IN THE MATTER OF

INTERNATIONAL ASSOCIATION OF PHOTOGRAPHERS ET AL.

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

Docket 6165. Complaint, Feb. 5, 1954—Decision, June 1, 1956

Order requiring sellers in Hollywood, Calif., of photograph albums, together with certificates for photographs to be taken at independent affiliated studios, to cease representing falsely in advertising, on certificates sold to customers, and by statements of their salesmen that the person solicited had been specially selected, was to receive an album free, and was charged only for photographs; that their regular prices were promotional and reduced; that the photographs provided by the certificates were of natural gold-tone finish; and that they had arrangements with photographers all over the country who would honor the certificates; to cease obtaining signatures on order blanks on the pretense that they were receipts for free albums, and attempting to collect from the signers; and to cease representing falsely, through use of their corporate name, that their business was an international association of photographers.

Mr. W. J. Tompkins and *Mr. Edward F. Downs* for the Commission.

Arkin & Weissman, of Culver City, Calif., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

HISTORY OF THE PROCEEDING

On February 5, 1954, the Federal Trade Commission issued its complaint in this proceeding, charging the above-named respondents with violation of the Federal Trade Commission Act by the use of false, deceptive and misleading statements and representations in connection with the sale and distribution of photographic albums and certificates for photographs to be taken in independent studios in various States of the United States. On March 5, 1954, the respondents submitted their answer denying the principal charges of the complaint. In due course evidence both for and against those charges was duly received into the record, and proposed findings as to the facts and proposed conclusions were submitted.

IDENTITY AND BUSINESS OF RESPONDENTS

Respondents admit that respondent International Association of Photographers is a corporation organized and existing under and by virtue of the laws of the State of California, with its office and prin-

cipal place of Business located at 1610 North Wilcox Avenue, Hollywood, California; that respondents Ray M. Mitchell, Frank Grzesiek, Raymond C. Ries, John Mason and Betty C. Mitchell, whose address is the same as the one just given, are individuals and officers of the corporate respondent; and that they direct and control the policies, acts and practices of the corporate respondent.

Respondents also admit that they are now, and for more than two years last past have been, engaged in the sale and distribution of photograph albums, together with certificates for photographs to be taken at independent affiliated studios; that in the course and conduct of their said business, respondents have caused their photograph albums, when sold, together with the certificates, to be transported from their place of business in the State of California to purchasers thereof located in various other States; that they maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States; that their volume of trade in said commerce has been substantial; and that they further engaged in commerce in that they transmit various instruments of a commercial nature to their customers located in States other than the State of California and receive from said customers instruments of the same nature.

The record shows that the respondents, in connection with and as a part of their business, have entered into agreements or understandings with a large number of photographic studios located in all or most of the States of the United States, whereby said studios have agreed to honor certificates for photographs to be taken by them and thereafter delivered to the purchasers of respondents' combination album and certificate. These certificates provide that the holders thereof are entitled to receive either ten or fourteen different 8 x 10 photographs of any member of their families, to be taken by the designated studio at the rate of two a year, at intervals of not less than ninety days.

In furtherance of the sale of respondents' album-certificate combinations, salesmen employed by respondents have called upon mothers of newly-born infants, whose names they have usually obtained from lists of births published in newspapers, and have solicited such mothers to purchase respondents' album-certificate combination.

The albums so offered were made either of plastic or leather. The plastic albums have been sold, together with a certificate for ten pictures, for $39.95, and the leather albums have been sold, together with a certificate for fourteen pictures, for $49.95.

THE ISSUES

The complaint divides the alleged misrepresentations disseminated by the respondents into three kinds:

1. The alleged misrepresentations made by respondents or their sales agents to prospective purchasers;

2. The alleged misrepresentation of an order blank as a receipt for an album; and

3. The alleged misrepresentation inherent in respondents' use of the phrase "International Association of Photographers" as a corporate name.

In their answer respondents denied that they made some of the alleged representations, and the falsity of all representations they admit making. The issues are, therefore, whether respondents have made the alleged representations, and, if so, whether such representations are in fact false, misleading and deceptive. The determination of these issues requires detailed enumeration of the various representations in question, and a thorough analysis thereof in the light of the entire record. These representations are alleged in the complaint as follows:

REPRESENTATIONS MADE BY RESPONDENTS OR THEIR SALES AGENTS TO PROSPECTIVE PURCHASERS

1. That the person solicited has been especially selected, was to receive an album free, and that the charge made was for the photographs.

This representation is alleged to be false in that prospective purchasers were not especially selected, and that the album was not free, the price thereof being included in the amount charged the customer for the combination deal of album and certificate.

Respondents admit that they have represented that the persons solicited had been especially selected, but maintain that they were so in fact, in that they are selected in a manner determined by respondents' salesmen, who, respondents contend, are independent dealers rather than agents of the respondents. They also admit that their album has at times been described to prospective purchasers as "free," but contend that all of the requirements concerning the purchaser thereof have been explained to the prospective purchasers before they signed an order blank, and, accordingly, no deception resulted.

All of the above contentions are without merit. The evidence shows that respondents' prospective purchasers were chosen because they belonged to the class of families who have young children and are therefore naturally interested in purchasing pictures of their children and an album to contain them. The names of such prospects were, in

most instances, secured from birth announcements published in newspapers. This basis of selection embraces such a large proportion of the purchasing public that the element of special selection, as that term would ordinarily be understood by a prospective purchaser, is not present, and its use in the instant connotation, therefore is deceptive.

The evidence shows, further, that respondents' salesmen presented both written and oral representations to prospective purchasers in the name of the corporate respondent. The literature, order blanks and certificates used in offering for sale and selling respondents' album-certificate combination were all furnished by and in the name of the corporate respondent. Payments were made by purchasers to the corporate respondent either indirectly, through the salesmen, or directly, by mail. Much of the profit made by respondents through the sale of their album-certificate combinations resulted directly from the efforts of these salesmen. Regardless, therefore, of the fact that respondents consider such salesmen to be independent contract dealers over whose representations respondents assert they have no control, respondents are responsible for all representations made by such salesmen in the process of offering for sale and selling respondents' album-certificate combinations.

No seller of a product can in justice furnish to others literature and order blanks bearing his name, creating thereby in the minds of prospective purchasers the impression that the person selling his product is his authorized sales representative, and thereafter, having enjoyed, through the efforts of such representative, a substantial volume of business, disclaim responsibility for any representation, either oral or written, by which such business was obtained. This principle has been repeatedly affirmed both by the Commission and by the courts.

The album, which is represented by respondents' salesmen as being free, is shown by the evidence not to be free in fact, because its cost is included as part of the price charged for the album-certificate combinations. Furthermore, the salesmen have, at the beginning of their conversation with the prospective purchaser, represented that the album is free, and have by that means gained admittance to the prospect's home. Later explanation of this misrepresentation to the prospective purchaser does not alter the fact that deception was earlier used to gain such admittance. Accordingly, it must be concluded that respondents' prospective purchasers are not especially selected; that the album is not given free; and that the two representations described above, for which respondents are responsible under the Federal Trade Commission Act, are false and misleading.

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2. That the prices of $39.95 and $49.95 for the albums and certificates were promotional and reduced prices.

It is alleged that these prices were not promotional or reduced prices, but were the prices usually and customarily charged by respondents for their albums.

The evidence shows that these prices were termed "promotional" on respondents' order blanks, and that they were inferentially presented as reduced prices in respondents' correspondence, particularly in respondents' letters to purchasers acknowledging receipt of orders for the album-certificate combination, wherein respondents informed the purchaser that he was receiving, for $39.95 or $49.95, merchandise worth $117.00 or $159.50, as follows:

> These ten separate portrait settings would regularly cost $79.50, but with this you receive ten portraits and a Genuine Custom Made Album which has an established price of $37.50. Total cost of this combination offer to you as stated in your contract is $39.95, plus tax and $1.00 delivery charges. This equals far less than the price of the portraits alone. * * *.

Respondents contend that their prices are promotional, and respondent Mitchell, in his testimony, states that they are reduced prices, because all the items comprising respondents' album-certificate combinations, including the photographs to be furnished by the various studios, would, if purchased separately, on the open market, cost more than $39.95 or $49.95. This contention is obviously fallacious. Respondents' prices cannot truthfully be said to be "reduced," since no one can reasonably claim that his price is a reduced price because it is less than someone else's price for a similar item. To be in fact a "reduced" price, the price must have been marked down from the seller's own former higher price. Nor can respondents' prices be truthfully said to be "promotional." They were not made as an introductory or promotional offer; in fact they were no more promotional than any price quoted with the expectation of making a sale. The evidence shows that the two prices at which respondents offer their two album-certificate combinations are the only prices at which these two combinations have been offered for sale; they are, therefore, respondents' usual and customary prices for such combinations, and are not in any sense "reduced" or "promotional."

Accordingly, it must be concluded that this representation is false, deceptive and misleading.

3. That the combination album-certificate deal was of the value of from $117.00 to $159.50.

This represented value is alleged to be fictitious because the amounts included for the photographs were in excess of the price charged therefor by photographers affiliated with respondents.

Respondents admit making the above representations as to the value of their album-certificate combination, but contend that such representation is true. Their contention is based on the theory, which is supported by uncontradicted evidence, that the average price of 8 x 10 photographs of comparable quality to those furnished under their certificate would, when added to the self-appraised value of their albums, equal the values of $117.00 to $159.50, as represented.

Counsel supporting the complaint does not question the self-appraised value of respondents' albums, or the arithmetical conclusion of the represented values. He contends, however, that since the values of the photographs, as represented by respondents, are based upon an average value of photographs throughout the country, they must include larger as well as smaller prices, so that, in some instances where lesser prices prevail, the represented values must be a misrepresentation. The question to be determined, however, is not whether the values represented by respondents are in some instances higher than the prices prevailing in a particular area, but whether they are, as alleged, fictitious.

Webster's New International Dictionary, 2nd Edition, Unabridged, defines "fictitious" as "feigned, imaginary, pretended—arbitrarily devised." In the light of all the evidence, it is clear that the represented values are not feigned, imaginary, or pretended, because they are based upon averages which approximate true values. There is no evidence in the record to show to what extent the price used as a criterion by respondents varies from the average, and therefore no basis for a conclusion that such variation was in fact substantial. In areas where the average price of photographs prevails, respondents' represented values are in accord with the facts; in areas where the price is higher than the average used by respondents, the variation is in favor of the prospective purchaser; and in areas where the price is lower, the degree of variation has not been shown.

Respondents' represented values cannot be said to be arbitrarily devised, since, according to testimony in the record, they result from a determination of average values of photographs over a considerable area, and were obviously arrived at by means of reasonable calculation based thereon, as distinguished from a random determination of values based on whim or caprice.

Accordingly, it must be concluded that this allegation, that respondents' represented values of $117.00 to $159.50 are fictitious, has not been sustained.

4. That Respondents have arrangements with photographers all over the country who will honor their certificates and that no matter where the holders

of certificates may reside during the time the certificates are in force a photographer who will honor the certificates will be readily available.

The above representation is alleged to be false because, although respondents have a large number of photographic studios who have contracted to honor their certificates, certificate-holders, as a matter of fact, have found, upon moving to another area, that there were no photographers readily available there who would honor the certificates they held.

Respondents admit that in some rare and exceptional instances certificate-holders have failed to find a convenient studio that would honor their certificates. The evidence shows that certain purchasers, upon moving to another area of the country, have failed to find a studio that would honor their certificates. Accordingly, it must be concluded that the above representation has the capacity and tendency to mislead and deceive some prospective purchasers.

5. That the photographs, to which a purchaser was entitled under the certificate, were of natural gold tone finish.

It is alleged that respondents represented that the photographs to which a purchaser would be entitled under the certificate were of natural gold tone finish, and that this representation is false, in that the photographs were not of natural gold tone finish, but were of ordinary sepia tone.

Respondents admit that in some instances the photographs furnished to the certificate-holders by the studios were not of natural gold tone finish. The evidence shows that the representation was made, as alleged, by the respondents within the period of time contemplated in the complaint. It must be concluded, therefore, that the above representation is false, misleading and deceptive.

THE PRACTICE OF OBTAINING SIGNATURES ON ORDER BLANKS BY REPRESENTING TO PROSPECTIVE PURCHASERS THAT THE ORDER BLANK IS A RECEIPT FOR AN ALBUM

It is alleged that respondents' sales agents, in some instances, have represented to prospective purchasers who appeared to be unwilling to purchase an album-certificate combination, but who had expressed a desire to accept an album free, that the album would be given them free, but to obtain it they must sign a receipt, which "receipt" was in fact a contract obligating the signer to purchase respondents' album-certificate combination. Having obtained the signature, the sales agent would thereafter make a notation on the signed order blank that a down-payment of $5.00 had been made, and respondents would attempt to collect the balance of $34.95 or $44.95 on the "purchase" of the album-certificate combination.

It is alleged that such a practice by respondents constitutes an unfair and deceptive act and practice.

Respondents contend that their "independent dealers" did not engage in the above-described practice, and, conversely, that "* * * the corporate respondent penalizes the dealer who is guilty of such practice and * * * does all in its power to prevent this situation from reoccurring." Respondents further contend that "* * * where the customer informs respondent corporation that this had taken place that corporate respondent upon receiving a satisfactory proof that this is the true situation, cancels the said contract and does nothing further * * *" to attempt to collect the amount therein set forth.

The evidence in the record, as well as respondents' admission quoted above, clearly supports that part of the allegation relating to the obtaining of orders by the fraudulent use of an order blank as a "receipt" for a free album. Furthermore, the evidence shows that respondents have, on some occasions, attempted to collect the purchase price of the album-certificate combination on the basis of "orders" procured in the manner above described. Accordingly, it must be concluded that the above allegation has been sustained, and that such practice constitutes an unfair and deceptive act and practice.

THROUGH THE USE OF THE CORPORATE NAME, INTERNATIONAL ASSOCIATION OF PHOTOGRAPHERS, RESPONDENTS HAVE REPRESENTED THAT THE CORPORATE RESPONDENT IS AN ASSOCIATION OF PHOTOGRAPHERS ORGANIZED UPON AN INTERNATIONAL BASIS

It is alleged in the complaint that through the use of the corporate name "International Association of Photographers," respondents represent that the corporate respondent is an association of photographers organized on an international basis. This representation is alleged to be false in that said corporation is not an association, nor is it engaged in the photographic business upon an international scale or otherwise, but is engaged primarily in the sale of photograph albums for profit.

The evidence shows that respondent corporation is a corporation organized primarily for the purpose of engaging in the sale and distribution of photograph albums, in combination with certificates which entitle the purchaser to receive a number of photographs, within a designated period of time, from various photographic studios who are under contract to respondent corporation to honor said certificates whenever and wherever presented. Respondents have been actively engaged in this business. By means of this sales plan, respondents promote the sale of photographs by the studios under contract with them, and at the same time promote their own sale of

albums. Respondent corporation was created to be a profit-making organization, and any "improvements" that it may bring to the photographic industry are incidental to its primary purpose of making a profit. The evidence shows, further, that the direction and control of the corporate respondent is vested in its officers, and not in the so-called "member" studios, which have no voice in the selection of such officers nor in the determination of the policy and practices of the corporate respondent. The photographic studios under contract with the corporate respondent are not brought together at meetings or otherwise for the mutual exchange of ideas relative to photography. The legal obligation which they have undertaken, that of honoring respondents' certificates, when presented, by furnishing photographs to respondents' customers, and thereby gaining an opportunity to sell additional photographs on their own account to those customers, does not in fact constitute any "association" whatever between or among the photographic studios under contract to respondents; and the only "association" of any kind whatever between respondents and the photographic studios is the narrow, contractual one of promoting sales of photographs for mutual profit.

It must be concluded, therefore, that respondents' use of the corporate name "International Association of Photographers" is false, misleading and deceptive.

CONCLUSION

In the light of the above analysis, this proceeding is found to be in the interest of the public. It is further found that the acts and practices of the respondents hereinabove concluded to be false, misleading and deceptive have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such acts, statements, representations and practices are true and to induce the purchasing public to purchase substantial quantities of respondents' album-certificate combinations as a result of such erroneous and mistaken belief; that such acts and practices 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

Wherefore, the premises considered, an order to cease and desist is issued, as follows:

It is ordered, That respondents International Association of Photographers, a corporation, and its officers, and Ray M. Mitchell, Frank Grzesiek, Raymond C. Ries, John Mason and Betty C. Mitchell, indi-

vidually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of photograph albums or certificates for photographs, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication—

(*a*) that they sell only to selected persons;

(*b*) that their albums are given free or without cost;

(*c*) that the prices at which they regularly or customarily sell their products are reduced or promotional prices;

(*d*) that the photographs provided by respondents' certificates are of natural gold tone finish;

2. Misrepresenting the number and availability of photographers who will honor certificates issued by respondents;

3. Obtaining signatures on order blanks upon the pretense that they are receipts for free albums, or attempting to collect from the persons who may have signed such blanks;

4. Using the corporate name "International Association of Photographers," or any other name of similar import to designate, describe or refer to respondents' business, or otherwise representing that their business is an association, international or otherwise, of photographers.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

Respondents (a corporation and individual officers thereof, who admittedly direct and control its policies, acts and practices) are charged with unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. It is admitted that respondents are engaged in commerce; that they sell and distribute photograph albums, together with certificates for photographs to be taken at independent studios with whom respondents have previously made arrangements. Selling is done through "dealers" who are in effect salesmen selling by personal solicitation.

The hearing examiner found against the respondents as to all alleged misrepresentations, except "that the combination album-certificate deal was of the value of from $117 to $159.50." Respondents appeal.

The alleged misrepresentations involved in this appeal are:

(1) That the person solicited has been especially selected, was to receive an album free, and that the charge was made for the photographs.

(2) That the prices of $39.95 and $49.95 for the album and certificates were promotional and reduced prices.

(3) That respondents have arrangements with photographers all over the country who will honor their certificates and that no matter where holders of certificates may reside during the time the certificates are in force, a photographer who will honor the certificates will be readily available.

(4) That the photographs to which a purchaser was entitled under the certificate were of natural gold tone finish.

(5) That signatures are obtained on order blanks by representing to prospective purchasers that the order blank is a receipt for an album.

(6) That through the use of the corporate name, International Association of Photographers, respondents have represented that the corporate respondent is an association of photographers organized upon an international basis.

1. Selection of Prospects and Gift

Part of respondents' answer is "that they state that the persons have been especially selected and in truth and in fact the persons solicited are especially selected but the selection is made by the franchised dealers who sell the album-portrait plan."

It is not disputed that names of prospects are secured from birth records kept by hospitals, clinics and similar sources. The sales force, sometimes with the assistance of the studio operator, further narrows the list by giving consideration to such facts as the number of children, location of the home, parents' economic status, etc. The method followed is for the purpose of securing good prospects and for the benefit of the seller rather than the purchaser.

The Commission recently considered a similar situation in the matter of General Products, Docket 6211, and what we said there is applicable here. We agree with the finding of the hearing examiner that the representation of special selection, as made in this case, has the capacity and tendency to deceive.

Admitting that the album has at times been described as "free," respondents nevertheless insist that all the requirements have been explained prior to the purchase and that the free goods rule, as laid down in the *Black* case, Docket 5571, has not been violated.

Such contention is not supported by the evidence. Several witnesses testified they were told they were to receive a gift and were not advised that there was any obligation on them, such as agreeing to pay for photographs.

Nor can it be said that the album was, in fact, free. Respondents sell for a stated amount an album and certificates entitling the purchasers to have photographs taken by a local studio. All the money collected goes to respondents. The studio pays no dues nor commission to respondent, and is interested in the plan largely because of its promotional and advertising value. The real interest respondent has in the scheme is the sale of its property, the album.

As to the various claimed misrepresentations made by salesmen, respondents point out that they do not control the details of their dealers' or salesmen's daily operations. They do, however, furnish the supplies, order blanks, etc. Contracts are made by the purchaser with the respondents and most of the payments are made to them. According to the contract, salesmen are paid a profit which is really a commission.

The facts here are similar to those in *Perma-Maid Company* v. *FTC*, (1941) 121 F. 2d 282, where the acts of selling agents were held to be within the scope of their employment and the respondent must assume full responsibility therefor.

2. Reduced and Promotional Prices

Respondents' literature asserts that the quoted prices of $39.95 and $49.95 are promotional and reduced prices. In their answer, respondents admit the representation as to reduced and promotional prices and "further state that in truth and in fact, the prices for which the said albums and certificates are sold are reduced rates in that by comparison with the retail selling price of the said album plus the average retail price of the number of portraits to which the purchasers are entitled, far exceed the prices for which the albums and certificates are sold."

That is, the value, if the purchaser avails himself of the certificate, is greater than the purchase price. Nevertheless, the $39.95 and $49.95 are the charges regularly made by respondents; it appears they never sold at different prices. Nor are these prices special prices made for a special occasion or for a particular purpose.

The terms "reduced prices" and "promotional prices" are frequently used and have acquired an established meaning to the ordinary prospective buyer. They mean that the seller formerly sold the article at a certain price and that now he is selling it at a lesser price. It is not the statement of an opinion, such as often exists when reference is made to value, it is a statement of fact that invites comparison between a former price and a present lesser price.

The complaint did make a charge having to do with value, to wit, that the combination album-certificate deal was of the value from

$117 to $159.50. As to that, the hearing examiner found the evidence insufficient to support an order.

The use of the terms "reduced" and "promotional" do not clearly describe the respondents' pricing policy and have the capacity and tendency to deceive.

3. That the respondents have arrangements with photographers all over the country who will honor the certificates and that no matter where the holders of certificates may reside during the time the certificates are in force, a photographer who will honor these certificates will be readily available

Respondents object to the following finding of the hearing examiner as not being supported by the evidence: "The evidence shows that certain purchasers, upon moving to another area of the country, have failed to find a studio that would honor their certificates."

We do not find any evidence to support that finding. There is, however, evidence to the effect that one salesman said: "You can go into any studio around and get the photographs"; that one purchaser, after having three photographs taken, discovered that the designated studio had cancelled its contract with respondents and the nearest studio representative was in another city some 12 miles distant; that another customer was told that respondents had studio representatives in different cities and "most principal cities, I believe she said, and if I ever moved, that I could have them take it, you know, just about anywhere. I don't believe she told me that they had them in every city, but pretty near." Respondent Ray M. Mitchell testified there were about 700 member studios located in practically all the states and in some foreign countries. It also appears that the contracts for pictures are transferrable and that a purchaser moving to a new location may have the contract completed by another studio member and that in case none can be found, the purchaser may send in a negative for enlargement by respondents. It appears, however, that this information was ordinarily given to the purchaser after the signing of the order.

We find that there were misrepresentations as to the number and availability of photographers who will honor certificates issued by respondents and that the order of the hearing examiner in that respect is proper.

4. That the photographs were of natural gold tone finish

At least three certificates introduced into evidence refer to the portraits to be furnished as "in natural golden tone finish". The testimony of the respondent Mitchell was to the effect that respond-

ents once used the term "gold tone" in their certificates. "Then later, because we found out that there had been some kind of controversy on gold tone through the Better Business Bureau, we changed it to 'golden tone.'" Still later "we changed it to 'tone' portrait, to have the photographer determine whatever type of developer he used." The reference "natural golden tone" was used in 1947 and 1948 and customers were not getting that in some cases.

Although the record on this phase of the case is not too satisfactory, we see no reason for interfering with the finding and order of the hearing examiner.

5. Obtaining signatures on order blanks by deceptive means

Several witnesses testified that they signed a document presented by the salesmen and represented by him to be simply a receipt, the signing of which was necessary to secure the album as a gift.

These documents, which were in fact order blanks, were sent to the respondents with a notation that the purchaser had paid $5.00 on account, when, in some cases, nothing or a lesser amount was actually paid. There is evidence that respondents tried to collect the amounts claimed to be due and on occasion utilized the services of a collection agency. When collections were disputed and the alleged purchaser would sign a notarized statement setting out the facts, the matter would be dropped.

Respondents claim they disapproved of this practice and imposed penalties on their salesmen who engaged in it. They also claim that the instances complained of were unauthorized acts of their salesmen which they tried to prevent, and that, in any event, the facts do not indicate that it was "a practice" of respondents. Nevertheless, the acts disclosed in the evidence are sufficient to warrant the finding and order entered by the hearing examiner. *Fox Film Corporation* v. *FTC*, (1924) 296 F. 353. *Gimbel Brothers, Inc.* v. *FTC*, 116 F. 2d 578.

6. Misrepresentation based on the use of the corporate name International Association of Photographers

The above-named is a corporation organized for profit. The articles of incorporation are not in evidence. The business was formerly owned and operated by Ray M. Mitchell, president of the corporation, as sole proprietor. When the corporation was created, he sold the business to the corporation in exchange for stock.

It does not appear that the studio owners own stock, or have any rights in or control over the corporation, except as contained in their individual contracts with the corporation, a copy of which is in evidence.

Under their agreements, the studio owners agree to honor the certificates sold by respondents and to furnish photographs and proofs in accordance therewith. The corporation agrees to act as good-will ambassador for the studio owners, to deliver albums as provided, to furnish the studio certain merchandise, and to sell other merchandise at prices which are claimed to effect considerable savings. No meetings of the cooperating studios have ever been held. There are no dues and no reports. Either party may cancel the contract "with cause" on 90 days' written notice.

Several studio owners having contracts with the corporation testified that they selected the dealers and at least helped select the prospects. One described the organization as a very good membership of studios who have a working merchandising plan. Respondent Ray M. Mitchell testified that the main business was selling portrait plans or programs.

We have no doubt that the working arrangement between the corporation and studio owners had elements of potential advantage for both. Nevertheless, it cannot be described as an association of photographers as that term would be normally understood. The corporation was obviously owned and controlled by a few people and its principal source of profit was the sale of albums to the public. The arrangement with the studios was for the purpose of furthering the sale of albums. That the name would have a tendency and capacity to deceive is indicated by the fact that some customers testified they understood they were doing business with an organization of photographers.

Except as modified herein, the findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission. The appeal of respondents is denied and it is directed that an order issue accordingly.

FINAL ORDER

The respondents in this proceeding having filed their appeal from the initial decision of the hearing examiner; and the matter having been heard on briefs and oral arguments of counsel; and the Commission having rendered its decision modifying the findings contained in the initial decision and adopting as its own decision the initial decision as so modified:

It is ordered, That to the extent noted in the accompanying opinion the respondents' appeal be, and it hereby is, granted. In all other respects, said appeal is hereby denied.

It is further ordered, That the respondents, International Association of Photographers, a corporation, and Ray M. Mitchell, Frank

Grzesiek, Raymond C. Ries, John Mason, and Betty C. Mitchell, individuals, 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 contained in the aforesaid initial decision.

IN THE MATTER OF

MITCHELL S. MOHR TRADING AS NATIONAL RESEARCH COMPANY AND SYDNEY FLOERSHEIM TRADING AS S. FLOERSHEIM SALES COMPANY

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

Docket 6236. Complaint, Oct. 11, 1954—Decision, June 1, 1956

Order requiring two individuals engaged in selling printed mailing forms for use of collection agencies and merchants in obtaining information concerning debtors, to cease using on printed forms, mailed from Washington, D. C., the terms "Claims Office," "Reverification Office," and "United States Credit Control Bureau," and particularly the words "United States" and the picture of an eagle similar to that on the United States seal, representing falsely thereby that their requests for information came from an agency of the United States Government; to cease stating falsely in said "Claims Office" and "United States Credit Control Bureau" forms that certain amounts of money were "collectible" and "due" the addressee; and to cease representing falsely through use on other printed forms of the terms "Cigarette and Tobacco Research Bureau" and "National Gasoline Research Bureau," together with the nature of the inquiries on the forms, that they represented research projects.

Mr. Michael J. Vitale for the Commission.
Mr. Murray M. Chotiner, of Beverly Hills, Calif., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

The Respondents herein are charged with violating the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in commerce, through the dissemination of deceptive printed forms designed to entice defaulting debtors to furnish certain information about themselves.

The complaint, which was issued on October 11, 1954, alleges that the respondents, through the use on certain printed forms of the terms "Claims Office," "Reverification Office" and "United States Credit Control Bureau," and particularly through the use of the words "United States" and a picturization of an eagle similar in design to that appearing on the seal of the United States Government, represent and imply to those to whom such forms are mailed that the requests for information contained therein emanate from an agency of the United States Government. Such implication, it is alleged, is enhanced by the fact that respondents mail such forms in

Washington, D. C. In addition, it is alleged that respondents insert in their "Claims Office" and "United States Credit Control Bureau" forms the statement that certain amounts of money are "collectible" and "due," thereby representing that the amounts so inserted in the forms are due and owing to the persons to whom the forms are mailed, and that by furnishing the information requested thereon, they will be entitled to receive such sums.

The above-described representations are alleged to be false, in that the so-called "Claims Office," "Reverification Office" and "United States Credit Control Bureau" are not agencies of the United States Government, and further, that there is no money due to the persons to whom the forms are sent.

The complaint further alleges that Respondents have also disseminated, in like manner, certain other printed forms wherein their use of the terms "Cigarette and Tobacco Research Bureau" and "National Gasoline Research Bureau," together with the nature of the inquiries made through such forms, serves to represent, and to place in the hands of purchasers of such forms instrumentalities by and through which such purchasers may represent, that research projects are being carried on for the purpose of ascertaining the brand of cigarettes smoked by the addressee of such printed form, and other information respecting cigarettes in the first instance, and to ascertain the brand of gasoline used by the addressee and other information respecting his use of gasoline, in the second instance. It is further alleged that such representations are enhanced by the fact that respondents cause the cigarette forms to be mailed in Richmond, Virginia, an important center of the cigarette industry, and the gasoline forms to be mailed in Oklahoma City, Oklahoma, a center of the gasoline industry.

These cigarette and gasoline forms are alleged to be misleading in that the respondents are not now, and never have been, engaged in a research project concerning cigarettes or gasoline.

The complaint concludes that the sole object of Respondents' various printed forms is to obtain information by subterfuge.

THE ANSWER

On November 12, 1954, respondents submitted their answer to the complaint herein, admitting that they are, and have been, engaged in the business of selling in commerce the printed forms described in the complaint, to collection agents, merchants, and others. Respondents also admit the use of various trade names in the conduct of their business, and their mailing of the forms in question in Washington, D. C., Richmond, Virginia, and Oklahoma City, Oklahoma. Respondents assert, however, that the forms designated as "Claims Office,"

"United States Credit Control Bureau" and "National Gasoline Research Bureau" were discontinued prior to the issuance of the complaint.

Specifically, respondents allege that the words "United States" which they use on some of their forms are also commonly used by numerous firms and businesses located in Washington, D. C. and elsewhere as part of their respective firm names, and are so widely used that they do not represent that such firms are agencies of the United States Government.

Respondents also allege that the picturization of an eagle on private documents has become so widely used that it does not imply that such forms belong to the United States Government. In addition, they assert that the eagle used on the seal of the United States Government differs from the eagle used by them in at least thirteen respects; for instance, the head of the United States eagle faces left, that of respondents' eagle faces right; the beak of the United States eagle is pointed sideways, that of respondents' eagle is pointed upwards; the beak of the United States eagle is closed, that of respondents' eagle is open; and the left talon of the United States Eagle holds an olive branch, while that of respondents' eagle rests on a portion of a shield. Respondents allege that because of such differences, their use of the eagle is not deceptive.

Respondents in their answer explain that the "Cigarette and tobacco Research Bureau" forms were used to obtain information for vending-machine companies for the purpose of determining the feasibility of using such research information commercially. Respondents admit that the "Claims Office," "Reverification Office" and "United States Credit Control Bureau" are not agencies of the United States Government. They further admit that no money is due to those persons to whom such forms are sent, but assert instead that the addressees owe to respondents' customers the sums appearing on the forms and that the major portion of the business of the National Research Company is to sell forms and service for the purpose of obtaining information concerning debtors for the respondents' customers. Respondents admit that some of the persons receiving such forms may have been misled or deceived, but they contend that the number of such persons is comparatively small when compared with the total number of persons receiving the forms.

As an affirmative defense, respondents allege, first, on the basis of information and belief, that the only persons to whom such forms are mailed are debtors who have defaulted on obligations owing to respondents' customers. Secondly, they allege that the number of defaulting debtors and the amount of money owed by them has

become so great that considerable losses are being sustained by merchants, to the extent that it is seriously affecting commerce and sound business conditions; that such losses are all to the prejudice and injury of the public in that such losses are passed on by the merchants, in many instances, directly to the buying public in the form of increased prices; wherefore respondents pray that the complaint against them be dismissed.

RESPONDENTS' IDENTITY AND ACTIVITIES IN COMMERCE

The record shows, and respondents admit, that respondent Mitchell S. Mohr is an individual trading and doing business under the name of National Research Company, with his office and principal place of business at 452 Washington Building, Washington, D. C.; that respondent Sydney Floersheim is an individual trading and doing business under the name of S. Floersheim Sales Company, with his office and principal place of business at 7319 Beverly Boulevard, Los Angeles, California; and that respondent Floersheim is the exclusive sales agency for respondent Mohr. Both respondents are now, and for more than one year last past have been, engaged under their respective trade names in the business of selling in substantial volume in commerce certain printed mailing forms, which are designed and intended to be used, and are used, by collection agencies, merchants and others to whom they are sold for the purpose of obtaining, with the aid and assistance of respondents, information concerning the purchasers' debtors.

RESPONDENTS' FORMS

The printed forms sold by respondents are of six types, as follows:

1. The "Claims Office" form, consisting of a single sheet, perforated to permit easy detachment of the lower portion. This form is designed to be forwarded to the addressees in an envelope provided by respondents, enclosing a return envelope addressed to "Claims Office, 100 Barr Building, Washington, D. C."

2. The "Reverification Office" form, consisting of a printed card perforated on the left side. The return envelope enclosed with this form is addressed to "Reverification Office, 422 Washington Building, Washington, D. C."

3. The "Credit Control Bureau" forms, consisting of two types of card. The return envelope accompanying this form is addressed to "United States Credit Control Bureau, 422 Washington Building, Washington, D. C."

4. "New Employment Status Questionnaire," consisting of a printed card perforated on the left side. The return envelope in this instance

bears the address, "Office of Employment Reclassification, 2017 S Street, N.W., Washington, D. C."

5. The "Disbursements Office" forms, consisting of a single sheet perforated near the center and bottom to permit easy detachment of both portions. The return envelope for this form is addressed to "Disbursements Office, 300 Calvert Street, N.W., Washington, D. C."

6. The "Cigarette" and "Gasoline" forms, consisting of double post-cards perforated to permit easy separation. The detachable portions of these cards are addressed, respectively, to "Cigarette and Tobacco Research Bureau, 1 No. 6th Street, Richmond, Virginia" and "National Gasoline Research Bureau, 601 Leonhardt Building, Oklahoma City, Oklahoma."

The return envelopes and the detachable portions of the double cards all provide that return postage will be paid by the addressees. Respondents have established mailing addresses at the various locations in Washington, D. C., Richmond, Virginia and Oklahoma City, Oklahoma.

Each of these forms sets out questions which, if answered, will provide information considered to be of value in the collection of accounts owed or alleged to be owed by the addressee. The purchasers of said forms fill in, in the spaces provided, the name of the alleged debtor and other appropriate data, including, on the "Claims Office" and "Credit Control Bureau" forms, the amount of the alleged indebtedness, and send the forms in bulk to respondents' agents at the appropriate mailing address, whereupon respondents' agents at that location mail the forms to the addressees. If the addressee completes the form and returns it, respondents' agents forward the form to respondents in Los Angeles, California. There the forms are processed and either the completed forms or the information thereon are forwarded to the purchasers of the forms. Respondents detach the upper portion of the "Disbursements Office" form, insert the amount of ten cents, sign the check, and return it to the addressee.

FORMS IMPLYING CONNECTION WITH THE UNITED STATES GOVERNMENT

Respondents, by their use on three forms of the respective terms "Claims Office," "Reverification Office" and "United States Credit Control Bureau," and particularly their use of the words "United States" as part of the latter term, together with the format and phraseology of each of these three forms, represent, and place in the hands of their customers instrumentalities whereby they may represent and imply to the recipients thereof, that the requests for information contained therein are made by an agency of the United States

Government. This implication is enhanced by the further fact that such forms are mailed by respondents from Washington, D. C.

Respondents contend in their defense of their use of the words "United States" that these words are used as a part of so many trade names throughout the country that they carry no implication of connection with the United States Government. Such contention appears to overlook the basic fact that the words "United States," however used, connote some connection with the Government of the United States. The question, of course, of whether actual deception results from the use of those words as part of a trade name must be determined on the merits of each individual case. In the present instance, the inference of Government connection resulting from respondents' use of the words "United States" on its printed collection forms is enhanced by the use thereon of the picturization of an eagle resembling the eagle appearing on the Great Seal of the United States, and by the fact that such forms bear a Washington, D. C. return address and are mailed by respondents from the Nation's Capital.

Respondents further contend that the picturization of an eagle on their forms is not deceptive, first, because such picturization on private documents has become so widely used that it does not imply any connection with the United States Government. Second, they contend, in substance, that thirteen differences between their eagle and the eagle appearing on the Great Seal of the United States prevent deception. Both of these contentions are refuted by the facts.

The American eagle has, throughout the life of this nation, been employed as a symbol of Governmental power and authority, and its picturization on any document has the tendency, therefore, to suggest the governmental authority of the United States. When an eagle is used on a private document, its tendency to suggest such governmental authority may be increased or lessened by the manner and form in which it appears thereon. In the present case, respondents' eagle is used in such a manner as to increase its tendency toward deception rather than to lessen it. Furthermore, although the thirteen differences in design between respondents' eagle and that on the Great Seal of the United States do exist, these differences do not eliminate the tendency toward deception resulting from respondents' use of an eagle on their forms.

In this connection it should be observed that the eagle appearing on the Great Seal of the United States is not the only picturization of an eagle officially used by the United States Government. Judicial notice is taken of the fact that at least four different eagle designs are officially used by the United States Government on its coinage, all of which differ materially from that appearing on the Great Seal of the

United States. In order, therefore, to eliminate the capacity and tendency toward deception inherent in respondents' use of an eagle on their forms, it would be necessary for the public at large to have specialized knowledge of the picturizations of eagles appearing, not only on the Great Seal of the United States, but on silver dollars, half-dollars and quarters, and of all the respects in which such designs differ from each other and from respondents' eagle.

We are compelled to conclude that all of these factors including the fictitious names of non-existent offices from which the forms purport to emanate, the use of the words "United States" as part of one such name, the phraseology of each form, the use of an eagle thereon, and the Washington, D. C. return address and mailing, tend, in conjunction one with another, to foster the erroneous belief and perpetrate the deception that respondents' fictitious offices are a part of the United States Government. We are likewise compelled to conclude that respondents have exploited such belief and consequent deception for the purpose of inducing the recipients of their forms to furnish information about their personal affairs.

FORMS IMPLYING AN EMPLOYMENT SURVEY

Respondents, by their use on one form of the term "New Employment Status Questionnaire" and the inquiries made thereon, represent, and place in the hands of their customers an instrument whereby they may represent and imply to the recipients thereof, that a general survey is being made to determine the change of employment status of employees generally and the reason therefor.

In fact, no such general survey is being made. The sole purpose of such form is to locate the recipient and obtain from him information as to his present employment status, which information respondents forward to those of their customers who have purchased this form, and who allege the recipients of such forms to be their delinquent debtors.

FORMS IMPLYING TO THE RECIPIENT THEREOF THAT MONEY IS DUE HIM

Respondents, in their "Claims Office" and "United States Credit Control Bureau" forms, have represented, by the use therein of the statement that a specific sum of money is "collectible" and "due," that such sum is due and owing to the recipient of the form, and may be collected by him by filling in the information concerning his personal affairs requested thereon, and returning the completed form, by mail or in person, to such "Claims Office" or "United States Credit Control Bureau." In fact, no money is due the recipient of such forms. The sum of money inserted by respondents on these forms is actually the

amount of the recipient's indebtedness to respondents' customer who has purchased the forms, and the words "collectible" and "due" are obviously and intentionally used in an ambiguous manner, in order to create in the mind of the recipient the false impression that that sum of money is actually payable to him from an undisclosed source, thereby inducing him to furnish the information requested.

Respondents, by their use on one form of the term "Disbursement Office," and the nature of that form, which resembles a blank check, represent, and place in the hands of their customers an instrument whereby they may represent and imply to the recipients thereof, that money is due to them from an undisclosed source, and will be paid to them upon the receipt by the "Disbursement Office" of the information requested on the reverse side of such form. In fact, however, no money is due to the recipient, and the sole purpose of the form is to elicit information relative to the recipient's personal affairs. The fact that, upon receiving the completed form respondents do send the recipient a check for the sum of ten cents does not eliminate the element of deception inherent in such form, nor justify respondents' statement that an amount of money is due and owing to the recipient. As stated by the court in the case of *National Service Bureau, et al.* v. *F.T.C.*, 200 F. 2d 362.

"* * * in the context of 'deposited' and 'a check'; ten cents is not a 'sum of money' or even 'a small sum of money'; * * * 'a small sum of money' in this context is, at least, a substantial number of dollars. A check for ten cents may net the debtor less than nothing, since some banks charge ten cents for depositing a check * * *."

It is obvious that these forms are intended solely to deceive the recipients thereof, and that the attached questionnaires are only a "gimmick" to aid in the subterfuge.

FORMS IMPLYING CONNECTION WITH A CURRENT RESEARCH PROJECT

Respondents, by their use on two forms of the respective terms "Cigarette and Tobacco Research Bureau" and "National Gasoline Research Bureau," together with the nature of the inquiries made thereon, represent, and place in the hands of their customers instrumentalities whereby they may represent and imply to the recipients thereof, that research projects are currently being conducted for the purpose of ascertaining the brand of cigarettes smoked by the recipient of such forms and other information respecting cigarettes, or the brand of gasoline used by him and other information respecting his use of gasoline. This implication is enhanced by the fact that the "Cigarette" forms are mailed at Richmond, Virginia, an important

center of the cigarette industry, and the "Gasoline" forms from Oklahoma City, Oklahoma, a center of the gasoline industry.

In fact, no such research projects are being conducted, and the "Cigarette and Tobacco Research Bureau" and "National Gasoline Research Bureau" do not exist except as fictitious names. The sole purpose of the forms bearing these designations is to obtain the address and other information relating to the personal affairs of persons alleged to be delinquent debtors of the customers to whom respondents sell these forms. Respondents' sole purpose in printing these forms is to sell them to others for use in obtaining information concerning alleged delinquent debtors, and respondents have used their mailing of these forms from known centers of the cigarette and gasoline industries as a selling point to facilitate their sale of such forms. When the recipient of a "Cigarette" form fills in the information requested thereon and returns the completed form to the "Cigarette and Tobacco Research Bureau," respondents send him a pack of twenty of the brand of cigarettes he has designated thereon as the one he smokes. This fact in no way detracts from the magnitude of the deception perpetrated by respondents through the use of this form.

ADMISSIONS BY RESPONDENTS

Respondents, with respect to the printed forms hereinabove described, admitted in testimony in the record of this proceeding that they have received inquiries from recipients of one or another of such forms, who believed money was due them, or that the request for information contained in respondents' form was from a Government agency.

As to the "Cigarette" and "Gasoline" forms, respondents admit that these forms were sold to be used only in connection with the locating of delinquent debtors. There is testimony in the record to the effect that at the outset respondents intended to offer the information obtained by the use of these forms to purveyors of cigarette-vending machines, but, finding such disposition of the forms and information not feasible by reason of lack of purchasers, respondents, for the purpose of avoiding financial loss, diverted the forms to their present use. This fact, however, does not ameliorate the deception practiced by respondents, and is of no consequence in determining the questions here at issue.

PUBLIC INTEREST

Respondents in their answer offer, in effect, the affirmative defense that their forms are mailed only to defaulting debtors; that the losses to merchants by reason of defaulting debtors have become so great

that it is seriously affecting commerce and sound business conditions; that such losses are to the prejudice and injury of the public, since, in many instances, they are passed on to the buying public as increased prices; and, by implication, that therefore respondents' practice of misrepresentation and deception for the purpose of locating defaulting debtors on behalf of their creditors is in the interest of the public and consequently should not be considered a violation of the Federal Trade Commission Act.

This defense is without merit for the simple reason that two wrongs do not make a right. If respondents' interpretation of what is in the public interest were to be accepted, our courts would be forced to embrace a policy almost exactly parallel to that proclaimed by a well-known three-member body: "Fair is foul and foul is fair." Such an interpretation would result in confusion worse confounded. The stability of business cannot be sustained by falsehood. The laudable purpose of assisting merchants to recover financial losses sustained by reason of defaulting debtors does not justify the perpetration of deceit upon those debtors. These principles are traditionally fundamental in America jurisprudence, and have been enunciated repeatedly by our courts.

In *Silverman* v. *F.T.C.*, 145 F. 2d 751 (CCA-9, 1944), a case similar to the instant proceeding, the Court, in affirming the Commission's cease-and-desist order, stated:

"Petitioners' scheme is a cheap swindle and the argument that it is less so because it may in certain cases trap swindling debtors is not one pleasing to entertain."

In *Lester Rothschild* v. *F.T.C.*, 200 F. 2d 39 (CCA-7, 1952), the Court, in affirming another order of the Commission, said:

"The fact that acts and methods deemed deceptive are used to trap delinquent debtors does not prevent such acts and methods from being against the public interest. * * *"

In the case of *Dejay Stores, Inc.*, v. *F.T.C.*, 200 F. 2d 865 (CCA-2, 1952), affirming the order of the Commission, the Court declared:

"* * * The Federal Trade Commission's conclusion that it is in the public interest to require that creditors should not use dishonest methods in collecting their debts is within its discretion. * * *"

The validity of these principles cannot be seriously questioned, and respondents' affirmative defense must in consonance therewith, be rejected as wholly fallacious.

CONCLUSION

Respondents' acts and practices 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. Accordingly,

It is ordered, That respondents Mitchell S. Mohr, individually and trading as National Research Company, and Sydney Floersheim, individually and trading as S. Floersheim Sales Company, or trading under any other name or trade designation, jointly or severally, their representatives, agents and employees, directly or through any corporate or other device, in connection with the business of obtaining information concerning delinquent debtors, or the offering for sale, sale or distribution of forms, or other material, for use in obtaining information concerning delinquent debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using or placing in the hands of others for use, any form, questionnaire, or other material, printed or written, which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors;

2. Representing, or placing in the hands of others any means of representing, directly or by implication, that money is being held for or is due, persons concerning whom information is sought, or is collectible by such persons, unless money is in fact due and collectible by such persons and the amount of such money is accurately stated;

3. Using the terms "Claims Office," "Reverification Office," or "United States Credit Control Bureau," or the picturization of an eagle, or any other word or phrase, or picturization of similar import to designate, describe or refer to respondents' business; or otherwise representing, directly or by implication, that requests for information concerning delinquent debtors are from the United States Government or any agency or branch thereof, or that their business is in any way connected with the United States Government;

4. Using the name "New Employment Status Questionnaire," or any other name of similar import to designate, describe or refer to Respondents' business; or otherwise representing directly or by implication that Respondents' business is that of gathering and furnishing information relative to employment;

5. Using the name "Disbursements Office," or any other name of similar import to designate, describe or refer to Respondents' business; or otherwise representing, directly or by implication, that money has been deposited with them for persons from whom information is requested, unless or until the money has in fact been so deposited, and then only when the amount so deposited is clearly and expressly stated;

6. Using the name "Cigarette and Tobacco Research Bureau," or "National Gasoline Research Bureau," or any other name of similar import to designate, describe or refer to Respondents' business; or otherwise representing, directly or by implication, that Respondents are a research bureau, or are engaged in research.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

This is an appeal by respondents from a decision and order of the hearing examiner directing respondents to cease and desist from engaging in unfair and deceptive acts and practices through the dissemination and use of "skip tracing" forms.

Respondents sold certain printed forms to creditors who are desirous of learning the whereabouts of defaulting debtors. The creditors fill in the proper data on the blanks, including particularly the last known address of the debtors, and return cards to the designated office of respondents, which office mails them to the individual debtors. If the debtor answers the communication, it is returned to the designated office which, in turn, sends it to respondents' office in Los Angeles, California. At that place, the answers are processed and the results forwarded to the purchasing creditors.

Respondents are not operating a collection agency; their efforts are restricted to locating the debtors so that the creditors have an opportunity to collect the debts due them. Of course, the debtor is not advised of these facts. The forms used are of such a character as to create in the mind of the debtor the notion that it is to his interest to answer the communication and furnish the required information.

Various types of forms are used, copies of which are in evidence. The return envelopes and the detachable portions of the double cards (which are the portions to be returned to the designated office) all provide that return postage will be paid by the addressee. Respondents have established mailing addresses in Washington, D. C., Richmond, Virginia, and Oklahoma City, Oklahoma.

Some of the printed forms sold by respondents may be described as follows:

(1) The "Claims Office" form:

This consists of a single sheet, perforated to permit easy detachment of the lower portion, which is designed to be returned in a return envelope addressed to "Claims Office, 100 Barr Building, Washington, D.C.". The upper portion of the form contains a picture of an eagle and the following:
"Retain this form until $........... is collected in full."
"The amount of .... Dollars is collectible."
"Identification of .... is needed by this office."
"Return the attached questionnaire immediately."

CLAIMS OFFICE
100 Barr Building
Washington, D. C. Identification and Collection Department."

The portion to be returned contains blanks for the debtor to furnish certain information, such as his name, address, mother's maiden name, present employer's name (for verification of social security number), employer's address, bank reference, etc.

(2) "Reverification Office" form:

This is a printed card with blanks for information as to name and address, name and address of employer, marital status, social security number, etc. The return envelope enclosed is addressed to "Reverification Office, 422 Washington Building, Washington, D. C."

(3) "Credit Control Bureau" forms:

These forms have the words "United States" on them and also the usual blanks for the furnishing of information. The return envelope is addressed to "United States Credit Control Bureau, Washington, D. C."

(4) "New Employment Status" questionnaire:

This card seeks to obtain information as to the debtor from a new employer. The return envelope is addressed to the "Office of Employment Reclassification, 2017 S Street, N. W., Washington, D. C."

(5) "Disbursements Office" form:

This purports to be a check of Disbursements Office, 300 Calvert Street, N. W., Washington, D. C. payable to the debtor. The debtor is advised that if the check and the accompanying blank are returned with the required information, the check will be returned with the amount filled in and properly signed for the debtor to cash. It has been the practice of respondents to return the check payable in the amount of 10¢.

(6) The "Cigarette" form:

The return portion of this card is addressed to "Cigarette and Tobacco Research Bureau", One N. Sixth Street, Richmond, Virginia. It purports to be a questionnaire calling for the name and address of the debtor and also of his present employer and for other information, such as preferred brand of cigarettes, and whether smoking or vending machines are allowed on the premises. The card also contains the following:

> "To determine what brand of cigarette or tobacco is being smoked by employed people during working hours, please fill out the attached card. If the questionnaire is properly filled out and returned immediately, your favorite brand of cigarette or tobacco will be sent you free of any charge."

It was the practice of respondents to send a package of cigarettes as above indicated.

(7) The "Gasoline" form:

This form was substantially similar to the cigarette form. The return address was "National Gasoline Research Bureau, 601 Leonhardt Building, Oklahoma City, Oklahoma."

Respondents argue that the cards and letters involved were not deceptive; that, for example, the eagle pictured thereon was different in many respects from the one generally adopted as the emblem of the United States, and that the use of the words "United States" is not uncommon in names of private firms. Evidence was offered to show

that 48 firms with the words "United States" and 55 firms with the word "Federal" with offices in Washington, D. C. are listed in the local telephone directory.

We think the evidence might well have been admitted. However, its exclusion was not prejudicial. It is a well-known fact that the use of such words in firm names and the display of an eagle are prevalent and in many cases would not be deceptive. Respondents' practices are to be considered in their entirety. The language used, the form of the cards, the various addresses, the whole purpose of the scheme, point clearly to the fact that it was designed to deceive. The plan was operated to get certain information from individuals who were deceived as to the purpose for which it was being secured.

Nor can it be said that public interest is lacking. Substantially every question raised here has already been decided by the courts. *Silverman* v. *FTC* (1944), 145 F. 2d 751; *Lester Rothschild* v. *FTC* (1952), 200 F. 2d 39; *Deejay Stores, Inc.* v. *FTC*, 200 F. 2d 865.

Commenting on previous decisions, respondents claim that changing conditions now make it desirable for the Commission to "make a new declaration of policy concerning the use of skip tracing forms."

We agree that debtors should pay their just debts and that creditors should not be denied any lawful means to collect them. Nevertheless, the various states, through exemption statutes and other laws, have put some limitation on collection procedures. The law involved here simply prohibits those practices in commerce which have a tendency and capacity to deceive.

The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission.

Respondents' appeal is denied, and it is directed that an order issue in accordance herewith.

FINAL ORDER

The respondents in this proceeding having filed their appeal from the initial decision of the hearing examiner; and the matter having been considered on briefs and oral arguments of counsel; and the Commission having rendered its decision denying the appeal and adopting the initial decision as its own decision:

It is ordered, That the respondents, Mitchell S. Mohr and Sydney Floersheim, 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 contained in the aforesaid initial decision.

IN THE MATTER OF

FOREMOST DAIRIES, INC.

Docket 6495. Order, June 4, 1956

Order holding that violation of sec. 7, Clayton Act, may also be violation of sec. 5, Federal Trade Commission Act, and reversing hearing examiner's ruling striking from the complaint allegations charging violation of sec. 5 through corporate acquisitions.

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

Mr. Raymond L. Hays, *Mr. Bernard M. Williamson* and *Mr. F. P. Favarella* for the Commission.

Camilier, McDonald & Bakke, and *Mr. Robert E. Freer*, of Washington, D. C., and *Milam, Lemaistre, Ramsey & Martin*, of Jacksonville, Fla., for respondent.

ORDER SUSTAINING APPEAL OF COUNSEL IN SUPPORT OF COMPLAINT AND REVERSING RULING OF HEARING EXAMINER

This matter having come on to be heard by the Commission upon an appeal, filed by counsel in support of the complaint, from a ruling of the hearing examiner striking from the complaint certain allegations charging the respondent with having violated Section 5 of the Federal Trade Commission Act through the acquisition of a number of corporations and other concerns engaged in the processing and distribution of dairy products; and

It appearing that the basis of the ruling appealed from was the hearing examiner's view that Congress in treating the subject of corporate acquisitions in Section 7 of the Clayton Act, as amended, intended to and did preclude the application of Section 5 of the Federal Trade Commission Act to this field of activity; and

The Commission being of the opinion that the hearing examiner was in error in this respect and that facts indicating a violation of Section 7 of the Clayton Act, as amended, may also indicate a violation of Section 5 of the Federal Trade Commission Act, and, further, that practices not technically within the scope of a specific section of the Clayton Act may nevertheless constitute a violation of Section 5 of the Federal Trade Commission Act; and

The Commission being of the further opinion that in electing to charge the respondent in this case with violation of both Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act the Commission acted in the exercise of its admini-

strative discretion and that in so doing it made a decision on which the hearing examiner has no authority to sit in judgment:

It is ordered, That the appeal of counsel in support of the complaint be, and it hereby is, sustained.

It is further ordered, That the ruling of the hearing examiner striking from the complaint the allegations charging the respondent with having violated Section 5 of the Federal Trade Commission Act be, and it hereby is, reversed.

IN THE MATTER OF

REDDI-SPRED CORPORATION

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

Docket 6228. Order, June 5, 1956

Order modifying prior cease and desist order issued May 5, 1955 (51 F. T. C. 1074), to conform to the order of the Court of Appeals, Third Circuit, of January 18, 1956, by striking out the latter part of the proviso under paragraph "1" so that the proviso as modified reads: "*Provided, however*, that nothing contained in this order shall prevent the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product."

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

Mr. William L. Pencke for the Commission.

Duane, Morris & Heckscher, of Philadelphia, Pa., for respondent.

Mr. M. R. Garstang, of Washington, D. C., for National Milk Producers Federation, *amicus curiae.*

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of respondent, testimony and other evidence in support of and in opposition to the allegations of the aforesaid complaint taken before the hearing examiner of the Commission theretofore duly designated by it; and the hearing examiner having thereafter filed his initial decision dismissing the complaint; and the matter having thereafter come on to be heard by the Commission upon appeal from said initial decision filed by counsel supporting the complaint, briefs in support of and in opposition to said appeal, and oral argument of counsel; and the Commission having duly considered and ruled upon said appeal, considered the record, and having determined that the hearing examiner had erroneously dismissed the complaint, reviewed and set aside the initial decision and made its findings as to the facts, concluded that respondent had violated the provisions of the Federal Trade Commission Act, and, on the 5th day of May 1955, issued an order to cease and desist against the said respondent and its officers, agents, representatives, and employees; and

Respondent having filed in the United States Court of Appeals for the Third Circuit its petition for review and to set aside said order to cease and desist; and that Court having heard the cause on briefs and

oral argument and having thereafter, on the 18th day of January 1956, filed its decision modifying said order and affirming said order as modified, and, on the 8th day of February 1956, entered its final decree enforcing said order as modified; and

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

It is ordered, That respondent Reddi-Spred Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of oleomargarine or margarine 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 contains any statement, word, grade designation, design, device, symbol, sound or any combination thereof which represents or suggests that said product is a dairy product;

Provided, however, That nothing contained in this order shall prevent the use of advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product.

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 in commerce, as "commerce" is defined in the Federal Trade Commission Act of said product any advertisement which contains any of the representations prohibited in paragraph one of this order.

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

IN THE MATTER OF

ROCKY MOUNTAIN WHOLESALE COMPANY ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (c) OF THE CLAYTON ACT

Docket 6230. Complaint, June 30, 1954—Decision, June 7, 1956

Order requiring a wholesaler of sundries, candy, and tobacco products in Albuquerque, New Mexico, to cease receiving unlawful allowances or brokerage in violation of Sec. 2 (c) of the Clayton Act as amended, through sharing, as partner in two brokerage companies, brokerage received by them on purchases made for respondent's own account.

Mr. Rice E. Schrimsher and *Mr. Peter J. Dias* for the Commission.
Mr. Louis C. Lujan, of Albuquerque, N. Mex., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents charging them with violating Section 2 (c) of the Clayton Act, (U.S.C. Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, which complaint was duly served upon the respondents. The respondent, Jack Beatty was named as such in his individual capacity as well also as President of the corporate respondent, and owner of the controlling interest thereof, and as a partner in the partnership firms of Consolidated Brokerage Company and G & Z Brokerage Company. No testimony or other evidence was received on behalf of any party to this proceeding, this Initial Decision being rendered upon motion of the attorneys in support of the complaint on the basis of admissions contained in the formal answer of respondents to the complaint herein. Specifically, the respondents Rocky Mountain Wholesale Company and Jack Beatty are charged with receiving and accepting payment of commissions in lieu of brokerage in connection with purchases of products made by them for their own account.

On August 2, 1954, respondents filed answer to the complaint admitting:

1. The status of the corporate respondent and the representative and individual connections of the individual respondent, as alleged in the complaint;

2. Interstate commerce; and

3. The payment and acceptance by respondents of brokerage, or other compensation in lieu thereof, in connection with purchases of products made by the respondents on their own account.

In and by said answer it was admitted that such brokerage payments were made to the G & Z Brokerage Company, in which the individual respondent Jack Beatty participated as a copartner, but specifically denies that he has ever received any brokerage or other compensation from Consolidated Brokerage Company. By way of further answer to the complaint the individual respondent alleges, with respect to the G & Z Brokerage Company and the Consolidated Brokerage Company, both being copartnerships, in which the individual respondent owns respectively 51% interest of the former and 50% interest of the latter, that he, the said Jack Beatty, during the period herein referred to, has performed the type of services referred to in Subsection (c) of Section 2 of the Clayton Act through the instrumentality of the corporate respondent Rocky Mountain Wholesale Company, in that he furnishes all of the bookkeeping services for Consolidated and for G & Z he furnishes office space, stenographic help, bookkeeping, and telephone service on all items handled by that firm and that he also warehouses the goods, furnishes the services of receiving and shipping and carries advertising on all his trucks for both concerns; that the value of the said services is in excess of any compensation which he receives in lieu of brokerage as aforesaid. And by way of affirmative defense, under the legal maxim *de minimis non curat lex*, sets up that the purchases made from the vendors represented by the G & Z Brokerage Company total but 2.15% of his, the individual respondent's, total purchases per year and that from vendors represented by Consolidated Brokerage Company such purchases amounted to but .84% of his total business; that the total purchases for the year 1953 amounted to $695.21 on which the commission received by Consolidated Brokerage Company was $34.76 from which he, Jack Beatty, received nothing.

On the basis of the foregoing answer containing the admissions set forth, the attorneys in support of the complaint filed a motion requesting the Hearing Examiner to issue an initial decision and cease and desist order based thereon. Thereafter the Hearing Examiner cancelled the date of the original hearing and accorded the respondents approximately 30 days within which to answer the aforesaid motion, and in said order extended to the respondents the privilege of supplementing their reply by filing a brief in support thereof or, in the alternative, extending an opportunity for oral argument, neither of which tenders was availed of by the respondents. Thereafter, on motion of respondents, the Hearing Examiner granted them an additional 30 days within which to answer, upon expiration of which time, that is to say October 19, 1954, the respondents filed a motion to dismiss the complaint on various grounds, among such being:

(1) that at no time did they "knowingly and intentionally operate in violation of the Clayton Act * * * but that any transgression was entirely through lack of proper information on their part"; (2) that respondents believed that the rendition of services to Consolidated Brokerage Company and G & Z Brokerage Company was sufficient to comply with the exemption clause covering "services rendered" as set forth in the Act and thus to relieve them from the impact of Subsection "C" of Section 2 of the Clayton Act as amended; (3) that "upon complete and thorough study of the matters presented in the complaint * * * the respondents came to the conclusion that they must make certain changes in their operations in order to come into compliance with the said Act." Said motion goes on to delineate the steps which the respondents have taken to enable them to "come into compliance," wherefore it was prayed that the complaint be dismissed. To the foregoing motion to dismiss the attorneys in support of the complaint did, on October 25, 1954, file an answer in opposition and renewing the motion for initial decision containing an order to cease and desist.

Upon consideration of the formal record as hereinabove recited, the Examiner is of the opinion that the motion of the attorneys in support of the complaint for the issuance of a cease and desist order, predicated of the admissions contained in the respondents' answer and also contained in the respondents' later motion to dismiss the complaint, should be granted, wherefore he makes the following findings of fact, conclusions, and order.

FINDINGS OF FACT

1. Respondent Rocky Mountain Wholesale Company is a corporation organized and existing under the laws of the State of New Mexico, with its principal office and place of business located at 314 South Second Street, Albuquerque, New Mexico, and with branch offices located in the cities of Roswell, Santa Fe and Farmington, New Mexico. The controlling stock interest in the respondent corporation is held by respondent Jack Beatty who directs, controls and is responsible for its acts and practices. Said respondent corporation is engaged in the business of buying sundries, candy and tobacco products from manufacturers and reselling such products to retailers.

Respondent Jack Beatty is an individual residing in Albuquerque, New Mexico, and is president of respondent Rocky Mountain Wholesale Company. He is also a partner in Consolidated Brokerage Company and G & Z Brokerage Company, having a 51% interest in the former company and a 50% interest in the latter. These two com-

panies located in Albuquerque, New Mexico, are engaged in business as brokers of sundries, food and candy products, in connection with the sale of such products to wholesalers.

2. In the course and conduct of their business as wholesalers, respondents are and have been engaged in commerce, as "commerce" is defined in the Act, purchasing products from vendors, whose places of business are located in states other than New Mexico, and causing them to be shipped to their places of business within the State of New Mexico.

3. In the course and conduct of said wholesale business in commerce, said vendors pay or grant to respondents and respondents receive or accept commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, in connection with said purchases of products made on their own account.

4. For example, during 1953, one method by which respondents received or accepted the commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof alleged in Paragraph Three involves Consolidated Brokerage Company and G & Z Brokerage Company. These companies act as brokers for vendors making sales of candy products and sundries to respondent Rocky Mountain Wholesale Company. The money received as brokerage by these companies on such sales is shared by respondent Jack Beatty as a partner in said companies. Thus, as a buyer through his control of Rocky Mountain Wholesale Company, Jack Beatty receives brokerage on purchases made for his own account.

CONCLUSIONS

1. From the foregoing it will be seen that the receipt of brokerage on purchases on their own account through the G & Z Brokerage Company are specifically admitted by the corporate and individual respondents, while denying that any such were received from the Consolidated Brokerage Company. However, in view of the admission that respondent Jack Beatty is the owner of a 51% interest in the Consolidated copartnership, and the admission in the answer that Rocky Mountain made purchases from Consolidated Brokerage on which the latter received brokerage fees, and the further fact that respondent Jack Beatty is the controlling owner and factor in Rocky Mountain, it is clear that the buyer received unlawful allowances or brokerages and that no weight can be accorded this attempted defense.

2. Referring to the allegations of the answer that respondent Beatty performs services through the respondent Rocky Mountain on behalf of the G & Z Brokerage Company and Consolidated Brokerage and that the amounts paid him are insufficient compensation for the serv-

ices performed, in addition to which that such services come within the "except for services rendered" clause of Section 2 (c): It is concluded that because of the relationships of the parties such a defense is unavailing to take the charges without the statute under the "exception clause," and in this connection the following excerpt from the Circuit Court of Appeals (*Great A. & P. Tea Co.* v. *F.T.C.*, 106 F. 2d 667. S&D 1939, p. 146, 154, 156) is given:

> We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. * * * The phrase 'except for services rendered' is employed by Congress to indicate that if there be compensation to an agent it must be for bona fide brokerage, viz., for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase "for services rendered," does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. *In short, a buying and selling service cannot be combined in one person* * * *. [Emphasis supplied.]

Also in the case of *Quality Bakers of America* v. *F.T.C.*, 114 F. 2d 393, the Court said:

> The petitioners contend that by the language in paragraph (c), above quoted, reading "except for services rendered in connection with the sale or purchase of goods," the Congress recognizes that a buyer, or his agent, may perform services for the seller in connection with the transaction for which the seller may pay and the buyer or his agent receive compensation by way of a brokerage fee or commission on the sale. We do not take such a view of the paragraph. The construction contended for makes much of its language meaningless; it does violence to the purpose of the Act and has been explicitly rejected in other circuits. *It is plain enough that the paragraph, taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent*, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase. [Emphasis supplied.] (See also: *Biddle Purchasing Co.* v. *FTC*, 96 F. 2d 687, certiorari denied, 305 U.S. 634; *Oliver Brothers* v. *FTC*, 102 F. 2d 763; *Webb-Crawford Co. v. FTC*, 109 F. 2d 268).

3. Referring to the unsupported asseveration of respondents' counsel, as contained in his motion to dismiss, that respondents have abandoned the practice complained of and are now in a state of compliance: It is well settled law that discontinuance does not render the controversy moot and thus bar an order to cease and desist. This is true whether the discontinuance is effected before or after issuance of the complaint. For the former see *Sears, Roebuck & Co.* v. *FTC*, 258 Fed. 307-310, and for the latter see *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257. This conclusion is not intended nor designed to impugn the good faith of respondents in their abandonment of the practices but, under the facts found, and bearing in mind that

the function of the Commission is not only in nature injunctive but as well prophylactic, it is concluded that an order to cease and desist is indicated and required.

4. Concerning the attempted defense of *de minimis* it is concluded that such is unavailing. It is the character of the acts charged and admitted which the law denounces, not the extent thereof, be it small or great. (*Louisiana Farmers Protective Union* v. *Great A. & P. Tea Co.*, 131 F. 2d 419, 422. *White Bear Theatre Corp.* v. *State Theatre Corp.*, 120 F. 2d 600-605.)

Certain it is that the machinery for violating the Act was all set up and operating; that commissions or brokerages were actually paid and received, and it is no defense that such was done unwittingly, without intent to violate the Act and in ignorance of the law.

5. The acts and practices of the respondents, as above found, violate Subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

ORDER

It is ordered, That the respondents Rocky Mountain Wholesale Company, a corporation, and Jack Beatty, individually and as President of Rocky Mountain Wholesale Company, and as a partner of Consolidated Brokerage Company and G & Z Brokerage Company and their respective representatives, agents and employees, directly or through any corporate or other device in connection with the purchase by respondents, or either of them, of sundries, candy and tobacco products in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof, upon purchases of sundries, candy and tobacco products made by respondents or for their account.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of June 1956, become the decision of the Commission; and, accordingly:

It is 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.

IN THE MATTER OF

GEORGE M. VOSS TRADING AS VOSS HAIR EXPERTS OF GEORGIA

Docket 6498. Order and opinion, June 7, 1956

Order granting respondent's appeal from hearing examiner's *ex parte* ruling on complaint counsel's motion to amend complaint.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Harold A. Kennedy for the Commission.
Frank E. & Arthur Gettleman, of Chicago, Ill., for respondent.

ORDER RULING ON INTERLOCUTORY APPEAL OF RESPONDENT

Counsel for respondent having filed an interlocutory appeal May 3, 1956, from the order of the hearing examiner, filed April 19, 1956, among other things, denying respondent's motion to vacate an order amending the complaint; and

The Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal should be granted in part and denied in part as there noted:

It is ordered, That the orders of the hearing examiner filed March 13, 1956, and April 19, 1956, respectively, be, and they hereby are, vacated and set aside.

It is further ordered, That respondent's request that the hearing examiner be required to rule on its motion of April 11, 1956, be, and it hereby is, denied.

OPINION OF THE COMMISSION

Per Curiam:

This case has come on for hearing before the Commission upon the interlocutory appeal filed May 3, 1956, by respondent, through counsel, from the order of the hearing examiner filed April 19, 1956, among other things, denying respondent's motion to vacate an order amending the complaint. No hearings have been held.

A motion was filed, by counsel supporting the complaint, March 6, 1956, requesting that the complaint be amended. Respondent filed an answer to this motion on March 14, 1956, but the hearing examiner had on March 13, 1956, ruling *ex parte*, filed his order granting the motion and allowing respondent thirty days after service of the order within which to file its answer. Subsequently, on March 29, 1956, respondent, through counsel, filed a motion to vacate the order amending the complaint. Counsel supporting the complaint filed an answer

to this motion on April 9, 1956. Respondent, by its counsel, it appears, also addressed an informal motion to the hearing examiner, dated April 11, 1956, requesting permission to reply to said answer of counsel supporting complaint and an extension of ten days within which to file the reply.

The hearing examiner in his order of April 19, 1956, ruling on respondent's motion to vacate the order amending complaint, stated he was of the opinion that the application for amendment was not an arguable matter and, hence, it was not necessary to consider the respondent's opposition thereto. He ordered that the answer of counsel supporting the complaint be stricken and further ordered that respondent's motion be denied. Respondent, through counsel, in its appeal, specifically requests relief as follows:

(*a*) The ruling of the hearing examiner of April 19, 1956, be reversed.

(*b*) That hearing examiner be required directly on respondent's motion filed March 14, 1956, to vacate his *ex parte* order of March 13, 1956.

(*c*) The hearing examiner be required to rule on respondent's motion of April 11, 1956.

Counsel supporting the complaint filed an answer opposing the appeal.

The provisions of the Rules of Practice directly pertinent to the matter under appeal are as follows:

§ 3.8. (c) "Within ten days after service of any written motion, or within such longer or shorter time as may be designated by the hearing examiner or the Commission, the opposing party shall answer or be taken to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the hearing examiner or the Commission."

§ 3.9. (a) (1) "If and whenever determination of a controversy on the merits will be facilitated thereby, the hearing examiner may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings; provided, however, that an application for amendment of a complaint may be allowed only if the amendment is reasonably within the scope of the proceeding initiated by the original complaint."

The hearing examiner incorrectly interpreted these provisions as authorizing him to rule *ex parte* on a motion to amend the complaint. While § 3.9 (a) (1) refers to a move for amendment of complaint as an "application for amendment," it is nevertheless a motion within the meaning of § 3.8 (c) and subject to the provisions thereof.

Furthermore, the plain language of § 3.9 (a) (1), itself, provides that in allowing amendments they are to be made upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties. It seems clear that an informed determination of whether an amendment will or may prejudice the rights of the parties would require due consideration by the hearing examiner of respondent's answer containing such arguments or reasoning it may have relative to possible prejudice of its rights.

Moreover, since the authority of the hearing examiner under § 3.9 (a) (1) is limited specifically to the allowance of amendments to complaints reasonably within the scope of the proceeding initiated by the original complaint, he must decide in each instance whether the provision authorizes the particular amendment. Respondent, obviously, could have arguments that the amendment does not fall within the scope of the proceeding originally initiated. There is, at least, the implication in the provision, therefore, that to resolve a question of this nature, the hearing examiner should consider the views of respondent.

We are of the opinion that, pursuant to the Rules of Practice, the hearing examiner should not have granted the motion to amend the complaint without first receiving and considering respondent's timely filed answer to the motion. The respondent's appeal, therefore, is granted to the extent that the examiner's orders of March 13, 1956, and April 19, 1956, respectively, will be vacated and set aside. Since no ruling on respondent's request that the hearing examiner be required to rule on its motion of April 11, 1956, is necessary in view of the relief herein provided, this request will be denied.

IN THE MATTER OF

JOSEPH JIMENEZ ET AL. DOING BUSINESS AS CREDIT TV SERVICE

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

Docket 6531. Complaint, Mar. 21, 1956—Decision, June 9, 1956

Consent order requiring two individuals in Washington, D. C., to cease misrepresenting their charges for servicing and repairing TV sets in the home, and misrepresenting shop estimates as free.

Before *Mr. Robert L. Piper*, hearing examiner.

Mr. Michael J. Vitale for the Commission.

Bradshaw, Shearin, Redding & Thomas, of Silver Spring, Md., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Joseph Jimenez and Catherine Jimenez, individuals, trading and doing business as Credit TV Service, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Joseph Jimenez and Catherine Jimenez are individuals trading and doing business as Credit TV Service. Said respondents cooperate and act together in performing the acts and practices hereinafter set forth. Their office and principal place of business is located at 1361 H Street, N.E., Washington, D. C.

PAR. 2. Respondents, for more than one year last past, have been engaged in the sale and distribution of television replacement parts. An essential and integral part of respondents' said business is the furnishing of television repair services. In connection with their television repair service respondents remove television sets from the homes of owners located in the District of Columbia and in the State of Maryland, and transport said television sets to their repair shop, which is located in the District of Columbia, for servicing and replacement of parts, said parts being furnished and sold by respondents after which the television sets are delivered to the owners at their places of residence.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in their said business in commerce in the District of Columbia and between the District of Columbia and the State of Maryland. Their volume of business in said commerce has been and is substantial.

PAR. 3. At all times mentioned herein respondents have been, and are now, in direct and substantial competition in commerce with other corporations, firms and individuals engaged in a similar business.

PAR. 4. In the course and conduct of their aforesaid business, respondents have made certain statements and representations concerning said business by means of advertisements in newspapers. Among and typical of the statements and representations made in such advertising is the following:

Mr. and Mrs. TV Owner
ATTENTION

99¢ House Call 99¢

all makes serviced in your home or
in our shop. Free shop estimates.

Picture Tube Weak?
We will rejuvenate your picture tube in your home.
All makes serviced.
Call for immediate service
9 A.M. to 10 P.M.
including Sunday

Call LI 7-4925
CREDIT TV SERVICE
Va. and Md. Slightly Higher

PAR. 5. By and through the use of the aforesaid statements respondents represented, directly or by implication:

1. That the service charge for servicing and repairing a television set in the home is 99¢.

2. That shop estimates are free.

PAR. 6. The aforesaid statements and representations were false, deceptive and misleading. In truth and in fact:

1. The charge for servicing or repairing a television set in the home is greatly in excess of the represented amount of 99¢.

2. Respondents make a charge whenever a shop estimate is given and the set is not left for repair.

PAR. 7. The use by the respondents of the aforesaid false, deceptive, and misleading statements, representations, and practices had the tendency and capacity to mislead and deceive a substantial portion of persons owning television sets into the erroneous and mistaken belief that such statements and representations were and are true, and to induce said persons to have respondents service and repair their television sets because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' 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.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on March 21, 1956, charging them with having violated the Federal Trade Commission Act. After being served with said complaint, respondents appeared by counsel and entered into an agreement, dated April 12, 1956, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged

in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the same are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondents Joseph Jimenez and Catherine Jimenez are individuals trading and doing business as Credit TV Service, with their office and principal place of business located at 1361 H Street, N.E., Washington, D. C.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents Joseph Jimenez and Catherine Jimenez, individuals, trading and doing business as Credit TV Service, or trading and doing business under any other name or names, and respondents' representatives, agents and employees, directely or through any corporate or other device, in connection with the offering for sale, sale and distribution of replacement parts for television sets and other merchandise, or repair services in connection therewith, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That the charge for servicing or repairing is 99¢, or any other amount which is not in accordance with the facts.

2. That there is no charge for estimates made in the shop, when such is not the fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 9th day of June, 1956, become the decision of the Commission; and, accordingly:

It is 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.

IN THE MATTER OF

NATIONAL FIRE SAFETY COUNSELLORS ET AL.

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

Docket 6489. Complaint, Jan. 11, 1956—Decision, June 12, 1956

Consent order requiring sellers in Irvington, N. J., through house-to-house canvassers, of a fire alarm system for homes, to cease representing falsely that their salesmen were connected with the federal government or a civic organization, were only demonstrators, and desired to make fire prevention talks or demonstrations only; that prospects and their homes were specially selected for demonstration purposes; that the total cost of the system would be little more than the credit allowed for supplying names of other prospects, and that demonstrations in the homes of referred prospects were not necessary before such credit was given; that the contract or promissory note for the purchase price would not be discounted and that carrying charges would not be added to the total cost; and to cease utilizing such scare tactics as newspaper clippings or horror pictures of fire fatalities to induce the purchase of their products, among other things.

Before *Mr. Frank Hier*, hearing examiner.
Mr. William R. Tincher for the Commission.
Mr. Jerome L. Kessler, of Newark, N. J., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Fire Safety Counsellors, a corporation, and Robert L. Berko and Howard Berko, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Fire Safety Counsellors is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Respondents Robert L. Berko and Howard Berko are the president and vice president respectively of said corporate respondent and formulate, control and direct the policies and practices of said corporate respondent and are responsible for the operation and management thereof. Respondent Robert L. Berko also does business under the name of the National Fire Safety Council. The office and principal place of business of all

respondents is located at 1068 Clinton Avenue, Irvington, New Jersey.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution, in commerce between and among the various States of the United States and in the District of Columbia, of a fire detection or fire alarm system usually installed in purchasers' homes or dwellings. Respondents cause and have caused said fire detection or fire alarm systems when sold to be shipped from the State of New Jersey to purchasers thereof located in various other states of the United States and in the District of Columbia, where they are installed in the homes or dwellings of such purchasers. The volume of business of respondents in said systems in commerce is now and has been substantial.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents are now, and have been, in substantial competition with other corporations, firms and individuals engaged in the business of selling and distributing fire detection or fire alarm systems in commerce.

PAR. 4. Respondents employ salesmen or house-to-house canvassers to sell their products. Said salesmen are customarily given a course of instruction in selling, supplied with sales manuals, demonstration kits, newspaper clippings and pictures of fires and fire fatalities and injuries. When a sale is made, the salesman secures the signatures usually of both husband and wife to a contract and promissory note attached thereto supplied by respondents.

PAR. 5. In the course and conduct of their aforesaid business and for the purposes of selling their products, respondents directly or through their representatives, employ many unfair and deceptive practices. Among and typical, but not all inclusive, of such practices are the following:

(1) In the telephone solicitation of prospective purchasers, respondents' salesmen falsely represent that they desire to make a fire prevention talk or demonstration only.

(2) Respondents' salesmen falsely represent themselves to be connected with some department of the Federal Government or with a civic organization when making said fire prevention talk and demonstration.

(3) Respondents' salesmen employ "scare tactics" in exhibiting news clippings and horror pictures during their sales talks, calculated to arouse parents emotionally as to the need to protect themselves and their children from fire hazards.

(4) Respondents' salesmen falsely represent that they are demonstrators only and not salesmen.

(5) Respondents' salesmen falsely represent that prospects have been especially selected or that their homes have been selected for demonstration purposes and that the call presents an exceptional opportunity for said prospects.

(6) Respondents' salesmen falsely represent the total cost of the fire detection or fire alarm system.

(7) Respondents' salesmen falsely represent that the entire cost of the system to prospective purchasers will be a few cents or dollars per month in excess of the credit that purchasers will receive from supplying names of other prospective purchasers to the respondents.

(8) Respondents' salesmen falsely represent to prospects that they will be given credit of $5 or $10 per name and address of other persons who might be interested in said system without disclosing that a demonstration in the homes of the referred persons is necessary before the credit will be given. Respondents' salesmen usually allow a specified number of names at time of the sale and thereafter represent that two or three names and addresses can be submitted monthly.

(9) Respondents' salesmen falsely represent that if any of the referred names culminate in a sale, an additional $20 credit will be given to the person furnishing the lead.

(10) Respondents' salesmen falsely represent that the names of those who supply prospective customers will not be revealed to the latter. These names are almost universally disclosed to the referred prospect.

(11) Respondents' salesmen in many instances have induced prospects to sign contracts and promissory notes which are attached thereto, in blank upon the representation that the total cost would be only a few cents or few dollars per month over and above the credit for supplying names of additional prospective customers. Such contracts and notes are subsequently returned to the purchasers filled in with the total cost and the carrying charges which are contrary to the representations made.

(12) Respondents' salesmen fail to reveal or do not advise the prospective purchasers that the contract and note will be discounted. Respondents almost universally discount the contract and note with a finance company or bank which in turn notify buyers that they hold a contract and note and expect full payment in monthly installments, usually 36 months. In the absence of being so advised, prospective purchasers do not expect their contracts and notes to be handled in this manner. Knowledge that their contracts and notes were to be so handled would have the tendency and capacity to cause prospective purchasers to refrain from entering into said contracts.

(13) Respondents' salesmen do not advise prospective purchasers that carrying charges will be added to the cost of the system. In the absence of being so advised, prospective purchasers do not expect respondents to add such carrying charges. Knowledge that carrying charges were to be added would have the tendency and capacity to cause prospective purchasers to refrain from entering into said contracts.

PAR. 6. The use by the respondents of the unfair and deceptive acts and practices, in connection with the conduct of their business has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public, to cause many prospective purchasers to become unduly alarmed in regard to fire and its consequences and to purchase respondents' fire detection or fire alarm system. As a result thereof trade has been unfairly diverted to the respondents from their competitors and substantial injury has thereby been done to competition in commerce.

PAR. 7. The above and foregoing practices of the respondents are all to the prejudice and the injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices in commerce, and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on January 11, 1956, issued and subsequently served its complaint in this proceeding against respondents National Fire Safety Counsellors, a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, Robert L. Berko and Howard Berko, individually and as president and vice president, respectively, of said corporate respondent, who as such formulate, control, and direct the policies and practices of said corporate respondent and are responsible for the operation and management thereof. The office and principal place of business of respondents is at 1068 Clinton Avenue, Irvington, New Jersey.

On April 25, 1956, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; agree that the answer of respondents herein to the complaint shall be considered as having been withdrawn; waive any further procedural steps before the hearing examiner and the Com-

mission; waive the making of findings of fact or conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents and when so entered it shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent, National Fire Safety Counsellors, is a corporation existing and doing business under the laws of New Jersey, with its office and principal place of business located at 1068 Clinton Avenue, Irvington, New Jersey. Respondents Robert L. Berko and Howard Berko are the president and vice president, respectively, of said corporation, with their office and principal place of business located at the same address as the corporate respondent.

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

ORDER

It is ordered, That the respondents National Fire Safety Counsellors, a corporation, its officers, agents, representatives and employees, and Robert L. Berko and Howard Berko, individually and as officers of said corporation, 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 fire detection or fire alarms systems, do forthwith cease and desist from representing, directly or by implication:

1. That respondents or any of their salesmen or employees are in any way connected with, or endorsed or approved by, the United States Government, any state Government, or any civic association;

2. That respondents' salesmen only desire to make fire prevention talks or demonstrations;

3. That respondents' representatives are not salesmen but are only demonstrators;

4. That prospective purchasers have been specially selected, or that their homes have been selected for demonstration purposes;

5. That the total cost or the cost per month of their fire detection device or fire alarm system is any less than the actual cost, without reference to credit for referrals;

6. That no demonstrations in the homes of referred prospective customers are necessary before credit is given to the supplier of said referrals;

7. That the identity of those supplying names of prospective purchasers will not be revealed to said prospective purchasers;

8. That the contract or promissory note for the purchase price of the system will not be discounted or failing to reveal that such will be discounted;

9. That carrying charges will not be added to the total cost of the system or failing to reveal that carrying charges will be added;

10. That newspaper clippings or horror pictures of fire fatalities represent what the prospective purchaser may expect in his home if he does not purchase respondents' products, or otherwise utilize such scare tactics to induce the purchase of respondents' products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of June, 1956, become the decision of the Commission; and, accordingly:

It is 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.

IN THE MATTER OF

FRUITVALE CANNING COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE CLAYTON ACT

Docket 5989. Complaint, May 14, 1952—Decision, June 15, 1956

Order requiring a packer of canned fruits in Oakland, Calif., to cease discriminating in price in violation of Sec. 2 (a) of the Clayton Act as amended, through such practices as the consistent pattern it followed during 1949 and 1950 of charging chain stores in San Francisco, which purchased directly through their buyers, less for its products than it charged buyers who purchased through brokers, by variations in price per dozen cans ranging from 2½¢ to 55¢ during 1950, the majority of which were 5¢ or 10¢ per dozen.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

Hadsell, Murman & Bishop, of San Francisco, Calif., and *Carretta & Counihan*, of Washington, D. C., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On May 14, 1952, the Federal Trade Commission issued its complaint in this proceeding, alleging that the above-named respondent, while engaged in commerce among the several states of the United States in selling and distributing canned fruits, wherein it constitutes a substantial factor, has, since June 19, 1936, discriminated in price between purchasers of such canned fruits of like grade and quality, which respondent sells for use, consumption and resale within the several states of the United States. Such discrimination is alleged to vary from approximately 2½% to approximately 7½% of the price of the commodity sold. Respondent is alleged to use two separate and distinct sales methods, as follows: (1) by selling canned fruits to buyers, principally wholesale grocers and retail chain stores, through brokers; and (2) by selling canned fruits of like grade and quality directly, without the intervention of a broker, to other buyers, most of whom are large retail chain grocers who buy through their buying agencies located in San Francisco, California. Representative of such direct buyers, who are characterized as favored purchasers, are Safeway Stores, Inc.; The Great Atlantic & Pacific Tea Company; The Kroger Company; The American Stores Company; First National Stores; National Retailer Owned Grocers, Inc.; Consolidated Grocery Co., and Topco Associates, Inc.

It is further alleged that the respondent's purchasers who are favored by respondent's discrimination in price have been competing, directly or indirectly, with respondent's non-favored purchasers in the resale and distribution of such products, and that the effect of such discrimination in price by respondent "* * * has been or may be substantially to lessen competition in the line of commerce in which * * *" both favored and non-favored purchasers are engaged, and to injure, destroy or prevent competition between such favored and non-favored purchasers, in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

The general allegations as set forth above are particularized by specific allegations citing representative discriminations between favored and non-favored buyers of products of like grade and quality during September 1949.

THE ANSWER

On June 16, 1952, respondent submitted its answer admitting its corporate identity, its two selling methods, and the interstate sale and distribution of its products. Respondent's answer denies, however, the principal charges of the complaint, and, as a special defense, avers that if respondent has discriminated in price between buyers of products of like grade and quality, then such buyers were not competing with each other in commerce, or such discrimination was due to one or another of the following factors:

1. "Price changes from time to time in response to changing conditions affecting the market for or the marketability of the goods concerned";
2. "The lower price was made in good faith to meet an equally low price of a competitor";
3. "Any differentials in price made and make only due allowances for differences in the cost of manufacture, sale and delivery resulting from the differing methods or qualities in which respondent sold or sells its commodities to the respective purchasers mentioned, either expressly or generally, in the complaint."

SUBSEQUENT PROCEDURE

Following the joining of issues raised by the pleadings, counsel for the respondent submitted a motion for a more definite statement than that contained in the complaint. This motion was granted by the hearing examiner on August 26, 1952. On February 9, 1953, following an appeal to the Commission, the hearing examiner's order granting the motion was vacated and set aside by the Commission. In due

course evidence was submitted in support of the complaint at hearings in San Francisco, California; Fort Wayne, Indiana; Toledo, Ohio; Philadelphia, Pennsylvania; Baltimore, Maryland; Washington, D. C.; and again in San Francisco, California. At this last-mentioned hearing, counsel supporting the complaint closed his case on June 21, 1955, whereupon counsel for respondent presented his evidence in defense. Thereafter proposed findings as to the facts and proposed conclusions were duly submitted by both counsel.

IDENTITY AND BUSINESS OF THE RESPONDENT

The record shows that the respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office, canning plant and principal place of business located at 905 - 66th Avenue, Oakland, California.

Since 1939 the respondent has been engaged in the business of packing, selling and distributing canned fruits, principally cherries, apricots, peaches, pears and fruit cocktail. Fruit cocktail is a combination of bits of grapes, peaches, pears and pineapple. All of the raw fruit for such canned products is purchased from growers in California except the pineapple, which is procured from the Hawaiian Islands. The harvest season for these fruits runs approximately from June 1st to September 10th, and the canning process proceeds during that time and to as late as November for fruits which have been placed in cold storage. The quantities of these fruits vary from year to year, and the price of the canned products varies accordingly. It is the objective of canners generally to endeavor to sell all of their canned products during the year in which the fruits are produced and canned, so as to have as small a "hold-over pack" as possible, because room is needed in the warehouse for the next season's pack, and because it is economically undesirable to have money invested in stored products.

Although the respondent sells some of its canned fruits under its own labels, the greater part is sold under the brands and private labels of its various purchasers. This factor, however, is not significant in the determination of the issues here involved.

RESPONDENT'S RELATIVE IMPORTANCE IN THE CANNING INDUSTRY

During the period from 1949 to 1954, the respondent processed, on an average, approximately 22% of all cherries canned by California packers; 3% of the apricots; 3% of the peaches; 5% of the fruit cocktail, and 8% of the pears. During 1949 respondent sold canned fruit to Safeway Stores, Inc., in the amount of $413,210.20; to The Kroger Grocery and Baking Company, $593,325.78; to The Great Atlantic & Pacific Tea Company, $730,311.60; and to The American

Stores Company, $60,310.00. On an average, 20% of the respondent's products have been sold to chain stores by direct purchase; 50% have been sold to wholesale grocers throughout the United States through brokers; 20% have been sold to the United States Government; and 10% to other outlets. As indicated above, the respondent, although not a dominant factor in the distribution and sale of canned fruit, is nevertheless a substantial one.

COMPETITION

In the course of respondent's business, it is now, and has been during all the times here involved, in active and substantial competition with other firms similarly engaged in the canning, sale and distribution of fruits of like grade and quality. The record also shows that many of respondent's buyers, both favored and non-favored, are likewise engaged in competition with each other and with customers of respondent's competitors in the resale of such products. Furthermore, respondent's wholesale buyers resell respondent's products to their retail customers, who compete directly with the retail outlets of the large chain stores which buy directly from respondent. Some of respondent's wholesale buyers also have their own retail outlets, which likewise compete in the same manner.

RESPONDENT'S SALES METHODS

As admitted by respondent in its answer, respondent sells and distributes its canned fruits by the two separate and distinct methods described in the complaint. Regardless, however, of whether the sale is a direct one to an alleged favored purchaser or a sale to a wholesaler through the intervention of a broker, the transaction is initiated by the respondent entering into a contract with the purchaser, wherein respondent agrees to sell, and the purchaser to buy, a stated amount of canned fruit of a stated grade and quality, some contracts stating the price, others not.

Thereafter the products are shipped to the purchaser at his location, which may be anywhere throughout the United States, and an invoice and bill of lading are forwarded, accompanied, in many instances, by a draft for payment of the amount of the invoice on arrival of the shipment at destination. A discount of 2% is allowed in all cases for cash payment on arrival of the shipment or within ten days thereof. In practically all instances buyers take advantage of this cash discount. Brokers receive from respondent a commission of 2½% of the net selling price. Allowances are made for labels supplied by the buyers, and in most instances the labels are so supplied. In many instances the invoice price varies from that stated in the contract,

but the invoice price is invariably the price actually paid by the purchaser.

DISCRIMINATION IN FAVOR OF DIRECT BUYERS

In August 1949, Mr. Emmett M. Hazlett, who, as Vice President of the respondent corporation, was chiefly responsible for the sale of its canned fruits, called upon substantially all the buyers for the large chain stores maintaining offices in San Francisco, and secured from them contracts for the purchase of substantial quantities of fruit cocktail at prices substantially lower than those announced in respondent's published price list, released to its brokers a few days later. Concerning these transactions, Mr. Hazlett testified on cross-examination at the hearing held in San Francisco, California, on June 22, 1955, as follows:

"Q. Do you recall stating to Mr. Hill that a price difference had been recognized between certain direct buyers and non-direct buyers in 1949 on the purchase of fruit cocktail, that with packing operations about to start, Fruitvale felt it was necessary for the corporation to have some business on hand, against it to start packing and in order to obtain business you called on the direct buyers maintaining buying offices in San Francisco and named prices which were acceptable to such buyers? Is that a correct statement?

"A. Well, if Mr. Hill put that in it must have been that I said that. It sounds reasonable.

"Q. Yes, sir. In other words, you went out and quoted prices, made contracts with the direct buyers at a lower figure than the figure at which you announced your prices to the trade right thereafter?

"A. Later on, that's correct. That's correct.

"Q. And that accounts for the differential to some extent if not entirely in the price at which fruit cocktail was sold to the large direct buyers and to buyers located throughout the country, who were not in that classification, that is the wholesaler?

"A. Yes."

The above testimony constitutes a frank admission that the respondent, in 1949, sold products of like grade and quality to the large chain stores for less than the price at which it sold such products to wholesale grocerymen through brokers. The reason given for this practice was that the respondent corporation needed the assurance of business on hand at the start of the packing season. The prevalence of this practice, resulting in favoritism to the chain stores during 1949 and 1950, is evidenced by many contracts and invoices in the record, typical examples of which show that respondent, during 1949, sold choice fruit cocktail 48/1T in heavy syrup to direct buyers in the marketing area of E. St. Louis, Illinois, and St. Louis, Missouri, as follows:

Date	Buyer	Number of cases	Price per dozen cans	CX No.
8/31/49	Great A & P Tea Co.	150	$1.70	265
9/ 2/49	do	400	1.70	262
9/ 6/49	The Kroger Company	200	1.70	270
9/30/49	do	360	1.70	312
10/14/49	Associated Grocers, Inc. (Nat. Ret. Owned Grocers, Inc.)	700	1.75	328

During the same period of time, in the same area, respondent sold the same product to buyers purchasing through brokers, the unfavored buyers, as follows:

Date	Buyer	Number of cases	Price per dozen cans	CX No.
9/19/49	J. Eisenstein Wholesale Grocer Co.	25	$1.80	289
9/19/49	do	35	1.80	290
10/21/49	Wetterau Grocer Co., Inc.	50	1.75	333

Similar transactions in other areas are as follows:

Date	Buyer	Number of cases	Price per dozen cans	CX No.
	PRODUCT: CHOICE FRUIT COCKTAIL 48/1T IN HEAVY SYRUP			
	FAVORED BUYER			
	In Fort Wayne, Indiana			
8/22/49	The Kroger Company	200	$1.70	658
9/16/49	do	310	1.70	287
10/12/49	do	125	1.70	327
12/12/49	do	200	1.65	662
	NON-FAVORED BUYERS			
8/13/49	A. H. Perfect & Company	100	1.80	728
9/ 9/49	Bursley & Company, Inc.	450	1.80	277
	In Toledo, Ohio			
10/19/49	The Kroger Company	100	1.70	330
10/24/49	do	200	1.70	335
10/24/49	The Great A & P Tea Co.	200	1.75	338
11/30/49	do	250	1.75	357
	NON-FAVORED BUYER			
8/31/49	The Bartley Co.	100	1.80	267
	In St. Louis, Missouri			
	FAVORED BUYER			
1/19/50	The Kroger Company	350	1.65	668
1/27/50	do	375	1.65	669
2/16/50	do	100	1.65	670
	NON-FAVORED BUYER			
2/15/50	Wetterau Grocer Co., Inc.	200	1.675	715
	In Cleveland, Ohio			
	FAVORED BUYER			
10/12/49	The Kroger Company	100	2.85	325
	NON-FAVORED BUYERS			
8/31/49	The Wm. Edwards Co.	498	2.95	266
9/10/49	Gray Drug Store, Inc.	50	2.95	281
9/10/49	The Standard Drug Co.	75	2.95	280
9/10/49	The Great Lakes Food Sup. Co.	25	2.95	279

Date	Buyer	Number of cases	Price per dozen cans	CX No.
	In Philadelphia, Pennsylvania			
	FAVORED BUYER			
11/11/49	The Great A & P Tea Co	350	$2.85	352
	NON-FAVORED BUYER			
11/10/49	David Soffer	50	2.95	350
	In Baltimore, Maryland			
10/26/49	The Great A & P Tea Co	200	2.85	339
	NON-FAVORED BUYERS			
9/ 1/49	Baltimore Wholesale Groc. Co	100	2.95	282
9/21/49	Joffee Bros	100	2.95	301
	Product: CHOICE FRUIT COCKTAIL 6/10 IN HEAVY SYRUP			
	Davenport, Iowa			
	FAVORED BUYER			
8/31/49	Western Grocer Co	150	10.00	264
	NON-FAVORED BUYERS			
9/ 8/49	Lagomarcino-Grupe Co	40	10.20	273
9/ 8/49	Smith Brothers & Burdick Co	300	10.20	274
	Product: CHOICE FRUIT COCKTAIL 24/2½ IN HEAVY SYRUP			
	In Omaha, Nebraska			
	FAVORED BUYER			
9/26/49	Safeway Stores, Inc	300	2.85	308
	NON-FAVORED BUYER			
9/27/49	The H. A. Marr Grocery Co	320	2.95	307
	Product: 48/8 oz. CHOICE L. S. R. A. CHERRIES IN HEAVY SYRUP			
	In Philadelphia, Pennsylvania			
	FAVORED BUYERS			
6/16/49	The Great A & P Tea Co	600	1.125	245
6/17/49	American Stores Co	360	1.10	246
2/17/50	The Great A & P Tea Co	250	1.05	606
4/21/50	do	350	1.05	615
6/17/49	Penn Fruit Co	350	1.15	247
6/23/49	H. Kellogg & Sons	200	1.125	248
6/27/49	Frankford Grocery Co	300	1.15	250
8/13/49	Do	300	1.15	444
6/27/49	Wm. Montgomery Company	40	1.15	249
8/31/49	Do	100	1.15	466
7/ 1/49	Alfred Lowry & Bros	100	1.15	251
10/ 7/49	Alfred Lowry & Brother	100	1.15	459
7/ 1/49	Richmond Grocery Co	100	1.15	252
12/30/49	Do	99	1.15	407
2/15/50	Wm. Montgomery Co	100	1.15	732
	PRODUCT: FANCY L. S. R. A. CHERRIES 24/2½ IN HEAVY SYRUP			
	In Philadelphia, Pennsylvania			
	FAVORED BUYERS			
2/17/50	The Great A & P Tea Co	250	3.00	606
4/21/50	Do	300	3.00	615
9/13/50	Do	200	3.50	625
5/23/50	American Stores Co	750	3.00	570
	NON-FAVORED BUYER			
2/15/50	Wm. Montgomery Co	365	3.425	732
7/12/50	Do	655	3.55	733
9/11/50	Do	400	3.55	734
10/19/50	Do	200	3.55	735

Date	Buyer	Number of cases	Price per dozen cans	CX No.
	PRODUCT: 24/2½ CHOICE SLICED Y. C. PEACHES IN HEAVY SYRUP			
	In Portland, Maine			
	FAVORED BUYER			
8/19/49	Topco Co., C. C. Shaw	25	$2.10	260
	NON-FAVORED BUYERS			
9/19/49	Cummings Bros	200	2.15	288
9/21/49	Hannaford Bros	100	2.15	304
	In Jacksonville, Florida			
	FAVORED BUYER			
8/26/49	Consolidated Grocers Corp	100	2.10	261
9/22/49	Clark Lewis & Co	50	2.15	303
	In Spokane, Washington			
	FAVORED BUYER			
11/ 1/49	Safeway Stores	100	2.10	343
	NON-FAVORED BUYER			
9/26/49	The McClintock-Trunkey Co., Inc	50	2.15	306
11/31/49	do	50	2.15	347
	In Portsmouth, Ohio			
	FAVORED BUYER			
8/ 6/49	The Kroger Company	350	2.10	256
	NON-FAVORED BUYER			
10/ 7/49	The Gilbert Grocery Co	150	2.15	322
	In Rochester, New York			
	FAVORED BUYER			
10/27/49	Brewster Crittenden & Co	100	2.10	340
	NON-FAVORED BUYER			
10/25/49	S. M. Flickinger Company, Inc	60	2.15	336
	PRODUCT: STANDARD HALVES Y. C. PEACHES SIZE 24/2½ IN LIGHT SYRUP			
	In St. Louis, Missouri			
	FAVORED BUYER			
12/27/49	The Kroger Company	445	1.65	664
	NON-FAVORED BUYER			
10/12/49	Wetterau Grocer Co., Inc	200	1.90	713
	PRODUCT: 48/1 CHOICE SLICED Y. C. PEACHES IN HEAVY SYRUP			
	In Columbus, Ohio			
	FAVORED BUYER			
8/21/49	Topco, Big Bear Stores	200	1.325	259
	NON-FAVORED BUYER			
8/12/49	S. M. Flickinger	75	1.40	324
	PRODUCT: 6/10 CHOICE SLICED Y. C. PEACHES, HEAVY SYRUP			
	FAVORED BUYER			
8/26/49	Consolidated Grocers Corp	50	7.30	261
	NON-FAVORED BUYER			
9/22/49	Clark Lewis & Company	50	7.55	303

Comparison of the prices charged the favored buyers with those charged the unfavored buyers in the above-cited transactions reveals variations ranging from 5¢ to 25¢ per dozen cans occurring in respondent's sales in commerce during 1949, and similar price variations, ranging from 2½¢ to 55¢ per dozen cans, occurring during 1950. The great majority of the variations, however, were 5¢ or 10¢ per dozen cans. Similar variations appear in many other transactions documented in the record.

Although the price variations cited above may appear inconclusive when considered separately, when considered as a whole they reveal one consistent factor in respondent's pricing policy throughout the years of 1949 and 1950, which constitutes a definite marketing practice during those years, confirming the admission made in testimony by the vice president of the respondent corporation, and supporting the allegations of the complaint. This one constant is the fact that the favored chain stores, which purchased directly through their buyers in San Francisco during 1949 and 1950, were *consistently charged less* by respondent for products of like grade and quality than respondent charged the unfavored buyers who purchased through brokers.

PRICE DISCRIMINATION NOT JUSTIFIED

The differences in price shown above are not justified by price changes from time to time in response to changing conditions affecting the market of the commodities in question. This is true, because, as previously observed, differences are recorded between the prices granted favored and non-favored buyers on the same day, and because of the consistent pattern throughout 1949 and 1950 of respondent selling to favored buyers at a lower price.

In addition, the price discriminations shown cannot be justified as prices made in good faith to meet equally low prices of a competitor. In some instances the prices granted by the respondent to its direct buyers were actually higher than the prices its competitors were quoting for commodities of like grade and quality. In other words, in those instances price was clearly not the deciding factor which gave respondent this business.

Furthermore, the differentials in price were not due to differences in the cost of manufacture, sale and delivery. Frequently an unfavored buyer purchased a larger quantity at one time, of the same grade and quality of product as a favored buyer, but nevertheless paid the higher price.

COMPETITION AMONG RESPONDENT'S WHOLESALER CUSTOMERS

The discrimination in price herein shown must be considered in the light of the fact that the grocery business, which furnishes the outlet for respondent's products, is highly competitive. The record shows that competition in such business is so keen that the mark-ups on so-called "fast-moving" items, such as canned peaches and fruit cocktail, are very small, sometimes as low as two or three percent. Price is therefore one of the chief factors in making sales. A difference in price of 10¢, or even 5¢, on a dozen cans of fruit is sufficient to divert business from one seller to another, resulting in injury to competition.

CONCLUSIONS

The effect of the discrimination in price of commodities of like grade and quality, as herein found, is such as may tend to, and does, substantially injure, destroy and prevent competition between respondent's favored and non-favored customers, who are competing with each other, directly or indirectly, in their respective sales areas.

Respondent's acts and practices are therefore in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent, Fruitvale Canning Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of canned fruits in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of canned fruits of like grade and quality:

1. By selling at differing prices to wholesalers who in fact compete with each other in the resale or distribution of such canned fruits;
2. By selling at differing prices to retailers who in fact compete with each other in the resale or distribution of such canned fruits;
3. By selling to any retailer at prices lower than prices charged any wholesaler who competes, or whose customers compete, with such retailer in the sale or distribution of such canned fruits.

The term "price" as used in this order means the net price after all discounts, rebates or other allowances have been deducted.

ON APPEAL FROM INITIAL DECISION

By KERN, Commissioner:

Respondent, Fruitvale Canning Company, has appealed from an initial decision of the hearing examiner prohibiting it from discrimi-

nating in the price of canned fruits in violation of Section 2 (a) of the amended Clayton Act.

Briefly the hearing examiner found that respondent is a comparatively small, though substantial, factor in the fruit canning industry, packing primarily under private labels; and that, through its sales to favored buyers at lower prices than it charges nonfavored buyers, respondent has engaged in discriminatory pricing tending to substantially injure, destroy and prevent competition between these two categories of customers who are competing with each other in their respective sales areas.

The favored buyers include large retail chain store groups and large wholesalers, all of whom maintain their own direct buying agencies in San Francisco. The nonfavored buyers, who pay consistently higher prices than the favored group, include wholesale grocers and voluntary, or sponsored, retail chain store groups who do not maintain direct buying agencies but purchase, rather, through brokers.

Comparison of prices charged favored buyers with those charged nonfavored buyers reveal, the hearing examiner found, variations in 1949 of from 5 to 25 cents per dozen cans and similar variations in 1950 ranging from 2½ to 55 cents per dozen cans. His finding, however, is that the great majority of the variations documented in the record were from 5 to 10 cents per dozen cans.

The hearing examiner further found that the grocery business is vigorously and highly competitive. Mark-ups on fast-moving items such as canned fruits are as low as 2 or 3% and the record discloses that the 5 to 10 cent price differentials involved in this proceeding are sufficient to divert business from one seller to another. Price, the examiner concluded, is a chief factor in making sales.

The hearing examiner further found that these price differentials were not due to changing market conditions, that the lower prices were not justified as having been made in good faith to meet equally low prices of a competitor, and that they were not cost-justified as asserted by the respondent by way of special defense.

Controverting the special defense that, if respondent has discriminated in price, it has been in response to changing conditions affecting the market, the record contains numerous invoices showing favored buyers paying lower prices than nonfavored buyers on the same day. Reference to the record also shows that the favored direct buyers in San Francisco consistently were charged less by respondent for products of like grade and quality than the respondent charged nonfavored buyers who purchased through brokers. The hearing examiner so found and we have concluded that this defense by respondent is not

supported by the record made herein. It is clear that respondent granted favored buyers the advantage of discriminatory prices as a customary and normal method of business, not in response to any averred changing market conditions.

On the question of good faith meeting of competition, we also find that special defense is not sustained on the record. In this connection the hearing examiner found instances where respondent's prices to favored direct buyers actually were higher than prices quoted by competitors to direct buyers in San Francisco, thus demonstrating the fallacy of respondent's argument that its discriminatory prices were established to meet the prices of competitors. In passing we note that the record contains documentary evidence of instances where prices respondent charged nonfavored buyers were the same as prices its competitors were quoting for products of like grade and quality, and yet respondent contemporaneously granted lower prices to favored direct buyers.

As to the defense that price differentials were cost-justified, there is nothing in the record to support it. On the contrary, the record discloses numerous instances where nonfavored buyers paid a higher price although purchasing a larger quantity at one time of the same grade and quality of product than favored direct buyers. We find this defense to be without merit.

In its appeal respondent argues that the allegations of the complaint and the findings, conclusions, and order contained in the initial decision are not supported by reliable, probative and substantial evidence, and urges that the complaint should be dismissed for lack of adequate proof. Respondent does not question the Commission's jurisdiction and specifically states that it does not deny it has sold commodities of like grade and quality to different purchasers at different prices.[1]

Respondent's position is that unequal price treatment alone does not amount to discrimination prohibited by the statute and that the record is devoid of any evidence to support a conclusion that its pricing practices have produced, or are likely to produce, any injurious effect upon competition.

Counsel in support of the complaint called a number of responsible and reliable merchants with many years of experience in the wholesale grocery business. A composite of their testimony is that they

[1] Respondent's argument on appeal that prices stipulated in contracts between it and its customers, favored and nonfavored, frequently were different from invoiced prices is of no importance here because this proceeding is concerned with the actual prices paid to respondent, Fruitvale, by purchasers from it. The record contains many invoices disclosing sales to favored buyers at prices less than those respondent charged nonfavored buyers and the evidence is that, even where contract and invoice prices differed, the direct buyers got the lower price and it was not lowered to the nonfavored buyers in such situations.

carried complete inventories of grocery items, including respondent's products; that they sold in sales areas covering radii of from 50 to 125 miles, in competition with the favored chain stores and other favored wholesalers who are customers of respondent; that they always take advantage of the 2% cash discount allowed by Fruitvale; that this 2% cash discount is greater than their annual net profit which runs usually about 1%, or less; that it is important for them to obtain merchandise at a price as low as chains so as to permit them to sell to retail customers at prices that are competitive with retail chain outlets; that the price at which they are able to resell to retailers affects volume as well as profits; that frequent complaints have been made by retail customers when prices appeared out of line with those advertised by the chains; that if all their suppliers charged them 5 to 10 cents more per dozen cans for their products than they charged national chains they, the nonfavored buyers, would not be able to stay in business; and that had they known Fruitvale was selling to chains for less than prices charged nonfavored buyers, they would have complained to Fruitvale or discontinued buying from that company.

A typical retailer, manager of the grocery department in a family-owned supermarket in a Baltimore suburb, was called to illustrate how discriminatory prices in favor of chains affect the retail grocer. His testimony confirms the immediately preceding composite summary of wholesaler testimony. He added that his market purchased substantial amounts of canned fruits from Fruitvale; that the market competes directly with A. & P. and American Stores, both of which have nearby retail outlets; that they have been competing as far back as he can remember; that a lower price of 1 or 2 cents a can on fruit cocktail is sufficient to divert customers, and further that, if so diverted, customers probably would purchase all of their merchandise elsewhere; that price is featured "above all" in the market's advertising handbills; that customers complain if these prices are out of line with those of the chains; that his market's "only salvation" is to buy as cheaply as chains; and that prices affect the market's volume as well as profits.

Counsel in support of the complaint also called Mr. Harold O. Smith, Jr., Executive Vice-President, United States Wholesale Grocers Association, Inc., Washington, D. C. He testified that the U.S.W.G.A. has a membership composed of wholesale grocers not in any way affiliated with any large group; that they are strictly owner-operated, servicing independent retailers who likewise own and operate their own businesses; and that certain exhibits in evidence in this proceeding prepared under his supervision illustrate profit and loss figures compiled from a representative cross-section of the trade and

disclose, in 1949, an average net profit of 1.380%. The high in 1949 was 1.555% and the low .931%. Mr. Smith further testified that in the last five years membership in the association has decreased materially due to wholesale grocery firms going out of business because of inability to operate on the small margin on which they are forced to operate so as to resell to retail customers who must compete directly with national chains; that where a canner sold wholesalers at 10 cents a dozen higher than it sold competing chain stores; both the wholesaler and his retailer customers in such a situation "would be in the red, at those differences"; that if such differentials in prices were general with all suppliers "it would certainly put the independent—both wholesale and retail—out of business in short order"; and, finally, that a 5-cent differential would have the same effect as a 10-cent one except that it would be a little slower and take a little longer.

In addition, a typical food broker in Washington, D. C., testified that he had been a food broker thirty years with offices in Washington, Baltimore, and Harrisburg; that A. & P. and American Stores are active in all these areas, plus Philadelphia, and have numerous outlets therein. He further testified as to the highly competitive nature of the grocery business and corroborated other testimony that any difference in price, whether 5 or 10 cents a dozen cans in favor of a favored chain over a nonfavored wholesaler who must resell to retailers directly competing with the chain would have a tremendous effect on the wholesaler and retailer if done on a broad scale.

The pattern of respondent's pricing practices as established in this proceeding closely parallels those pricing practices uncovered by the Commission Chain Store Investigation of 1934.[2] Even casual reference to the legislative history makes it clear that these and similar harmful competitive practices provided the major impetus for the passage of the Robinson-Patman Act of 1936. Indeed, as we view it, the main thrust of the Robinson-Patman Act was to curb the predatory use of monopoly power by chain stores and mass buyers and to preserve the place of small business as well as to protect its competitive position. This record discloses substantial price differentials favoring large chain groups and large wholesalers of a type and character identical to those we conceive the Robinson-Patman Act was enacted to curb. The testimony of many witnesses called in support of the complaint as above outlined demonstrates the injurious competitive effect of such price differentials. Having concluded that respondent's special defenses were not sustained on the record, there exists no sound basis for overturning the initial decision of the hearing examiner.

[2] S. Doc. No. 4, 74th Cong., 1st sess.

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Respondent vigorously excepts to the substance and form of the order to cease and desist, arguing that certain specified inhibitions of the order are erroneous because "they do not specify 'at the same or substantially about the same time.' " It is further contended that the order is too broad in scope and exceeds the authority of the Commission by failing to limit its provisions to instances "where the effect is injury to secondary line competition." Respondent objects also to the fact that the order not only runs against corporate respondent but also is directed against its officers, representatives, agents and employees.

On respondent's point relative to limitation of the order to cover only sales made at the same or substantially the same time it was established here that respondent's prices were discriminatory and that they had the requisite competitive effect. None of the defenses available under the Act has been sustained, and the record is replete with instances of sales on the same day at unlawful price differentials. And respondent, by the order herein, is not precluded "from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos." [3] This contention of respondent is without merit.

Respondent's argument that the order should be limited in its application to price discrimination "where the effect is injury to secondary line competition" likewise cannot be sustained.

The order prohibits price discrimination between wholesalers, or between retailers, in competition with each other, or the granting of a lower price to a retailer than to a wholesaler who competes, or whose customers compete with such retailer. By implication its operation is limited, as respondent contends it should be, to situations where there will, or might be, injury to competition in the secondary line of competition. It goes only to circumstances where the hearing examiner has found the requisite effect of competitive injury under the terms of the amended Clayton Act. It would be improper for the order to recite that it is limited specifically to instances of unlawful price discriminations in the secondary line of competition as such. The incidence of competitive injury is not a matter appropriate to the order itself. In the *Morton Salt* case substantially the same inhibitions as appear in the order here were considered in detail and expressly approved by the Supreme Court. The reasons there obtaining in support of the form of order equally are applicable here.

Furthermore, the effect of any such limitation would be to shift to the courts the Commission's statutory responsibility to hear evidence

[3] *F. T. C.* v. *The Ruberoid Co.*, 343 U. S. 470 (1952).

on discriminatory pricing practices and to make findings concerning possible injury to competition, and to then prohibit such practices. In this connection the Supreme Court foreclosed any such possibility when it said in the *Morton Salt* case:[4]

"Such findings are to form the basis for cease and desist orders definitely restraining the particular discriminatory practices which may tend to injure competition without justification. The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order. The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U.S.C., § § 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order."

Respondent's exception in this regard is overruled.

Respondent attacks the scope of the order in that it is directed not only against the respondent, Fruitvale Canning Company, but also against "its officers, representatives, agents, and employees" citing *Reynolds Tobacco Co.* v. *F.T.C.*, 192 F. 2d 535 (7th Cir. 1951). The same court in its more recent decision in the *Anchor Serum*[5] case pointed out that the order in the *Reynolds* case was issued pursuant to the Federal Trade Commission Act and held that the order in a Clayton Act case was properly directed against officers, representatives, agents, and employees of a corporate respondent. We deem the same holding appropriate here. Respondent's exception on this point is denied.

Finally, respondent objects to the inclusion in the order of a definition of the term "price" stating that:

"The order is erroneous by reason of its definition of 'price' as meaning 'net price after all discounts, rebates or other allowances have been deducted.' In this industry, 'price' means the price before any deductions are made for regular discounts, rebates and other allowances, which are offered initially to all buyers."

The purpose of the definition included in the order is to make it indubitably clear that what is prohibited are discriminatory "net

[4] *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37 (1948).
[5] *Anchor Serum Company* v. *F. T. C.*, 217 F. 2d 867 (C. A. 7, 1954).

prices" with the requisite competitive effect, not prices initially quoted to purchasers. It is the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances with which we are concerned here. The fact that, in the fruit canning industry, price may mean "gross price" is not controlling here, where, for the purpose of inhibiting unlawful price discriminations the principal factors are the "net prices" and any differentials that might exist as between purchasers from respondent of commodities of like grade and quality. Respondent's objection to the order's definition of price is overruled.

We have fully considered the whole record herein including transcripts of hearings and oral argument before the Commission, as well as exhibits and briefs. It is our conclusion that the hearing examiner's initial decision is correct and that respondent's appeal therefrom should be, and it hereby is, denied, and the initial decision hereby is adopted as the decision of the Commission.

FINAL ORDER

Respondent, Fruitvale Canning Company, having filed its appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard upon the whole record including the briefs and oral argument of counsel; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission:

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

IN THE MATTER OF

CENU FIBRES, LTD., ET AL.

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

Docket 6512. Complaint, Feb. 17, 1956—Decision, June 16, 1956

Consent order requiring a manufacturer in New York City to cease violating the Wool Products Labeling Act, through failing to attach to wool fabrics tags, labels, etc., bearing the information required by the Act.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. John T. Walker for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cenu Fibres, Ltd., a corporation, and Philip Hausfeld, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under said Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cenu Fibres, Ltd., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 868 Sixth Avenue, New York, New York.

The individual respondent, Philip Hausfeld, is president of the corporate respondent, Cenu Fibres, Ltd., and formulates, directs and controls the acts, policies and practices of said corporate respondent. Said individual respondent has his office and principal place of business at the same address as corporate respondent.

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

PAR. 3. Among the wool products introduced and manufactured for introduction into commerce, and sold, transported and distributed in said commerce as aforesaid, were fabrics. Exemplifying respondents' practice of violating said Act and the Rules and Regulations promulgated thereunder is their misbranding of the aforesaid products in violation of the provisions of said Act and said Rules and Regulations by failing to affix to said fabrics a stamp, tag, label or other means of identification, or a substitute in lieu thereof, as provided by said Act, showing (a) the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding five percentum 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 the wool product of non-fibrous loading, filling or adulterating matter; (c) the percentages in words and figures plainly legible by weight of the wool contents of such wool product where said wool product contains a fiber other than wool; (d) the name of the manufacturer of the wool product or the name of one or more persons subject to Section 3 of said Act with respect to such wool product, or the registered identification number of such person or persons as provided for in Rule 4 of the Regulations as amended.

PAR. 4. Respondents, in the course and conduct of their business, were and are in competition with other corporations, firms and individuals likewise engaged in the sale of fabrics in commerce.

PAR. 5. The acts and practices of respondents, as herein alleged, constitute misbranding of wool products and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and said acts and practices are to the prejudice and injury of the public and of respondents' 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.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On February 17, 1956, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondents with unfair and deceptive acts and practices and unfair methods of competition in commerce by the misbranding of their wool products, in violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder.

On April 27, 1956, Respondents and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease

And Desist, which was approved by the Director and Assistant Director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent Cenu Fibres, Ltd., is identified in the agreement as a New York corporation, with its office and principal place of business located at 868 Sixth Avenue, New York, New York, and Respondent Philip Hausfeld as the president thereof, having his office at the same place as the corporate Respondent, the acts, policies and practices of which he formulates, directs and controls.

Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents, in the agreement, waive any further procedure before the Hearing Examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance therewith. All parties agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; and that the agreement is for settlement purposes only and does not constitute an admission by Respondents that they have violated the law as alleged in the complaint.

The agreement sets forth that the order to cease and desist as contained therein shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint herein may be used in construing the terms of said order.

After consideration of the charges set forth in the complaint, and the provisions of the agreement and the proposed order, the Hearing Examiner is of the opinion that such order will safeguard the public interest to the same extent as could be accomplished by an order issued after full hearing and all other adjudicative procedure waived in said agreement. Accordingly, in consonance with the terms of the aforesaid agreement, the Hearing Examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That Respondents Cenu Fibres, Ltd., a corporation, and Philip Hausfeld, 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 introduction or manufacture for introduction into commerce, or 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 any "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:

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 percentum 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 products of any non-fibrous loading, filling, or adulterating matter;

(*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 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;

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.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 16th day of June 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Cenu Fibres, Ltd., a corporation, and Philip Hausfeld, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

CYRUS SWIFT AND MYRTLE F. SWIFT DOING BUSINESS AS FAIRYFOOT

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

Docket 6479. Complaint, Dec. 8, 1955—Decision, June 19, 1956

Consent order requiring a seller in Chicago to cease representing falsely in advertisements in newspapers, periodicals, leaflets, and form letters, that her bunion plasters, designated "Fairyfoot for Bunions," were a sensational and miraculous scientific achievement use of which would permanently stop the pain of a bunion, cause the inflammation and swelling to quickly subside, correct the deformity of the foot associated with a bunion, etc.

Before *Mr. Robert L. Piper*, hearing examiner.
Mr. Joseph Callaway for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cyrus Swift and Myrtle F. Swift, individuals doing business under the trade name of Fairyfoot, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Cyrus Swift and Myrtle F. Swift are individuals doing business under the trade name of Fairyfoot, with their office and principal place of business located at 1223 South Wabash Avenue, