with the complaints’. ANAC sells its products as “hand-made,” although some hand-held power tools are used by natives (see Findings 47 through 50). ANAC sells its products as “native-made” and tries to adhere to the “one-quarter or more native blood” statutory definition, but it also sells products as “native-made” if they are made by someone recognized in the community as a native even though he or she may not come within the statutory definition (Tr. 704).

respondents to duplicate individualistic, artistic native products; what we are concerned with (once the romantic assumptions about ANA products are shattered by reality) are products, whether ANA-made or [33] made by respondents, which do not purport to be (and are not) "art" or even "handicrafts." Respondents are in the business of selling to the tourist trade and the ANAs are in the same business.

60. The 1964 U of A Report recognized these "hard truths" about ANA products:

Output of Alaska native crafts represented in the ANAC catalog is a mixed bag. Many of the items could not be classed as "authentically" native in nature (RX 39, p. 38).

The woodcarving of the Southeast Alaska Indians, except for the work of three or four truly skilled carvers and the group output of the Alaska Indian Arts, Inc., is a sad parody of the output of a people who once were unchallenged masters in this medium * * *. Eskimo ivory carving, which is generally most prominently represented in any selection of Alaskan native crafts, is a truly mongrel craft (RX 39, pp. 40-41).

With the possible exception of some of the better Eskimo masks and a rare individual piece of ivory carving, there is nothing in the total "product" which even remotely approaches art (even with an extended definition of the term) and little of the remainder can be classified as good handicrafts (RX 39, p. 45).

Rather than condemning the Seattle producers of "imitation" products the report concluded:

"In many instances the resulting products compare favorably with the 'hand made' Alaska version in esthetic and sentimental appeal and are generally sold at a fraction of the price" (RX 39, p. 49).

The report even suggested that ANAs begin to emulate the Seattle manufacturers by producing souvenirs using semi-mass [34] production methods¹⁷ (RX 39, p. 28), in apparent recognition that tourists seeking souvenirs may not have a desire for individualistic hand-crafted products.

3. *Factors Which Influence Consumer Assumptions And Preferences*

61. Although the dominant orientation of respondents' and ANA products is toward the tourist souvenir market in Alaska (RX 39, p. 3), some consumers may have an initial assumption that the pickle forks, bolo ties, billiken key chains, cutlery, etc. which they see in gift shops in Alaska are made in Alaska, by hand, by ANAs.

¹⁷ The coordinator of Arts and Crafts Development of the Alaska Department of Economic Development actually considered the possibility, in 1973, of purchasing one of the Seattle workshops and moving it to Alaska (RX 32, p. 31).

62. Complaint counsel argue, however, that the initial assumptions of some tourists remain unchanged and that tourists have an unvarying preference for "authentic" souvenirs as opposed to "imitation" souvenirs regardless of differences in quality or price. I cannot accept this simplistic approach to such a complex issue.¹⁸ In my opinion, the setting in which the average consumer views and purchases souvenirs profoundly affects his assumptions and preferences. Those factors which affect consumer assumptions and preferences and which complaint counsel have ignored in their proposed findings include the following:

(a) The Silver Hand Program

63. In 1962, Alaska adopted the "Silver Hand Statute" whose purpose was to provide for the identification of [35] "authentic articles of Native handicraft made in the State" (see .45.65.010-.150, Alaska State Statutes) through the use of identification seals (see RX 23, p. 17). The statute was not implemented until 1972; at that time Alaska's Department of Economic Development began to distribute identification labels and publicize the program (Tr. 985; RX 32, pp. 17-18). Although this program has been limited in scope due to budgetary restraints (Tr. 985-86), pamphlets illustrating the seal and explaining its purpose are found in the seat-pockets of some airplanes going to, from and within Alaska (RX 25; Tr. 811, 1792, 1802). Distribution in airplanes has, however, been erratic (Tr. 986-87). Cardboard signs bearing the "Silver Hand" and an explanation of the program are distributed to dealers (RX 52; Tr. 1791, 1945) and the program is advertised on radio and in publications (RXs 53-58, 61; Tr. 811, 1791-1804, 2115-17). The "Silver Hand" label is now widely used in Alaska gift shops (Tr. 805-06, 1601, 1788, 1945, 1950, 1999, 2125, 2202) as well as in the Seattle-Tacoma Airport through which a large number of tourists come on their way to Seattle (Tr. 262, 810). Tourists are made aware of the program by guides on tour buses, by retailers and by the Anchorage Visitors Bureau (Tr. 1792, 1946, 2052, 2115-16, 2202).

64. The Wolff Report, which was made before the "Silver Hand" program was implemented (and which may have contributed to the decision to implement the program) concluded that a program of identifying native products would "insure that those who wish to buy authentic Native products are given a good opportunity to distinguish them" (CX 173, p. 49) and it is apparent that even at its present level of

¹⁸ The E & E Report found that:

"In defining this industry, then, we are faced with inexact and highly personalized ideas of what a given item means to one individual versus another" (RX 29, p. 1-2).

funding this program contributes to consumer awareness that there are “authentic” and “non-authentic” souvenirs sold in Alaska.¹⁹

[36] 65. Also contributing to consumer knowledge about souvenir items are the advertisements run by ANAC, one of which (RX 53, p. 7) states:

“Alaska native handicrafts are copied by many. So, ask before you buy. Any good shop will know. Or ask us.”

This and similar advertisements were placed in publications with extensive circulation (RXs 53-57, 60, 61; Tr. 1799, 1804, 1884). Individual ANAs may also place their own identifying labels on their products (Tr. 1788-89).

(b) The Display of Respondents' and ANA Products

66. While some gift shops in Alaska sell only ANA handicrafts, most offer a variety of products (Tr. 991), some made by respondents, some from foreign countries, so labeled (Tr. 1804-16, 1851, 1957, 2056; RXs 10-11, 14, 64, 125-127, 129-136, 138, 142-150), some made in Alaska but not by natives (Tr. 1410, 1818, 1822-31, 1957; CX 189; RXs 67, 71, 73, 74), some made by ANAs using hand-held tools (Tr. 673, 787, 813, 1201-02, 2180), some made by ANAs showing that they are so made (RXs 47-51), some made by ANAs with no labels (Tr. 2079, 2180, 2216) and some which are obviously “junk” items for the tourist trade (RXs 99-127, 129-152; Tr. 1851-57).

67. There are also physical differences in the display of some of respondents' and ANA products. Houston's products are displayed and sold in gift boxes of a uniform color and type (Tr. 76). IAC's products (and therefore some of Oceanic's and Northwest's, since IAC buys from these two companies) are also boxed (Tr. 186). Some ANA products are only wrapped in tissue paper when they are delivered to Alaskan gift shops (Tr. 2197; see also Tr. 2059).²⁰ In about half of the gift shops visited by one witness, non-native products were kept separate from ANA products (Tr. 1907); in others, however, “authentic” and “imitation” souvenirs are intermingled (Tr. 747, 1265, 1342). [37]

(c) The Prices of Respondents' and ANA Products

68. The ANAC mail order catalog contains products whose prices

¹⁹ For example, one of the tourists interviewed by complaint counsel's witness, Miss Allen, reportedly said:

“I read about the Alaska hand symbol which is supposed to be on all the souvenirs that are actually made by the native peoples. And, you know, after I read about the symbol, I haven't seen hardly any of them around. I think that even some of the Indian artifacts and totems aren't even made by the natives.” (Roxanne Burton, CX 194B). See also interview with Guy Johnson (CX 191F).

²⁰ On the other hand, some ANA products sold by ANAC are also packaged (see CX 168, an “authentic” cocktail stirrer).

range from under \$100 to \$12,000 (Tr. 819-25). Its manager, Mr. Tiffany, testified to comparative prices of four ANAC and IAC products:

18" Totem Poles:

ANAC: \$115 and \$130

IAC: \$10 (Tr. 822, 915)

Mask:

ANAC: \$100

IAC: \$16.50 (Tr. 916)

Letter Openers:

ANAC: \$20 and \$25

IAC: Forty cents (Tr. 917)

Coasters:

ANAC: \$72 - \$120 per dozen

IAC: \$9 per dozen (Tr. 918)

69. The Wolff Report surveyed 25 native and non-native products and found that, with one exception, the native products were sold at prices 10 to 150 percent higher than comparable non-native products (CX 173, p. 32). The E & E Report found that "ANAC jewelry prices are roughly twice what the acceptable imitation articles bring" and compared a set of six steak knives sold by ANAC for \$45 to \$50 with a similar set made in Seattle which would retail in Alaska for \$21, and a set of roast carvers sold by ANAC for \$24 to \$36 with a similar set made in Seattle which would retail in Alaska for \$16.50 (RX 29, pp. II 35-36).

70. Several witnesses commented upon the high prices of ANA products as compared with respondents':

Olsen:

"And when they [tourists] see the ANAC prices on some of the items, the smaller and bigger [38] items, they find that it is really not a tourist item and generally they will go and buy the lesser priced item" (Tr. 1343).

Reventlow:

Q. "I believe you say many times people coming in your store, they see the high price of native items and they will be guided down to another gift store by you . . . and will come back and they have purchased a Seattle item; is that correct?"

A. That's right, very often; also Japanese or Taiwan items" (Tr. 1415; see also Tr. 1420).

Edwards:

“In my store the non-native item is lower priced” (Tr. 2061).

Sain:

Q. “Do the customers tell you what their reason is for choosing the Seattle product?”

A. Two main reasons; the price is a big factor, and also quality of the merchandise” (Tr. 2152).

Q. “Mr. Sain, I will ask you a similar question to that which I asked the other witnesses. Do you carry any jewelry items produced by the J. L. Houston Company?”

A. Yes, I do.

Q. Do you also carry jewelry items produced by Alaska native Americans?”

A. Yes, I do.

Q. Which are higher priced?”

A. The Alaska native American” (Tr. 2155).

[39] Wood:

Q. “Mrs. Wood, if I walked into your store as a tourist, how in your opinion would I tell a native-made item from a non-native made item?”

* * * * *

A. “Price.

Q. Would you explain that a little more?”

A. Your non-native made item is cheaper in price than your native made item” (Tr. 2197; see also Tr. 2210, comparing a \$30 non-native bracelet with a \$100 native-made one).

71. Complaint counsel claim that the testimony of Mr. Wolff and a chart in their reply brief showing prices of ANAC and respondents’ products reveal that there are no significant price differences between similar products. Mr. Wolff’s testimony does not support this claim. While Mr. Wolff said that price differences would not indicate to the consumer that some products were native and others were non-native, he did not give any substantial reason for this statement (Tr. 1139). Furthermore, Mr. Wolff is the author of the study which reported price differences between comparable ANA and non-ANA products ranging from 10 percent to 150 percent.

72. The chart in complaint counsel’s reply brief is based upon so many assumptions that it cannot counter the contrary evidence. Complaint counsel assume that all retailers in Alaska arrive at the retail price of their products by doubling the wholesale price, but refer only to the testimony of Mrs. Edwards (Tr. 2088) who, incidentally, testified

that non-native items were lower priced in her store (Tr. 2061). Complaint counsel assume that ANAC products, which they compare with respondents' products, are representative of all native products. Finally, complaint counsel assume that the price comparisons are of similar products without any proof that they would appear similar to the consumer.

[40] 73. While there may be some ANA products which are comparable in price to similar respondents' products, the testimony of knowledgeable witnesses and the E & E and Wolff reports lead to the conclusion that, as a general rule, respondents' products are lower priced than similar ANA products.

