IN THE MATTER OF

UNITONE CORPORATION AND JOSEPH BARROWS

DECISION AND OPINION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6019. Complaint, July 29, 1952—Decision, Apr. 8, 1954

Where a corporation and its president engaged in the interstate sale and distribution of a preparation which was designated as "B-Amino Complex" or "BAC"; in advertising in circulars, leaflets, folders, and newspaper advertising which they furnished to dealers, and in the payment for some of which they participated—

(a) Represented falsely that the use of their said "B-Amino Complex," as directed, would check and cure deafness; and

(b) Represented falsely that their said preparation constituted a new medical discovery for the treatment of deafness; when it was essentially a vitamin compound:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. B. G. Wilson and *Mr. William L. Pencke* for the Commission.

Cohen & Bingham, of New York City, for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on July 29, 1952, issued and subsequently served its complaint in the above-entitled proceeding upon respondents Unitone Corporation, a corporation, and Joseph Barrows, individually and as an officer of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the Act. After the issuance of the complaint herein and the filing of respondents' answer thereto, hearings were held, at which testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record by the above-named Hearing Examiner, theretofore duly designated by the Commission, and duly filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the Hearing Examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, and oral argument thereon. The Hearing Examiner, having duly considered the record herein, finds

that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Unitone Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondent Joseph Barrows is president of the corporate respondent and formulates, directs and controls the policies, acts and practices thereof. The office and principal place of business of both corporate and individual respondents is located at 42 Lispenard Street, New York, New York.

PAR. 2. Respondents are now, and for more than a year have been, engaged in the business of selling and distributing a preparation designated as "B-Amino-Complex," sometimes called "BAC," which is a drug within the meaning of the Federal Trade Commission Act. The formula and directions for use of respondents' preparation "B-Amino-Complex" are as follows:

Formula:

Vitamin B1 (Thiamine Hydrochloride)	18.0 mg.
Vitamin B2 (Riboflavin)	27.0 mg.
Niacinamide	180.0 mg.
Vitamin B6 (Pyridoxine Hydrochloride)	3.0 mg.
High Potency Yeast	200.0 mg.
Brewer's Type Yeast	200.0 mg.
Inositol	60.0 mg.
Choline Hydrochloride	60.0 mg.
Panthenol (Equal to Cal. Pantothenate 30 mg.)	26.1 mg.
AMINO ACIDS (Vitagenic Accelerators) as contained in	
Yeast Protein Enzymatic Hydrolysate	1.0 Gm.
fortified with	
Nucleic Acid	100.0 mg.
Glutamic Acid	50.0 mg.
Glycine	50.0 mg.
Cysteine Hydrochloride	25.0 mg.
DI AND TRI-VALENT MINERALS	
Iron (Ferric Citro Pyrophosphate Soluble)	28.8 mg.
Copper (Copper Sulfate)	2.1 mg.
Magnesium (Magnesium Sulfate)	5.9 mg.
Zinc (Zinc Sulfate)	1.4 mg.
Cobalt (Cobalt Sulfate)	1.3 mg.

Directions for Use:

Directions: Maximum response may generally be initiated through the use of two or more BAC Activator tablets three times daily, most advantageously

taken at meal time. As the benefits of BAC (B-Amino-Complex) therapy becomes manifest, the dosage may be reduced gradually until—eventually as a maintenance dose—a single BAC Activator tablet may suffice. This product is indicated as an aid in the bio-chemical processes involved in cell and tissue intermediary metabolism. It is not intended for treatment of protein deficiencies.

PAR. 3. In the course and conduct of their business, respondents cause their preparation "B-Amino-Complex," when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various States of the United States, and maintain, and at all times mentioned herein have maintained, a course of trade therein between and among the various States of the United States. Their volume of business in commerce has been and is substantial.

PAR. 4. In the course and conduct of their business, respondents for more than a year have disseminated and caused the dissemination of, and have furnished to dealers and participated in the payment for, certain advertisements concerning their preparation "B-Amino-Complex", by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including circulars, leaflets, folders, and newspaper advertising, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their preparation; and respondents have disseminated and caused the dissemination of advertisements concerning their preparation, including, but not limited to, the advertising matter referred to above, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their preparation "B-Amino-Complex" in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among and typical of the statements and representations contained in respondents' advertisements, disseminated as aforesaid, are the following:

NEW HOPE FOR THE HARD OF HEARING!

AMAZING NEW MEDICAL DISCOVERY CHECKS DEAFNESS!

A new revolutionary discovery concerning the cause of and remedy for chronic progressive deafness, has startled the entire medical profession! This discovery was made by a world-famous specialist, head of ear, nose, and throat department of leading New York hospital. These tests were made on 581 hard-of-hearing men, women, and children.

RESULTS ASTOUNDING

In most cases deafness stopped and very satisfactory results in functional hearing and the general clinical picture were obtained.

Extensive tests proved that many people who are hard of hearing have an excess supply of one or two (sometimes both) body chemical substances—pyruvic

acid and cholesterol. When there is an excess of pyruvic acid, it means your body is not using carbohydrate foods properly. This affects tissues and nerves, and impairs your hearing.

When there is an excess of cholesterol in your blood, fatty crystals may deposit themselves in the small blood vessels of the ear and form a lesion. The lesion cements the tissue and prevents sound waves from entering the ear. The result is gradual loss of hearing. Deafness!

The ear specialist prescribed a course of treatment to correct these conditions.

This treatment proved to be a sensational success.

He prescribed a product called BAC (B-Amino-Complex Tablets).

The doctor pointed out that the stopping of further deafness and the improvement in hearing does not come overnight. Results from BAC are gradual and are noticed in 3 to 6 months. But isn't that wonderful—if in 3 to 6 months you notice a definite improvement in your hearing?

It is intended for chronic, progressive deafness in otherwise normal, healthy people.

PAR. 5. In the first line of the above-quoted advertisement, respondents represent that the drug preparation "B-Amino-Complex," sometimes designated "BAC," offers "NEW HOPE FOR THE HARD OF HEARING." Later in the advertisement, respondents appear to particularize the application of their preparation by offering it as an effective treatment to persons having deafness resulting from an excess of pyruvic acid or cholesterol, or both. This particularization, however, does not limit the previous broad representation, which clearly implies that their drug preparation is a cure, remedy, or treatment for defective hearing in all persons so afflicted, regardless of cause or degree of deafness.

In the second line of the above-quoted advertisement, respondents describe their preparation by stating:

AMAZING NEW MEDICAL DISCOVERY CHECKS DEAFNESS!

The only logical conclusion to be drawn from this statement is that respondents' preparation is both amazing and new as a treatment for deafness, and that it will materially benefit or retard the progression of all types of deafness.

In the concluding paragraph of respondents' advertisement appears the statement, with reference to their preparation "B-Amino-Complex," that "it is intended for chronic, progressive deafness in otherwise normal, healthy people."

A logical interpretation of the meaning of the last of the foregoing representations requires an understanding of the general physiological mechanism of hearing; the characteristics, causes and treatment of deafness; and, particularly, the meaning of the phrase "chronic, progressive deafness."

PAR. 6. Hearing in human beings, is accomplished by means of the physiological mechanism consisting of the external and internal ear and the auditory nerve. The external ear, or auricula, is designed to collect and intensify air waves, through which sound is projected, and transmit them through the external ear canal to the drum membrane. There the sound waves are conducted, not only through the air in the middle ear, but through the small chain of bones known as ossicles, located in the middle ear. The Eustachian tube, which leads from the back of the throat to the middle ear, is also a part of the hearing mechanism. From the middle ear, the sound impulses are transmitted to a fluid medium in the inner ear, or cochlea, wherein they produce microscopic miniature waves, which are, in turn, transmitted by the auditory nerve to the brain centers which interpret them as sound.

Deafness is a symptom which indicates a dysfunction of some part of the human mechanism of hearing, and consists of a partial or total loss of the ability to hear.

Deafness may be produced by a variety of diseases, injuries, or malformations affecting any part of the mechanism of hearing. Such causes include enlarged adenoids and tonsils; the contagious diseases of childhood, such as scarlet fever and measles; infectious diseases such as syphilis; diseases involving a disturbance of metabolism, such as diabetes; acute and chronic infections of the middle ear, such as mastoiditis; the common cold; and external interference, such as injury, packed hard wax in the ear, or congenital malformation. There are also the degenerative changes in bone structure known as otosclerosis, which may be incident to the onset of senility, but which also occur in patients of all ages from puberty onward, and arise from a variety of causes, which in turn may be caused by disease, by hereditary factors, or by disturbances in metabolism, endocrine balance, or blood circulation or chemistry. A disturbance in metabolism, particularly in carbohydrate metabolism, may also cause perceptive deafness by interfering with the chemical reaction by which the nerve endings receive the sound waves conducted to them by the mechanism of the middle and inner ear.

The many and various conditions giving rise to the symptom of deafness should be treated as indicated by an exhaustive examination of the individual, and the therapy required to benefit or cure the particular patient may include surgery, medication, mechanical hearing aids, and vitamin and nutritional therapy designed to improve the general health. Failure to determine and institute the proper therapy, or combination of therapies, particularly suited to the individual patient may not only fail to improve the hearing, but may result in progressively increasing deafness.

The phrase "chronic, progressive deafness" is a general description of the symptom of deafness, or hardness of hearing, when that symptom has existed over a considerable period of time with increasing severity, irrespective of the pathological condition or conditions causing such symptom.

In the light of the foregoing facts, the conclusion is compelled that respondents, through the use of the statements appearing in the above-quoted advertisements, have represented, as alleged in the complaint, that the use of their preparation "B-Amino-Complex", as directed, will check and cure deafness, and that said preparation constitutes a new medical discovery for the treatment of deafness.

PAR. 7. Since deafness is a symptom arising from various, often multiple causes, which causes can only be determined by an individual medical examination of the patient, and the therapy used in the treatment of each patient must accordingly vary widely, no one preparation can constitute an adequate cure, remedy, or treatment for all types of deafness. Therefore respondents' preparation "B-Amino-Complex", by itself, will not check or cure deafness.

Respondents' preparation is essentially a vitamin compound, and, as such is not a new medical discovery for the treatment of deafness.

Although the witnesses in support of the complaint testified that respondents' preparation would have no significant effect in the treatment of deafness, they admitted, in effect, lack of experience in biochemistry and in certain phases of metabolic disturbance which might adversely affect hearing. Their testimony, therefore, did not exclude the possibility that respondents' preparation might, as indicated by the testimony of witnesses for respondents, be of some value in the treatment of perceptive deafness resulting from an excess of pyruvic acid.

Respondents' preparation "B-Amino-Complex" has been prescribed by some physicians, usually in conjunction with other therapy, in the treatment of deafness involving high blood content of pyruvic acid. The record contains, however, no evidence of properly controlled experiments with respondents' preparation, upon which to base a conclusion either that such preparation will be beneficial when so prescribed, or that it will not. It must be concluded, therefore, that the burden of proof of lack of efficacy of respondents' preparation, when so used, has not been sustained.

Accordingly, the possibility has not been excluded that respondents' preparation "B-Amino-Complex" may serve as a useful adjunct to other suitable therapy in the treatment of the restricted percentage of perceptive deafness caused by a disturbance in the carbohydrate

metabolism, when such disturbance results in a high pyruvic acid content of the blood, causing dysfunction of the auditory nerve.

PAR. 8. Respondents, by supplying to others the advertising matter above referred to, and by participating in the payment of the publication charges therefor, furnish to others the means and instrumentality by and through which to mislead and deceive the public as to the properties and value of their said preparation.

PAR. 9. Respondents' aforesaid representations concerning the drug preparation "B-Amino-Complex", to the extent hereinabove found, are misleading in material respects; have had and now have the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such statements and representations are true, and into the purchase of substantial quantities of said drug preparation as a result thereof; and constitute false advertisements within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered that respondent Unitone Corporation, a corporation, and its officers, and Joseph Barrows, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug product now designated as "B-Amino-Complex" or "BAC", or any other product containing substantially the same ingredients or possessing substantially similar properties, whether sold under the same name or under any other names, do forthwith cease and desist from:

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

(a) That said product will check or cure deafness or have any significant effect upon deafness, except in cases of perceptive deafness wherein failure of the auditory nerve has resulted from a high blood-

content of pyruvic acid, caused by disturbance of the carbohydrate metabolism of the body;

(b) That said product is a new medical discovery for the treatment of deafness;

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

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The complaint charges respondents with false advertising of a drug preparation known as "B-Amino-Complex," sold by them in interstate commerce. A typical newspaper advertisement complained of is the following, which was disseminated in interstate commerce:

"NEW HOPE FOR THE HARD OF HEARING!
AMAZING NEW MEDICAL DISCOVERY CHECKS DEAFNESS!"

"A new revolutionary discovery concerning the cause of and remedy for chronic progressive deafness, has startled the entire medical profession! This discovery was made by a world famous specialist, head of ear, nose, and throat department of leading New York hospital. These tests were made on 581 hard-of-hearing men, women, and children."

"RESULTS ASTOUNDING!

"In most cases deafness stopped and very satisfactory results in functional hearing and the general clinical picture were obtained."

"Extensive tests proved that many people who are hard of hearing have an excess supply of one or two (sometimes both) body chemical substances—pyruvic acid and cholesterol. When there is an excess of pyruvic acid, it means your body is not using carbohydrate foods properly. This affects tissues and nerves, and impairs your hearing.

"When there is an excess of cholesterol in your blood, fatty crystals may deposit themselves in the small blood vessels of the ear and form a lesion. The lesion cements the tissue and prevents sound waves from entering the ear. The result is gradual loss of hearing. Deafness!

"The ear specialist prescribed a course of treatment to correct these conditions.

"This treatment proved to be a sensational success.

"He prescribed a product called BAC (B-Amino-Complex Tablets).

"The doctor pointed out that the stopping of further deafness and the improvement in hearing does not come over night. Results from BAC are gradual and are noticed in 3 to 6 months. But isn't that wonderful—if in 3 to 6 months you notice a definite improvement in your hearing."

"It is intended for chronic, progressive deafness in otherwise normal, healthy people."

The hearing examiner found that respondents, through such advertisement, had represented, as alleged in the complaint, that the use of B-Amino-Complex as directed will check and cure deafness and that said preparation constitutes a new medical discovery for the treatment of deafness and that such representations are false.

This finding has ample support in the evidence and is not seriously challenged by either party.

The order requires respondents to cease and desist from advertising that:

(a) Said product will check or cure deafness or have any significant effect upon deafness, except in cases of perceptive deafness wherein failure of the auditory nerve has resulted from a high blood-content of pyruvic acid, caused by disturbance of the carbohydrate metabolism of the body;

(b) Said product is a new medical discovery for the treatment of deafness.

Both counsel supporting the complaint and respondents appeal.

In exceptions 1, 2, 5, 6, and 7, counsel supporting the complaint challenged the sufficiency of the evidence to support the hearing examiner's findings and 1 (a) of the order, and also challenged the propriety of the order even under the findings so made.

Witnesses for counsel supporting the complaint were Dr. Ralph Almour and Dr. Edmund P. Fowler, both experienced practitioners in the field of eye, ear, nose, and throat. They both testified in substance that respondents' product was not a new medical discovery, that it will not check deafness or cure it, or have any significant effect upon it. As pointed out by the hearing examiner "they admitted in effect lack of experience in biochemistry and in certain phases of metabolic disturbances which might adversely affect hearing," a circumstance properly to be considered in weighing their testimony.

Respondents introduced the testimony of Dr. Nachmansohn, a biochemist, Dr. De Graff, a heart specialist, and Dr. Benton. Their testimony sets out the basic theory upon which the claimed value of respondents' product is based. Briefly, that theory is as follows: nerve perception and nerve conduction depends upon the action of a chemical

substance known as acetyl choline which is produced when carbohydrate substances in the blood are metabolized. One of the products also produced is pyruvic acid which, when broken down, gives off certain phosphates which are important in the formation of acetyl choline. Imperfect carbohydrate metabolism is generally indicated by a high pyruvic acid level which indicates that the pyruvic acid is not being properly oxidized. To remedy this condition, certain vitamins are useful. The B-Amino-Complex increases the rate at which carbohydrate metabolism occurs and thus aids eventually the production of acetyl choline.

Respondents also put on the stand Dr. Julius W. Bell, an experienced otolaryngologist. He testified that he was familiar with the experiments and theories of Dr. Kopetzky and that he had prescribed B-Amino-Complex and Betazyme in his practice.

The reasonable conclusion to be drawn from Dr. Bell's testimony is that in certain types of deafness B-Amino-Complex does have value in conjunction with other types of therapy.

After hearing all the testimony, the hearing examiner found as follows:

"The possibility has not been excluded that respondents' preparation 'B-Amino-Complex' may serve as a useful adjunct to other suitable therapy in the treatment of the restricted percentage of perceptive deafness caused by a disturbance in the carbohydrate metabolism, when such disturbance results in a high pyruvic acid content of the blood, causing dysfunction of the auditory nerve."

The above finding is supported by the evidence. However, such finding does not justify 1 (a) of the order. The order should limit the value of the respondents' product to that of a useful adjunct to other suitable therapy.

Exception is also taken to the failure of the hearing examiner to find specifically that the layman is not qualified to diagnose deafness and properly evaluate or interpret the symptoms of deafness or to determine the proper therapy for such conditions. An additional exception is to the failure of the hearing examiner to find specifically that the use of respondents' product by laymen in cases of deafness or impaired hearing may delay competent medical treatment and result in serious injury.

The evidence does establish that the layman is not qualified to diagnose deafness and ordinarily could not determine the proper therapy for such condition. We may also concede that reliance on any advertised product may in some cases delay competent treatment and result in injury. The same result might follow where the afflicted person took no remedy at all or even where he received incompetent

medical attention. There is no evidence that the preparation is dangerous to the health nor will respondents' advertising (as limited by the order proposed herein) represent expressly or impliedly that diagnosis by competent medical people is unnecessary. As having some bearing on the issue involved here, see *Alberty* v. *Federal Trade Commission* (1949) 182 F. 2d 36.

In their appeal, respondents claim that since the advertisement set out in the complaint does not purport to do more than to accurately restate medical conclusions reached and published by a reputable otolaryngologist, it cannot be said to be false and misleading.

If respondents circulated false and misleading statements, it is no defense that they were merely setting forth the statements and conclusions of someone else. The issue is not whether Dr. Kopetzky actually made certain statements. The issue is: are these statements true? In connection with this issue, respondents offered reprints from medical publications of two articles written by Dr. Kopetzky, an expert in otolaryngology. At the time of the hearing, Dr. Kopetzky was deceased. The authenticity of the articles was conceded. Counsel supporting the complaint admitted that the articles were published but objected to their introduction in evidence as proof of the facts related therein. This objection was sustained by the hearing examiner and exception is taken by respondents.

It does not appear that the articles were recognized and generally accepted as standard authorities on the subject with which they dealt. On the contrary, they were the statements of Dr. Kopetzky concerning a theory which is still a matter of controversy. The ruling of the hearing examiner was correct (see 32 C. J. S. Sec. 718).

The findings of fact made by the hearing examiner are correct and are adopted as the findings of the Commission. It is directed, however, that 1 (a) of the Order be modified as suggested herein.

With that exception, the appeals of both parties are dismissed.

Commissioner CARRETTA did not participate.

ORDER MODIFYING INITIAL DECISION AND ADOPTING SUCH DECISION AS MODIFIED AND ORDER TO FILE REPORT OF COMPLIANCE

This case having come on for hearing before the Commission upon the appeals filed by the respondents and by counsel supporting the complaint from the initial decision of the hearing examiner; and

The Commission having determined that the appeal of the respondents should be denied and that the appeal of counsel supporting the complaint should be granted in part and denied in part; and

The Commission, for reasons stated in its opinion which is separately issuing herein, having additionally determined that the findings

as to the facts, conclusion, and order contained in the initial decision are in all respects appropriate, save and except for certain of the provisions contained in Paragraph 1 (a) of the order to cease and desist which the record now requires be modified:

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That the appeal of counsel supporting the complaint be, and it hereby is, granted to the extent that such appeal challenges Paragraph 1 (a) of the order contained in the initial decision as inconsistent with the findings as to the facts appearing in the initial decision and that such appeal be, and it hereby is, denied in all other respects.

It is further ordered, That subparagraph (a) of Paragraph 1 of the order contained in the initial decision be, and it hereby is, modified to read as follows:

That said product will check or cure deafness, or will have any value in the treatment of deafness except that it may serve as a useful adjunct to other suitable therapy in cases of perceptive deafness caused by a disturbance in the carbohydrate metabolism when such disturbance results in a high pyruvic acid content in the blood and causes dysfunction of the auditory nerve.

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

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

Commissioner CARRETTA not participating.

Syllabus

IN THE MATTER OF

ALASKA SALMON INDUSTRY, INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6141. Complaint, Nov. 12, 1953—Decision, Apr. 8, 1954

Where some 41 business enterprises, corporate and otherwise, which were engaged in operating canneries in the various fishing areas or districts of Alaska as established by the Department of the Interior for the purpose of controlling salmon fishing; entered into contracts for salmon caught in seven of such fishing areas or districts by the fishermen members of the unions in the fishing areas or districts in which said packers maintained such canneries; operated about 90 of the 110 salmon canneries operating in Alaska in which salmon fishing and canning constituted the Territory's largest industry and its principal source of employment and tax revenue; sold large quantities of salmon, including that caught in the fishing areas or districts concerned and purchased from the fishermen members of the unions involved, to purchasers, after canning; and were in substantial competition in the purchase of fresh or raw salmon from the fishermen who caught the same in such areas or districts, except as restrained or destroyed, as below set forth, with each other and with others likewise—

(a) For many years past, and especially since 1946, and beginning with the date of their affiliation with their corporate trade organization or association, by means of and through said trade association and its managing director and their individual acts, entered into, maintained, and effectuated an agreement or understanding to pursue, and pursued, a planned, common, and concerted course of action between and among themselves to adopt, fix, and adhere to certain practices and policies which restricted and restrained competition in the offer to purchase and the purchase of fresh or raw salmon in commerce in said Territory; and as a part of and in furtherance of the aforesaid agreement, etc., and among other things—

(1) Agreed to and did determine and fix the purchase prices in the various fishing areas or districts of Alaska for the different types of fresh or raw salmon;

(2) Agreed to and did restrict price competition between and among themselves in the purchase of said salmon;

(3) Agreed to and did maintain uniform minimum prices for the purchase thereof and agreed to and did authorize and empower their said trade organization to negotiate on their behalf contracts or agreements with the said unions to fix and establish the annual minimum prices at which the various types of salmon were to be purchased by said packers and canners, members of their said organization, and were to be sold by the fishermen members of said unions; and

Where for many years past, and especially since 1946, said trade organization, a membership corporation, its said managing director, acting on behalf of its members, said members, from the date of their affiliation with their said trade organization, acting both individually and as members of said trade

organization, and the various unions concerned, acting for and on behalf of their Alaska salmon fishermen members—

(b) Entered into, maintained, and effectuated an agreement or understanding to pursue, and pursued, a planned, common, and concerted course of action to adhere to certain practices and policies which restricted and restrained competition in the offer for sale, sale, and distribution of fresh or raw salmon in commerce in said Territory; and as a part of and in pursuance to and in furtherance of the aforesaid agreements, etc., among other things—

(1) Agreed to and did determine and fix minimum prices for the purchase and sale of the various types of fresh or raw salmon caught in the aforesaid fishing areas or districts of Alaska;

(2) Agreed to and did restrict price competition between and among fishermen members of said unions in the sale of said salmon;

(3) Agreed to and did adopt and maintain an arrangement whereby each of said unions entered into annual agreements or contracts in one or more of the various fishing districts or areas of Alaska with said trade organization and its said members, whereby the annual minimum fish prices for the purchase and sale of said salmon were fixed;

(4) Agreed to and did establish and maintain minimum prices for the purchase and sale of said fish;

(5) Agreed to and did restrict individual salmon fishermen members of said unions from selling any such salmon to canneries of the members of said organization except in accordance with annual agreements or contracts entered into by said organization and its members and the union or unions concerned; and

(6) Agreed to and did restrict raw or fresh salmon from being sold in any fishing area or district of Alaska until and unless the annual contract fixing and establishing the prices at which the various types of such fish should be purchased and sold had been entered into by or in behalf of said members and the union or unions for the area or district involved:

Held, That such acts and practices, under the circumstances set forth, had a dangerous tendency unduly to prevent price competition between and among respondents in the purchase and sale of raw or fresh salmon in commerce, and were all to the prejudice and injury of the public, and constituted unfair acts and practices in commerce and unfair methods of competition therein.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Fletcher G. Cohn, *Mr. Lewis F. Depro*, *Mr. Paul H. LaRue* and *Mr. Everette MacIntyre* for the Commission.

Mr. W. C. Arnold, of Seattle, Wash., for Alaska Salmon Industry, Inc.

Mr. Thomas M. Green and *Mr. Frank T. Rosenquist*, of the firm of Graham, Green, Howe & Dunn, of Seattle, Wash., for Ellamar Packing Co., Egegik Packing Co., P. E. Harris Co., Inc., Intercoastal Packing Co., Peninsula Packers, San Juan Fishing & Packing Co., Todd Packing Co., Uganik Fisheries, Inc., Calvert Corp., Trans-Pacific Fishing & Packing Co., and Marine Fishing & Packing Co.

Mr. Robert Graham and *Mr. Edward Dobrin* of the firm of Bogle, Bogle & Gates, of Seattle, Wash., for Alaska Pacific Salmon Co.,

Bristol Bay Packing Co., Chignik Fisheries Co., Kadiak Fisheries Co., New England Fish Co., and Seldovia Bay Packing Co.

Medley & Haugland, of Seattle, Wash., for Alaska Year Round Canneries Co., General Fish Co. and Kayler-Dahl Fish Co.

Allen, Hilen, Froude, DeGarmo & Leedy, of Seattle, Wash., for Farwest Wrangell Co. and Nakat Packing Corp.

Kerr, McCord, Greenleaf & Moen, of Seattle, Wash., for Fidalgo Island Packing Co. and Pacific American Fisheries.

Mr. E. H. Taylor, of the firm of Pillsbury, Madison & Sutro, of San Francisco, Calif., for Alaska Packers Ass'n and L. G. Wingard Packing Co.

Mr. Wendell Wyatt, of Astoria, Ore., for Columbia River Packers Ass'n.

Mr. M. A. Marquis of the firm of McMicken, Rupp & Schweppe, of Seattle, Wash., for Copper River Packing Co.

Mr. R. E. Robertson of the firm of Robertson, Monagle & Eastaugh, of Juneau, Alaska, for Icy Straits Salmon Co.

Holman, Mickelwait, Marion, Black & Perkins, of Seattle, Wash., for Libby, McNeill & Libby.

Mr. S. J. King of the firm of Ryan, Askren & Mathewson, of Seattle, Wash., for Whiz Fish Products Co.

Moriarty & Olson, of Seattle, Wash., for Wards Cove Packing Co.

Mr. Walter Walsh, of Juneau, Alaska, for Hood Bay Salmon Co., Annette Islands Canning Co., Keku Canning Co., Klawock Oceanside Packing Co., and Hydaburg Cooperative Ass'n.

Mr. Roy E. Jackson and *Mr. Carl B. Luckerath*, of Seattle, Wash., for Alaska Fishermen's Union.

McCutcheon, Nesbett & Rader, of Anchorage, Alaska, for Cordova District Fisheries Union.

Bassett, Geisness & Vance, of Seattle, Wash., for Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades, Bering Sea Fishermen's Union, United Fishermen of Alaska, and United Fishermen of Cook Inlet.

Walthew, Oseran & Warner, of Seattle, Wash., for Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska, Local No. 3–3, Fishermen & Allied Workers Division, International Longshoremen's & Warehousemen's Union and Local No. 30, Fishermen & Allied Workers Division, International Longshoremen's & Warehousemen's Union.

Mr. Hugh E. Pickel, Jr., of Seattle, Wash., for Stikine Gillnetters Ass'n.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 12, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair acts and practices and unfair methods of competition in violation of the provisions of Section 5 of said Act.

The respondents desiring that this proceeding be disposed of by Consent Settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the Consent Settlement hereinafter set forth, and in lieu of the answers to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, are to be withdrawn from the record, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint;

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law;

3. Agree that this Consent Settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 8, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

It appearing to the Commission that Sebastian-Stuart Fish Company, one of the respondents in this proceeding, is no longer engaged in the business of canning salmon in Alaska and that it has no present intention of reentering the business:

It was also ordered, That the complaint herein be dismissed as to said respondent Sebastian-Stuart Fish Company.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Alaska Salmon Industry Inc., is a membership corporation, organized and existing under the laws of the State of Delaware, with its principal office in the State of Delaware located at No. 100 West 10th Street, Wilmington, Delaware, and its principal office for the transaction of business of the corporation located at 200 Colman Building, 811 First Avenue, Seattle 4, Washington. It, its officers, directors and members are here named and made parties respondent to this proceeding. Said respondent, Alaska Salmon Industry Inc., will sometimes hereinafter be referred to as respondent "industry." The members of said respondent Industry will sometimes hereinafter be referred to as respondent "Industry Members."

Except as hereinafter noted, the following corporations, individuals, and partnerships were members of respondent Industry as of June 20, 1952, and each has continued such membership.

Therefore, because of that status and the acts, practices, and policies in which they participated, as hereinafter set forth, each such respondent industry member is also here named and made a party respondent individually. Each such respondent Industry Member is described as follows:

Respondent, Alaska Pacific Salmon Company is a corporation organized under the laws of the State of Nevada, with its principal office and place of business located at the Skinner Building, Seattle, Washington.

Respondent, Alaska Packers Association is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 215 Fremont Street, San Francisco, California.

Respondent, Alaska Year Round Canneries Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 5355 28th Avenue, N. W., Seattle, Washington.

Respondent, Angoon Community Association, operating under the name of the Hood Bay Salmon Company, is a corporation organized and existing under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, having its principal office and place of business located at 625 Colman Building, Seattle 4, Washington.

Respondent, Bristol Bay Packing Company is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located on the Seventh Floor of the Skinner Building, Seattle, Washington.

Respondent, Chignik Fisheries Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1826 Exchange Building, Seattle 4, Washington.

Respondent, Columbia River Packers Association, Inc., is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at Astoria, Oregon.

Respondent, Cook Inlet Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 303 Colman Building, Seattle 4, Washington.

Respondent, Copper River Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2408 Commodore Way, Seattle, Washington.

Respondent, Egegik Packing Company is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle, Washington.

Respondent, Ellamar Packing Company is a sole proprietorship conducted by Milton G. Brown, with its principal office and place of business located at 2408 Commodore Way, Seattle, Washington.

Respondent, Farwest Wrangell Co., Inc., is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 740 Westlake North, Seattle 9, Washington.

Respondent, Fidalgo Island Packing Company, Inc., is a corporation organized and existing under the laws of the State of Maine, with its principal office and place of business located at 2360 Commodore Way, Seattle 99, Washington.

Respondent, General Fish Co., Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 5355 Twenty-Eighth Avenue NW., Seattle, Washington.

Respondent, P. E. Harris Company, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1220 Dexter Horton Building, Seattle 4, Washington.

Respondent, Hydaburg Cooperative Association is a corporation operating under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, with its principal office and place of business located at 916 American Building, Seattle 4, Washington.

Respondent, Icy Straits Salmon Company is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 219 Herald Building, Bellingham, Washington; said respondent was a member of respondent industry until December 31, 1950, since which date it has not held membership in respondent industry.

Respondent, Independent Salmon Canneries Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 66, Bell Street Terminal, Seattle 1, Washington.

Respondent, Intercoastal Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle 14, Washington.

Respondent, Kadiak Fisheries Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1826 Exchange Building, Seattle 4, Washington.

Kayler-Dahl Fish Company, Inc., which was named as a respondent in the complaint, is now dissolved.

Respondent, Keku Canning Company, is a corporation operating under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, with its principal office and place of business located at 4103 Arcade Building, Seattle, Washington.

Respondent, Ketchikan Packing Company is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 625 Colman Building, Seattle, Washington.

Respondent, Klawock Cooperative Association, doing business as Klawock Oceanside Packing Company, is a native charter corporation operating under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, with its principal office and place of business located at 2700 Westlake North, Seattle 9, Washington.

Respondent, Libby, McNeill & Libby is a corporation organized and existing under the laws of the State of Maine, with its principal place of business being located at Union Stockyards, Chicago, Illinois.

Respondent, Metlakatla Indian Community operating under the trade name of Annette Islands Canning Company, is a Federal corporation chartered under the Act of Congress of June 18, 1934, with its principal office and place of business located at 505 Colman Building, Seattle 4, Washington.

Respondent, The Nakat Packing Corporation is a corporation organized and existing under the laws of the State of New York, with its

principal office and place of business located at 1355 Dexter Horton Building, Seattle 4, Washington.

Respondent, New England Fish Company is a corporation organized and existing under the laws of the State of Maine, with its principal office and place of business located at 1828 Exchange Building, Seattle 4, Washington.

Respondent, Pacific American Fisheries, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 401 Harris Avenue, Bellingham, Washington.

Nick Bez, William Calvert, Lawrence Calvert and Starr H. Calvert are not engaged in business under the trade name of Peninsula Packers and there is substituted for them as respondents herein Trans-Pacific Fishing & Packing Company and Calvert Corporation, both of which corporations are organized under the laws of the State of Washington; the principal office and place of business of said partners trading under the name of Peninsula Packers in 1220 Dexter Horton Building, Seattle 4, Washington; said partners do acknowledge that full service of process has been effected upon them. Said partnership ceased its membership in respondent industry as of June 30, 1952.

Respondent, Port Ashton Packing Corporation is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 627 Colman Building, Seattle 4, Washington.

Respondent, Pyramid Fisheries Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2003 Exchange Building, Seattle 4, Washington.

Respondent, Superior Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2003 Exchange Building, Seattle 4, Washington.

Respondent, San Juan Fishing & Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle, Washington.

Respondent, Sebastian-Stuart Fish Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 24, Spokane Street Dock, Seattle 4, Washington; said respondent filed no answer to the complaint.

Respondent, Seldovia Bay Packing Company is a corporation organized and existing under the laws of the Territory of Alaska, with

its principal office and place of business located at Central Building, Seattle 4, Washington. Said respondent was a Member of said respondent Industry on June 20, 1952 but has since that date ceased to be a member thereof.

Respondent, Snug Harbor Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1805 Smith Tower, Seattle, Washington; said respondent filed no answer to the complaint.

Respondent Todd Packing Company is a partnership composed of San Juan Fishing & Packing Company and Marine Fishing & Packing Company, corporations, both of which are organized and existing under the laws of the State of Washington; the principal office and place of business of said partnership is located at Pier 31, Foot of Stacy Street, Seattle, Washington. Said partners do acknowledge that full service of process has been effected upon them.

Respondent, Uganik Fisheries Inc., is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle, Washington.

Respondent, Wards Cove Packing Company Inc., is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 303 East Northlake Avenue, Seattle 5, Washington.

Respondent, Whiz Fish Products Company, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2000 Alaskan Way, Seattle 4, Washington.

Respondents, L. G. Wingard, Mary Lou Wingard, Lester L. Wingard, Lou M. Hill, Charles Coffey, Conney Nelson, Lorraine Nelson and Richard W. Hill are individuals doing business as a partnership under the trade name of L. G. Wingard Packing Co., with their principal office and place of business located at 10457 Maplewood Place, Seattle, Washington.

Win-Ra Fisheries Inc., which was named as a respondent in the complaint herein, has been dissolved.

Respondent, W. C. Arnold has been for several years last past, and is now the Managing Director of respondent, Alaska Salmon Industry, Inc., with its principal office and place of business located at 200 Colman Building, 811 First Avenue, Seattle 4, Washington; he is here also named and made a respondent individually.

Each of the following parties described in this Paragraph 1 entered into agreements with the above-named respondents and participated with them in carrying out the acts and practices hereinafter alleged.

Therefore, each such party is here named and made a respondent to this proceeding.

Respondent, Alaska Fishermen's Union is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal place of business is located at 84 Union Street, Seattle, Washington.

Respondent, Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal place of business is located at Sitka, Alaska.

Associated Fishermen & Allied Workers, who was named as respondent in the complaint herein could not be served with process. Therefore, the complaint is dismissed as to it.

Respondent, Bering Sea Fishermen's Union is an unincorporated association among whose members are fishermen engaged in catching the various types of raw or fresh salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Dillingham, Alaska.

Respondent, Cordova District Fisheries Union, is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Cordova, Alaska.

Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska, which was named as a respondent in the complaint herein, was not engaged in the acts and practices alleged in the complaint. However, there are named as respondents herein, in lieu of said Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska, Local No. 3–3 of the Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union and Local No. 30, Fishermen & Allied Workers Division of International Longshoremen's and Warehousemen's Union, both unincorporated associations among whose members are fishermen engaged in catching various types of fresh or raw salmon in one or more of the fishing districts of Alaska; the principal office and place of business of said respondent, Local No. 3–3, is 84 Union Street, Seattle, Washington, and that of said respondent Local No. 30, is Ketchikan, Alaska; said respondents do acknowledge that full service of process has been effected upon them.

Petersburg Vessel Owner's Association which was named as a respondent in the complaint herein, was not engaged in any of the acts or practices hereinafter set out.

No service of process was effected upon Southeastern Alaska Salmon Purse Seiners Association, which was named as a respondent in the complaint herein.

Stikine Gillnetters Association, which was named as a respondent in the complaint, is an unincorporated association whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska and selling same through such association in compliance with the provisions of the Fishermen's Marketing Act.

Respondent, United Fishermen of Alaska, is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Kodiak, Alaska.

Respondent, United Fishermen of Cook Inlet, is an unincorporated association among whose members are fishermen engaged in catching the various types of raw or fresh salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Anchorage, Alaska.

PAR. 2. Respondent, Alaska Salmon Industry, Inc., was organized in 1940. It is a trade organization or association composed of corporations, partnerships, firms, and individuals who are engaged in the canning of salmon in Alaska. Its membership constitutes in excess of 50% of the salmon canners or packers operating in Alaska, and they can or pack well in excess of 50% of the total volume of salmon produced in said territory.

Respondent Industry has acted, and is acting for, and in cooperation with, the respondent Members thereof in negotiating and fixing the annual minimum prices to be paid by said respondent Members to fishermen members of respondent Unions for fresh or raw salmon caught by said fishermen in Alaskan waters and sold by them to such Members. In carrying out this function, respondent Industry, in each of the fishing areas or districts of Alaska, which are hereinafter described, fixes and establishes with the respondent Unions, for each of said districts or areas, fish prices for salmon caught in such areas or districts. All of the respondent Members of the respondent Industry having canneries in a particular fishing district or area, authorize and empower respondent Industry to act for them as a group in negotiating and fixing the fish prices for the various types of salmon caught by the fishermen members of the respondent Union or Unions in that particular fishing area or district.

PAR. 3. All of the individuals, partnerships, firms, and corporations hereinbefore described in Paragraph 1 are engaged in the business of

maintaining and operating canneries in one or more of the various fishing areas or districts of Alaska, as hereinbefore described, for the purpose of canning salmon including that caught by the fishermen members of respondent Unions in the fishing areas or districts in which said respondent Industry Members maintain such canneries Each of said respondents was, or is, a member of respondent Industry, except as otherwise indicated in Paragraph 1, and has authorized, participated in, adopted or confirmed, as a member of respondent Industry, the acts and practices of said Industry hereinafter set forth.

PAR. 4. The respondent Unions are now engaged, and at all times herein mentioned have been engaged, in transacting business on behalf of their fishermen members. Each of said respondent Unions enters into contracts or agreements for one or more of the fishing districts or areas in Alaska with the respondent Industry and/or with respondent Industry Members who have canneries in the areas or districts covered by said contracts or agreements whereby minimum fish prices for the various types of salmon caught and sold in said fishing areas or districts are fixed and established for each annual fishing season.

PAR. 5. As to members of respondent Unions, including fishermen members, who are employees as one or more of respondent Industry Members, said respondent Unions have bargained, and do bargain, with the respondent Industry and/or respondent Industry Members as to wages and working conditions of said employees.

With the exception of the Bristol Bay area, referred to in the second paragraph of Paragraph 11, there is no agreement among respondents as to the status of fishermen members of respondent Unions. No Finding of Fact or Conclusion is made with respect to such status.

As to such status, the Commission is to consider and give full weight to the decisions and actions of the National Labor Relations Board.

PAR. 6. Respondent W. C. Arnold, who is made a respondent herein both individually and in his official capacity as Managing Director of respondent Industry, is the executive officer of said respondent Industry, and as such, acting for and on behalf of respondent Industry, supervises and directs the negotiations and agreements hereinafter described between respondent Industry and the respondent Unions.

PAR. 7. Each of the respondents herein named has directly or indirectly participated in, approved or adopted one or more of the acts and practices hereinafter set forth in Paragraphs 13 and 14.

PAR. 8. It is common knowledge that the Territory of Alaska is an important commercial factor in the economy of this country. Salmon fishing and canning is Alaska's largest industry and its principal

source of employment and tax revenue. The salmon canners are scattered along the shores of Alaska where it will be convenient for boats and fishing gear to intercept the incoming migration.

The law requires that salmon be canned, or otherwise preserved, within forty-eight hours after being caught, and the canneries, including those operated by respondent Industry Members, in order to secure the highest quality product, have adopted the practice of canning or otherwise preserving salmon within twenty-four hours.

The Territory has been divided into separate fishing areas or districts by the Fish and Wildlife Service, Department of Interior, for the purpose of controlling salmon fishing. The respondent Industry Members maintain canneries and enter into contracts for salmon caught in seven of such fishing areas or districts, to wit: Bristol Bay; Peninsula or Westward; Chignik; Kodiak Island; Cook Inlet; Copper River and Prince William Sound; and Southeastern Alaska.

The Secretary of Interior, by Congressional authority, promulgates and issues regulations annually, governing fishing for each year, whereby are controlled the opening and closing dates for salmon fishing in each of the fishing areas or districts. Such seasons vary in the different areas, but generally speaking, any particular area is not open for more than five weeks, and the greater portion of the catch in any such area is made within a fifteen-day period.

Normally there are about 110 salmon canneries operating in Alaska, and the respondent Industry Members operate approximately 90 of them. The capital investment in Alaska salmon fisheries is estimated at approximately $100,000,000. The industry utilizes approximately 20,000 employees and fishermen, the total fishermen being approximately 14,000. About one-half of this 20,000 are year-round residents of the Territory, and the other 10,000 are transported to the Territory each spring from the continental United States and returned in the fall after the seasons' operations are concluded.

In 1952 the pack was approximately 3,250,000 cases (a case contains 48 one-pound cans), having a wholesale value of approximately $95,000,000 and being valued to the fishermen at approximately $33,000,000.

PAR. 9. Respondent Industry Members sell large quantities of salmon, including that caught in the fishing areas or districts of Alaska and purchased from the fishermen members of respondent Unions, to purchasers of said salmon after same has been canned by respondent Industry Members, and which purchasers are located in the various States of the United States, and cause same to be transported for sale from the Territory of Alaska to such purchasers. Said respondent Industry Members, as well as the fishermen members of respondent

Unions, maintain, and at all times herein mentioned, have maintained a regular course or current of trade and commerce in raw or fresh salmon in the Territory of Alaska.

The respondents, Industry, W. C. Arnold, and Unions, have been, and are, media whereby respondent Industry Members and fishermen members of respondent Unions have committed and performed, and are committing and performing, in commerce, the practices and policies hereinafter set forth in Paragraphs 13 and 14. All of the respondents named herein have been, and are now, engaged in commerce in raw or fresh salmon, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 10. Respondent Industry Members in the course and conduct of their business in purchasing fresh or raw salmon from the fishermen who catch same in the fishing areas or districts of Alaska, are in substantial competition, except as such competition has been restrained or destroyed, as hereinafter set forth, with each other and with others who likewise are engaged in purchasing and selling such salmon in commerce.

Respondent Unions, as well as the fishermen members thereof, in the course of negotiating for sale, and in selling the salmon caught by said fishermen in the fishing areas or districts of Alaska, are engaged in substantial competition, except as such competition has been restrained or destroyed, as hereinafter found: (a) the fishermen members of a respondent Union being in competition with each other; (b) all respondent Unions having fishermen members catching salmon in the same fishing area or district being in competition with each other; (c) respondent Unions and the fishermen members thereof being in competition with other unions and their members who are engaged in offering for sale and selling such salmon; and (d) said respondents and their fishermen members being in competition with other fishermen who are not union members, but who are engaged in catching and selling salmon in commerce.

PAR. 11. Fresh or raw salmon, with rare exceptions, is purchased by the respondent Industry Members as the result of, and on the basis of, the negotiations and bargaining carried on for each of the fishing areas or districts, in advance of the fishing seasons for each district, with the respondent Industry acting for, on behalf of, and with the approval of respondent Industry Members, and the respondent Unions acting for, on behalf of, and with the approval of all their fishermen members in the affected district. Such negotiations and bargainings fix and determine the fish prices, which are the prices at which fishermen members of respondent Unions agree to sell and the respondent Industry Members agree to purchase the various types of salmon for

the particular fishing season in the different fishing areas or districts covered by said contracts or agreements.

The greater majority of the fishermen members of respondent Unions who are, and have been for the last several years past, catching salmon within the Bristol Bay area are, and have been, employees of one or more of the respondent Industry Members operating canneries in said area.

PAR. 12. The fish prices fixed and determined in the aforedescribed manner are adopted and maintained, at least as the minimum prices, for the various types of salmon in each of the fishing areas or districts covered by such contracts or agreements for the particular season named therein, by the respondent Industry Members and the fishermen members of the respondent Unions covered thereby.

PAR. 13. For many years last past, and especially since 1946, and continuing to the filing of this complaint, respondent Industry Members have, from the date of their affiliation with respondent Industry, by means of and through respondent Industry and respondent Arnold, and also by their individual acts, entered into, maintained and effectuated an agreement or understanding to pursue, and they have pursued, a planned common and concerted course of action between and among themselves to adopt, fix and adhere to certain practices and policies which restrict and restrain competition in the offering to purchase and the purchase of fresh or raw salmon in commerce in the Territory of Alaska.

As part of, pursuant to, and in furtherance of the aforesaid agreement, understanding and planned common and concerted course of action, said respondent Industry Members, among other such practices and policies, have agreed:

1. to determine and fix, and they have determined and fixed, and are still determining and fixing, the purchase prices in the various fishing areas or districts of Alaska for the different types of fresh or raw salmon;

2. to restrict, and have restricted, and are still restricting, price competition between and among themselves in the purchase of said salmon;

3. to maintain, and they have maintained, and are still maintaining, uniform minimum prices for the purchase of said salmon;

4. to authorize and empower, and they have authorized and empowered, and are still authorizing and empowering, respondent Industry to negotiate on their behalf contracts or agreements with respondent Unions to fix and establish the annual minimum prices at which the various types of said salmon are to be purchased by respondent Industry Members and to be sold by the fishermen members of respondent Unions.

PAR. 14. For many years last past, and especially since 1946, and continuing to the filing of this complaint, (a) respondent Industry, (b) respondent W. C. Arnold, acting on behalf of respondent Industry Members, (c) respondent Industry Members from the date of their affiliation with respondent Industry, acting both individually and as members of said Industry, and (d) respondent Unions, acting for and on behalf of the Alaska salmon fishermen members of said Unions, have entered into, maintained and effectuated an agreement or understanding to pursue, and they have pursued, a planned common and concerted course of action between and among themselves to adopt, fix, and adhere to certain practices and policies which restrict and restrain competition in the offering for sale, sale and distribution of fresh or raw salmon in commerce in the Territory of Alaska.

As part of, pursuant to, and in furtherance of the aforesaid agreement, understanding, or planned common and concerted course of action, said respondents, among other practices and policies, have agreed

1. to determine and fix, and they have determined and fixed, and are still determining and fixing, minimum prices for the purchase and sale of the various types of fresh or raw salmon caught in the aforesaid fishing areas or districts of Alaska;

2. to restrict, and they have restricted, and are still restricting, price competition between and among fishermen members of respondent Unions in the sale of said salmon;

3. to adopt and maintain, and they have adopted and maintained, and are still adopting and maintaining, an arrangement whereby each of respondent Unions has entered into annual agreements or contracts in one or more of the various fishing districts or areas of Alaska with the respondent Industry and the respondent Industry Members, whereby are fixed the annual minimum fish prices for the purchase and sale of said salmon;

4. to establish and maintain, and they have established and maintained, and are still establishing and maintaining, the minimum prices for the purchase and sale of said salmon;

5. to restrict, and they have restricted, and are still restricting individual salmon fishermen members of respondent Unions from selling any such salmon to canneries of respondent Industry Members except in accordance with annual agreements or contracts entered into by respondent Industry and respondent Industry Members and respondent Union or Unions;

6. to restrict, and they have restricted, and are still restricting, raw or fresh salmon from being sold in any fishing area or district of Alaska until and unless the annual contract or agreement fixing and

establishing the prices at which the various types of such salmon should be purchased and sold, have been entered into by or in behalf of respondent Industry Members and the respondent Union or Unions for said area or district.

PAR. 15. In addition to the effects, as hereinbefore set forth in Paragraphs 13 and 14, the acts, practices and policies of the respondents likewise have the capacity and tendency to affect the cost of food by their effect on the prices which the public is required to pay for canned salmon.

CONCLUSION

The acts and practices of respondents as hereinbefore found have a dangerous tendency unduly to hinder competition because they have promoted and contributed to the suppression, elimination and prevention of price competition between and among respondents in the purchase and sale of raw or fresh salmon in commerce, as "commerce" is defined in the Federal Trade Commission Act, and such acts and practices, all and singularly, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondents, Alaska Salmon Industry Inc., a corporation, its officers, directors and members, and Alaska Pacific Salmon Company, Alaska Packers Association, Alaska Year Round Canneries Company, Angoon Community Association trading as Hood Bay Salmon Company, Bristol Bay Packing Company, Chignik Fisheries Company, Columbia River Packers Association, Inc., Cook Inlet Packing Company, Copper River Packing Company, Egegik Packing Company, Ellamar Packing Company, Farwest Wrangell Co., Inc., Fidalgo Island Packing Company, Inc., General Fish Co., Inc., P. E. Harris Company Inc., Hydaburg Cooperative Association, Icy Straits Salmon Company, Independent Salmon Canneries, Inc., Intercoastal Packing Company, Kadiak Fisheries Company, Keku Canning Company, Ketchikan Packing Company, Klawock Cooperative Association doing business as Klawock Oceanside Packing Company, Libby, McNeill & Libby, Metlakatla Indian Community operating under the trade name of Annette Islands Canning Company, The Nakat Packing Corporation, New England Fish Company, Pacific American Fisheries, Inc., Trans-Pacific Fishing & Packing Company and the Calvert Corporation, both corporations doing business under the trade name

of Peninsula Packers, Port Ashton Packing Corporation, Pyramid Fisheries, Inc., Superior Packing Company, San Juan Fishing & Packing Company, Sebastian-Stuart Fish Company, Seldovia Bay Packing Company, Snug Harbor Packing Company, San Juan Fishing & Packing Company and Marine Fishing & Packing Company, corporations, doing business as Todd Packing Company, Uganik Fisheries, Inc., Wards Cove Packing Company, Inc., Whiz Fish Products Company, Inc., L. G. Wingard, Mary Lou Wingard, Lester L. Wingard, Lou M. Hill, Charles Coffey, Conney Nelson, Lorraine Nelson and Richard W. Hill, doing business as a partnership under the trade name of L. G. Wingard Packing Co., and W. C. Arnold, individually and as Managing Director of Alaska Salmon Industry Inc., and Alaska Fishermens Union, Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades, Bering Sea Fishermen's Union, Cordova District Fisheries Union, Local 3–3 of the Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union and Local No. 30, Fishermen & Allied Workers Division of International Longshoremen's and Warehousemen's Union, United Fishermen of Alaska and United Fishermen of Cook Inlet, and respondents' members, who shall be deemed herein to be parties respondent, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of raw or fresh salmon caught in the fishing areas or districts of Alaska, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common and concerted course of action, understanding or agreement between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts:

1. Fixing, establishing, maintaining or adhering to, in any manner or by any method whatever, the price or prices at which any type of raw or fresh salmon caught in the fishing areas or districts of Alaska are to be, or are, purchased or sold;

2. Fixing, establishing, maintaining or adhering to or attempting to fix, establish, maintain or cause adherence to, by any means or method, uniform or minimum prices for the purchase or sale of said salmon;

3. Jointly or collectively negotiating, bargaining or agreeing by any means or method as to the price or prices at which said salmon is proposed to be, or is, purchased or sold;

4. Authorizing or empowering any association, group, corporation or union to negotiate, bargain or agree as to the prices to be paid or received in the purchase or sale of any such salmon.

Provided, however, That nothing herein contained shall prevent any association of bona fide salmon fishermen, acting pursuant to and in accordance with, the provisions of the Fisheries Cooperative Marketing Act (15 U. S. C. A., Paragraphs 521, 522) from performing any of the acts and practices permitted by said Act;

Provided further, That nothing herein contained shall be deemed to prohibit one or more respondents from entering into or continuing a bona fide partnership, joint operation or venture, or consolidation, for the purpose of operating one or more canneries, and in which the prices paid for raw or fresh salmon are determined by said partnership, joint operation or venture, or consolidation, and where such determination is, under the contract establishing such partnership, joint operation or venture, or consolidation, binding upon all members thereof; This proviso shall not be construed as either an approval or a disapproval of any specific partnership, joint operation or venture, or consolidation, nor as permitting any such partnership, joint operation or venture, or consolidation, to be continued or formed for the purpose or with the effect directly or indirectly of rendering ineffective or unenforceable the inhibitions of this order and the purposes thereof.

Provided further, That nothing herein contained shall prevent collective bargaining between any respondent Union and respondent Industry and/or any employer respondent with respect to wages and working conditions of employee members of said Union within those fishing districts wherein they may be.

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

The complaint herein is dismissed as to the following who were named as parties respondent in the Complaint:

Kayler-Dahl Fish Company, Inc.; Nick Bez, William Calvert, Lawrence Calvert and Starr H. Calvert; Win-Ra Fisheries, Inc.; Associated Fishermen & Allied Workers; Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska; Petersburg Vessel Owners' Association; Southeastern Alaska Salmon Purse Seiners Association and Stikine Gillnetters Association.

Seattle, Washington
23 January 1954
Amended 10 March 1954.

403443—57——57

The following attorneys of record for the respondents named in the aforesaid Order to Cease and Desist do herewith attach their signatures to this Consent Settlement on the behalf of and for the respondents.

Sgd. W. C. Arnold,
Attorney for Alaska Salmon Industry, Inc.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Alaska Pacific Salmon Company.

Sgd. W. C. Arnold,
Attorney for Alaska Packers Association.

Sgd. Medley & Haugland,
Attorney for Alaska Year Round Canneries Company.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Bristol Bay Packing Company.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Chignik Fisheries Company.

Sgd. W. C. Arnold,
Attorney for Columbia River Packers Association, Inc.

Sgd. Margaret Mason, Secty.-Treas.,
Cook Inlet Packing Company.

Sgd. Donald D. MacLean,
Attorney for Copper River Packing Company.

Sgd. Thomas M. Green, Jr.,
Attorney for Egegik Packing Company.

Sgd. Thomas M. Green, Jr.,
Attorney for Ellamar Packing Company.

Sgd. Allen, Hilen, Froude, DeGarmo & Leedy,
by Seth W. Morrison,
Attorney for Farwest Wrangell Co., Inc.

Sgd. R. A. Moen,
Attorney for Fidalgo Island Packing Company, Inc.

Sgd. Medley & Haugland,
Attorney for General Fish Co., Inc.

Sgd. Thomas M. Green, Jr.,
Attorney for P. E. Harris Company, Inc.

Sgd. Medley & Haugland,
Attorney for Icy Straits Salmon Company.

Sgd. G. K. Davis,
Secretary for Independent Salmon Canneries, Inc.

Sgd. Thomas M. Green, Jr.,
Attorney for Intercoastal Packing Company.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Kadiak Fisheries Company.

Sgd. E. Dobszinsky,
President for Ketchikan Packing Company.

Sgd. Wendell W. Black—Francis E. Holman,
Attorneys for Libby, McNeill & Libby.

Sgd. Allen, Hilen, Froude, DeGarmo & Leedy,
by Seth W. Morrison,
Attorney for The Nakat Packing Corporation.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for New England Fish Company.

Sgd. R. A. Moen,
Attorney for Pacific American Fisheries, Inc.

Sgd. Thomas M. Green, Jr.,
Attorney for Trans-Pacific Fishing & Packing Company and Calvert Corporation d/b/a Peninsula Packers.

Sgd. C. F. Johnson,
Vice Pres., Port Ashton Packing Corporation.

Sgd. Frank Wright, Jr.,
President, Pyramid Fisheries, Inc.

Sgd. John T. Tenneson, Jr.,
Vice Pres. for Superior Packing Company.

Sgd. Thomas M. Green, Jr.,
Attorney for San Juan Fishing & Packing Company.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Seldovia Bay Packing Company.

Sgd. Thomas M. Green, Jr.,
Attorney for San Juan Fishing & Packing Company and Marine Fishing & Packing Company, d/b/a Todd Packing Company.

Sgd. Thomas M. Green, Jr.,
Attorney for Uganik Fisheries, Inc.

Sgd. Moriarty, Olson & Campbell,
by Richard T. Olson,
Attorney for Wards Cove Packing Company, Inc.

Sgd. Snyder J. King,
Attorney for Whiz Fish Products Company, Inc.

Sgd. W. C. Arnold,
Attorney for L. G. Wingard, Mary Lou Wingard, Lester L. Wingard, Lou M. Hill, Charles Coffey, Conney Nelson, Lorraine Nelson, and Richard W. Hill, d/b/a L. G. Wingard Packing Co.

Sgd. W. C. Arnold,
Attorney for W. C. Arnold, individually and as Managing Director of Alaska Salmon Industry, Inc.

Sgd. Roy E. Jackson,
Attorney for Alaska Fishermen's Union.

Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades.

Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for Bering Sea Fishermen's Union.

Sgd. Roy E. Jackson,
Attorney for Cordova District Fisheries Union.

Sgd. Walthew, Oseran, Warner—John F. Walthew,
Attorney for Local No. 3–3, Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union.

Sgd. Walthew, Oseran, Warner—John F. Walthew,
Attorney for Local No. 30, Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union.

Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for United Fishermen of Alaska.

Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for United Fishermen of Cook Inlet.

Sgd. ——— ———,
Attorney for Sebastian-Stuart Fish Company.

Sgd. Joseph R. Fribrock,
Pres. for Snug Harbor Packing Company.

Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Angoon Community Association, trading as Hood Bay Salmon Company.

Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Hydaburg Cooperative Association.

Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Keku Canning Company.

Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Klawock Cooperative Association, doing business as Klawock Oceanside Packing Company.

Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Metlakatla Indian Community operating under the trade name of Annette Islands Canning Company.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 8th day of April 1954.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 5675. Complaint, July 7, 1949—Decision, opinion, and dissenting opinion, Apr. 13, 1954

Charge: Discriminating in price in the sale of "Certo" and "Sure-Jell" pectin products in violation of Section 2 (a) of the Clayton Act, as amended.

Before *Mr. Abner E. Lipscomb* and *Mr. William L. Pack*, hearing examiners.

Mr. Eldon P. Schrup for the Commission.

Mr. Lester E. Waterbury, of White Plains, N. Y., for respondent.

DECISION OF THE COMMISSION DENYING APPEAL AND DISMISSING COMPLAINT

This matter came before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint.

The Commission has considered the entire record herein including the exceptions to the initial decision and, for the reasons stated in the written opinion of the Commission which is issued herewith, is of the opinion that the rulings of the hearing examiner are free from prejudicial error and that the allegations of the complaint should be dismissed.

It is ordered, therefore, That the appeal of counsel supporting the complaint from the initial decision is hereby denied and that the allegations of the complaint are hereby dismissed.

Commissioner MEAD dissenting and Commissioner CARRETTA not participating.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The complaint charges respondent with territorial price discrimination in violation of Section 2 (a) of the Clayton Act, as amended. At the conclusion of the evidence of counsel supporting the complaint, respondent moved for dismissal on the ground that the evidence failed to prove:

(a) That the goods involved were of like grade and quality;

(b) That there was any price discrimination; and

(c) That the alleged practices tended substantially to lessen competition, or to create a monopoly, or to injure, destroy, or prevent

competition within the meaning and intent of said Section 2 (a) of the Clayton Act, as amended.

The hearing examiner sustained the motion on the latter ground and counsel, supporting the complaint, appeals.

Respondent, a large manufacturer and wholesale distributor of food products, also sells "Certo" (a liquid pectin) and "Sure-Jell" (a powdered pectin), which products are used by the housewife in making jellies and jams. In 1929, by the purchase of certain patents, respondent had a virtual legal monopoly in the liquid household pectin business. In 1939, because of the expiration of these patents and because of the appearance of powdered pectin on the market, the situation had changed considerably. At that time respondent had 75% to 80% of the national market of liquid pectin and 40% of powdered pectin. In the western territory it had 50% of liquid and 25% of powdered pectin.

In 1940 (and continuing until the end of 1947) respondent put into operation certain "deals" in the western territory (being roughly that portion of the United States west of the Rocky Mountains). Under these deals, respondent's wholesalers, jobbers, and retailers were authorized to sell one additional bottle of Certo, for example, for 3¢ when the customer bought two bottles at the regular price. The net effect of these deals was to sell Certo and Sure-Jell to the consumers in the western territory cheaper than prices maintained elsewhere. Within the chosen area the deals were open to all who wished to buy Certo and Sure-Jell. There is no claim of injury in other than the primary line, that is to competition between respondent and others engaged in the sale of household pectin at wholesale.

That part of Section 2 (a) of the amended Clayton Act material to this inquiry is as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States, or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them":

The first question to be considered is what is the test for determining injury to competition in territorial discrimination cases where injury is in the primary line. On that subject, the hearing examiner at page 6 of his initial decision said:

"Whatever may be the correct rule in cases charging injury to competition among competing purchasers, the examiner understands that in territorial price discrimination cases where the injury charged is in the primary line, that is, to competition among sellers, the inquiry is of a broader and more general nature. In such cases the important question is not whether a particular seller may have lost business but rather whether competition in the area in question has been or is likely to be substantially injured. In short, whether there is a substantial tendency toward monopoly."

It is true that in such cases injury to competition and a tendency toward monopoly are proper subjects of inquiry. But we do not believe the law makes the distinction between competitive injury to sellers and competitive injury to their customers that the above statement would seem to indicate. Both sellers and customers are equally under the protection of Section 2 (a). The test is the same in either case. The standard for determining the unlawfulness of an unjustified price discrimination, namely, the substantiality of the effects reasonably probable, is the same whether the competitive injury occurs at the seller level or at the customer level. The fact of injury is to be determined in all cases by a consideration of all the competent and relevant evidence and the inferences which may be reasonably drawn therefrom. Under differing circumstances the proof necessary to establish injury or even to make out a prima facie case will differ. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1947).

That the statements of the Court in the Morton Salt case concerning permissible inferences of injury where the discrimination was between competing customers could not automatically be applied in cases of territorial price discrimination, even in the case of customers, is well set out in the 1948 Policy Statement of the Federal Trade Commission.

"However, there are strong reasons why the concept of injury adopted by the court in the Morton Salt case should not be applied automatically to discriminations arising under geographic pricing systems in which purchasers paying different prices are differently located and the price differences generally diminish as the distances diminish between purchasers' locations. In these circumstances competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories. Seeming advantages in price may be materially affected by

disadvantages of location. These and other considerations make it clear that in geographical price discriminations inferences of injury to competition drawn merely from the existence of price differences between purchasers who compete in some degree would have no sound basis. The minimum determination of injury should be based upon ascertained facts that afford substantial probability that the discriminations, if continued, will result in injury to competition."

Puerto Rican American Tobacco Company v. *American Tobacco Company*, 30 F. 2d 234, involved a territorial discrimination under Section 2 (a) prior to its amendment by the Robinson-Patman Act. The evidence there was that the competing seller had suffered severe financial loss because of the discrimination and also that the discriminator was selling cigarettes in Puerto Rico at a loss, for the purpose of eliminating its competitor. *Muller Company* v. *Federal Trade Commission* (1944) 142 F. 2d 511, was generally similar in its facts. There the evidence was that prices were reduced in certain areas below cost with the deliberate intention of eliminating a competing seller. That this competing seller did suffer injury was shown by the decline of its sales of chicory from 2,319,507 lbs. in 1936 to 1,459,195 lbs. in 1937.

Count III of *Minneapolis-Honeywell Regulator Company* v. *Federal Trade Commission* (1951) 191 F. 2d 786, involved price discriminations under Section 2 (a). The complaint charged injury in both the primary and secondary lines. The hearing examiner found "that competition is not injured." The Commission, with one member dissenting, reversed the hearing examiner. In reversing the Commission, the court pointed out "various undisputed facts as to the effect of Minneapolis-Honeywell practices on competitor competition" (that is, in the primary line), including the following:

(a) That the prices charged by Minneapolis-Honeywell's competitors were generally lower than those of Minneapolis-Honeywell and that there is no evidence of any undercutting of its competitors by the Minneapolis-Honeywell Company.

(b) That throughout the complaint period the keenest kind of price competition existed among control manufacturers.

(c) That during this period the total business of Minneapolis-Honeywell's competitors increased.

(d) That Minneapolis-Honeywell's share of the available control business was reduced from 73% in 1937–1938 to only 60% in 1941.

With respect to the secondary line, the court also found that injury to competition was not proved because there was no causal connection between the price of controls (sold by respondent) and the price of the finished product (oil burners with respondent's controls attached) sold by respondent's customers. A writ of certiorari was dismissed

because the petition was not filed within the period allowed by law. The dissent of Mr. Justice Black indicated his disagreement with the conclusion arrived at by the Circuit Court of Appeals in regard to injury in the secondary line, a question not presented in the instant case.

The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Company* v. *Federal Trade Commission*, 135 F. 2d 453, the court held that proof of discrimination in price is not sufficient; that in addition "there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered." In suits brought to recover treble damages both before and after the Robinson-Patman Amendments to the Clayton Act, it has been indicated that the plaintiff must allege and prove injury to competition. See *Baren* v. *Goodyear Tire and Rubber Company* (1918) 256 Fed. 570; *Sidney Moss* v. *National Association of Stationers, Office Outfitters and Manufacturers* (1930) 40 F. 2d 620; *Arthur* v. *Kraft-Phenix Cheese Corporation* (1938) 26 Fed. Supp. 824.

Moss, Incorporated v. *Federal Trade Commission* (1945, Second Circuit) 148 F. 2d 378, apparently announces a different conclusion. That case involved discriminations in price under Section 2 (a) and the claimed injury was in the primary line, that is, to competitors of the seller. The Commission made findings of fact which set out eight instances in which respondent had discriminated in price. In each case, there was a finding that such discriminations resulted in substantial injury to respondent's competitors and tended to create a monopoly. (In the matter of *Samuel H. Moss, Inc.* (1942) 36 FTC 640.) Thus, the question of which party has the burden of proof is not involved. The court, however, stated that where a discrimination was shown, the burden was on anyone making such discrimination to show that injury to competition did not occur. This view was again expressed by the same court in *Federal Trade Commission* v. *Standard Brands* (1951) 189 F. 2d 510.

The view apparently taken by this court has been criticized by writers on the subject. See Oppenheim, "Should the Robinson-Patman Act be Amended," Robinson-Patman Act Symposium, New York State Bar Association, 1948 CCH edition, pp. 141, 152 (1948); McCollester, "Suggestions as to Certain Amendments," Robinson-Patman Act Symposium, *supra*, pp. 133, 136 (1948); Austern, "Required Competitive Injury and Permitted Meeting of Competition," Robinson-Patman Act Symposium, New York State Bar Association, 1947 CCH edition, pp. 63, 70 (1947).

The Federal Trade Commission has very generally held, that under Section 2 (a), counsel supporting the complaint has the burden of proof to establish the necessary competitive injury. Where that burden has not been sustained, the cases have been dismissed. See in the matter of *Champion Spark Plug*, Docket 3977; in the matter of *General Motors Corporation and A C Spark Plug Company*, Docket 5620; and in the matter of The *Electric Auto-Lite Company*, Docket 5624. Even in its brief opposing certiorari in the *Moss* case, the Commission expressed this same view, in the following language taken from page 8:

"Although a respondent undoubtedly has the burden of proving the various justifications listed in the provisos in Section 2 * * * the Commission has always construed the Act to require it as a part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition."

The first part of Section 2 (a) sets out the elements necessary to establish a violation of the law. They are: (1) discriminations in price betweeen different purchasers of commodities of like grade and quality; (2) certain jurisdictional facts; and (3) competitive injury. Proof of all three is necessary to make out a prima facie case. It has often been pointed out that differences in price without competitive injury are not illegal.

The section then goes on to point out certain situations in which price difference is not illegal. That is, in those instances, proof of certain facts may be made, not by way of denial, but by way of justification. The burden, however, of affirmative justification is on the party charged with the violation. The facts which such a party must show are facts concerning which he would have peculiar means of knowledge. Therefore, Congress (following a plan often adopted by legislative bodies) put on him the burden of rebutting the prima facie case. As to the fact of competitive injury, however, such a party would ordinarily have no peculiar knowledge or means of knowledge. We should not assume that Congress meant to apply the same rules of proof to these clearly different situations unless it said so in clear and unequivocal language.

The complaint in this case alleges competitive injury and counsel supporting the complaint offered evidence to prove the allegation. In order to prove injury to a competitor, counsel supporting the complaint presented the testimony of Herbert T. Leo, President of the Mutual Citrus Products Company of California, a competitor of respondent in the sale of pectin. Mr. Leo stated that respondent's deals had adversely affected his business to a substantial degree. As pointed out by the hearing examiner, however, the figures given as

to the sales by the witness in cross-examination showed a different picture.

"In 1939, the year immediately preceding the first of the deals, M. C. P.'s sales were 98,874 dozen packages; in 1940, the first year of the deals, sales were 101,001 dozen; in 1941, 120,070 dozen; in 1942, 168,878 dozen; in 1943, 405,202 dozen; in 1944, 410,251 dozen; in 1945, 294,263 dozen; in 1946, 42,708 dozen; in 1947, 335,447 dozen; in 1948, 495,113 dozen; in 1949, 428,423 dozen; in 1950, 327,052 dozen; in 1951 (to September 1), 387,215 dozen."

Mr. Leo further testified that the lower sales in 1946 were due to sugar rationing rather than to respondent's deals and that the increased sales of 1948 and 1949, after the deals ended, were due to the failure in quality of the product of a third competitor. The evidence also shows that the deal price of respondent was generally a little above Mutual Citrus Products prices, although in 1947 the latter advanced its price above the deal price but later went back to the old price.

The vice president of another competitor, Pen-Jel Corporation, also testified that respondent's deals injured that company. However, he also testified that Pen-Jel sales were 10% to 15% higher in 1947 than in 1940.

The record also shows that the sales of another competitor, Faultless Foods Company of Seattle, Washington, had dropped from 25,558 cases in 1939 to 3,058 in 1946, risen to 27,940 cases in 1947, and had declined to 1,740 in 1950. It appears however, that the drop in the volume of sales was due to causes other than the competition of respondent's deals. While the president of this company also claimed injury because of respondent's deals, he further expressed the opinion that his company had lost business to the two other competitors named herein.

Figures are not available to show respondent's position in the western territory during the years in which the deals were in operation. However, the percentage of the national pectin market held by Certo and Sure-Jell for certain years was shown to be as follows:

Year	%
1938	67.2
1939	62.2
1940	67
1941	69.4
1942	74.4
1943	72.6
1944	74.2
1945	80.2
1946	80.5
1947	64.6

The hearing examiner also found "except for the early years, when there was a legal monopoly due to the existence of patents, competition in the pectin industry, including that in the western portion of the United States, appears to have been at all times active and virile and to be so today."

The hearing examiner concluded that the evidence failed to establish a prima facie case in support of the complaint. He had opportunity to observe the witnesses both on direct and cross-examination and his findings are to be given proper weight. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474; *Folds* v. *Federal Trade Commission* (1951) 187 F. 2d 658.

We agree with the conclusion of the hearing examiner, and it is therefore ordered that the complaint be dismissed.

Commissioner MEAD dissents and Commissioner CARRETTA did not participate.

DISSENTING OPINION OF COMMISSIONER MEAD

The respondent in this case, the General Foods Corporation, is one of the nation's largest producers and distributors of foods. It produces a number of nationally advertised products such as "Jell-O", "Maxwell House", "Birds Eye" and others. This case relates to respondent's pectin products designated "Certo" and "Sure-Jell." Certo is a liquid product and Sure-Jell is a powdered product. Pectin is used in making jams and jellies.

The Commission on July 7, 1949 issued a complaint alleging that respondent was violating Section 2 (a) of the Clayton Act, as amended, by discriminating in price in the sale of its pectin products. This case relates to the Robinson-Patman amendment to the Clayton Act.

The attorney in support of the complaint has completed his case in chief. The attorney for the respondent has filed a Motion to dismiss the complaint on the ground that the record does not support a prima facie case of law violation by the respondent. The Hearing Examiner issued his initial decision dismissing the complaint. The attorney in support of the complaint appealed to the Commission from this initial decision.

The record indicates that the pectin industry in the United States originated as a result of certain experiments performed by Robert E. Douglas who obtained two U. S. patents. In 1929 General Foods purchased all of the assets of the Douglas Company, including the Douglas patents. These patents included only liquid pectin which was the only type manufactured at that time. For a few years after General Foods obtained the Douglas patents, it enjoyed a complete

monopoly in the sale of pectin in this country. In the mid thirties the Douglas patents expired. Respondent and others also began to produce a powdered form of pectin. According to the Hearing Examiner, in 1939 in the liquid pectin field, General Foods' percentage of the national market had declined from 100% to approximately 75% or 80%. In the powdered pectin field, General Foods controlled approximately 40% of the national market. In the Western states respondent's share of the liquid pectin market was approximately 50% and of the powdered pectin market approximately 25%.

The record shows that a few small manufacturers began to give respondent some competition in the pectin field in the late thirties. Respondent considered ways and means of retaining its dominant position in the field. Respondent could have, of course, in meeting price competition, reduced its prices across the board. It decided against a general price reduction and in lieu thereof, chose to offer its customers in the Western States, where it had competition, certain so-called "deals." In other words, respondent did not choose to reduce its prices generally but did choose to discriminate in price between two geographical areas.

The "deals" described above were offered by General Foods to its Western customers from 1940 until about 1947. For illustration, in 1946, respondent's usual case price for Certo was $4.30 per case of two dozen. Respondent's "deal" price for Certo was $3.22 per case less handling allowance of 4 cents per case. The "deal" price therefore was $3.18 per case as compared to the usual price of $4.30 per case. As for Sure-Jell, respondent's usual price was $3.25 per case but its "deal" price amounted to a net of $2.57½ per case.

Respondent distributed its pectin products on a nationwide basis. As stated above, respondent offered these "deals" only in the Western States. Respondent therefore was discriminating in price among its purchasers of commodities of like grade and quality in commerce. It is not necessary under Section 2 (a) of the Clayton Act that the customers of the seller be competing customers. If the price discrimination is among *competing* customers, the question is usually whether or not there has been any injury in the so-called secondary line of commerce, that is, whether the injury is to the purchasers who are discriminated against. In this case as the purchasers who were discriminated against are not in competition with the favored customers, the question of injury relates only to the so-called primary line of commerce, that is, to the manufacturers who are competing with General Foods.

Although we may assume from the record that the competitive products are of equal quality to the General Foods pectin products,

the latter command premium prices in the market. This is apparently because of the prestige of General Foods, the wide distribution, nation-wide advertising, etc. Although by use of the "deals" in the Western States respondent substantially reduced its prices in that area, the prices charged by respondent's local competitors in those States continued to be lower than respondent's prices. It is an obvious economic fact, however, that a reduction in the price of a well advertised national brand of merchandise may cause business to be diverted from a relatively unknown local or regional product although the reduced price of the national brand may continue to be greater than the price of the local or regional brand.

There is very frequently a trade price differential between well advertised brands and relatively unknown brands of merchandise although the quality of the two may be substantially equal. If this trade differential is 10 cents a unit and the gap is reduced to 8 cents a unit, a certain number of customers will discontinue purchasing the cheaper product and will purchase the premium product. This economic fact was recognized in the hearings before Congressional committee in connection with the proposals to amend the Robinson-Patman Act provision relative to meeting the equally low price of a competitor. The point was that if a seller is to be allowed to claim the defense of good faith meeting of competition, he should not be required to meet the identical price in order to plead this defense. He should only be required to meet that price which is equal to the customary trade differential between the two products if such trade differential in fact exists.

The purpose of General Foods in offering these "deals" in the Western states was frankly aggressive. As stated by the attorney for General Foods in his able oral argument before the Commission:

"We were interested in getting some more business in the 11 Western states, that is the reason we did it."

A memorandum obtained from the files of the respondent and dated November 30, 1942, describes the purpose of the "deals" as follows:

"I also am of the opinion that had we not made it tough for M. C. P. as we did the last three years, they would have spread eastward at a much faster rate than they did and we would now be facing some pretty tough competition in the middle-west, the high 'Sure-Jell' per capita market. * * * The management may rightfully ask how much longer is it going to be necessary for us to continue the deal operation in the West. I cannot answer that question. The record, however, would indicate that if we cease to be competitive in the West, we will very likely lose ground rapidly to M. C. P. and other local competition. If we can, by means of the deal operation, confine this competition

largely to the Far West, I think there is good insurance and that the deal serves a two-fold purpose." (Comm. Ex. No. 28)

The general picture, therefore, as I see it, is that the former legal patent monopolist in the field and the current dominant seller initiated these deals in order to confine its existing competitors to their local markets in the Western states and to prevent these competitors from obtaining any higher percentages of the Western market. Assuming these to be the purpose of the "deals," they were successful as General Foods has localized this competition and has obtained a larger percentage of the national market.

The Examiner and the majority opinion point out that certain of respondent's competitors increased their dollar volume during the period that General Foods offered these deals. However, the significant test as to whether or not a concern is losing ground or succeeding in the competitive struggle over any period of time is the changes, if any, in the share of the market enjoyed by such concern. The record in this case shows that General Foods increased its share of the market and that the competitors of General Foods had a decreasing share of the market.

Dollar volumes increased substantially in the war years. During that period a concern might continue to have the same dollar volume or even have a modest increase in its dollar volume but yet be falling behind competitively speaking. It is common knowledge that during this period the cost of doing business substantially increased. Concerns were staying competitive not by retaining their past dollar volumes but by retaining their proportionate shares of the expanding market. The substantial new business helped offset the higher break even levels which were a necessary floor for staying in business. The contest among competitors, therefore, was for this new business which could be obtained during the war years. This contest was vital for small business with limited resources.

The statistical picture showing the different shares of the market of the pectin competitors between 1939 (prior to the General Foods' deals) and 1946 (after the deals had been in effect for approximately 6 years) is very vividly illustrated by Commission's Exhibit 79. This exhibit was obtained from the files of General Foods.

In 1939 total United States pectin sales were divided as follows:

Liquid Sales—56%		*Powder Sales*—44%	
1. Certo sales	41.4%	1. Sure-Jell sales	20.8%
2. Jels-Rite	5.9%	2. Pen-Jell sales	11.6%
3. All others	8.7%	3. All others	11.6%

General Foods had 62.2% National Market.

In 1946 total United States pectin sales were divided as follows:

Liquid Sales—48.5%		*Powder Sales*—51.5%	
1. Certo sales	42.8%	1. Sure-Jell sales	37.7%
2. All others	5.7%	2. Pen-Jell	6.1%
		3. M. C. P. sales	4.4%
		4. All others	3.3%

General Foods now had 80.5% of the National Market. This shows (A) The 1939 liquid market dropped from 56% in 1939 to 48.5% in 1946 or a drop of 7.5 percentage points.

1. Certo gained from 41.4% in 1939 to 42.8% in 1946 or a 1.4 percentage point gain on a dropping market.

2. All other liquids including Jels-Rite dropped from 14.6% in 1939 to 5.7% in 1949 or a loss of 8.9 percentage points.

(B) The powdered market gained from 44% in 1939 to 51.5% in 1946 or a gain of 7.5 percentage points.

1. Sure-Jell gained from 20.8% in 1939 to 37.7% in 1946 or a gain of 16.9 percentage points.

2. Pen-Jell lost from 11.6% in 1939 to 6.1% in 1946 or a loss of 5.5 percentage points on a rising market.

3. M. C. P. which first appears on the chart in 1941 with 4.7% had 4.4% in 1946 or a loss of $\frac{3}{10}$ of a percentage point on a rising market.

4. All others lost from 11.6% in 1939 to 3.3% in 1946 or a loss of 8.3 percentage points on a rising market.

The above analysis and also the majority opinion point out that in 1939, the year immediately prior to the initiation of the deals, General Foods controlled 62.2% of the national market in pectin. The opinion and the analysis further shows that General Foods' share of the market increased during the "deal" years to 1946 when its share was 80.5% of the market. (During the last deal year—1947—General Foods had operational difficulties and its share of the national market decreased.)

The Court in the case of *E. B. Muller & Co.* vs. *Federal Trade Commission*, 142 F. 2d 511, aptly described this economic situation.

"These discriminations were not, as petitioners would have us believe, unrelated to the central purpose, which was the destruction of petitioners' only competitor. By discriminating against other general trade areas in favor of New Orleans, Muller, on the one hand, was able to force the price so low in New Orleans that Schanzer could not meet its competition. On the other hand, by selling at higher prices in other general trade areas, Muller made up its loss in the New Orleans district."

Economists may differ as to what particular percentage of the national market a concern may have before it may be classified as a monopoly. A concern having 35% of the market may not be a monopoly, but certainly when a concern begins to obtain over 50% of the national market in any particular commodity, then such concern, because of such share, is in the position to exert a very significant effect on the market. An area price discrimination by a concern having 35% of the market may not have as great an adverse effect as a discrimination by a concern controlling 80% of the market. If a crocodile had any concern as to the future of the fish enclosed with him in a small pool, the crocodile should exert some care as to the manner in which he flips his tail. It would not be necessary for him to exercise the same degree of care if he and the fish were in a large body of water. In the smaller pool the crocodile already occupies most of the maneuvering space.

Commission Exhibit 28 which was taken from the files of General Foods affords a very enlightening picture as to what officials of General Foods believed these deals were accomplishing on the West Coast. The exhibit states in part that the Pacific Northwest and Southwest account for close to one-fourth of the total pectin sales "hence losses or gains in this important pectin territory affect our national pectin sales materially." The exhibit states that a table shown on the exhibit "shows a comparison of our (General Foods) competitive position in these two crop areas for 1938 and 1939—the two years immediately preceding our deal operation and for the three years during which we had the consumer deal in effect." This table shows that in 1939 (the last pre-deal year) the competitive brands had 53.9% of the market and General Foods brands had 46.1% of the market in the Pacific Northwest. In 1942 (the last deal year shown on this particular table) all competitive brands had 37.5% of this market and General Foods' brands had 62.5% of the Pacific Northwest market. The table shows that for the Pacific Southwest in 1939 all competitive brands had 44.3% of the market and General Foods' brands had 55.7% of the market. The table shows that in 1942 all competitive brand had 30.9% of the Pacific Southwest market and General Foods' brand had 69.1% of such market.

Commission exhibit 28 (taken from General Foods' files) states immediately after the table referred to above, as follows:

"Prior to 1939, M. C. P. (a competitor) was selling a liquid pec in a tin can which did not meet with any success. In 1939 they introduced their powdered product and promoted it aggressively. ' above figures show that we lost heavily the first two years of M. C powder competition. In the Southwest, Certo and Sure-Jell (

bined dropped from 73% of the market to 52% in two years. In 1940 we offered the Sure-Jell deal in the Southwest. We made a good gain on Sure-Jell but M. C. P. made greater gains, resulting in a further sharp decline for Certo. In 1941 we offered deals on both products and registered substantial progress, M. C. P. taking a sharp loss. In 1942 we made a further gain on Sure-Jell but lost a little ground on Certo. M. C. P. also showed a small gain but you will notice that liquid competition has almost been completely eliminated, Certo and Sure-Jell combined getting 69% of the market compared to 52% in 1940 and 73% in 1938."

As an addendum to the above, the share of the market enjoyed by General Foods continued to increase subsequent to 1942 until in 1946 General Foods had 80.5% of the market. If this exhibit (28) had been prepared in 1946 instead of 1942, the officials of General Foods would probably have stated that the deals had been extraordinarily successful in view of the fact that General Foods then had almost a monopoly on pectin sales in the United States.

Monopoly and competition has been a favorite subject recently of learned economists. We are advised from the cloistered halls of economic thinking that perfect price competition does not exist. Our aim, we are told, should be to obtain the most desirable form of imperfect competition. There is, however, a disagreement among economists as to which is the preferred type of imperfect competition. We hear such terms as countervailing powers, workable competition, effective competition, potential competition, substitute products, etc. Some of the economists appear to give doctrinal support for the thesis that the antitrust laws as interpreted by the Courts are now outmoded. It is indicated that we should view the problem of competition on a much broader basis than heretofore.

For illustration, if the manufacturer of a product becomes too nonopolistic a competitive substitute product will be developed and hus curb the monopolistic practice and make unnecessary an antitrust egal proceeding. This broad type of cosmic economic thinking is nteresting, if indefinite. However, this Commission is enforcing specific statute. We are dealing here with questions of fact about jury to certain small competitors. We are not dealing with general nomic theories.

The sum of competition in this industry equals the accumulative rts of these small competitors of the dominant seller—General ds. The only way to view the whole—competition in the indus—is to examine the parts.

ertain sources have claimed that the Robinson-Patman Act pros soft competition rather than hard competition. This generally

erroneous concept may be due in part to a misunderstanding or perhaps in a few cases, to a misapplication of the Robinson-Patman Act.

The Robinson-Patman Act promotes hard, fair competition. For illustration, General Foods, the dominant seller, encountered a degree of competition on the West Coast. Competition is vitalized by any one or more of the following: (1) lowering prices; (2) raising quality; or (3) better selling methods. General Foods choose to use a "deal" offer which was in fact a price reduction. But did this Goliath march bravely on the field of battle and compete with these little Davids by making this "deal" available to all of its customers? That would have been a choice by General Foods *for* hard and fair competition between General Foods and the small business competitors. But General Foods did not so choose. It chose instead to have its customers in the other sections of the country, who did not enjoy the fruits resulting from this competition by the small competitors, to be charged higher prices so that General Foods would have a war chest to beat down the small business competition. For General Foods—it was soft competition. For the small competitors—it was unfair competition.

Under this system the small local area businessman cannot compete on even approximately equal terms with the nationwide distributor. The large corporation can play its area pricing patterns like a piano. It can crush small business competition wherever the latter appears and charge the tariff to its other customers who have no price alternatives. The little Davids are deprived of even their sling shots in their contest with Goliath. Is that hard or soft competition for Goliath? It is soft for the dominant seller, the Goliath. It is calamitous for small business, the little Davids.

Because of his limited area distribution, each of the small businessman's customers is generally in competition with the other customers. The small distributor, therefore, must charge all of his customers proportionately equal prices or else he may be guilty of an illegal price discrimination. The nationwide distributor, of course, has many customers who are not in competition with each other and he may charge different prices in different areas without directly injuring the nonfavored customers. If the nationwide distributor can legally use this area price discrimination weapon against his small competitors, he has another powerful weapon to add to his arsenal which includes mass production, nationwide advertising, large financial resources, research facilities, and many others. Should a large distributor receive a price subsidy from other areas of the country in order to compete with a few small competitors on the West Coast? Again I ask, is that hard or soft competition—for General Foods?

To constitute a prima facie case of violation of Section 2 (a) of the Clayton Act, there must be established (1) jurisdiction; (2) the sale of goods of like grade and quality to purchasers at discriminatory prices; and (3) the existence of circumstances which makes it reasonably probable that the competitive effects described in the statute will result from this price discrimination.

There is no issue before us as to jurisdiction, the grade or quality of the goods or that General Foods sold at discriminatory prices. The only issue is as to whether or not the competitive effects described in the statute resulted from the price discrimination. The statute describes these effects as follows:

"may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them";

It is admitted that Government counsel did not offer in evidence in this case the scalps or the hides of the small business competitors of General Foods. We do not have in evidence pounds of flesh or buckets of blood. We should not expect the type of evidence that Salome is said to have asked of Herod—the head of John the Baptist on a silver platter.

In lieu of sanguinary evidence, let us review what the victims of General Foods' price discrimination practices had to say about this particular brand of competition. A witness representing M. C. P., a competitor of General Foods, testified on page 307 of the record as follows:

"Q. I ask you one direct question, Mr. Leo. Is it your testimony that during the years 1940 through 1947, while the General Foods Corporation deals were in effect on Certo and Sure-Jell that they hurt your business?

A. Yes, they did very materially."

This witness also testified as follows:

"Q. Now, in the areas where the General Foods' special deals on Certo and Sure-Jell were in effect, would you tell us whether or not they substantially affected the sales of your product?

A. Yes, very definitely, because it was a special deal that they offered. And General Foods, without any special deals, are pretty tough competition. They operate some 2,500 salesmen and have entre to retail chains and jobbers by various pressure methods. They are able to get distribution where the average small business concern today is faced with a horrible problem of trying to get distribution, and they try to hold that distribution from time to time. And we

didn't have a margin of profit sufficient to travel very many men out. Even now we can only travel two or three men, and it's quite difficult to maintain distribution."

This competitor was fortunate in that he also sold in an area where General Foods did not offer these deals. This competitor enjoyed some increase in business. However, this witness was asked whether or not the business increase was more in the territories where there was no deal than it was in the territories where there was a deal. The witness answered "Positively."

A witness for Jels-Rite, another competitor of respondent, testified on page 747 of the record as follows:

"Q. State whether or not the deals in effect on Certo and Sure-Jell during the years 1940 through 1947 in any way affected the sales of your product, Jels-Rite.

"A. I feel definitely that they did.

"Q. What effect did they have on your sales?

"A. Decreasing our sales through their advertising medium and their free goods, or whatever you wish to term it, and their aggressiveness, pointed, I would say, particularly at our Northwestern territory."

This witness on cross-examination was interrogated as follows:

"Q. As I understand it, you complain because the price of Sure-Jell as you contend was reduced in your territory; is that right?

"A. Right.

"Q. Well, what difference did it make to you whether it was reduced or maintained outside of your territory? What effect would that have on your territory?

"A. The effect it had was to break down my territory, I would say. In other words, I was reaching at that time to Denver and San Diego and it did make, it made it increasingly hard for me to get into these territories, and I am completely out of them now."

A witness for the California Fruit Growers Exchange testified on page 454 of the record:

"Q. And would you state that, in your sales to the jobbers, those deals of General Foods Corporation might affect the sales to these jobbers?

"A. Yes, I think any special deal of any competitor is bound to affect the sale of a similar product of other manufacturers."

A witness for a food brokerage firm in Portland, Oregon, was interrogated at page 876 of the record as follows:

"Q. And what effect, if any, on your attempted sales of M. C. P. products did these General Foods Corporation deals on Certo and Sure-Jell have?

"A. Well, it has been my job to cover the entire area, the State of Oregon and the 7 Southern Counties in Washington, and also West

Idaho there, to cover all the jobbers and large direct chain buyers in the interest of M. C. P. powdered pectin.

"Now, as you gentlemen well know the merchandising of pectin is entirely a seasonal operation. Time is the essence, and as I made these rounds and contacts, it was particularly noticeable among the larger jobbers and the larger chains, also the fact that when we presented our picture to the jobber, buyer, or other chain store buyer, the buyers' answers seemed to be entirely contingent upon the receipt of an announcement from General Foods as to the number of Certo deals and the number of Sure-Jell deals he was going to receive.

"Now, in other words, when we were working against the General Foods deal, it was extremely difficult for us to secure large initial placement orders at the beginning of the season, with which to merchandise to the retailer and other consumers. * * *

"In other words, there was a natural reluctance on the part of the buyer to purchase large quantities of M. C. P. or even to cover at times, until he knew exactly what he had coming from General Foods; and by the way, these allotments in my territory were usually handled on the allotment basis, and the jobber and the chain were told earlier in the season how many cases of deals they could plan on receiving, and their merchandising was built around that quantity.

"Now, that infiltrates itself into the retail level because every retailer has got to buy the deals to protect himself from competition, and it is entirely relative."

The testimony of this food broker paints a very clear picture of the effect on competition of the deals offered by General Foods. Each customer of General Foods was allotted a certain number of these deals and apparently these customers would not consider purchasing competitive products until it was ascertained by them the extent of the deal allotment they would receive from General Foods. One must keep in mind that these deals constituted price reductions to customers on the West Coast and price discriminations to customers elsewhere. I believe it is obvious that the use by General Foods of these deals not only resulted in a reasonable probability that competition in these Western states was injured but on the basis of the present record the Commission could reasonably find that competition was injured in fact.

In *F. T. C.* v. *Morton Salt*, 334 U. S. 37, the Supreme Court pointed out that the Congressional Committee reports on the Robinson-Patman Act emphasized the belief that the old Section 2 of the Clayton Act had been too restrictive in requiring a showing of general injury to competitive conditions. The Court in a footnote quoted from the statement of the Senate Judiciary Committee as follows:

"This clause represents a recommended addition to the Bill as referred to your committee. It tends to exclude from the Bill other-

wise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause not contained in Section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is the injury to the competitor victimized by the discrimination. Only through such injury, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower."

We do not have here only one competitor testifying that he has been "victimized" by a discrimination in price, but we have substantially all of respondent's competitors on the West Coast testifying that they have been "victimized." If the dominant seller continues to suppress its smaller competitors and continues to obtain by means of price discriminations a larger and larger share of the market, the probable result would be a monopoly and then perhaps a Sherman Act case for dissolution. A dissolution would certainly not be good for the dominant concern. For the entire economy, it is much better for these conditions to be corrected before a dissolution proceeding is necessary. It was for that principal reason that the Congress passed the Clayton Act. It is the duty of the Commission to act in the incipiency of the monopolistic tendencies before the monopoly matures and a dissolution suit is the only effective remedy.

It is stated that assuming that General Foods illegally discriminated in prices between 1940 and 1946 this discrimination was not continued thereafter. In other words, it is claimed that there is no public interest now to justify the Commission proceeding further in this matter. General Foods contends that it did not discriminate illegally. General Foods has not stated that if the Commission dismisses this complaint General Foods will not resume this practice in the future. In this connection, Commission Exhibit No. 80 dated November 12, 1948, is interesting. This was a memorandum obtained from the files of General Foods. The memorandum was written after the deals had been discontinued by General Foods but a few months before the complaint was issued by the Commission. The memorandum states:

"West Coast promotion—study of Barton and Neilson reports indicate that the major powdered competitor—M. C. P.—made competitive headway on the Coast this summer, as did Pen-Jell on a smaller scale. For lack of a better explanation, we have to believe that the withdrawal of our West Coast free-goods deal put us at a competitive disadvantage which we can ill afford in that region. Accordingly, we agree with you that it is almost essential that you reinstate some form of deal in '49."

It is reasonable to assume that if the complaint in this case had not been issued, General Foods would have resumed offering the deals on the West Coast. In other words, the smaller competitors could compete with General Foods if General Foods did not discriminate in price. The dominant seller, however, demands the added weapon of price discrimination when it competes with small business. Does General Foods want hard competition or soft competition—for General Foods?

The majority Opinion relies as a matter of law in dismissing this case on *Minneapolis-Honeywell Regulator Company* vs. *F. T. C.*, 191 F. 2d 786. That was a Section 2 (a) Clayton Act case involving in part the question of injury in the primary line of commerce. However, the price discriminations involved were not geographical price discriminations. Minneapolis-Honeywell was using a quantity discount system of pricing which it was alleged was discriminatory. The Court of Appeals for the Seventh Circuit reversed a finding by the Commission of injury in the primary line of commerce. The Court based its opinion on a showing that the total business of Minneapolis-Honeywell competitors had increased, that three new concerns which had entered the industry had enjoyed a steady growth in sales volume, that Minneapolis-Honeywell's share of the available control business was reduced from 73% in 1937–1938 to only 60% in 1941, that Minneapolis lost to its competitors 53% of the control business of 31 customers who previously had standardized on Minneapolis controls and that in the same year 126 of Minneapolis' other oil burner manufacturer-customers also purchased competitive controls.

In my opinion, the above statement by the Court of the facts in the Minneapolis-Honeywell case clearly distinguishes that case from the factual situation in this case. General Foods had a larger share of the market and the area price discrimination used by General Foods was obviously devised for the purpose of obtaining the customers of the small competitors. No evidence was introduced in the Minneapolis-Honeywell case of documents written by officials of that company boasting of the success of Minneapolis price discriminations in eliminating competition.

In regard to the Minneapolis-Honeywell case, it is interesting to note that the Government petitioned the Supreme Court for a writ of certiorari in that case. The Supreme Court in its opinion of December 22, 1952 dismissed the appeal of the Commission on the ground that the Commission did not file its petition for writ of certiorari within 90 days after the entry of the judgment of the Court of Appeals. However, Mr. Justice Black in a dissent commenting on the opinion of the Court of Appeals stated:

"The end result of what the Court does today is to leave standing a Court of Appeals decree which I think is so clearly wrong that it could well be reversed without argument."

Justice Black further stated that the "Court of Appeals here failed to follow our holding in the Morton Salt case. For this reason also it should be reversed."

It might be argued that the Minneapolis-Honeywell case was not reversed because of a technical error in the filing of a petition for the writ of certiorari. Whether or not the Supreme Court would have reversed Minneapolis-Honeywell if the Court had considered the case on its merits is a matter of speculation. Granting, however, that Minneapolis-Honeywell is a correct statement of existing law, I believe that the evidence of injury to competition in this case is much more significant and substantially greater than was present in the record in the Minneapolis-Honeywell case. If we accord the decision in Minneapolis-Honeywell full scope, the facts in this case would still, in my opinion, amply justify the Commission in finding the requisite statutory injury to competition in the primary line of commerce.

The disturbing factor to me in this case is the question of what is the future of Section 2 (a) of the Clayton Act as it relates to possible injuries in the primary line of commerce. If the price discrimination is among competing customers and the resulting injury is in the secondary line of commerce, the fact of such probable injury may be readily apparent and demonstrable. In other words, if a seller has two customers located across the street from each other and the seller discriminates in price between the two customers, probable injury to the non-favored customer may be reasonably apparent. However, the question of injury in the primary line is not so readily discernible, particularly if the sellers are of comparable equal size and control substantially the same percentage share of the market. If the sellers are substantially equal and if the competition is keen, there may be a constant fluidity of prices as one competitor may lower a price here or there to test the market. Any price discriminations resulting from these factors may be sporadic and may strengthen competition rather than injure it. An entirely different situation is present, however, when one large seller controls most of the market and uses an area price discrimination over a substantial period of time for the obvious purpose of controlling an even greater share of the market and thus deprive his seller competitors of their opportunity for healthy growth or ultimate survival. It is apparent to me that is the situation in this case.

A reasonable man might very well find in the light of the Morton Salt case (334 U. S. 37) and the fact that General Foods has discriminated in price and also controls such a large share of the market that the obvious result may be the competitive injury described in Section 2 (a) of the Clayton Act. However, in this case there is much more than just proof of a price discrimination and the fact that the seller has a large share of the market. There is in the record the testimony of the small competitors that they were seriously injured by the General Foods price discriminations. There are in the record documents taken from General Foods' files in which officials of the company bragged about the results of the deals (price discriminations) and stated in Commission Exhibit 28 that in 1942 "liquid competition has almost been completely eliminated." It is very unusual for the government to obtain the type of evidence that was obtained in this case. I am referring to the exhibits from respondent's files in which officials boasted that because of the price discriminations, General Foods' share of the market had been substantially increased. If the evidence now in this record is not sufficient to establish a prima facie case under Section 2 (a), I seriously pose the question of what additional evidence could the government reasonably obtain in order to carry its burden.

In the vernacular of baseball, it is much easier for the batter to get a three base hit or a home run if he proceeds from first base directly to third base and avoids following the base paths around second base. If his competitors are required to follow the rules and touch second base, that is soft competition for the base runner. In this case, the small competitors have followed the rules. They are not discriminating in price. General Foods is discriminating in price. If the New York Yankees were competing with a small minor league baseball club it would be unfair to require the players on the minor league team to circle the bases properly according to the rules and to permit the Yankees to bypass second base. General Foods—like the New York Yankees—should touch second base.

In my opinion, the record shows prima facie that General Foods has violated Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act. In my opinion, the decision of the Hearing Examiner dismissing the complaint should be reversed and the case remanded to the Examiner to permit the respondent to proceed with its defense.

The majority of the Commission has concluded that General Foods has not violated the law, and has dismissed the complaint. From that action by the majority, I dissent.

Consent Settlement

IN THE MATTER OF

PAUL E. FEDER DOING BUSINESS AS SIGMA SEWING MACHINE COMPANY

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6147. Complaint, Dec. 3, 1953—Decision, Apr. 15, 1954

Where an individual engaged in the sale of sewing machine heads imported from Japan and of complete sewing machines incorporating the same, upon the front of which a medallion, easily removable, displayed the word or words "Japan" or "Made in Japan" in such indistinct lettering as not to constitute adequate notice to the public that the machines were imported, and upon which, in the event of such removal, there appeared no visible marks of origin—

(a) Failed to disclose adequately on his said sewing machines and sewing machine heads—upon which, before offered to the public, he placed no other marks disclosing their foreign origin—that said products were made in Japan;

(b) Falsely represented, through the adoption and use of the words "Admiral Star" as the trade name for his said products, and the conspicuous display thereof on the front horizontal arm of the machine and use thereof in his advertising matter, that his said product was made by or connected in some way with the well and favorably known American firm with which the word "Admiral" had long been associated:

Held, That such acts and practices constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. William L. Pack*, hearing examiner.
Mr. Ames W. Williams for the Commission.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 3, 1953, issued and subsequently served its complaint on the respondent in the caption hereof, charging him with unfair and deceptive acts and practices and the use of unfair methods of competition in violation of Section 5 of said Act.

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 15, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

The respondent, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint hereby:

1. Admits all the jurisdictional allegations set forth in the complaint.

2. Consents that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondent, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrains from admitting or denying that he has engaged in any of the acts or practices stated therein to be in violation of law.

3. Agrees that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondent consents may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Paul E. Feder, is an individual trading as the Sigma Sewing Machine Company with his office and principal place of business located at 270 West 19th Street, New York 11, New York.

PAR. 2. Respondent is now and has for several years last past been, engaged in the sale of sewing machine heads imported from Japan and complete sewing machines of which said heads are a part to distributors and also to retailers who in turn sell to the purchasing public. In the course and conduct of his business, the respondent causes his products, when sold, to be transported from his place of business in the State of New York to the purchasers thereof located in various other states and maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States. The volume of trade in said commerce has been and is substantial.

PAR. 3. When the sewing machines were sold by the respondent they were marked with a medallion placed upon the front of the machine

and upon which medallion the word "Japan" or the words "Made in Japan" appear. The lettering of such word or words was so indistinct, however, as to not constitute adequate notice to the public that the sewing machines were imported. Furthermore, said medallion could be easily removed and when the medallion was so removed no visible marks of origin appeared on the machine.

Respondent placed no other marks on the sewing machines disclosing foreign origin before such machines were offered for sale to the public.

PAR. 4. When sewing machines or sewing machine heads are exhibited and offered for sale to the purchasing public by retail dealers and others who sell to the public and such products are not labeled or otherwise distinctly marked so as to disclose foreign origin the purchasing public understands and believes such products to be wholly or substantially of domestic origin.

There is and was among the members of the purchasing public a substantial number who had and now have a decided preference for sewing machines and sewing machine heads which are manufactured in the United States over such products originating in whole or in substantial part in foreign countries.

PAR. 5. Respondent used the words "Admiral Star" as a trade name for his sewing machines. Such name appeared in conspicuous letters on the front horizontal arm of the sewing machine. It likewise appeared as a trade or brand name in respondent's advertising matter. The word "Admiral," used as aforesaid by the respondent, is the trade name, mark, or brand of a business organization, long established and engaged in the manufacturing and marketing of household appliances in the United States, and which has been and is favorably known to the purchasing public.

PAR. 6. By using a domestic trade or brand name such as "Admiral Star" respondent represented, and now represents, directly and by implication, that his product, a household appliance, is manufactured by, or connected in some way with, the well and favorably known American firm with which the word Admiral has long been associated, which is contrary to the fact, and the use of such name by respondent confuses and misleads the public and constitutes an unfair and deceptive act and practice. The use of said trade or brand name by the respondent on his sewing machines and sewing machine heads enhanced the belief upon the part of the public that said sewing machines and heads were products of or sponsored by the well and favorably known firm with which said name has long been associated.

PAR. 7. Respondent, by placing in the hands of dealers his said sewing machines and sewing machine heads, provided said dealer

a means and instrumentality whereby they may mislead and deceive the purchasing public as to the manufacture and place of origin of such sewing machines and sewing machine heads.

PAR. 8. Respondent, in the course and conduct of his business, was and is in substantial competition in commerce with other individuals and with firms and corporations engaged in the sale of sewing machines and sewing machine heads in commerce.

PAR. 9. The failure of the respondent to disclose adequately on his sewing machines and sewing machine heads that such products are made in Japan, and also the use of the trade or brand name "Admiral Star" on his sewing machines and sewing machine heads had the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that his products were of domestic manufacture and were manufactured by the well and favorably known firm with which said trade or brand name "Admiral" has long been associated, and to induce members of the purchasing public to purchase sewing machines and sewing machine heads because of said erroneous and mistaken belief.

As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from his competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSION

The acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent, Paul E. Feder, individually and trading as the Sigma Sewing Machine Company, or under any other name, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines and sewing machine heads in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machine heads, or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads in such manner that it will not be hidden or obliterated the country of origin thereof.

2. Using the word "Admiral", or any simulation thereof, as a brand or trade name, or as a part thereof, to designate, describe or refer to his sewing machines or sewing machine heads; or representing through the use of any other word or words, or in any other manner, that said sewing machines or sewing machine heads are manufactured by anyone other than the actual manufacturer.

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

(Sgd) Paul E. Feder,
PAUL E. FEDER,
doing business as Sigma Sewing Machine Company.

Date: March 23, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 15th day of April 1954.

IN THE MATTER OF

SVIRSKY CLOTHING CO., INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

Docket 6166. Complaint, Feb. 5, 1954—Decision, Apr. 15, 1954

Where a corporation and its two officers, engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

(a) Misbranded certain men's coats in that while they were labeled or tagged as containing "All Wool" or "100% Wool", they contained substantial quantities of reprocessed and reused wool;

(b) Further misbranded such coats in that the fiber content of interlinings contained therein was not separately set forth on labels or tags attached thereto as required under the provisions of said Act; and

(c) Further misbranded certain of said wool products in that the stamp, tag, label, or other means of identification required under the provisions of said Act failed to disclose the name or registered identification number of the manufacturer thereof, or of one or more persons engaged in the introduction into commerce or in the offer for sale, sale, transportation, distribution, or delivery for shipment of said wool products in commerce:

Held: That such acts and practices, under the circumstances set forth, were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Mr. Sidney A. Mauriber, of New York City, for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, the Federal Trade Commission, on February 5, 1954, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Acts.

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 15, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order is disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

The respondents, desiring that this proceeding be disposed of by consent settlement procedure, provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Svirsky Clothing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondents Samuel Svirsky and Seymour Svirsky are the president and secretary-treasurer, respectively, of said respondent corporation. These individuals formulate, direct and control the acts, policies, and practices of said corporate respondent. The offices and principal place of business of all respondents is 110 Fifth Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since 1951, respondents have manufactured for introduction into commerce, introduced in commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

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

Among such misbranded wool products were men's coats labeled or tagged by respondents as containing "All Wool" or "100% Wool," whereas, in truth and in fact, said products did not consist of all wool or 100% wool as defined in said Act, but contained substantial quantities of reprocessed and reused wool.

PAR. 4. Certain of said wool products were further misbranded by the respondents in that the fiber content of interlinings contained in said coats were not separately set forth on labels or tags attached thereto as required under the provisions of Section 4 (a) (2) of said Wool Products Labeling Act, and of Rule 24 of the rules and regulations promulgated thereunder.

PAR. 5. Certain of said wool products were further misbranded by the respondents in that the stamp, tag, label, or other means of identification required under the provisions of Section 4 (a) (2) of said Act failed to disclose the name or registered identification number of the manufacturer thereof, or of one or more persons engaged in the introduction into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment of said wool products in commerce, as "commerce" is defined in said Wool Products Labeling Act.

CONCLUSION

The acts and practices of the respondents as herein found were in violation of the Wool Products Labeling Act of 1939 and of the rules and regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent Svirsky Clothing Co., Inc., a corporation, and its officers, and respondents Samuel Svirsky and Seymour Svirsky, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of men's coats or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five per centum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter;

(c) The name of the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Failing to separately set forth on the required stamp, tag, label or other means of identification the character and amount of the constituent fibers appearing in the interlinings of such wool products, as provided in Rule 24 of the Rules and Regulations promulgated under the said Act.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939, and

Provided further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act or the Rules and Regulations promulgated thereunder.

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

Svirsky Clothing Co., Inc.,
a corporation.
By /s/ Samuel Svirsky,
President.

/s/ Samuel Svirsky,
Samuel Svirsky, individually and as an officer of Svirsky Clothing Co., Inc.
/s/ Seymour Svirsky,
Seymour Svirsky, individually and as an officer of Svirsky Clothing Co., Inc.

Date: March 12, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 15th day of April 1954.

IN THE MATTER OF

HARRY BERNSTEIN & SONS, INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

Docket 6182. Complaint, Feb. 18, 1954—Decision, Apr. 15, 1954

Where a corporation and its two officers, engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

(a) Misbranded men's suits in violation of said Act and the Rules and Regulations promulgated thereunder in that, labeled or tagged as consisting of "100% Wool", they contained in addition to wool a substantial quantity of non-woolen fibers;

(b) Misbranded such suits in that labels attached thereto were neither clear, distinct, nor plainly legible, as required by Rule 5 of said Rules and Regulations; and

(c) Misbranded certain samples, swatches, or specimens of woolen fabrics in that they were not marked, tagged, or labeled to show their fiber content and other information required by law:

Held, That such acts and practices, under the circumstances set forth, were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Webster Ballinger*, hearing examiner.
Mr. George E. Steinmetz for the Commission.
Mr. Louis Epstein, of New York City, for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Ac and the Wool Products Labeling Act of 1939, the Federal Trad Commission on February 18, 1954, issued and subsequently serve its complaint upon the respondents named in the caption here charging them with the use of unfair and deceptive acts and practi in violation of the provisions of said Acts.

The respondents, desiring that this proceeding be disposed of consent settlement procedure, provided in Rule V of the Commissi

[1] The Commission's "Notice" announcing and promulgating the consent settlem published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of w served herewith, was accepted by the Commission on April 15, 1954, and ordered of record as the Commission's findings as to the facts, conclusions, and order in dis of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs f date of service hereof.

Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint heretofore filed and which answer, upon acceptance by the Commission of this settlement, is to be withdrawn from the record, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Harry Bernstein & Sons, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York. Harry Bernstein is president, Herbert Bernstein is secretary, and Leon Bernstein is treasurer of said respondent corporation. These individuals formulate, direct and control the acts, policies and practices of said corporate respondent. The offices and principal place of business of all respondents are located at 104 Fifth Avenue, New York 11, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since 1951, respondents have manufactured for introduction into commerce, introduced, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Wool Products Labeling Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (1) of said Wool Products Labeling Act, and of the Rules and Regulations promulgated thereunder in that they were falsely and deceptively labeled or tagged with respect

to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were men's suits labeled or tagged by respondents as consisting of 100% wool; whereas, in truth and in fact, said wool products did not consist of 100% wool but contained, in addition to wool, a substantial quantity of nonwoolen fibers.

PAR. 4. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (2) of said Wool Products Labeling Act, and of the Rules and Regulations promulgated thereunder.

Among such misbranded wool products were men's suits bearing labels or tags attached by respondents which were neither clear, distinct nor plainly legible as required by Rule 5 of the Rules and Regulations promulgated pursuant to said Act in that they were blurred, indistinct or illegible.

PAR. 5. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (2) of said Wool Products Labeling Act and Rule 22 of the Rules and Regulations promulgated thereunder; in that certain samples, swatches, or specimens of woolen fabrics circulated in commerce by respondents for the purpose of promoting and furthering sales, were neither marked, tagged, nor labeled to show their respective fiber content and other information required by law.

CONCLUSION

The acts and practices of the respondents, as herein found, were in violation of the Wool Products Labeling Act of 1939, and of the Rules and Regulations pursuant thereto, and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent Harry Bernstein & Sons, Inc., a corporation, and its officers, and respondents Harry Bernstein, Herbert Bernstein and Leon Bernstein, individually, and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of men's suits or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool,"

"reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution, or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Using stamps, tags, labels or other means of identification upon such wool products, which are blurred, indistinct or illegible.

4. Using any samples, swatches or specimens of wool products with which to promote sales in commerce, unless labeled or marked to show their respective fiber content and other information required by law.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939, and

Provided further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act or the Rules and Regulations promulgated thereunder.

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

Harry Bernstein & Sons, Inc.,
a corporation.
By /s/ Harry Bernstein,
President.

/s/ Harry Bernstein,
Harry Bernstein, individually and as an officer of Harry Bernstein & Sons, Inc., a corporation.
/s/ Herbert Bernstein,
Herbert Bernstein, individually and as an officer of Harry Bernstein & Sons, Inc., a corporation.
/s/ Leon Bernstein,
Leon Bernstein, individually and as an officer of Harry Bernstein & Sons, Inc., a corporation.

Date: April 2, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 15th day of April 1954.

IN THE MATTER OF

A. ELGART & SONS, INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

Docket 6186. Complaint, Mar. 4, 1954—Decision, Apr. 20, 1954

Where a corporation and its two officers, engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

(a) Misbranded certain men's overcoats in that they did not have affixed thereto stamps, tags, labels, or other means of identification showing the percentage of the fiber weight of wool, fiber other than wool, and other information called for under the Act; and

(b) Misbranded said overcoats in that, labeled or tagged as consisting of "100% All Wool", they contained substantial quantities of reprocessed wool or were composed entirely of such wool:

Held, That such acts and practices, under the circumstances set forth, were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Mr. James E. Markham, of Washington, D. C., for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, the Federal Trade Commission, on March 4, 1954, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Acts.

The respondents, desiring that this proceeding be disposed of by consent settlement procedure, provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, and review thereof, and the enforcement of the order consented to, and

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding a copy of which is served herewith, was accepted by the Commission on April 27, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusions, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent A. Elgart & Sons, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of New York. Nelson Elgart is President, Benjamin Elgart is Vice-President, and Philip Elgart is Secretary and Treasurer of said respondent corporation. These individuals formulate, direct and control the acts, practices, and policies of said corporate respondent. The office and principal place of business of all respondents are located at 890 Broadway, New York 7, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since January 1952, respondents have manufactured for introduction into commerce, introduced, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Wool Products Labeling Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products described as men's overcoats were misbranded within the intent and meaning of Section 4 (a) (2) of said Wool Products Labeling Act, and of the rules and regulations promulgated thereunder.

PAR. 4. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (1) of said Wool Products Labeling Act and of the rules and regulations promulgated thereunder, in

that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were men's overcoats labeled or tagged by respondents as consisting of "100% All Wool"; whereas, in truth and in fact, said wool products did not consist of 100% wool or all wool, but contained, in addition, substantial quantities of reprocessed wool; else were composed entirely of reprocessed wool, as the terms "wool" and "reprocessed wool" are defined in said Act and the rules and regulations promulgated thereunder.

CONCLUSION

The acts and practices of the respondents, as herein found, were and are in violation of the Wool Products Labeling Act of 1939, and of the rules and regulations pursuant thereto, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent A. Elgart & Sons, Inc., a corporation, and its officers, respondents Nelson Elgart, Benjamin Elgart, and Philip Elgart, individually, and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of men's overcoats or other "wool products," as such products are defined in and are subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool," or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool products, exclusive of ornamentation not exceeding five per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4)

each fiber other than wool where said percentage by weight is five percentum or more, and (5) the aggregate of all other fibers.

(b) The maximum percentage of the total weight of such wool products of any non-fibrous loading, filling, or adulterating material.

(c) The name or the registered identification number of the manufacturer of such wool products or of one or more persons engaged in introducing such wool products into commerce, or in the offering for sale, sale, transportation, distribution, or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

Providing that the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by Paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939.

Providing further, that nothing contained in this order shall be construed as limiting any applicable provision of said Act or the Rules and Regulations promulgated thereunder.

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

A. Elgart & Sons, Inc.,
a corporation.

By /s/ Nelson Elgart,
President.

/s/ Nelson Elgart,
Nelson Elgart, individually and as an officer of A. Elgart & Sons, Inc., a corporation.

/s/ Benjamin Elgart,
Benjamin Elgart, individually and as an officer of A. Elgart & Sons, Inc., a corporation.

/s/ Philip Elgart,
Philip Elgart, individually and as an officer of A. Elgart & Sons, Inc., a corporation.

Date: March 31, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 20th day of April 1954.

IN THE MATTER OF

E. T. MOYE TRADING AS MOYE PHOTOGRAPHERS

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6101. Complaint, May 21, 1953—Decision, Apr. 23, 1954

Where an individual with studio and principal place of business in Washington, D. C., engaged in the interstate sale and distribution of photographs through sales agents who called upon prospective customers and solicited orders through one or more of several sales agreements, sometimes designated by him as certificates or advertising offers, and through oral representations—

(a) Represented through such agents that a "portrait," as described in said sales agreement, would be made for $2.95, the representative to be paid $1.75 or $1.95 as the case might be, balance to be paid photographer at time of appointment, that about six proofs would be shown, and, as stated by said agents, that the pictures would be taken within a few days at a definite time fixed; the facts being that at different times his representatives failed to take the pictures as agreed or to deliver proofs when taken or finished pictures as promised or within a reasonable time; sometimes made no delivery of proofs or pictures until long after time promised and then only as a result of persistent demands; in other cases made no such delivery; frequently, where either no pictures were taken or proofs or pictures delivered and customers were required to go to his studio for the pictures, refused to refund the initial payment; sometimes declined to deliver proofs unless the customer made a deposit on additional pictures to be purchased; in some instances when pictures were not delivered and deposits not returned, customers were compelled to resort to the Small Claims Court in order to protect their rights and obtain a refund; and he sometimes failed to furnish promised proofs; and

(b) Represented, in soliciting over the phone, that the customer, upon answering correctly a simple question, would receive free one 8 x 10 silvertone portrait; following which answer the salesman, calling to make an appointment and give the customer a certificate entitling him to sittings at the studio, always collected $1.00 "service" charge, and, when the pictures were taken, required the payment of an additional sum of $3.00 in order to obtain the pictures, failing which, no portraits or pictures were delivered or refund made of said additional payment, thus exacted:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Ames W. Williams for the Commission.

Mr. E. T. Moye, of Silver Spring, Md., and *Mr. David I. Abse*, of Washington, D. C., for respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 21, 1953, issued and subsequently served its complaint in this proceeding upon respondent E. T. Moye, an individual trading as Moye Photographers, charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. At hearings held thereafter, testimony and other evidence were introduced in support of and in opposition to the allegations of the complaint before a hearing examiner of the Commission. On November 12, 1953, the hearing examiner filed his initial decision.

The Commission subsequently placed this case on its own docket for review and, having reason to believe that the initial decision of the hearing examiner did not constitute an appropriate disposition of the proceeding, it issued, on March 4, 1954, and thereafter served its order affording the respondent and counsel supporting the complaint an opportunity to show cause why the initial decision should not be altered in the manner and to the extent shown in the tentative decision attached to that order. No appearance was entered however in response to such leave to show cause.

This case regularly came on thereafter for final consideration by the Commission upon the record herein on review, and the Commission, having duly considered such record, now finds that this proceeding is in the public interest and concludes additionally that the aforementioned tentative decision is an appropriate decision and now should be adopted as the decision of the Commission.

It is therefore ordered, That the tentative decision of the Commission as attached to the order of March 4, 1954, be, and it hereby is, adopted as the decision of the Commission in disposition of this proceeding.

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

Commissioner MEAD concurs except for the form of the order regarding use of the word "free". (See Mead dissent in the matter of Walter J. Black, Inc., et al., Docket 5571.)

TENTATIVE DECISION OF THE COMMISSION

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent E. T. Moye is an individual trading as Moye Photographers with his studio and principal place of business located at 711 14th Street NW., Washington, D. C. Respondent

is now and for more than a year last past has been engaged in the business of making and selling photographs.

PAR. 2. Respondent during the period stated herein has engaged in the sale and distribution of photographs in commerce between and among the various States of the United States and in the District of Columbia. Respondent's volume of business in such commerce has been and now is substantial, particularly in those States adjacent and near to the District of Columbia.

PAR. 3. In the course and conduct of his said business, respondent has employed and now employs sales agents or representatives who call upon prospective customers in their homes or at their place of employment for the purpose of securing orders for photographs.

PAR. 4. In soliciting orders for photographs said sales agents or representatives make use of one or more of several sales agreements sometimes designated by respondent as certificates or advertising offers which contain provisions of sale substantially as follows:

A Beautiful 15 x 19 Salon Size Portrait

FOR ONLY $2.95
UNMOUNTED

*$1.00 EXTRA CHARGE FOR MORE THAN 1 PERSON

*SITTINGS MADE IN YOUR HOME OR OUR STUDIO

PAYABLE AT TIME OF SITTING

*APPROXIMATELY 6 PROOFS SHOWN

*ADDITIONAL PORTRAITS AT SPECIAL PRICES

Pay Representative $1.95 and Balance to Photographer at Time of Appointment

In some instances this sales agreement, certificate or advertising offer contains the following language:

A Beautiful 16 x 20 Salon Size Portrait

FOR ONLY $2.95
UNMOUNTED

*$1.00 EXTRA CHARGE FOR MORE THAN 1 PERSON

*SITTINGS MADE IN YOUR HOME OR OUR STUDIO

PAYABLE AT TIME OF SITTING

*APPROXIMATELY 6 PROOFS SHOWN

*ADDITIONAL PORTRAITS AT SPECIAL PRICES

PAY REPRESENTATIVE $1.95
AND BALANCE TO PHOTOGRAPHER AT TIME OF APPOINTMENT

In other instances the following language was used in the sales agreements or certificate signed by customers:

A Beautiful 16 x 20 Salon Size Portrait

Unmounted

FOR ONLY $2.95

Pay Representative $1.75

$1.20 at Time of Sitting
Plus 50¢ Handling Charges

GROUP CHARGES $1 FOR EACH ADDITIONAL PERSON;

ADDITIONAL PORTRAITS CAN BE OBTAINED AT SPECIAL PRICES

6 PROOFS SHOWN
TO SELECT FROM

Name _____
Location _____
Town _____

PAR. 5. Agents or representatives of said respondent in the course and conduct of their solicitation of business for the respondent call from house to house upon housewives and induce such customers to sign the sales agreements, certificates or advertising offers hereinbefore described and to pay said representative $1.95 or $1.75 as the case may be. In the course of these solicitations, the sales representatives state and represent, among other things, that respondent's offers are special offers, that the pictures will be taken within a few days at a definite time fixed, and that the balance of $1.00 in some instances and $1.20 in others is to be paid at the time the pictures are taken.

On numerous occasions the respondent's representatives have failed to take the pictures as provided in said agreements and in other instances have failed to deliver the proofs of pictures when taken, and in still other instances respondent has failed to deliver finished pictures within the time promised or within a reasonable time thereafter. In a number of cases delivery of the proofs or the pictures was not made until many months after the time promised and then only as a result of persistent demands by the customers and in still other instances such delivery has never been made. In numerous instances respondent has also refused to make refunds of the initial payment made at the time of the solicitation where either the pictures were not taken, the proofs were not delivered or the pictures were not delivered, the customers being required to go to respondent's studio for the pictures.

In some instances the sales representatives of the respondent declined to deliver proofs to the customers unless the customers made a deposit on additional pictures to be purchased from the respondent. When deposits were made on the order for finished pictures as required by respondent's said representatives, in some instances the pictures were not delivered and the deposits were not returned to the customers, and said customers were compelled to resort to the Small Claims Court in order to protect their rights and to obtain a refund of money deposited.

In some instances when pictures were taken, respondent did not furnish the customers with six proofs as represented in the agreement.

PAR. 6. It is also the practice of sales agents and representatives of the respondent in soliciting orders for photographs to call prospective customers on the telephone and advise such prospective customers that upon answering correctly a simple question they will receive free of charge one 8 x 10 silvertone portrait and if the question is answered correctly, an appointment is made to call upon said prospective customers for the purpose of arranging for sittings at respondent's studio. Thereafter, said salesmen or representatives call upon the prospective customers at their homes to make an appointment for sittings at respondent's studio and to give to the prospective customers certificates entitling them to sittings at the studio and although it was understood that no further charges would be made, and the pictures were free, the representatives always collected $1.00 "service" charge from each of the customers and at the time the pictures are taken, the customers are required to pay an additional sum of $3.00 each in order to obtain the pictures. If the customers refuse to pay the additional $3.00, respondent refuses to deliver the portraits or pictures or to refund the payments originally made.

PAR. 7. The use by the respondent of the aforesaid acts and practices in connection with the offering for sale and sale of photographs in commerce has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations hereinabove set forth are true, and into the purchase of said portraits or photographs in reliance upon such erroneous belief.

CONCLUSION

The aforesaid acts and practices of respondent, as hereinabove set out, are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent E. T. Moye, individually, and trading as Moye Photographers, or under any other name, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of photographs in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing over the telephone or otherwise, directly or by implication, that a photograph will be presented for correctly answering a question or inquiry unless such photograph is actually given as represented.

B. Using the word "free" or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any photograph, or other article of merchandise:

(1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) when, with respect to any article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (a) increases the ordinary and usual price; or (b) reduces the quality; or (c) reduces the quantity or size of such article of merchandise.

C. Representing through the use of coupons, certificates or otherwise that photographs of a designated kind and character will be made for a stipulated price or at a time or times specified, unless this is in fact done and without the imposition of conditions not clearly stated or revealed when such representation is made.

D. Representing that finished photographs will be delivered to purchasers or will be delivered at a specified time or place when such delivery is not made, in fact.

IN THE MATTER OF

NATIONAL BISCUIT COMPANY

OPINION AND MODIFIED ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (A) OF THE CLAYTON ACT AS AMENDED

Docket 5013. Opinion, etc., Apr. 26, 1954

Opinion and orders modifying, in response to motion by Commission's Bureau of Antimonopoly, grounded on asserted greater clarity and enforceability, section 3 of an order issued on Feb. 23, 1944, 38 F. T. C. 213, 222, which—after theretofore requiring respondent, among other things, in connection with the offer, etc., of bakery packaged food products in interstate commerce for use or resale, to cease and desist from selling such commodities of like grade and quality to competing purchasers at uniform prices, but subject to certain varying additional discounts pursuant to which, as set forth in the findings in detail, customer purchasers with branches or outlets were privileged, under respondent's so-called "Headquarters Discount" schedule, to aggregate their monthly purchases, irrespective of the quantity or volume delivered to the particular branch or outlet so as to receive the monthly volume and other discounts thereby provided—

Further required respondent, in the aforesaid connection, to cease and desist:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts; or in any other manner resulting in price discriminations substantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended";

So as to require respondent, in lieu thereof, to cease and desist:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products."

Mr. Austin H. Forkner for the Commission.

Covington & Burling, of Washington, D. C., and *Mr. Everett Wheeler Barto*, of New York City, for respondent.

OPINION OF THE COMMISSION

By MASON, Commissioner:

This case is before us on a motion by counsel in the Commission's Bureau of Antimonopoly to reopen the proceeding solely for the purpose of modifying the Commission's order to cease and desist, respondent's answer opposing the motion, reply of counsel supporting the motion, and oral argument of counsel.

The Commission, on February 23, 1944, found that the respondent has violated Section 2 (a) of the Clayton Act as amended and entered

its order directing the respondent to cease and desist from discriminating in price in the manner and under the circumstances described in the findings and also to cease and desist:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts; or in any other manner resulting in price discriminations substantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended."

Counsel supporting the motion suggests that the order to cease and desist would be clearer and more enforcible if the above-quoted provision is modified to read:

"From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products."

Respondent opposes the motion on the grounds, among others, that under controlling authority and settled Commission policy it would be improper for us to reopen this proceeding and modify the order to cease and desist in the respects set out in the motion; that substantive rights of the respondent would be affected if the order is modified as requested; and that the facts disclosed by the record in this case would not support an order prohibiting all price discriminations between competing customers because there is no showing that any or all price differentials adversely affect competition.

The basic question raised by the motion is whether the order heretofore entered is ambiguous, unclear, or otherwise inadequate or inappropriate to prohibit the respondent from continuing or resuming the unlawful practices it was found to have engaged in. If the order, for one reason or another, is inadequate or inappropriate for that purpose, we have not only the statutory authority but also the duty to modify the order in the respects necessary. Obviously, any modified order to cease and desist which we might enter must be supported and justified by the facts disclosed by the evidence in the record. No substantive rights of the respondent will be affected by any modified order which is fully supported and justified by the evidence in the record.

The stipulated facts in this case show that respondent has discriminated in price between different purchasers by selling its bakery food products to competing customers at different prices and that the effect of the described discriminations in price, some of which were

no more than one-half of one percent of the selling price, "has been or may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged, and to injure, destroy, or prevent competition between purchasers receiving the benefit of said discriminatory prices and those to whom they are denied. The effect also has been or may be to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in said line of commerce in the various localities or trade areas in the United States where said favored customers and their disfavored customers are engaged in business."

The stipulated facts, we believe, fully support an order prohibiting the respondent from discriminating in price between competing customers.

We turn now to the question of whether an order prohibiting discriminations in price should exclude from its prohibitions those discriminations expressely permitted by Section 2 of the Clayton Act. We think not. As the Supreme Court pointed out in the *Ruberoid* case (*FTC* v. *Ruberoid Co.*, 343 U. S. 470) the statutory provisos are necessarily implicit in every order issued under the authority of the Act. However, recognition of the implicit availability of a seller's defenses under the Act does not allow a seller to relitigate in enforcement or contempt proceedings issues already settled. In the original proceedings in this case, respondent had an opportunity to avail itself of any one or all of the defenses set out in Section 2 of the Clayton Act, as amended. This the respondent did not see fit to do. All questions as to respondent's defenses to the discriminations shown have thus been settled. The order, however, does not make it clear that in a violation proceeding it is not necessary to again determine whether discriminations made under the same circumstances as those existing at the time the order was entered are permitted by Section 2 of the Clayton Act, as amended. To the contrary, the inclusion of the phrase "except as permitted by Section 2 of the Clayton Act as amended" may actually be misleading as suggesting the possible retrial in enforcement or contempt proceedings of issues already settled.

This is not to say that a seller who has violated Section 2 (a) of the Clayton Act, as amended, and against whom we have issued an order o cease and desist, is forever precluded from asserting one or more of he defenses which were available to him during the original proceedng and which either were not advanced or failed for lack of proof. 'o the contrary, in the event of a definite change of circumstances ıch a seller may avail himself of any or all of the statutory defenses.

To illustrate, let us assume that a shoe manufacturer with two anti-

quated, manually operated machines in his shop was charged with having discriminated in price because he granted a discount of ten percent off list price on a thousand pairs of shoes and only five percent off on one dozen pairs. His defense that the price difference was cost justified was not established. The Commission, after making appropriate findings, entered a cease and desist order telling the shoe manufacturer to quit discriminating in price between competing purchasers. The order contained none of the statutory provisos. The day after the order was entered the shoemaker discarded his two antiquated and manually operated machines and installed ten new, automatic machines. The cost of tooling up these new machines for one dozen pairs of shoes was just as much as the cost for tooling up for a thousand dozen. The shoemaker's accountants, after making a thorough cost study, advised him that because of this and other cost savings he could now cost justify a discount of twenty percent on a thousand dozen or more pairs of shoes. In such a case, assuming the advice is sound, the respondent shoemaker would have a good defense to a charge that he had violated the order to cease and desist. He could either show these facts affirmatively in a motion to the Commission to modify the order or he could wait until the Commission petitioned a United States Court of Appeals for enforcement of the order and then present the changed facts to the trier of the facts in that proceeding.

We believe the order to cease and desist in this case should be modified in the respects and in the particulars set out in the motion.

Commissioners Howrey and Gwynne did not participate for the reason that oral argument on the motion to modify the order was heard prior to their appointment to the Commission.

ORDER GRANTING MOTION, AND REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

This matter having come on to be heard by the Commission upon the motion by counsel in the Commission's Bureau of Antimonopoly to reopen this proceeding solely for the purpose of modifying the Commission's order to cease and desist entered herein on February 23, 1944, in the particulars set out in said motion, respondent's answer opposing the motion, reply of counsel supporting the motion, and oral argument of counsel; and

The parties heretofore having had notice of the proposed modification and having been heard with respect thereto, and the Commission being of the opinion, for the reasons set forth in the accompanying opinion of the Commission, that the said motion should be granted and that this proceeding should be reopened and the order to cease and desist modified in the respects and in the particulars set out in said motion:

It is ordered, That the said motion to reopen this proceeding solely for the purpose of modifying the order to cease and desist be, and it hereby is, granted.

It is further ordered, That this proceeding be, and it hereby is, reopened solely for the purpose of modifying the order to cease and desist in the respects and in the particulars set out in said motion.

It is further ordered, That the order to cease and desist heretofore entered in this matter be, and it hereby is, modified by changing paragraph 3 thereof to read as follows:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products."

It is further ordered, That a modified order to cease and desist incorporating the modification provided for in this order be issued and served upon the respondent.

Commissioners Howrey and Gwynne not participating for the reason that oral argument on the motion was held prior to their appointment to the Commission.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding was heard by the Federal Trade Commission upon the complaint of the Commission and the stipulation as to the facts entered into between the respondent herein and the then Chief Counsel for the Commission, which provided, among other things, that without the presentation of argument or other intervening procedure the Commission might issue and serve upon the respondent herein findings as to the facts and conclusion based thereon and an order disposing of the proceeding; and the Commission, having made its findings as to the facts and its conclusion that said respondent had violated the provisions of subsection (a) of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," the Clayton Act, as amended by the Robinson-Patman Act, issued its order to cease and desist on February 23, 1944.

Thereafter, counsel in the Commission's Bureau of Antimonopoly filed a motion requesting modification of the said order to cease and desist, and the Commission, having duly considered said motion, respondent's answer thereto, reply of counsel supporting the motion, and oral argument of counsel, and having issued its order granting said motion and reopening the proceeding and modifying said order to cease and desist in the respects set out therein, now issues this, its modified order to cease and desist:

It is ordered, That the respondent, National Biscuit Company, a corporation, and its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of bakery packaged food products in interstate commerce for use or resale, do forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.

2. From continuing or resuming the discriminations in price referred to and described in paragraph four of the aforesaid findings as to the facts.

3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products.

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

Commissioners Howrey and Gwynne not participating for the reason that oral argument on the motion to modify the order was heard prior to their appointment to the Commission.

IN THE MATTER OF

THE DAHLBERG COMPANY ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6143. Complaint, Nov. 18, 1953—Decision, Apr. 27, 1954

Where a corporation and its three officers, engaged in the interstate sale and distribution of their "Dahlberg Tru-Sonic Canal Earphone", which was sold as an accessory or attachment for hearing aids and was designed to be inserted in the ear canal; in advertising in newspapers and circulars and other media—

(a) Falsely represented that said device would fit the ear canals of all persons and that when inserted in the ear canal, it was hidden and out of sight;

(b) Falsely represented that it had been accepted by the American Medical Association; and

(c) Falsely represented that it was so constructed that it would fit all hearing aids:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Charles S. Cox for the Commission.

Mackall, Crounse, Moore, Helmey & Palmer, of Minneapolis, Minn., for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 18, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with unfair and deceptive acts and practices, in violation of the provisions of said Act.

Respondents desiring that this proceeding be disposed of by the Consent Settlement procedure in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, and review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the Consent Settlement here-

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 27, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

inafter set forth, and in lieu of the answer to said complaint heretofore filed and which upon acceptance by the Commission of this settlement, is to be withdrawn from the record, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that according to information furnished by respondent, The Dahlberg Company, the name of one of the vice presidents of said corporation was Lester W. Wilbrecht but that this information was in error and that the correct name of this individual named in the complaint as Lester W. Wilbrecht is Lester L. Wilbrecht. It is further agreed that the correct name Lester L. Wilbrecht may be incorporated in the following consent settlement with the same force and effect as if the correct name had been incorporated in the complaint.

4. The parties recognize that while respondents' advertisements set out in Paragraph 4 of the complaint state that their device, when inserted in the ear canal, is completely hidden and out of sight, Paragraph 5 of the complaint does not specifically charge that respondents have so represented.

The parties further recognize that Paragraph 6 of the complaint expressly alleges that such representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act and construe the complaint as having raised the issue as to the misleading nature of such representations.

5. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, The Dahlberg Company, is a corporation organized, existing, and doing business by virtue of the laws of the State of Minnesota, with its office and principal place of business

located at Golden Valley in the City of Minneapolis 22, State of Minnesota. Individual respondents Kenneth H. Dahlberg, Arnold R. Dahlberg, John Palmer, and Lester L. Wilbrecht, are president, vice president and treasurer, secretary, and vice president in charge of engineering, respectively, of respondent, The Dahlberg Company, a corporation. All of said individual respondents, except John Palmer, have acted, and now act, in conjunction with each other in formulating, directing and controlling the business, acts, practices and policies of said corporate respondent, including the advertising claims made directly and indirectly by said respondent, The Dahlberg Company, a corporation.

Respondent John Palmer executed an affidavit to the effect that he has not in the past and does not now, nor will he in the future, engage in the general business activities of the respondent, The Dahlberg Company, a corporation; he has had no occasion to determine the policy for the day-to-day practices of said corporate respondent, nor has he participated in policy decisions regarding the advertising methods or materials of said corporate respondent.

By reason of the matter set out in said affidavit the Commission finds that the said complaint, insofar as it relates to the respondent John Palmer as an individual and as an officer of respondent, The Dahlberg Company, a corporation, should be dismissed. The word "respondents" as hereinafter used does not include John Palmer.

PAR. 2. Respondents, for more than two years last past, have been engaged in the sale and distribution of a device designated as "Dahlberg Tru-Sonic Canal Earphone." Said device consists of a tip, a length of clear plastic tubing, an adaptor and a receiver, plus a wire cord with a plug attachment. It is sold as an accessory or attachment for hearing aids and designed to be inserted in the ear canal. Respondents sell said device through distributors located in various States of the United States.

PAR. 3. Respondents cause said device, when sold to be transported from its place of business in the State of Minnesota to purchasers thereof located in various States of the United States and, at all times mentioned herein, have maintained a course of trade in commerce among and between the various States of the United States.

PAR. 4. In the conduct of the aforesaid business, respondents have disseminated and caused the dissemination of advertisements concerning their said device by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and circulars and in other advertising media for the purpose of inducing and which were likely to induce, directly

or indirectly, the purchase of their said device; and respondents have also disseminated and caused the dissemination of advertisements concerning their said device by various means for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said device in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among and typical of the statements contained in said advertisements, disseminated as aforesaid, are the following:

DEAF or just HARD OF HEARING?

Now a new invention, the Dahlberg Canal Earphone, a feature of the Dahlberg hearing device, helps you hear and hides your deafness too * * *

(Drawing of outer ear with diagram indicating the placement of the Dahlberg Tru-Sonic Canal Earphone in Ear Canal)

THE BEST NEWS YET for the HARD OF HEARING

NEW Dahlberg Tru-Sonic Canal Earphone

No earmold!

Fits any ear!

Near-natural Hearing!

Yes, it's true! We now offer the world's first real aid-power receiver small enough to fit inside your ear * * * And it's out of sight! Completely hidden! * * *

DON'T WAIT! TRY IT TODAY! YOU'LL thrill to a new and completely different hearing experience. Dahlberg Hearing Aids are accepted by the American Medical Association.

Out of sight! No earmold! Fits any ear—all hearing aids.

PAR. 5. Through the use of the aforesaid statements and others of the same import, but not specifically set forth, respondents represented that their "Dahlberg Tru-Sonic Canal Earphone" will fit the ear canals of all persons; that when inserted in the ear canal, said device is hidden and out of sight; that said device has been accepted by the American Medical Association; and that said device is so constructed that it will fit all hearing aids.

PAR. 6. The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the "Dahlberg Tru-Sonic Canal Earphone" will not fit all sizes of ear canals. Said device, when inserted into the ear canal, is not hidden nor out of sight. Said device has not been accepted by the American Medical Association. It is not so constructed that it will fit all hearing aids.

PAR. 7. The use by the respondents of the foregoing false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and to induce

a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' said device.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondent, The Dahlberg Company, a corporation, and its officers, respondents Kenneth H. Dahlberg, Arnold R. Dahlberg and Lester L. Wilbrecht, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the device designated as the "Dahlberg Tru-Sonic Canal Earphone," or any device of substantially similar character, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or through inference that said device:

(a) Will fit the ear canals of all persons;

(b) Is hidden or out of sight when inserted in the ear canal;

(c) Has been accepted by the American Medical Association;

(d) Will fit all hearing aids.

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

It is further ordered, That the complaint be, and it is hereby dismissed against respondent John Palmer, individually and as an officer of respondent, The Dahlberg Company, a corporation.

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

The Dahlberg Company,
a corporation,

By (Sgd) Kenneth H. Dahlberg,
President.

(Sgd) Kenneth H. Dahlberg
KENNETH H. DAHLBERG,

(Sgd) Arnold R. Dahlberg
ARNOLD R. DAHLBERG,

(Sgd) Lester L. Wilbrecht
LESTER L. WILBRECHT,
Individually and as officers of
The Dahlberg Company.

March 12, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 27th day of April 1954.

IN THE MATTER OF

JOSEPH ROSENBLUM AND SADIE ROSENBLUM DOING BUSINESS AS MODERN MANNER CLOTHES

Docket 5263. Complaint, Jan. 2, 1945—Findings and order, Dec. 19, 1950, 47 F. T. C. 712. Order vacating, etc. and opinion, May 4, 1954

Charge: Advertising falsely as to free wearing apparel.

Before *Mr. George Biddle*, hearing examiner.
Mr. Harold A. Kennedy for the Commission.
Mr. Copal Mintz, of New York City, for respondents.

ORDER DISPOSING OF RESPONDENTS' MOTION TO VACATE CEASE AND DESIST ORDER AND FOR OTHER RELIEF; VACATING CEASE AND DESIST ORDER; AND DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon respondents' motion (a) that the order to cease and desist entered herein on December 19, 1950, be vacated and that an order be entered dismissing the complaint in its entirety, (b) that Paragraphs Five and Six of the findings as to the facts and the conclusion be stricken and that the findings and conclusion recommended by the respondents be substituted therefor, and (c) that counsel to the Commission be authorized and directed to join in an application to the United States Court of Appeals for the Second Circuit to vacate the order to cease and desist made and entered by that Court and to enter in lieu thereof a decree dismissing the proceedings, and answer to said motion filed by counsel supporting the complaint; and

The Commission having duly considered said motion, answer thereto, and the record herein, and being of the opinion that, for the reasons set forth in the accompanying opinion of the Commission, the said motion should be granted to the extent indicated in the said opinion, and that the order to cease and desist heretofore entered in this proceeding should be vacated and the complaint dismissed in its entirety:

It is ordered, That the respondents' said motion be, and it hereby is, granted to the extent indicated in the accompanying opinion of the Commission.

It is further ordered, That the order to cease and desist entered herein on December 19, 1950, be, and it hereby is, vacated.

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

It is further ordered, That the General Counsel of the Commission be, and he hereby is, authorized and directed to join the respondents in application to the United States Court of Appeals for the Second Circuit to vacate the final decree heretofore entered by that Court in this matter and to enter in lieu thereof a decree dismissing the proceeding.

Commissioner Mead dissents. (See Mead dissent in the matter of Walter J. Black, Inc., et al., Docket 5571.)[1]

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter is before the Commission upon a motion filed by the respondents requesting (a) that the order to cease and desist entered herein on December 19, 1950, be vacated and that an order be entered dismissing the complaint in its entirety; (b) that Paragraphs Five and Six of the findings as to the facts and the conclusion be stricken, and that findings and conclusion recommended by the respondents be substituted therefor; and (c) that counsel to the Commission be authorized and directed to join in an application to the United States Court of Appeals for the Second Circuit to vacate the order to cease and desist made and entered by that court and to enter in lieu thereof a decree dismissing the proceeding.

The Commission, on December 19, 1950, issued its order directing the respondents to cease and desist from:

"Using the word 'free', or any other word or words of similar import or meaning, to designate, describe, or refer to wearing apparel, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the performance of some service inuring directly or indirectly to the benefit of the respondents."

The respondents petitioned the United States Court of Appeals for the Second Circuit to review and set aside the Commission's order to cease and desist. The court, on November 29, 1951, entered an order affirming the Commission's order (*Rosenblum* v. *FTC*, 192 F. 2d 392). The Supreme Court, on March 24, 1952, denied respondents' petition for a writ of certiorari.

The order to cease and desist entered in this matter was in strict conformity with the Commission's policy in effect at the time the order was issued and was identical with orders which had theretofore been issued against many other advertisers concerning the use of the word "free." However, subsequent to the date of the issuance of its

[1] See p. 225 of this volume.

order to cease and desist in this case, the Commission changed its position with respect to the use, in advertising, of the word "free." As announced by the Commission in the matter of Walter J. Black, Inc., etc., Docket 5571 (September 11, 1953), henceforth, the use of the word "free" or other words of similar import or meaning, in advertising or in other offers to the public, to designate or describe an article of merchandise will be considered to be unfair and deceptive only (1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or (2) when, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either increases the ordinary and usual price, reduces the quality, or reduces the quantity or size of such article of merchandise.

It is obvious that the outstanding order against the respondents in this proceeding prohibits them from using the word "free" under circumstances which would not now be considered as unfair or deceptive, and imposes upon the respondents requirements which would not be imposed upon their competitors.

Although the order in this case has been affirmed by the United States Court of Appeals for the Second Circuit, the Commission has the power and duty to vacate or modify the order if conditions exist which warrant any such action. *American Chain & Cable Co.* v. *FTC*, 142 F. 2d 909 (C. A. 4th 1944). We believe the change in the Commission's position with respect to the circumstances under which the use of the word "free" will be considered unfair and deceptive has created such a condition that the public interest requires action by the Commission in this case.

Under these circumstances it is necessary that we re-examine the facts disclosed by the record in this case to determine whether the respondents' use of the word "free" has been such as to be unfair or deceptive under the Commission's new existing policy. The facts presently material can be summarized as follows:

The respondents, operating under the name Modern Manner Clothes, carry on a mail order business in interstate commerce in women's wearing apparel. Respondents engage saleswomen in various parts of the country to take orders for the merchandise from the public. The services of such salespersons are obtained by inserting advertisements in the want ad sections of newspapers, typical of which is the following:

"WE START YOU IN BUSINESS

"Fifth Avenue, New York, firm desires women to sell dresses, coats, sportswear, negligee, lingerie featured in 'Vogue' and 'Mademoiselle.' Also children's garments. Good commission. Sample book free. Write Modern Manner * * * New York."

Interested women who communicate with the respondents for further information are informed that if they become representatives of the respondents, they will receive, in addition to their regular commissions, free dresses, coats, suits, and other garments. Typical of the statements and representations to that effect are the following:

"Moreover, in addition to your regular profits you will get your own dresses, coats, and suits—Free."

"Your own Dresses Free. Modern Manner enables you to have all your personal dresses, suits, coats, lingerie Free. Every month Modern Manner offers a special bonus to active representatives. Practically every Modern Manner representative earns at least from 10 to 12 dresses a season without any cost to her."

"By getting all these free bonus dresses, you have a complete wardrobe of smart Fifth Avenue styles."

"You, too, have a most marvelous opportunity to get your new wardrobe."

"Here is our special offer—

"SELL 12 dresses and GET a $5.00 dress FREE
15 dresses and GET a $6.00 dress FREE
20 dresses and GET a $9.00 dress FREE
25 dresses and GET a $12.00 dress FREE
30 dresses and GET a $15.00 dress FREE
(or 3—$5.00 dresses)"

The Commission found that the respondents' use of the word "free" in the manner above indicated was false, misleading, and deceptive because "the respondents do not give the dresses or other articles of wearing apparel free, but require the payment of a valuable consideration on the part of the agents or salespersons in the form of service and the sale of a certain number of articles of wearing apparel by said agents or salespersons before the same are delivered to the agents or salespersons."

It appears to us that respondents' offer of "free" merchandise to their representatives upon the completion of a specified number of sales is clear and unambiguous. All of the terms and conditions of the offer are clearly set forth. The persons to whom the offer is made are not required to purchase any other merchandise in order to obtain the

"free" merchandise. There is no reasonable probability that anyone could misunderstand or be misled by the offer. We believe, therefore, that respondents' use of the word "free" as disclosed by the record in this case cannot be considered unfair or deceptive under the Commission's present policy on this subject.

In view of the foregoing, the order to cease and desist heretofore entered in this matter will be vacated and the complaint will be dismissed in its entirety, and the General Counsel of the Commission will be authorized and directed to join in an application to the United States Court of Appeals for the Second Circuit to vacate the final decree heretofore entered by that Court in this matter and to enter in lieu thereof a decree dismissing the proceeding.

Commissioner Mead dissents. (See Mead dissent in the matter of Walter J. Black, Inc., et al., Docket 5571.)

IN THE MATTER OF

AQUELLA PRODUCTS, INC., AND PRIMA PRODUCTS, INC., ET AL.

MODIFIED CEASE AND DESIST ORDER

Docket 5622. Order, May 4, 1954

Order modifying Commission's prior order, dated June 1, 1953, 49 F. T. C. 1394, in accordance with the decision of the Court of Appeals for the Second Circuit in *Prima Products, Inc. et al.* v. *F. T. C.*, 209 F. 2d 405, in which said court on January 7, 1954, filed its decision modifying said order and affirming the same as modified, and on January 26, 1954, entered its final decree enforcing said order as modified—

So as to delete from said order the prohibition against representing that respondents' product "Aquella" will waterproof or prevent the penetration of water through the walls of underground fortifications such as those constructed on the Maginot Line, but in other respects affirming the provisions of said order prohibiting respondent Prima Products, Inc. et al., and certain officers thereof—the Commission having dismissed in the said original order, the complaint as to respondent Aquella Products, Inc., and certain of its officers—from misrepresenting, as there and below set forth, the nature and qualities of said "Aquella" product.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Edward L. Smith, *Mr. George M. Martin* and *Mr. J. M. Doukas* for the Commission.

Mr. Robert E. Kline, Jr., of Washington, D. C., and *Kirlin, Campbell & Keating*, of New York City, for Aquella Products, Inc., and the officers thereof.

Mr. Milton Elias Schattman, of New York City, for Prima Products, Inc., and the officers thereof.

Brody & Brody, of Bridgeport, Conn., also represented Charles S. Brody.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answers of the respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a hearing examiner of the Commission theretofore duly designated by it; and the hearing examiner having thereafter filed his initial decision; and the matter having thereafter come on to be heard by the Commission upon appeals from said initial decision filed by counsel for respondents Prima Products, Inc., Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer, and by counsel supporting the complaint,

briefs in support of and in opposition to said appeals, and oral arguments of counsel; and the Commission having duly considered and ruled upon said appeals, considered the record, found that the proceeding was in the interest of the public, made its findings as to the facts, concluded that respondents Prima Products, Inc., a corporation, Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer had violated the provisions of the Federal Trade Commission Act, and, on June 1, 1953, issued an order to cease and desist against said respondents, and their respective agents, representatives, and employees; and the Commission having dismissed the complaint as to respondent Aquella Products, Inc., a corporation, respondents Ira A. Campbell, L. J. Clarke, Leandro W. Tomarkin, and Zella F. Campbell, individually and as officers of Aquella Products, Inc.; and

Respondents Prima Products, Inc., Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer having filed in the United States Court of Appeals for the Second Circuit their petition to review and set aside said order to cease and desist; and that Court having heard the cause on briefs and oral argument and having thereafter, on January 7, 1954, filed its decision modifying said order and affirming said order as modified, and, on January 26, 1954, entered its final decree enforcing said order as modified; and

The Commission being of the opinion that its order should be modified so as to accord with the aforesaid judgment of the United States Court of Appeals for the Second Circuit:

It is ordered, therefore, That respondent Prima Products, Inc., a corporation, and respondents Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer, individually and as officers of said corporation, and their respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product, now designated "Aquella," or any other product of substantially similar composition or possessing substantially similar properties under whatever name sold forthwith cease and desist from—

(1) Representing, directly or by implication, that respondents' product, now designated "Aquella," operates on an entirely new principle in the control of water seepage through porous masonry;

(2) Representing, directly or by implication, that the manner of application of respondents' product, now designated "Aquella," is as easy or simple as whitewashing or that the ease of application of said product in any way approaches the ease of application of whitewashing;

(3) Representing, directly or by implication, that the application of respondents' product, now designated "Aquella," to porous masonry surfaces below grade will render such structures impermeable to or proof against the passage of water or moisture; and

(4) Using the words "waterproof" or "watertight" or any other word or words of similar import or meaning to designate respondents' product or to describe or refer, directly or by implication, to use thereof, when applied to below grade masonry surfaces or structures.

It is further ordered, That said respondents, within thirty (30) 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.

It is further ordered, That the complaint be dismissed as to the respondents Aquella Products, Inc., a corporation, Ira A. Campbell, L. J. Clarke, Leandro W. Tomarkin, and Zella F. Campbell, individually and as officers of Aquella Products, Inc.

IN THE MATTER OF

BORDEN-AICKLEN AUTO SUPPLY CO., INC. ET AL. DOCKET 5766 AND D & N AUTO PARTS CO., INC. ET AL. DOCKET 5767

Orders and opinion, May 5, 1954

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Taylor & Taylor, of Memphis, Tenn., for Borden-Aicklen Auto Supply Co., Inc. et al.

Mr. Frank J. Tipler, Jr., of Andalusia, Ala., for D & N Auto Parts Co., Inc. et al.

ORDERS DENYING APPEALS FROM RULINGS OF HEARING EXAMINER

These matters having come on to be heard by the Commission upon respondents' appeals from orders of the hearing examiner denying respondents' motions to dismiss the complaints and briefs and oral arguments of counsel in support thereof and in opposition thereto; and

The Commission having duly considered said appeals and being of the opinion, for the reasons set forth in the accompanying opinion of the Commission, that the hearing examiner properly denied respondents' motions to dismiss the complaints and that the appeals should therefore be denied:

It is ordered, That respondents' said appeals be, and they hereby are, denied.

Commissioner Howrey not participating.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

These matters are before the Commission upon appeals from orders of the hearing examiner denying motions of the respondents to dismiss the complaints.

So far as material here, the complaints in these proceedings are the same. Respondents in each case are charged with violation of subsection (f) of Section 2 of the Clayton Act, as amended. After the complaints were issued and respondents had filed their answers, hearings were held before a hearing examiner and considerable evidence was

introduced in support of the allegations of the complaint. However, before counsel supporting the complaint had completed their cases in chief, respondents filed motions with the hearing examiner to dismiss the complaints, contending that the facts alleged are insufficient to constitute a violation of subsection (f) of Section 2 of the Clayton Act, as amended. The hearing examiner denied these motions and respondents in each case applied for leave to appeal. The Commission, believing that a prompt decision on the appeals was necessary in order to prevent unusual expense and delay in the proceedings, granted respondents' requests for leave to appeal, as well as their requests for oral argument on the appeals. Briefs were filed and oral arguments were made in support of and in opposition to the appeals.

The only question we are called upon to resolve is whether the complaints in these cases allege sufficient facts to constitute a violation of subsection (f) of Section 2 of the Clayton Act, as amended.

Respondents' contentions that the allegations of the complaints are insufficient to constitute a violation of Section 2 (f) of the Clayton Act, as amended, appear to be based primarily on the decision of the Supreme Court of the United States in *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U. S. 61, which was rendered after the hearings were begun in these cases. So far as pertinent here, the Court in that case held that a buyer is not liable under Section 2 (f) if the lower prices he induces are either within one of the seller's defenses, such as cost justification, or not known by him not to be within one of those defenses. The Court made no decision as to the sufficiency of the complaint in the *Automatic Canteen* case. Instead, it outlined the burden of proof to be assumed by the Commission in proving a violation of Section 2 (f). The effect of the decision on the cases here under consideration is to require that counsel supporting the complaint assume the burden of showing that the discriminatory prices allegedly knowingly induced and received by the respondents were not within one of the sellers' defenses and that respondents knew or should have known that the lower prices were not within one of those defenses.

The complaints in these proceedings charge that the respondents have demanded discriminatory prices not otherwise offered or granted by the sellers; that respondents have demanded discounts, rebates, or allowances based on the aggregate of their purchases through a group buying organization which does not function as a purchaser for its own account; that respondents have adopted, followed, and pursued purchasing policies and practices which were knowingly designed and intended to and did induce discriminatory prices from sellers; that a

group buying organization (Mid-South Distributors in one case and Cotton States, Incorporated, in the other) has been utilized and employed to knowingly induce prices which were discriminatory and that each and all of the respondent jobbers made individual purchases upon which they knowingly induced and received through the group buying organization favorable discriminatory prices which were not otherwise available to, offered, or granted by the sellers to the respondents or their competitors.

Therefore, if the facts alleged are proven, the required degree of knowledge will also be proven. Under these circumstances, the respondents could not have induced and received the discriminatory prices in the manner alleged without the knowledge that the lower prices were discriminatory and not within one of the sellers' defenses. The complaints thus set forth detailed charges which we believe are sufficient to fully apprize the respondents of the nature of the proceedings against them and the circumstances from which conclusions have been drawn that violations of Section 2 (f) of the Clayton Act, as amended, have occurred. In addition, the respondents have the benefit of the Automatic Canteen decision as to the extent of proof required to support the charges of the complaints.

As a result of the Supreme Court's decision in the *Automatic Canteen* case, the Commission has heretofore dismissed the complaints in two cases where the respondents were charged with violation of Section 2 (f) of the Clayton Act, as amended. Those cases were Safeway Stores, Incorporated, Docket 5990, and The Kroger Company, Docket 5991. In both those matters counsel supporting the complaint filed statements in which they said that they were of the opinion that the evidence then available was insufficient to prove the degree of knowledge on the part of the respondents which the Supreme Court in the Automatic Canteen decision said was necessary to be proven in order to establish a violation of Section 2 (f). Our order in the Safeway case, dismissing the complaint without prejudice, clearly shows that the lack of evidence to prove the required degree of knowledge was the reason the complaint was dismissed.

In the Kroger case, the hearing examiner, in his initial decision dismissing the complaint without prejudice, misconstrued the statement by counsel supporting the complaint as an admission that the allegations of the complaint were insufficient to constitute a cause of action. His dismissal of the complaint was on the grounds that no violation of Section 2 (f) was alleged. After reviewing the hearing examiner's initial decision, we adopted it as our decision. However, in the order adopting the hearing examiner's decision we noted that the hearing examiner had misconstrued the admissions made by counsel

supporting the complaint, but that the conclusion reached by him was correct. The conclusion referred to was that the complaint should be dismissed without prejudice.

No evidence had been introduced in either the Safeway or Kroger case at the time the complaints were dismissed. If we had thought that, as a result of the Automatic Canteen decision, the complaints did not state a cause of action, we could and should have amended them so that they would have stated a cause of action, unless, of course, the evidence then available did not indicate that a violation of the statute as it had been construed by the Supreme Court could be proven.

Our dismissal of the Safeway and Kroger complaints, therefore, constitutes no authority for holding that the complaints involved in these appeals do not state a cause of action.

We are of the opinion that the hearing examiner properly denied respondents' motion to dismiss the complaints in the two cases presently under consideration, and that the respondents' appeals should therefore be denied.

Commissioner Howrey did not participate.