4. *Consumer Assumptions And Preferences*

(a) Preliminary

74. The record contains no evidence that any consumer ever purchased one of respondents' products and was led solely by its appearance to assume that it was hand-made in Alaska by an ANA, nor is there any evidence that consumers actually prefer ANA products over comparable products of respondents.

75. Complaint counsel attempt, instead, to prove capacity to deceive by referring to consumer assumptions about all products sold in Alaska in the belief that the totality necessarily encompasses that part consisting of products sold by respondents. However, this approach ignores and is inconsistent with the ANA motif definition and the theory on which the complaint was issued (Findings 19 to 36).

76. Thus, testimony by Mr. Kent that everything which is made of ivory or soapstone is believed by consumers to be hand-made in Alaska by ANAs is of no assistance in determining their assumptions about and preferences for any products with an ANA motif, let alone respondents (Tr. 1055-56).²¹

77. The testimony of Mr. Wolff, Miss Allen and Mr. Noonan also present the same problem, since their perceptions of consumer assumptions and preferences ignore the ANA motif definition (Tr. 1130, 1369-72, 1380-81, 1438-42).

[41] 78. Complaint counsel suggest in their reply brief that this difficulty can be swept aside by ignoring the definition and by entering, instead, an "all products" order, or an order which refers to particular products without mentioning any depictions (p. 4). I cannot accept this theory. It is true that the notice order is only proposed and that the

²¹ The uncertainty of the ANA motif definition is exemplified by the testimony of Mr. Kent, a resident of Alaska, who claimed on cross-examination that ivory carvings of flowers do not have an ANA motif (Tr. 1084) whereas complaint counsel argue that products depicting dogwood flowers have an ANA motif because of their association with Alaska (CX 14).

actual order which might be entered can differ substantially from the notice order. However, the ANA motif definition is contained in the complaint, complaint counsel had the burden of proving that the definition was valid, and respondents' defense was geared to that definition. Furthermore, the option which complaint counsel offer is academic, for I am convinced that whatever products the order might encompass, they have failed to prove that consumers assume at the time of purchase that respondents' products are hand-made in Alaska by ANAs and that consumers prefer ANA products over respondents' products.

(b) Consumer Assumptions

79. Miss Allen and Mr. Noonan apparently assumed that the products which they purchased were hand-made in Alaska by ANAs but their testimony is not a reliable guide to typical consumer assumptions about respondents' products. Mr. Noonan's romantic attachment to Alaska hardly qualifies him to speak for the typical consumer, and since both may have actually purchased ANA products, their assumptions about authenticity may have been correct or may have been influenced by factors other than the products' appearance. Finally, since neither purchased any of respondents' products, their testimony provides scanty support for complaint counsel's claims of consumer assumptions about those products.

80. The testimony of complaint counsel's retailer witnesses is a more reliable guide to consumer assumptions and preferences and indicates that when the average tourist visits Alaska, he prefers to purchase products made by ANAs (Tr. 733, 738, 1334-35, 1403-09, 1584-86, 1596).

81. However, this preference is not necessarily accompanied by an assumption that products such as respondents' are made by ANAs. Tourists are much more alert to the fact that non-ANA products are also sold in gift shops in Alaska. This is especially true with respect to [42] the kind of souvenirs sold by respondents. Mrs. Olsen, a former saleslady for ANAC, stated:

Q. "Did you also say the following, Mrs. Olsen: 'Ideally, the consumer wishes to spend about \$10, but when he sees ANAC prices or similar merchandise in gift stores, he decides to purchase this cheaper item.' * * *

A. Those are the tourists. They are tourists coming up to Alaska looking for souvenirs. And when they see the ANAC prices on some of the items, the smaller and bigger items, they find that it is really not a tourist item and generally they will go and buy the lesser priced item." (Tr. 1343)

82. Practically every retailer who testified commented on the questions which tourists ask about the origin of the products sold in Alaska gift shops (Tr. 733-34, 1417, 1425, 1942-46, 2051, 2060, 2114, 2149, 2198).

83. Miss Allen conducted interviews with tourists in preparation for a newspaper article about Alaskan gift shops. While her notes of these interviews are hearsay, and may not be completely accurate records of her conversations, they provide some insight into consumer assumptions about souvenir products. According to these notes, many of the interviewees were aware that non-ANA products are sold in Alaskan gift shops: Dudley (CX 191A); Bakersfield (CX 191A); White (CX 191B); Michaels (CX 191B); Burton (CX 191B); Packard (CX 191C); Hendrickson (CX 191D); Myers (CX 191F); Smith (CX 191F); Kaminski (CX 191G). Others apparently assumed that the products they purchased were made in Alaska not because of appearance but because of what they were told by sales clerks or because they were influenced by a label: Rathbaum (CX 191A); LaMountain (CX 191C); Adams (CX 191C); Hastings (CX 191E); Johnson (CX 191F); Collins (CX 191G). Some were unconcerned with whether the products they purchased were made by ANAs: Neuberger (CX 191E); Campbell (CX 191E); Sampson (CX 191F); Mullins (CX 191G).

84. The rest of the interviewees assumed that particular products they intended to or had purchased were made by ANAs: Brighton, totem pole (CX 191A); Murphy, moose horns or a big carving (CX 191B); Hoffman, totem pole, carvings, sealskin [43] slippers and clothes (CX 191C); Whitted, totem pole (CX 191D); Webber, stuffed animal (CX 191D), but I still do not know why they had such assumptions. Was it because of the products' appearance, or was it because of some other factors which were not adequately developed by Miss Allen during her interviews?²²

85. While it may be that some of respondents' products appear to be similar to the ANAC products placed in evidence, a product-by-product comparison made by me or by witnesses in the hearing room does not produce any insight into consumer assumptions about those products at the time of purchase. This can only be done by considering all of the information which the consumer has available at that time.

86. This information includes price, perhaps the most significant difference between respondents' and ANA products. Other information contributes to consumer assumptions: many of respondents' products are distinctively packaged, some ANA products are not. While the Silver Hand program has not been adequately funded, it nevertheless

²² Even Miss Allen could not conclude that people in Alaska are misled simply by the appearance of a product (Tr. 1468).

alerts the consumer to the fact that ANA and non-ANA products are sold in gift shops, as does ANAC's advertising. Separate displays of ANA products in many gift shops also indicate to consumers that there are non-ANA products for sale.

87. Complaint counsel insist that none of these factors have any significant impact on consumer assumptions and ask me to infer a consumer assumption that all of respondents' products with an ANA motif are made by ANAs.

88. The only inference which I can make after reviewing all of the evidence on this point is contrary to that urged by complaint counsel. If consumers uncritically assume that the products which they see in Alaskan gift shops are made by ANAs, they would not seek information from retailers, yet it is undisputed that retailers are often asked searching questions about the origin of the products they offer for sale. Actually, consumers are so [44] aware that Alaskan retailers sell both types of products that they are surprised to find stores, such as ANAC's, which sell only ANA products (Tr. 865). This consumer awareness may explain why complaint counsel did not call a single witness who was deceived by the appearance of one of respondents' products.²³

89. Because consumers are provided with a variety of product information before they visit Alaskan gift shops and when they see souvenirs on display, I conclude that they do not assume that all of respondents' products with an ANA motif (supposing for the moment that the definition describes their products accurately) are hand-made in Alaska by ANAs.

(c) Consumer Preferences

90. When a tourist first visits Alaska he undoubtedly prefers, all things being equal, to purchase ANA products (Finding 80). But all things are not equal in the souvenir market and the consumer soon becomes aware of differences in the price and quality of products which are offered for sale.

91. Complaint counsel ignored these facts. They presented their case on the theory that consumer assumptions about ANA products are equivalent to a preference for those products, for the testimony they cite for the proposition that consumers prefer ANA products relates only to initial consumer beliefs about ANA products without discussing comparable products of respondents (CPF, pp. 2-3 and CPF 139).

92. Because they relied on this theory, complaint counsel offered no evidence that after comparing similar products made by respondents

²³ Mrs. Tordoff assumed that one of Houston's products was made by an ANA, but that was because the product was signed with the name "Nunuk" (Finding 132).

and ANAs, consumers choose the ANA products because of a preference for them. This issue would have been a subject of mere speculation if respondents had not offered evidence of consumer preferences.

93. Disregarding this evidence for the moment, it seems improbable that even if they were sold at the same price, [45] consumers would always prefer the "authentic" ANA products over respondents' products. For example, the engraving on the handle of an "authentic" pie server (CX 163) is inferior in design and execution to that of the cocktail stirrer produced by Oceanic (CX 94) and it is entirely possible that consumers would prefer the Oceanic product over the "authentic" product. Of course, some of the ANA products appear to be of higher quality than some of respondents' (compare CX 152 with CXs 122 and 123) but it is nevertheless possible that consumers would prefer the "imitation" totem poles because of their lower price (\$1.99 v. \$8.50).

94. The evidence confirms my belief, since consumers often purchase non-ANA products because they prefer them over ANA products. The Wolff Report concluded that many consumers who might initially prefer ANA products "will ultimately choose not to buy an authentic product, because of high price or other factors" (CX 173, pp. 48-49; see also Tr. 1237). These other factors may well include indifference as to source:

"Moreover, many tourists, military personnel, and others truly do not care if the product is authentic. Whether they buy it for their own personal use or as a gift, the important factor in the buying decision is to satisfy a want for an 'Alaskan-type' product that is a souvenir or other memento from the region they have visited" (E & E Report, RX 29, p. III 3-4).

"The product would be a range of items which would be purchased primarily as mementos of visits to Alaska with utility to the buyer as keepsakes or conversation pieces * * *. These souvenirs would be inexpensive items and not really examples of the Alaska native handicrafts * * *." (U of A Report, RX 39, p. 12).

95. Some ANA arts and crafts are of high quality and collectors of these pieces undoubtedly prefer them despite their high price, but precisely because of their interest, collectors would ask questions about the origin of those products (Tr. 573-75, 965).

[46] 96. The tourist, unlike the collector, is not that interested in the authenticity of souvenir items and may prefer the higher quality Seattle-made product:

"Unless superior merchandise is presented, there is little chance to

convince a purchaser to buy authentic handcrafted goods" (E & E Report, RX 29, p. I-14).

97. The experiences of retailers who sell souvenirs to tourists confirm the findings of the reports referred to above. Mr. Reventlow, owner of a gift shop in Anchorage, agreed with the statements that there is a demand for non-Alaskan goods because hand-made Alaskan products are so expensive (Tr. 1420) and that Seattle- or foreign-made products are purchased because the tourists' "likes don't meet their pocketbooks" (Tr. 1415). Mr. Tiffany, ANAC's manager, stated that ANAC customers complain about its prices (Tr. 748), and a former ANAC clerk said that when a tourist compares its prices with those of cheaper "imitation" products, the tourist purchases the cheaper item (Tr. 1343). Mrs. Flavin, a Sears, Roebuck department head in its Anchorage store, has experienced situations in which the customer has an initial preference for an ANA product but ends up purchasing a non-ANA product because it is cheaper (Tr. 1610). Other retailers noted that an initial preference by some of their customers for ANA products was not sustained and that eventually these customers, either because of price or quality, would purchase non-ANA products (Tr. 1965-67, 2062-65, 2151-52).

98. Complaint counsel recognize that some consumers ask questions of retailers, but insist in their reply brief that retailers may not have enough information about their products to answer product questions accurately and may even mislead consumers as to origin (pp. 8-10). This argument is not supported either by logic or by the evidence. If respondents' products had the inherent capacity to deceive and retailers wanted to capitalize on this capacity, they would be able to sell respondents' products for the same price as "authentic" ones, yet retailers sell respondents' products for less than ANA products.

99. There is no evidence that retailers deceive consumers. ANAC sells two products which, according to complaint counsel's theory, might have the capacity to deceive because [47] the origin of the raw materials (Tr. 825-30) or method of manufacture (Tr. 873) is not disclosed by labels, yet Mr. Tiffany believes that this causes no problem because these facts are disclosed by his clerks (Tr. 830, 873). Mr. Reventlow sells totem poles done in polyurethane which simulate wood and are signed "Amos Wallace" and which, according to complaint counsel's theory, would be deceptive, yet Mr. Reventlow makes everybody aware of their true origin (Tr. 1422-23). He also sells products made by his German wife which are signed "Imnuk" without any intention to or belief that this practice deceives consumers (Tr. 1424-27; see also Tr. 1307).

100. Because respondents' products are generally lower priced than

ANA products and their quality often equals and sometimes exceeds that of ANA products, I find that a substantial number of consumers do not prefer ANA products at the time of purchase.

F. DECEPTION BY USE OF LABELS AND SIGNATURES

1. *Labels*

101. Porter has used labels or tags on its products which state: "Genuine Ivory," "Genuine Baleen," "Whale Baleen," "Lucky Billiken," and "Traditional Cutlery, Genuine Ivory Handles" (CXs 34C, 58A-D; Tr. 94-95, 109-10, 114-16).

102. IAC has used labels or tags on its products which state: "Genuine Ivory," "Genuine Indian Made," "Eskimo Made," "Billiken," "Thunderbird Totem Pole," "Brief History of the Totem Pole," "Raven Flood Totem Pole," "Shwah-Kuk the Frog," "Eh-Kole the Whale," and "Hand Made" (Adm. 66-70; Findings 105-106).

103. Houston has used labels and tags on its products which state: "Genuine Ivory," "Genuine Carved Ivory," "Genuine Baleen," "Genuine Whale Bone," "A Gift From Alaska," "The Care of Ivory," and "Billiken" (CXs 1Z4-1Z5, 31A-B).

104. Western has used labels or tags on its products which state: "Genuine Ivory," "Ivory," "hand-etched," "Hand-etched by Eddie Omnick, an Eskimo from Pt. Hope, Alaska," and "Hand Carved Ivory" (CXs 130-134, 136-138).

[48] 105. Oceanic has used labels and tags on its products which state: "Genuine Ivory," "Genuine Indian Made," "Eskimo Made," "Billiken," "Thunderbird Totem Pole," "Brief History of the Totem Pole," "Raven Flood Totem Pole," "Shwakkuk the Frog," and "Eh-Kole the Whale" (CXs 83N-P, 98A-E, 99A-B, 99D-F; Tr. 205-07).

106. Northwest has used labels on its products which state: "Genuine Ivory" (CX 82; Tr. 152).

107. Labels or tags currently used by Porter, Houston and IAC were reviewed by the Federal Trade Commission four to five years ago and found acceptable for use on respondents' merchandise (Tr. 66-67, 94-95, 98-99, 257-58). Many of these labels and tags are identical to those used by respondents Western, Oceanic and Northwest (Findings 101-106). While prior acceptance of the labels or tags by the Federal Trade Commission does not preclude a challenge to their use, it should be considered in evaluating respondents' good faith in attaching such labels and tags to their merchandise.

108. At the suggestion of the Federal Trade Commission, Houston discontinued its use of the labels "Hand Carved" (4-5 years ago; Tr. 66, 2245), "A Gift From Alaska" and "Billiken" (one year prior to complaint;

CX 1Z4-1Z5; Tr. 27). The voluntary discontinuance of such use evidences an attempt by Houston to comply with a labeling format acceptable to the Federal Trade Commission, and it is unlikely that the practice will be resumed.

109. Houston discontinued the sale of cutlery and use of the label "The Care of Ivory" (CX 1Z4-1Z5) one year ago (Tr. 27). Porter, while continuing to sell cutlery, discontinued use of the label "Traditional Cutlery, Genuine Ivory Handles" (CX 58D) three and a half years ago (Tr. 114-15). It is unlikely that this practice will be resumed.

110. Walrus ivory, elephant ivory and sperm whale ivory are used in the production of souvenir items sold in Alaska. A major portion of ivory used by respondents does not come from Alaska (Tr. 79, 101, 166). That respondents' labels "Genuine Ivory" and "Ivory" (CXs 1Z4-1Z5, 34C, 58A, 82, 83N-P, 98B-C; Adm. 66-70) are literally accurate in setting forth the material composition of items to which they are attached is not challenged by complaint counsel (Tr. 31, 67, 79, 110, 153, 197).

[49] 111. Respondents' labels "Whale Baleen," "Genuine Baleen" and "Genuine Whale Bone" (CXs 1Z4-1Z5, 34C, 58B) accurately describe the material composition of items to which they are attached (Tr. 27, 67, 110).

112. The billiken, a figure with distinct features (grinning mouth, peaked hair, large eyes and feet stuck straight out in front), was originally created in Missouri in 1908. It is an emblem of good luck and has been made in varying mediums throughout the world (CX 171; Tr. 206-07). In Alaska, ivory billikens are popular souvenir items. Respondents' "Billiken" and "Lucky Billiken" labels are descriptive of the good luck pieces to which they are attached.

113. Mrs. Ray, referring to her book *Artists of the Tundra and the Sea*, testified that, in her opinion, an item made by an individual who was legally and culturally an Eskimo could, without deception, be labeled "Eskimo Made" (Tr. 466-68). Complaint counsel concurred in this opinion, stating they had no objection to labeling an item "Eskimo Made" if, in fact, made by an Eskimo (Tr. 469). Mr. Krupp, testifying as to Oceanic's use of "Eskimo Made" and "Indian Made" labels stated that such labels were used only when technically applicable to the individual who made a given item. Complaint counsel thereafter stipulated that these labels were so used (Tr. 205). Mr. Lowen testified that IAC's labeling practices with reference to "Hand Made," "Eskimo Made" and "Genuine Indian Made" labels also limited their use to items which were in fact hand-made and made by an Eskimo or Indian (Tr. 257-58). Since no contradictory evidence was presented, I find that labels reading "Hand Made," "Eskimo Made" and "Genuine Indian Made" accurately

represented the mode of production and/or the individual making the item to which they were attached.

114. Respondents' competitors in the Alaskan souvenir market frequently use labels similar to those of respondents. Additionally, labels which explicitly or implicitly denote Alaska as the origin of the product are used, *e.g.*, "Genuine, Authentic Alaskan" (Tr. 1305), "Authentic Alaskan Made," "Made in Alaska" (Tr. 1064, 1480), "Alaska Product," and "Souvenir of Alaska" (Tr. 1508). These labels may well be inaccurate either as to origin or may be affixed to products which are not made by Alaskan natives (CX 190).

[50] 115. Mr. Wolff testified that consumers believe products displayed in Alaskan shops are authentic individually crafted, native handicrafts (Tr. 1138). Testimony by Mr. Noonan and Miss Allen's notes also attest to the existence of assumptions by some consumers that certain souvenirs they see in Alaska are "authentic" native arts and crafts (CX 191A (Brighton), CX 191C (LaMountain); Tr. 1384). However, it is not clear whether these consumers' assumptions are attributable to product labeling, the manner in which products are displayed, misinformation supplied by retail clerks as to the origin or authenticity of products displayed (CX 191A (Rathbaum)), or other factors.

116. Thus, while Mr. Wolff testified that in some instances a consumer might believe a souvenir item was more authentic because of a label attached to it, he pointed out that deception was usually caused by a combination of factors (Tr. 1268). Mrs. Olsen, a former ANAC employee, testified that sometimes tourists believed a souvenir was Alaskan if labeled "Genuine Ivory," "Made in Alaska" or "Made by an Alaskan" but gave no examples of consumer deception observed by her. The only specific example of reliance on product labeling was Mr. Kent's hearsay testimony about a conversation he had with Mr. and Mrs. Sheridan. The Sheridans had purchased a sealskin wallet labeled "From the Land of the Midnight Sun" and an ivory bracelet labeled "Genuine Ivory." They told Mr. Kent that these labels guaranteed the authenticity of the products they purchased (Tr. 1011-12) and that the ivory used was genuine walrus ivory (Tr. 1040) but, again, it is unclear whether this assumption was caused by the labels alone or by the situation in which the purchase was made.

117. While hearsay is admissible in an administrative proceeding, this single conversation is neither substantial nor reliable evidence that respondents' labels have deceived consumers, and the unsupported opinions of Mr. Wolff and Mrs. Olsen are not substantial or reliable evidence of the capacity of respondents' labels to deceive consumers.

118. Without record support, I cannot infer that all of these labels have the capacity to deceive a substantial number of consumers. The

label "Genuine Ivory" which is [51] completely truthful since respondents' products are made from elephant ivory does not, I believe, have the capacity to deceive consumers into assuming that respondents' products are made of walrus ivory or that respondents' products are "authentic." To the contrary; the label is simply informative and carries no hidden meaning.

119. In any event, ANAs do not limit themselves to the carving of walrus ivory. Although Mrs. Ray has not seen Eskimos use elephant ivory or sperm whale tooth ivory, she is aware that these products have been used by Alaskan natives. Sperm whale teeth have been used by Eskimos since 1848 and sperm whales are not uniquely Alaskan (Tr. 433-34). Since ANAs are using products other than walrus ivory for carving and are not revealing this fact (Tr. 435), one could even argue that under complaint counsel's theory they are deceiving consumers.

120. The labels "Eskimo Made," "Hand Made," "Genuine Indian Made," "Hand Etched" and others of this kind are true, yet complaint counsel say that they have the capacity to deceive because consumers assume that the labels guarantee authenticity. I do not agree. The labels make truthful statements which are not ambiguous. In the absence of some indication that their meaning is, or might be, unclear to consumers, I cannot infer that consumers would necessarily conclude that some statement as to authenticity is being made.

121. The only labels which might be construed as having the capacity to deceive are "Traditional Cutlery, Genuine Ivory Handles" and "A Gift From Alaska." The word "traditional" might well mean "Made in Alaska" to consumers as might the phrase "Gift From Alaska;" however, these labels were apparently approved by an F.T.C. employee several years ago, were used in good faith thereafter and were discontinued prior to issuance of the complaint. Under these circumstances, an order directing Porter and Houston to cease using them would be senseless, especially since there is no evidence that any consumer was actually deceived by these labels.

2. Signatures

122. Porter's carved and etched merchandise usually carries the signature of "Apodruk," an Eskimo employed by Mr. Porter (CXs 44, 45, 53, 54; Tr. 108-09, 113, 127). [52] Although Mr. Porter stated that only items made by Mr. Apodruk bear his signature, the initial machine outlining or carving is sometimes done by a different Porter employee and thereafter finished by Mr. Apodruk (Tr. 126A). Mr. Apodruk also uses machine carving and a pantograph during the preparatory stages of merchandise made entirely by him (Tr. 131-32).

123. IAC and Oceanic carry soapstone carvings signed "Ben,"

"Saclamana" or "Ben Saclamana" (CX 97). Mr. Saclamana, an Eskimo and resident of Alaska (Tr. 175, 213), is Oceanic's main soapstone carver and has been in its employ six to ten years (Tr. 212). No evidence was introduced indicating that carvings bearing his signature were not done entirely by hand and by him.

124. IAC and Northwest carry soapstone carvings signed "Luke" (CX 105). Mr. Luke, an Eskimo (Tr. 144, 2081), usually puts his signature on large soapstone carvings done by him before they are sold. If asked, he would also sign smaller carvings. Every item made by Mr. Luke has his name on it, although not necessarily his signature (Tr. 147-48).

125. IAC and Northwest also carry soapstone carvings signed "Kayutak" and "Rai." The exhibit of Mr. Kayutak's work (CX 80) was hand-made by him and, due to the lack of contrary evidence, he presumably is an Alaskan native (Tr. 144-45). Mr. Rai, a non-native carver, sometimes signs his hand-made soapstone carvings (Tr. 148). There is no evidence that either signature has ever been placed on carvings which were not hand-made by the designated artist.

126. IAC carries totem poles stamped "Genuine Indian Made, Hand Carved by Chief White Eagle" or a derivative thereof. Chief White Eagle died approximately 5 1/2 years ago and this stamp is currently used by some of his children and his last wife on totem poles made by them (Tr. 238).

127. Oceanic and IAC have carried carved and etched merchandise inscribed "Nuguruk" (CX 94; Tr. 1872). "Nuguruk," an Eskimo word for "Good Luck" (Tr. 193), was suggested to Oceanic by one of its customers years ago to alleviate the problem of confusion of their merchandise with copies produced by other manufacturers. "Nuguruk" [53] was copyrighted and used as a method of identifying Oceanic's products (Tr. 192-93). Use of "Nuguruk" was voluntarily discontinued approximately three years ago (Tr. 187-89, 1872-73). Mr. Lowen testified that discontinuance of this word has had no adverse effect on IAC's sales and that, in his opinion, Oceanic would not resume the practice of identifying its products with "Nuguruk." He also stated that he would no longer carry any merchandise with a word on it which could be construed as a person's name unless it was the signature of the artist who had handcrafted the specific item (Tr. 1873-74).

128. Houston has carried carved and etched merchandise inscribed with the word "Nunuk" (CXs 2, 4; Tr. 2274). Use of "Nunuk," the Eskimo word for porcupine (Tr. 402), began many years ago when customers suggested that Houston merchandise should be signed. Respondent decided to use a word which sounded like an Alaskan name as a means of distinguishing its merchandise (Tr. 71, 79). This pen name was copyrighted and used by various Houston engravers (Tr. 35, 71).

The Federal Trade Commission had told Mr. Houston they did not think "Nunuk" was misleading and that he had the right to use it on his merchandise (Tr. 2246). However, when Mr. Katz subsequently objected, Mr. Houston discontinued the use of "Nunuk" and now does not sign any items (Tr. 70, 72, 2246). He can think of no reason why he would resume use of the word "Nunuk." He also stated he did not see how anyone could confuse the items he makes with native products (Tr. 72, 80).

129. Specific examples were introduced during the hearing which demonstrate the assumptions created by the appearance of signatures on items in Alaskan gift shops.

130. Mr. Hastings based his assumption that a ceramic cup had been made by an Alaskan native at least in part on the presence of a signature on the item, although a salesgirl also told him that this item was authentic (CX 191E). While this was not one of respondents' products, it is indicative of the effect a signature on seemingly handcrafted items might have on consumer assumptions.

131. Mrs. Smalley, in assisting customers of the Guilded Cage, stated she would look for a name on an item and assume it had been etched or made by the artist whose name appeared (Tr. 2023-24). If this assumption exists [54] with one having great familiarity with gift shop merchandise, it does not seem unlikely that consumers would draw the same inference from signed merchandise.

132. Mrs. Tordoff, relying on the signature "Nunuk," represented an ivory pin as authentic scrimshaw by a native in Alaska in an article she wrote for the Alaskan Journal (CX 176C; Tr. 1630-31). She did not seek to verify the pin's authenticity with the proprietor of the Alaska House shop as she had not felt this was necessary prior to making the purchase (Tr. 1649).

133. While the evidence on this point is not overwhelming, it is probable that consumers seeing products in Alaskan gift shops which are signed with Eskimo- or Indian-sounding names would assume that they are made by ANAs. There is no evidence, however, that consumers assume these products are made in Alaska rather than in Seattle or that they would be concerned if they discovered that respondents' ANA-made products were made in Seattle.

134. Consumers who purchased products signed with the names "Nuguruk" and "Nunuk" before discontinuance probably assumed, as

did Mrs. Tordoff, that these products were made by ANAs and were "associated with" Alaska. (See ANA motif definition)²⁴ This assumption would exist even if respondents' products were lower priced than comparable ANA products, for consumers would assume that the signature guaranteed the products' authenticity. Since these products were not made by ANAs, it is probable that consumers other than Mrs. Tordoff were led to purchase them because of a mistake as to a material fact.

135. Nevertheless, an order directed to those respondents which have used these signatures and which would prohibit the use of these or similar signatures is not needed to protect the public interest since respondents used them in good faith for several years, and discontinued their use before the complaint issued. Furthermore, there is no likelihood that this practice will be resumed. [55]

G. DECEPTION BY FAILING TO DISCLOSE FOREIGN ORIGIN

136. Complaint counsel charge that IAC does not disclose the foreign origin of some of its products because its foreign origin labels are not conspicuous or are not properly affixed to the products and may fall off (CPF 138). The only evidence offered in support of this claim is the following:

137. On November 8, 1974, Mr. Michael Katz, an FTC consumer protection specialist, purchased a beaded necklace at the Seattle-Tacoma airport which was then being sold by IAC to retailers.²⁵ The label of foreign origin was missing (Tr. 296-97; CX 112).

138. Many more identical beads—80 to 100—were hanging on the same rack and only 3 of 40 which Mr. Katz inspected were missing a paper wraparound foreign origin label (Tr. 320). Mr. Katz did not know why or how the foreign origin labels were removed from the beads he bought (Tr. 318).

139. Mr. Katz conceded on cross-examination that a consumer seeing one of respondent's beaded necklaces without a label could not have been deceived as to origin because so many other identical beaded necklaces with labels were on the same rack (Tr. 321), and complaint counsel offered no proof of actual consumer deception (Tr. 273-74).

140. In April 1975, one of complaint counsel visited the Sears Roebuck store in Anchorage and purchased two of IAC's foreign-made totem poles, one with and one without a label of foreign origin. He also pointed this out to Mrs. Flavin, the manager of the department selling

²⁴ Although there is some contrary evidence (Tr. 2081), I do not believe that "Rai" is an Eskimo-sounding name and I can make no inference as to consumer assumptions about products signed with this name. In any event, products made by Mr. Rai are hand-made (Tr. 259).

²⁵ Although conceding that the necklace which he purchased would be irrelevant in this proceeding if it did not have an ANA motif, Mr. Katz did not know whether its design was associated with ANAs (Tr. 331).

these poles, and they ascertained that 7 of 14 on display did not have foreign origin labels on them (Tr. 1550-51, 1581; CXs 122, 123).

141. When these totem poles arrive at the Sears store all of them have labels of foreign origin, but apparently [56] because of handling by store employees in unpacking and pricing the products and by customers during the time the poles are on display, some of the labels fall off (Tr. 1603-05).

142. Mr. Lowen, one of its officers, testified that IAC has never sold or delivered any foreign-made product without a label of foreign origin (Tr. 267).

143. On the basis of the above evidence, I find that IAC has a policy of disclosing and does disclose the origin of foreign-made products, and there is no reliable evidence that its labels are inconspicuous or that they are not properly attached to its products. The missing labels on the products purchased by Mr. Katz and complaint counsel were the inevitable result of the handling which such products receive at the point of display, and complaint counsel do not suggest further steps IAC could have taken to prevent labels from falling off its products.

144. IAC delivers its products to retailers with foreign origin labels attached. If, as sometimes happens, these labels fall off during display because of handling, that is not IAC's fault, but that of the retailers who should periodically review their display of products with foreign origin labels.

H. COMPETITIVE INJURY

145. The average tourist most often wants a souvenir of his visit to Alaska, not a work of art. Respondents' products meet this need, yet attain a high standard of workmanship at an attractive price. Officials connected with the State of Alaska apparently recognized this, for Mr. Kent discussed purchasing Houston's business because:

"There was a great deal of talk for a number of years within the State which preceded my arrival in the State, about perhaps what we ought to do is purchase one of the Seattle plants and move it to Alaska and then at least we could employ natives and natives could get more of the benefit of the sale of these factors - items - whatever you want to call them" (Tr. 1305-06).

[57] This reaction is consistent with the reports which recommend that ANAs begin to emulate the Seattle manufacturers because they are providing reasonably priced souvenirs which meet the needs of the tourist trade as opposed to the collector of fine handicrafts.

146. The ANA who produces fine handicrafts is not in competition

with respondents because they sell to two distinct groups of consumers. There are undoubtedly many ANAs who produce souvenir items which compete with respondents for the same tourist dollar. These ANAs may well have lost potential sales because tourists chose to purchase respondents' products; but since respondents have not deceived consumers into purchasing their products, any loss of sales experienced by ANAs was the result of legal competitive activity.

III. CONCLUSIONS OF LAW

A. INTERSTATE COMMERCE

IAC and Houston have admitted that they maintain a substantial course of trade in commerce as that term is defined in the FTC Act (Findings 7 and 10) and Western did not offer any evidence to rebut the ruling in my April 28, 1975 order that its practices are in commerce (Finding 13). With reference to these respondents, therefore, no jurisdictional issue exists.

While Porter, Oceanic and Northwest have made sales to customers located in Alaska, they claim that these sales were not of sufficient magnitude to form the basis necessary for Commission jurisdiction over their activities.

The magnitude of these respondents' sales in commerce is, however, of little significance so long as they are not *de minimis*. In *Safeway Stores, Inc. v. FTC*, 366 F.2d 795, 798 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967), the court held that respondents' bread sales were in commerce, citing a proceeding in which \$3,086.31 in interstate purchases gave the NLRB jurisdiction over the activities of a local cemetery association.²⁶ Applying this test, I cannot say that the sales of Porter, Oceanic and Northwest were [58] *de minimis* even though most of Oceanic's and Northwest's sales were to IAC in Seattle (Findings 3, 15 and 17). See *Guziak v. FTC*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967). Oceanic and Northwest have not changed their selling practices and therefore Commission jurisdiction over their current activities exists.

During 1974, Porter changed its practices and since that time has made no sales outside Washington State. All of its recent sales have been made to the Johnson company which is located in Seattle (Finding 4), and Porter argues that its practices are therefore no longer in interstate commerce and it is not now subject to Commission jurisdiction.

Complaint counsel cite language in *U.S. v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939) as support for their position that the purchases

²⁶ *NLRB v. Inglewood Park Cemetery Ass'n.*, 355 F.2d 448 (9th Cir. 1966).

of products by Johnson which are destined for subsequent interstate sale give the Commission jurisdiction over the seller, Porter, even though its sales are wholly intrastate.²⁷ I do not read this language as broadly as do complaint counsel, for the statute which the Court construed (The Agricultural Marketing Agreement Act of 1937) gives the Secretary of Agriculture jurisdiction over an act "in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects" such commerce (*Id.* at 568). As I read its opinion, the Court upheld the Department's jurisdiction because of the Secretary's findings that the activities of local milk producers were not only "in commerce" but also "burdened and obstructed" commerce:

"Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low value, the power of Congress extends also to the local sales.

"The power over commerce when it exists is complete and perfect."
(*Id.* at 569)

[59] In contrast to The Agricultural Marketing Agreement Act of 1937, Congress deliberately refused to exercise its total power over interstate commerce when it passed the FTC Act, and activities which simply affect commerce have not been, until the passage of the Magnuson-Moss Act, subject to Commission jurisdiction. In a recent interpretation of the commerce language of Section 7 of the Clayton Act [*U.S. v. American Building Maintenance Industries*, 422 U.S. 271 (1975)], the Supreme Court looked to its decision in *FTC v. Bunte Bros.*, 312 U.S. 349 (1941) which rejected the argument that Section 5 of the F.T.C. Act gave the Commission jurisdiction over activities affecting interstate commerce. The Court held that to be engaged "in commerce"

"* * * a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce" *American Bldg. Maintenance Industries* at 283.

Since some time in 1974, Porter has neither distributed nor produced goods in interstate commerce, and while it may be "engaged in

²⁷ "[W]here commodities are bought for use beyond state lines, the sale is part of interstate commerce." *Rock Royal*, at 568-69.

commerce" because of its purchases of out-of-State raw materials and might be subject to Section 7 jurisdiction based on these transactions,²⁸ its sales of products are not now, as I view them "in commerce" as the Supreme Court has defined that term.²⁹

Whether I could nevertheless issue an order directing Porter to cease and desist from unfair or deceptive acts and practices affecting commerce is problematic despite the Commission's recent holding in *Koscot Interplanetary, Inc.*, [86 F.T.C. 1106]. CCH Trade Reg. Rep. ¶21,056 (Nov. 18, 1975): [60]

"On its own motion the Commission has broadened those portions of the order relating to Section 5 violations to proscribe covered conduct 'affecting' commerce, inasmuch as the Commission's authority has been broadened in that respect." (*Id.* at 20,902)

B. THE VAGUENESS OF THE ANA MOTIF DEFINITION

Some uncertainty is probably caused by the terms of every order the Commission enters, but courts generally do not uphold challenges to the vagueness of orders which bear a reasonable relationship to the violation found. See *e.g.*, *Luria Brothers & Co. v. FTC*, 389 F.2d 847, 862 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968) ("Exclusive or substantially exclusive"); *Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253, 261 (2d Cir. 1968) ("substantial and significant"); *Bantam Books, Inc. v. FTC*, 275 F.2d 680, 683 (2d Cir. 1960), *cert. denied*, 364 U.S. 819 (1960) ("clear, conspicuous type").

Vagueness is tolerated because, in some cases, the language is as precise as circumstances will permit. Judicial concern over vagueness is also alleviated because Commission procedures provide that a respondent may seek advice as to whether a proposed course of conduct would violate a cease and desist order. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393-94 (1965); *Giant Food Inc. v. FTC*, 322 F.2d 977, 987 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964); *Regina Corp. v. FTC*, 322 F.2d 765, 770 (3d Cir. 1963).

However, a Commission order should be precise enough to inform a respondent what he can and cannot do. *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948). In *FTC v. Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962), the Supreme Court held that this was essential because

²⁸ See *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1068-69 (1962).

²⁹ The "flow of commerce" theory is not applicable here because Porter's manufacturing activities significantly alter the raw materials which it purchases out of State. See *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 542-43 (1935). See also *Hampton v. Graff Vending Co.*, 1975 CCH Trade Reg. Rep. ¶60,405 (5th Cir. 1975) which held that intrastate sales by a Texas concern were not in commerce for Robinson-Patman Act purposes even though it purchased supplies from Illinois. While Porter's sales apparently were in commerce for a short time after the complaint issued, complaint counsel do not claim that Porter changed its selling method to evade Commission jurisdiction.

“* * * [t]he severity of possible penalties prescribed * * * for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.”

[61] See also, *Asheville Tobacco Board of Trade, Inc. v. FTC*, 294 F.2d 619 (4th Cir. 1961).

Applying the standard of definiteness required in Commission orders to the present cases, I believe the ANA motif definition is so vague that if orders were entered, respondents would not know which of their many products would be covered (Finding 18). Applying to the Commission for advice would not solve the problem, for if complaint counsel's witnesses, including the consumer protection specialist who developed these cases (Tr. 303) could not agree on the products coming within that definition, it is unlikely that any Commission employee could give adequate advice to respondents as to which of their products came within the proposed orders' proscriptions (Findings 33-34 and footnotes to Findings 76 and 137).

There are other problems inherent in the complaints' definition of ANA motif. The definition would require that ANAs who make respondents' products have “not less than one-quarter Alaskan Indian, Eskimo, or Aleut blood” (footnote to Finding 19). If made by other individuals, respondents would have to warn consumers that their products are not native-made, even though ANAC, which sells “authentic” products, is less than scrupulous about adhering to this definition of ANA, not because it intends to deceive consumers, but because “native” cannot realistically be defined with such precision (footnote to Finding 56).

Finally, the word “traditional” which is used in the definition has no meaning as far as Alaskan Eskimos are concerned. If interpreted literally, as it would be in compliance, the complaint's definition would place respondents in jeopardy of violating the order if they introduced new products into Alaska which were subsequently copied by ANAs (Findings 29-31).

Entering orders with a different definition (assuming ones were entered) is not an acceptable alternative. Paragraph Two of the complaints state: “For the purpose of this *complaint and the accompanying order* to cease and desist, the definitions below shall apply” (emphasis added). The ANA motif definition, therefore, is more than a notification of possible product coverage in orders which might be entered; rather, it constitutes a theory of liability, that is, that only

respondents' products with that motif, and no other products, are inherently deceptive.

[62] Until their reply brief, complaint counsel never suggested that they might urge an alternative theory of liability. Both the case-in-chief and the defense were based on the accuracy (or inaccuracy) of the complaints' definition. To now accept what amounts to a new theory of liability would come perilously close to violating respondents' rights to adequate notice of the charges against them:

“[I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change.” *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)

C. DECEPTION BY APPEARANCE

Although there is no evidence that any consumers were deceived by the appearance of respondents' products, this is not necessarily a fatal omission for it has been accepted for years that the Commission may infer from visual inspection of the exhibits as well as the record that the challenged practice has the tendency or capacity to deceive, even in the absence of consumer testimony; in fact, despite consumer testimony that they were not deceived. *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268 (10th Cir. 1965).

The Commission is an expert body which can interpret for itself statements or representations and determine whether they could deceive consumers. *FTC v. Colgate, supra*, at 391-92; *ITT Continental Baking Co., Inc.*, [83 F.T.C. 865; modified 83 F.T.C. 1105] CCH Trade Reg. Rep. ¶20,464 (Oct. 19, 1973):

“The Commission ‘may draw its own inferences from the advertisement and need not depend on testimony or exhibits’ in the record, aside from the advertisements themselves.” *Id.* at [954] 20,377.

However, an advertisement makes the same statement regardless of where it is read—in the consumer's home or in the Commission's chambers and when the Commission reads an advertisement and makes inferences based upon its expertise, it is not violating the principal that “Advertisements must be considered in their entirety as they would [63] be read by those to whom they appear.” *Independent Directory Corp.*, 47 F.T.C. 13, 30 (1950); *aff'd* 188 F.2d 468 (1951). Although this theory can consistently be applied to written advertisements, it is not necessarily applicable to respondents' products in the instant cases.

Respondents urge that whereas advertisements make explicit repre-

sentations, their products make none concerning origin or method of production, and that in consequence neither I nor the Commission can infer that they have the capacity to deceive consumers because of their appearance (IAC Reply Brief, pp. 1-10). This argument is not wholly acceptable as a general proposition in view of cases such as *Haskelite Manufacturing Corp. v. FTC*, 127 F.2d 765 (7th Cir. 1942),³⁰ but under the circumstances of this proceeding I find it persuasive.

Complaint counsel ask that, after viewing respondents' products, I make four precise and complex inferences—that is, that consumers assume, simply from appearance, such products (1) are made in Alaska; (2) by hand; (3) by ANAs; and (4) that consumers prefer ANA products. Complaint counsel claim that these inferences can be made even though the “representations” which supposedly create them are made in Alaskan gift shops. I find, however, that comparing respondents' products with ANA products in the courtroom or in the Commission's offices gives no clue as to consumer assumptions and preferences since they are the result of a complex set of impressions which impinge upon consumers' consciousness from the moment they enter [64] Alaska until they decide to purchase a souvenir product (Findings 53-73). Because complaint counsel presented their case without offering substantial evidence of those factors which might affect consumer assumptions and preferences, the inferences which they ask me to make would be based on speculation, and that is not an adequate basis to support a finding of capacity to deceive. An inference must be based on “the *clear* and *necessary* message of respondents' advertisements when viewed in their entirety.” *ITT Continental, supra*, at p. 20,379 (emphasis added). See also *The Coca-Cola Co.*, [83 F.T.C. 746] CCH Trade Reg. Rep. ¶20,470 (Oct. 5, 1973):

“We find that the false and misleading representations alleged to have been made in Hi-C's advertising are not reasonably likely to have been conveyed to consumers.” *Id.* at [818] 20,398

I decline, as did the Commission in *ITT Continental* and *Coca-Cola*, to make the speculative inferences requested by complaint counsel³¹ because I cannot find that there is a reasonable probability that the appearance of respondents' products conveys a deceptive “message” to consumers.

³⁰ Although respondents in this case made affirmative misrepresentations that trays made of processed paper were wood, the Court of Appeals viewed these products and held:

“The trays themselves were the best evidence of the possibility of confusion. Without some warning, the trays of themselves are almost certain to deceive the buying public. The Commission had a right to consider this fact, so forcefully apparent upon an examination of the physical exhibits.” *Id.* at 766.

³¹ “We do not believe that it is possible under this pleading [for us] to imply from respondents' advertisements these very specific representations as to the precise claims which these subparagraphs allege and we decline to do so.” *ITT Continental, supra*, at [959] 20,379.

Nor does the vague extrinsic evidence offered by complaint counsel on consumer assumptions and preferences, considered in light of the analogous series of "foreign origin" cases brought by the Commission in the past, constitute substantial proof that the appearance of respondents' products (1) has the capacity to deceive consumers at the time of purchase, and (2) that consumers prefer ANA products. To establish capacity, the evidence must demonstrate:

"* * * that a substantial number of buyers suppose that unmarked goods are home made goods, and have a preference for such goods * * *." *Segal v. FTC*, 142 F.2d 255 (2d Cir. 1944).

[65] In *Manco Watch Strap Co., Inc.*, 60 F.T.C. 495 (1962), the Commission held that an order directing affirmative disclosure of foreign origin could be entered only if there were proof of "(1) a belief or assumption by a substantial segment of the buying public that the product, not being clearly marked otherwise, was made in America; and (2) a preference by such buyers for the American-made product * * *." *Id.* at 511.

While the Commission held in *Manco* that because of its vast experience in foreign origin cases it would "relieve the parties in this type of case of the unnecessary burden of continuing to litigate, over and over again, the same general factual issues as to consumer attitudes and preferences." (*Id.* at 512-13), these are the first litigated cases involving the question of consumer assumptions and preferences about "foreign" products produced in one State and sold in another.

Thus, while there is an analogy between foreign origin cases and the present ones, it would be inappropriate to adopt the *Manco* presumption of consumer preferences for "local products." In these cases, complaint counsel should be required to meet their burden of proof by presenting reliable evidence of consumer assumptions and preferences.

Complaint counsel have not met this burden. Neither Mr. Noonan nor Mrs. Tordoff represent typical consumer attitudes toward the appearance of respondents' products and Miss Allen concluded that her interviews with consumers in Alaska did not establish they were deceived by the appearance of respondents' products (Findings 34, 79, footnotes to Findings 84, 88). Neither Mr. Kent nor Mr. Wolff are retailers, and Mr. Kent's job, which is to encourage the development of native handicrafts (Tr. 982), might well have influenced his perception of tourist attitudes toward respondents' products. Furthermore, Mr. Wolff conceded that consumer deception is caused, if at all, by a combination of factors, a position which is fundamentally inconsistent with that of complaint counsel (Finding 116).

Actually, respondents have established by a preponderance of the

reliable evidence that consumers do not have any fixed assumptions about respondents' products or ANA products (Findings 79-89), and have demonstrated that [66] because their products are generally lower priced than ANA products and are of equal or better quality, consumers would often prefer to purchase Seattle-made souvenirs (Findings 90-100).

In *Manco Watch Strap Co., Inc.*, 50 F.T.C. 553 (1953), the Commission dismissed a complaint which charged failure to disclose foreign origin because:

The evidence in the record indicates that there are no domestic watch or wrist bands which are sold at prices comparable to the prices at which respondent's imported bands are sold. There is no evidence in the record showing a preference on the part of a substantial number of members of the purchasing public for the higher priced domestic bands over respondent's lower priced imported bands. *Id.* at 554.

In *Oxwall Tool Co., Ltd.*, 59 F.T.C. 1408 (1968), the Commission limited its 1953 *Manco* decision to some extent,³² but still adhered to the principle that consumer deception as to foreign origin required proof that consumers preferred the domestic product.

The purchasing public is, of course, entitled to protection against deception as to origin, whether it is caused by an affirmative misrepresentation or by omission of a material fact (*Manco*, 60 F.T.C. at 510), but the foreign origin cases do not present a perfect analogy for the present cases. The underlying theory of foreign origin cases derives, at least in part, from an earlier time when there was a deep-seated prejudice against articles of foreign manufacturers and "buy American" was the watchword: [67]

"Of course, we neither approve nor disapprove the state of mind reflected by a consumer preference for American goods; we merely recognize that it exists. The grounds for such preference may vary. But whether it springs from patriotism or prejudice, reason or unreason, it is not our concern." *Manco*, 60 F.T.C. at 512.

See also *L. Heller & Sons, Inc. v. FTC*, 191 F.2d 954, 955 (7th Cir. 1951).

Respondents are American companies which provide jobs for American citizens, and I will not infer, as the Commission might well do in a foreign origin case, a prejudice by consumers against Seattle-made products in the absence of reliable proof.

Since negative disclosures give the consumers information which they

³² " * * * it should be pointed out that the fact that an imported article has no domestic competitors in its price class does not force the conclusion that consumers who purchase such an imported article unmarked as to foreign origin have no preference for domestic goods. To the extent that the holding in the *Manco* matter may be inconsistent with this statement, the *Manco* opinion does not reflect the present views of the Commission." *Id.* at 1417.

might like to know, requiring respondents to disclose such information ("Made in Seattle;" "partially machine made") might be said to be demanding very little, but the law requires much more than a showing that such disclosures would be informative; it requires proof that the omitted information is material; that is, that it would influence a substantial number of consumers to purchase the product under a mistaken assumption:

Where there exists a substantial chance that "purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin, * * * the purchasing public is entitled to be protected against that species of deception." (*Manco*, 60 F.T.C. at 512).

Complaint counsel have not established that respondents are withholding material facts from consumers. [68]

D. DECEPTION BY LABELS AND SIGNATURES

The best evidence of the deceptive capacity of the labels and signatures used by respondents would have been testimony about consumer impressions, but aside from the testimony of Mrs. Tordoff concerning the signature "Nunuk," there is no reliable evidence of the "message" which affirmative statements such as "Genuine Ivory" deliver to the consumer (Findings 116-120).

The Commission is, of course, not limited by the literal truth of a statement, but may infer that certain implications or suggestions are being made to and perceived by consumers. *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943). *Coca-Cola, supra*, at 20, 395-96.

Here, however, I cannot find, in the absence of reliable extrinsic evidence, that truthful labels such as "Genuine Ivory" are not only making that statement but are also signalling the consumer that the products to which they are attached are made of walrus ivory and are "authentic." Complaint counsel's proposed findings do not reveal why consumers would believe that the label "ivory" invariably means only walrus ivory; in fact, the evidence is that consumers are equally incorrect if they assume that ANAs work only in walrus ivory, since they also use elephant ivory and sperm whale ivory (Findings 49 and 119).

On the other hand, it is not unreasonable to infer that the labels "Traditional Cutlery" and "A Gift From Alaska" and the signatures "Nuguruk" and "Nunuk" might have had the capacity to deceive consumers into believing that the products to which they were affixed were made by ANAs.

While use of these labels and signatures was dropped during the Commission's investigation, discontinuance under such circumstances—

when the company is aware that a complaint might result—is normally not a defense. *Diener's, Inc. v. FTC*, 494 F.2d 1132, 1133 (D.C. Cir. 1974); *Cotherman v. FTC*, 417 F.2d 587, 594-95 (5th Cir. 1969); *Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965); *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

[69] I recognize that accepting the defense of discontinuance here would leave the respondents free to resume the use of these labels and signatures, but I cannot see that entry of an order is needed to prevent this. First, I am convinced that they will not resume this practice, the impact of which on the general public is, by the way, not that clear.

In the usual case, even a little deception should not be tolerated, *Travel King, Inc.*, [86 F.T.C. 715], CCH Trade Reg. Rep. ¶21,024 (Sept. 30, 1975), p. 20,877, nor should satisfaction with respondents' products excuse deception, *FTC v. Colgate-Palmolive, supra*, at 388, yet there are special circumstances about respondents' use of these labels and signatures which calls for relaxation of the normal rule which does not recognize discontinuance as a defense.

Respondents negotiated with Commission representatives for several years prior to issuance of these complaints and, at one time, were informed by these representatives that the labels and signatures they used were not illegal (Findings 107, 128).

A new group of investigators' opinions differed with the prior ones, but as soon as respondents were informed that certain labels and signatures might be deceptive, their use was discontinued (Findings 108, 127-128). While the contrary opinions of subordinates cannot estop the Commission from issuing an order, *Double Eagle Lubricants, Inc. v. FTC, supra*, at 270, this is a fact which, combined with the lack of evidence that anyone other than Mrs. Tordoff was deceived, the quality of respondents' products which may have been purchased under a misconception, and their good faith discontinuance, convinces me that entry of an order is not appropriate. *Cf. Bristol-Myers Co.*, [85 F.T.C. 688], CCH Trade Reg. Rep. ¶20,900, pp. 20,751-52 (April 22, 1975); *Rodale Press, Inc. v. FTC, supra*, at 1257:

While there is some authority for a deceptive practices proceeding based on discontinued advertising, there is obviously an outer limit to the Commission's discretion. At some point, the balance between the public interest and fundamental fairness to respondents must be weighed * * *.

[70] Complaint counsel have also challenged respondents' practice of selling soapstone carvings signed by the carver, but what, aside from sheer speculation, supports the claim that respondents are withholding a material fact from consumers when they sell carvings by ANA artists such as Mr. Saclamana (Findings 123-25)? These carvings are as

“authentic” as those made by residents of Alaska, yet complaint counsel believe logic calls for an inference of consumer deception because consumers prefer products made in Alaska and respondents’ ANAs happen to carve in Seattle (Tr. 145). Under this theory, respondents would have to move their businesses to Alaska if they wanted to avoid the negative disclosures sought by complaint counsel. The inference which complaint counsel wish me to make concerning respondents’ ANA-made products is not only unreasonable, but borders on the outlandish.³³

E. IAC’S FAILURE TO DISCLOSE FOREIGN ORIGIN

The evidence in support of this charge against IAC is so minimal that it does not warrant serious discussion (Findings 136-144). While the Commission need not have substantial proof that a proposed respondent’s activities are illegal at the pre-complaint stage and may issue a complaint on the basis of “reason to believe,” it is now clear that there was no pre-complaint evidence which would warrant even a suspicion that IAC had deliberately or inadvertently failed to disclose the origin of the products it purchases from foreign countries. One can only wonder, in view of the post-complaint evidence which was developed, why this issue has been pursued (Tr. 296-97, 306-09; Finding 140).

F. COMPETITIVE INJURY

Complaint counsel urge that respondents’ refusal to disclose the origin of their products harms ANAs but the record establishes that while ANAs may be “pro-disclosure,” they are more concerned about respondents’ legitimate competitive activities. Mr. Kent testified: [71]

“Obviously, it makes sense to import machines, or other types of objects into the State to fulfill our needs in the State and keep the money inside the State of Alaska instead of sending it outside to the Far East, New York, or Seattle.” (Tr. 1067)

The testimony of Mr. Wolff also reveals a prejudice by Alaskans against “foreign” goods from Seattle:

A. I think generally that it is an Alaskan phenomenon that Alaskans resent the importation of certain fundamental kinds of goods.

I am sure you are well aware Alaskans do not like people in Seattle. They don’t like oil companies in Seattle. They don’t like the oil companies. They don’t like the

³³ Mr. Saclamana lives in Alaska several months of the year. If he were to produce carvings in Alaska and ship them to Seattle for eventual resale in Alaska, this would not be deceptive according to complaint counsel, but if he were to produce identical carvings in Seattle, failure to disclose this would be a misrepresentation as to a material fact (Tr. 212-13).

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wholesale grocers. And this is part of that general pattern where they feel Seattle business is exploiting a fundamental Alaskan situation.

Q. So, are you saying the Alaskan Chamber of Commerce, the Alaskan businessmen, and even Alaskan natives who make handcrafted products object to the Seattle products because they are made in Seattle in a factory instead of made in Alaska in a factory?

A. I think that is the source of some objection; yes. (Tr. 1270)

These gentlemen's views may not represent the official position of the State of Alaska, but I note that Mr. Kent works for its Department of Economic Development and Mr. Wolff was a consultant for that department in 1971. Unless one assumes that Alaska's Department of Economic Development is out to deceive consumers (and I do not), the only conclusion one can draw from its attempt to get more jobs for ANAs by moving one of respondents' factories to Alaska (Footnote to Finding 60) is that the Department recognizes there is no uniform consumer preference for "authentic" souvenirs. The only preference is for reasonably-priced, well-made products.

[72] While the Commission's orders can lawfully impose burdens on the flow of goods in interstate commerce for a legitimate purpose, since there is no evidence that respondents' practices have deceived or have the capacity to deceive consumers, entry of an order for the sole purpose of protecting ANAs from the competition offered their products by respondents would accomplish that which the State of Alaska could not constitutionally do unless it placed the burden of negative disclosure on its citizens as well as respondents.³⁴ Alaska has not yet done this. Reputable retailers are engaging in practices which might be deceptive under the theory of these complaints (Finding 99). ANAs are importing roughed-out carvings, apparently without disclosing that they are partially machine-made (Finding 49) and potentially deceptive labels accompany many products sold in Alaska by respondents' competitors (Finding 114).

G. SUMMARY

Many products which the consumer purchases are not what they appear to be or what they are advertised as. "Colonial" furniture sold by large furniture manufacturers may appear identical to furniture made in the 1700's. The "French" bread made by some of the better American baking companies looks and tastes like the real thing but it is not. "Danish" pastry sold in America is no more Danish in origin than is the

³⁴ Cf. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

"* * * the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Id.* at 145.

"Italian" food sold in thousands of restaurants in this country. Each time these products are advertised or labelled, their makers have made literally [73] untrue statements. Reproductions of colonial furniture are not colonial furniture. Only bread made in France by a Frenchman is truly French bread, at least according to the theory of these complaints. The same can be said of Danish pastry, Scandinavian furniture and a host of other products.

Revealing the whole truth about such products would do away with any unfounded assumptions which consumers might have, but if this kind of negative disclosure were required as a matter of law, practically every statement about a product would have to be modified by warnings, caveats and disclaimers, for no statement tells the whole truth about a product.

While it has been distinguished on its facts,³⁵ the accuracy of the following statement from *Alberty v. FTC*, 182 F.2d 36 (D.C. Cir. 1950) has never been challenged:

It would be ideal from the buyer's point of view if all advertisements were required to describe the product with cold precision, to enumerate with fidelity its shortcomings, and to call attention to the circumstances in which it is valueless. And a plausible argument can be made that an advertisement is not really truthful unless it does all those things. But we think that the negative function of preventing falsity and the affirmative function of requiring, or encouraging, additional interesting, and perhaps useful, information which is not essential to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter. *Id.* at 39.

If the makers of Danish pastry, French bread or Scandinavian furniture do not deceive a substantial number of consumers into believing that they are buying "authentic" [74] products, then the fact that they are not "real" is of no moment, even if there may be a few misguided souls who believe that all Danish pastry is made in Denmark by Danes. Such consumers are entitled to their opinions, but not the protection of the law. *Universe Co.*, 63 F.T.C. 1282, 1290 (1963), *aff'd* 337 F.2d 751 (9th Cir. 1964).

The situation of a visitor to a foreign land is somewhat different. He may assume that the Danish pastry he buys in Denmark is made by Danes. This assumption is much more reasonable than the ones discussed above, as may be the claim that visitors to Alaska assume that everything they see in gift shops are hand-made there by ANAs. But the inquiry into deception cannot end with consumer assumptions. Simply because a consumer assumes that pastry he purchases in a bakery is Danish does not mean that he has been deceived, for he may

³⁵ *E.g.*, *J. B. Williams Co. v. FTC*, 381 F.2d 884, 890-91 (6th Cir. 1967); *National Bakers Service, Inc.*, 62 F.T.C. 1115, 1142-43 (1963).

not care if it is not made by a Dane as long as it tastes like Danish pastry.

The situation presented here is analogous. Complaint counsel, not unreasonably, argue that consumers initially assume that some of the products they see are hand-made in Alaska by ANAs but they have not established that such an assumption is a material fact which influences their purchasing decisions. The evidence reveals, instead, that tourists who visit Alaska are primarily interested in obtaining a souvenir of their visit, are often not concerned with the origin of such souvenirs, but if they are, have enough information to distinguish between respondents' products and "authentic" ANA products.

In conclusion:

1. The Commission has jurisdiction over the acts and practices of all respondents except Porter.
2. The definition of ANA motif is so vague that respondents would not know which of their products would have to carry the negative disclosures required by the proposed order.
3. Consumers do not assume at the time of purchase that respondents' products are made in Alaska by hand by ANAs.
- [75] 4. Consumers do not prefer ANA products over respondents' products at the time of purchase.
5. The appearance of respondents' products alone does not have the capacity to, and has not, deceived consumers.
6. The labels "Traditional Cutlery" and "A Gift From Alaska" and the signatures "Nuguruk" and "Nunuk" may have had the capacity to deceive consumers but their use has been discontinued. An order prohibiting their future use is not needed to protect the public interest.
7. No other labels or signatures used by respondents have the capacity to, or do, deceive consumers.
8. IAC has disclosed the origin of products purchased from foreign countries.
9. The sale of respondents' products has not illegally affected the sales of their competitors.

ORDER

It is ordered, That the complaints in Dkts. 8964, 8965, 8966, 8967, 8968 and 8969 be, and they hereby are, dismissed.

[2] OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

Complaints in this matter were issued on June 3, 1974, charging the

corporate and individual respondents with violations of Section 5 of the Federal Trade Commission Act.

On August 7, 1974, the cases were consolidated "at least for the presentation of complaint counsel's case-in-chief" (I.D. p. 4),¹ and as events transpired, for their duration. A trial was held before Administrative Law Judge (ALJ) Lewis Parker, who issued an initial decision dismissing the complaints in their entirety. This matter is before the Commission on the appeal of complaint counsel from the ALJ's decision.

Respondents are manufacturers and distributors of various carved and engraved craft and souvenir-type items, a large fraction of which are shipped from their place of manufacture in Washington to the State of Alaska where they are resold, frequently to tourists, by Alaskan merchants. (I.D. 1-17) The complaints principally alleged that respondents manufactured and distributed products which, by virtue of their appearance and design² had the tendency and capacity to mislead purchasers into believing that they [3] were handmade by Alaskan Native Americans in Alaska, rather than machine made³ in the State of Washington by non-Alaskan Native Americans. The complaints also alleged certain less pervasive misrepresentations, detailed in the initial decision.

In dismissing the complaints, the administrative law judge concluded that consumers in Alaska do not generally assume that respondents' products are handmade in Alaska by Alaskan natives, and as a result are not deceived by the absence of disclosures as to origin and method of manufacture. The ALJ further concluded that to the extent such deception might *arguendo* occur, it is nevertheless not a material factor in consumers' choice of products, and hence not actionable for this reason as well. (I.D. pp. 62-67) While we are unable to accept some of the reasoning and conclusions of the ALJ in reaching his determination, and agree with complaint counsel's objections thereto, we do concur in the ALJ's determination that the complaints be dismissed.

Although its application to the facts present here is somewhat novel, the theory upon which complaint counsel have proceeded in this case is not. It is well established that deception may result simply from the

¹ Abbreviations used herein include:

I.D. — Initial Decision, Finding No.
I.D. p. — Initial Decision, Page No.
Tr. — Transcript of Testimony
CX — Complaint Counsel's Exhibit No.
RX — Respondent's Exhibit No.

² The products in question were alleged to be those with an "Alaskan Native American motif," defined generally as any item made of ivory, baleen, soapstone, seal skin, walrus skin, reindeer skin, wood beads, argillite or products simulating these, which (1) depicts an image of the Alaskan Native American way of life or (2) depicts an image of mammals, wildlife, or wildflowers found or associated with Alaska, or (3) is traditionally made by Alaskan Native Americans (e.g. totem poles, masks, moccasins, mukluks and beadwork) or (4) is associated with or has become associated with Alaskan Native American handiwork, such as the billiken.

³ The complaint in Dkt. 8968 (Oceanic) did not allege a misrepresentation as to the method of manufacture.

appearance of a product as well as from explicit verbal representations made in the course of its sale. *Haskelite Manufacturing Corp. v. FTC*, 127 F.2d 765 (7th Cir. 1942). Perhaps closest in point is the long line of "foreign origin" cases, in which courts and the Commission have recognized that "[i]f it is true that a substantial number of buyers suppose that unmarked goods are homemade goods, and have a preference for such goods, the sale of unmarked foreign goods is a misrepresentation, which the Commission [is] authorized to stop." *Segal v. Federal Trade Commission*, 142 F.2d 255 (2d Cir. 1944); see also *American Tack Co. v. Federal Trade Commission*, 211 F.2d 239 (2d Cir. 1954); *L. Heller & Son, Inc. v. Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951); *Manco Watch Strap Co.*, 60 F.T.C. 495 (1962).

[4] On appeal complaint counsel ask the Commission to find that a significant number of purchasers of respondents' unmarked products do believe they are handmade in Alaska by Alaskan Native Americans, and that this belief is material to their purchasing decision. While we find it possible to draw the second conclusion, we cannot conclude that the evidence of record preponderates in favor of the first.

The evidence of both sides with respect to the attitudes and assumptions of Alaskan craft consumers, and the resultant extent to which they may be deceived by unlabeled merchandise, leaves much to be desired. Complaint counsel did introduce testimony of three consumers residing in Alaska, but we must generally agree with the law judge that the testimony of these witnesses does not appear to be representative, either of current conditions or of any substantial segment of consumers.⁴ Complaint counsel also presented testimony of retailers indicating a tendency on the part of consumers to become angry and disappointed when apprised of the non-native origin of certain craft products (suggesting a prior assumption of native origin), which respondents countered with retailer testimony suggesting widespread consumer propensity to inquire as to the origin of gift products (suggesting the absence of any prior assumptions). (I.D. 82) Few of the witnesses for either side may be said to have been wholly disinterested in the outcome of the case.

The law judge concluded that while some consumers might initially approach various of respondents' souvenir items with the assumption they had been made in Alaska by native Alaskans, a variety of factors conspired to dispel this assumption on the part of those for whom it could prove material to the purchasing choice. These factors included the aforementioned disposition of consumers to ask questions regarding

⁴ The incident about which witness Tordoff testified occurred by her estimate 15-17 years earlier (Tr. 1636) and her deception in any case was substantially influenced by an affirmative labeling claim, since discontinued, rather than the implied misrepresentation alleged here. See also I.D. 79.

origin, the existence of a State-sponsored "Silver Hand" program providing for the affirmative labeling of authentic native products (with publicity of the fact of such labeling) (I.D. 63-64), and substantial price disparity between authentic and mainland-made products, serving to place consumers on notice of differences in origin and method of manufacture. (I.D. 68-73)

[5] Acknowledging the paucity of evidence regarding actual consumer deception, complaint counsel urge that the Commission need only determine that respondents' products have the "capacity to deceive" and that such a determination may be made by the Commission itself upon viewing the physical evidence, *i.e.*, samples of respondents' products.

As a general proposition complaint counsel are clearly correct. Proof of actual deception is not a necessary element in a Section Five case; only the capacity to deceive need be shown, *e.g.*, *FTC v. Raladam Co.* 316 U.S. 149 (1942); *Charles of the Ritz Distributing Co. v. FTC*, 143 F.2d 676 (2d Cir. 1944), and in determining whether it exists the Commission may rely upon its own first-hand evaluation of the evidence, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-2 (1965); *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963). Thus, the Commission commonly reviews advertisements to determine their meaning, *e.g.*, *ITT Continental Baking Co. Inc., et al.* 83 F.T.C. 865 (1973) *affd.*, 532 F.2d 207 (2d Cir. 1976); *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967), and has similarly conducted its own inspection of physical evidence to determine whether products in themselves may tend to mislead consumers as to their attributes, *e.g.*, *Haskelite Mfg. Corp., supra.*, *Walco Toy Co., Inc. et al.*, 83 F.T.C. 1723, 1825 (1974); *The Papercraft Corporation*, 63 F.T.C. 1965, 1991 (1963).

In this case, however, the judgment we are required to make is somewhat more complex than those involved in many of the cases which might be cited as precedent for it. An advertisement for shaving cream is likely to convey fairly much the same meaning to the Commission viewing it in chambers as it is to consumers seeing it in their living rooms. Similarly, the deceptive potential of a box filled half with toys and half with air is no less apparent when perched on our meeting table than when nestled on the retailer's shelf. The evidence in this case is somewhat different. We have looked at the seals, walruses, Eskimos, story bracelets, totem poles, creches, mukluks, billikens and other artifacts placed in the record by complaint counsel. Simply from viewing these items, without further information, we would not conclude that they possess the capacity to deceive as to their origin and method of manufacture. We are asked to determine, however, whether they would have such capacity when viewed by consumers in Alaska. While it is

certainly within the authority and expertise of the Commission to make such a determination, the judgment involved is one which cannot with prudence be made [6] without some resort to record evidence respecting the assumptions, attitudes, and behavior of consumers in Alaskan gift shops.⁵ It is here that complaint counsel have not carried the burden that is theirs.

Quite obviously, Alaskan consumers, including many tourists, become aware during their presence in the State of the indigenous Eskimo and Indian culture, and of the fact that native Alaskans engage in the production of craft items, involving materials (*e.g.*, ivory, soapstone, baleen) and subject matter (*e.g.*, seals, walruses, Eskimos) often associated with Alaska. It is also clear, from our own review of the exhibits that it is sometimes difficult for the untutored eye to distinguish between native Alaskan-made and mainland-made craft items. It is not at all clear from this, however, whether, and to what extent consumers in Alaska therefore assume that all unlabeled products which resemble products which might be made by Alaskan Native Americans are, in fact, so made. That many consumers ask questions with respect to the origins of these products suggests that they do not make assumptions as to origin. In addition, the State of Alaska has implemented a Silver Hand Program, whereby authentic native Alaskan products may be labeled with a conspicuous silver label indicating their origin. Although the program has apparently suffered from inadequate funding, consumers entering Alaska are nonetheless apprised to some extent of its existence and this, too, alerts them to the likelihood that unlabeled items may not be authentic.

Moreover, visitors to Alaska are quickly made aware that the "gift" or "tourist" trade in Alaska is in reality little different from that found elsewhere. In addition to products of some artistic and cultural substance, the record in this case abounds in memorabilia whose aesthetic merits and associations with native culture are more dubious, *e.g.*, souvenir napkins and sweatshirts with Alaskan imagery, ivory-handled pickle forks and pie servers, bolo ties, ossified [7] moose excrement, one can of pure Alaskan air, and a genuine oosik.⁶ Complaint counsel do not, of course, contend that any deception results as to these,⁷ but respondents' point in introducing them into evidence is, to some extent well-taken: the line between palpably unauthentic "schlock" and more substantial artifacts of a native culture is not always easy to draw.

⁵ By requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimonial evidence must be added.

⁶ The bony reproductive organ of the male walrus (Tr. 1825), often sold in cross-section as a souvenir (RX 76) and, according to the record, highly prized, especially by walruses (Tr. 824).

⁷ The complaint's definition of products with an Alaskan Native motif would apparently cover some of these items, for example the bolo ties and pickle forks of which the ALJ made light.

and consumers' exposure to both is likely to alert them to the difficulty of making assumptions as to the origin and method of manufacture of either.⁸ We are not dealing here, after all, with a situation in which consumers observe native craftspeople at work, as on an Indian reservation, and are thereupon immediately confronted with ostensibly authentic products on the reservation trading post. The chain of associations which might lead the Alaskan tourist to assume that products sold in a gift shop in Anchorage were handcrafted by Alaskan natives is somewhat more complex, and freighted with all the dissonant observations noted above.⁹

[8] To be sure, the record hardly proves, as respondents suggest, that consumers are never misled as to the origin and method of manufacture of respondents' products. It may well be, as the law judge recognized, that in certain instances, with respect to certain products, a few consumers do purchase upon the erroneous assumption that they have been manufactured in Alaska by Alaskan Native Americans.¹⁰ We must conclude, however, that as to no particular product is the capacity to deceive demonstrated by a preponderance of the evidence and under these circumstances we cannot justify entry of an order.¹¹

[9] While complaint counsel have failed to carry their burden of demonstrating the capacity of respondents' products to deceive, we must note our agreement with their contention that, had they been proven, the misrepresentations alleged would have been "material." The ALJ appears to have concluded otherwise, or to have concluded that no conclusion could be reached. He seems to have based this position on the fact that respondents' products are of good quality and generally sell for considerably less than authentic handmade Alaskan native products, as

⁸ As the ALJ observed, native Alaskan craftspeople themselves now cater heavily to the tourist trade, (I.D. 58-59) and many of their own creations would not fall within complaint counsel's revised list of products as to which deception is alleged.

⁹ A comparison with the "foreign origin" cases is perhaps instructive. One of the reasons underlying the Commission's determination that consumers expect items of foreign origin to be labeled as such is the fact that labeling of imported goods is required by the Tariff Act of 1930, 19 U.S.C. §1304. There is, of course, no comparable requirement with respect to any of the items of information whose omission is allegedly deceptive here.

¹⁰ Moreover, the absence of labels on respondents' products clearly creates the opportunity for retailers to foster deception through various explicit representations. While a manufacturer may not place into the hands of others the instrumentality of deception, *Holiday Magic, Inc., et al.*, 84 F.T.C. 748, 1038 (1974), the record contains only the most impressionistic evidence of retailer misrepresentations and respondents were not charged with participating in whatever deception as to their products may be engineered by those who resell them.

¹¹ There is much debate in the briefs over the complaint's use of the term products with an "Alaskan Native American motif." The ALJ and respondents appear to contend that the definition was an element of the violation alleged, and complaint counsel's failure to "prove" the definition was fatal to their case. In our view, the term "Alaskan Native American motif" merely defines those products as to which deceptive capacity was alleged by the complaint. It would have been proper for complaint counsel to prove deception with respect to a subset of these products, even if they failed as to the entire set, just as the failure to prove one charge in a complaint does not invalidate proof of others. If the ALJ believed that the record demonstrated deception as to a class of products less inclusive than the complaint's definition of "ANA motif" he could properly have entered whatever order could be justified by such a finding. While complaint counsel have proposed such a modified order on appeal, we cannot agree that it is justified.

a result of which they are, or would be, preferred by many consumers notwithstanding their mainland origin.

In discussing materiality, the ALJ and respondents appear to have assumed that the consumer has only two behavioral options, to buy respondents' products or to buy the more expensive native products. Thus the ALJ criticized complaint counsel for failing to offer evidence that consumers chose ANA products after comparing them to respondents' offerings. [I.D. 92] But such evidence was not required. To demonstrate the materiality of a misrepresentation that a rhinestone is a diamond, one need not show that the consumer, if not deceived, would buy the diamond. One need only show that the consumer would be less likely to buy the rhinestone. Put another way:

* * * proof of competition is not essential to proof of violation of the Act. Unfair or deceptive acts and practices in commerce are forbidden in the interest of protecting the public whether they injure competitors or not. Where there exists a substantial danger that 'purchasers are deceived into purchasing an article which they do not want or intend to buy if correctly informed as to its origin,' *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 217, 'the purchasing public is entitled to be protected against that species of deception * * *' *Ibid. Manco Watch Strap Co., Inc., et al.*, 60 F.T.C. 495, 509 (1962).

Materiality is a matter which the Commission in its expertise may infer. *FTC v. Colgate-Palmolive Co.*, *supra*, at 392. In this case we feel justified in inferring that some substantial group of Alaskan residents and tourists would, all things being equal, prefer authentic Eskimo-crafted [10] gift and souvenir items to non-native made imports¹² from other parts of the United States. The ALJ himself acknowledged this (I.D. 90) and the most convincing basis for the inference may well be the very disparity in prices of authentic and non-authentic items which the judge described (I.D. 68-73), since such a price disparity would not be expected to persist in the absence of a perceived difference in value. It follows from the foregoing that any misrepresentation as to the Alaskan native origins of respondents' products would be likely to render consumers more inclined to buy them. More than this need not have been shown to demonstrate materiality.

OTHER COUNTS

The complaint further alleged that respondents had used affirmative labeling to mislead consumers as to the origin of their products. Included among such practices were the placement of Eskimo words and names like "Nuguruk" ("good luck") and "Nunuk" on products to

¹² It should be noted that some, though not most of respondents' products are or were produced by Alaskan Native Americans no longer residing in Alaska. Our disposition of this matter spares us the necessity to resolve the status of these products.

give the appearance that a native Alaskan carver had signed his own creation. The law judge recognized the deceptive capacity of such affirmative labeling, (I.D. pp. 68-69) and we can only agree. However, the ALJ withheld entry of an order because respondents had abandoned the practice.

Ordinarily the law looks with disfavor upon the claim of abandonment as a defense to a charge of Section 5 violations, e.g., *Fedders Co.*, Dkt. 8932 (January 1975), *aff'd.*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 45 U.S. Law Week 3244 (Oct. 5, 1976). In this instance, however, we agree with the ALJ that entry of an order with respect to affirmative labeling is unnecessary. We base this conclusion upon the combination of three factors: (1) the relatively minor character of the challenged practices; (2) the fact that representatives of the Commission initially informed respondents that these practices did not violate the law; and (3) respondents' prompt abandonment of the practices upon being subsequently advised contrarily and correctly by succeeding Commission representatives [11] that the practices were deceptive. Individually, none of these considerations would be adequate grounds for the Commission to conclude that no repetition of the offending practices is likely. In particular, the erroneous advice of an employee of the Commission cannot bind the agency or excuse a violation of law, *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268, 270 (10th Cir. 1965), nor does abandonment in the face of an investigation suffice to obviate the need for an order, *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Taken together, however, this unusual combination of circumstances does convince us that entry of an order with respect to affirmative labeling practices is unnecessary. The Commission notes that it will view with extreme disfavor the citation of this case as precedent in situations in which all of the three factors cited above are not present.

With respect to the label "genuine ivory" to describe products made of elephant ivory, we must agree with the ALJ that the capacity to deceive has not been demonstrated. Complaint counsel argue that consumers would construe the term to refer to the walrus ivory used by some native Alaskan craftsman, but the record basis for such a finding is unconvincing.

Finally, as regards allegations that respondents failed to disclose the foreign origin of their imported products, we also agree with the ALJ that the evidence is insubstantial. Complaint counsel are correct in suggesting that the duty to label implies the duty to use labels that will remain affixed to the labeled product under conditions of normal handling. There is insufficient evidence, however, that respondents have been derelict in this respect.

CONCLUSION

For the foregoing reasons the complaints in this matter shall be dismissed. In making this determination we do not conclude that the problems alleged to exist with respect to consumers' ignorance of the origin of certain gift and souvenir items sold in Alaska are trivial or of no consequence. We do believe, however, that no adequate basis has been presented to warrant entry of an order. To the extent that a problem may exist, we believe that the remedial approach initiated by the State of Alaska has considerably greater potential for solving [12] it than would the sort of order which the Commission might enter. To the extent that consumers desire authentic handcrafted native Alaskan products, it is clearly easier and more efficient to vindicate this desire by the affirmative labeling of products which satisfy it than by the negative labeling of a fraction of the products which do not. The State's interest in protecting its native craftsmen coincides to a great degree with what is necessary and sufficient to protect consumers, and in this particular instance we believe the State of Alaska is in a peculiarly superior position to gauge the extent of any harm and to effectuate an efficient solution.

An order of dismissal is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having determined that the appeal should be denied and that the complaints should be dismissed.

It is ordered, That the findings of the administrative law judge be adopted as the findings of the Commission to the extent not inconsistent with the accompanying opinion.

It is further ordered, That the complaints in this matter be, and they hereby are, dismissed.

Commissioner Dole did not participate by reason of absence.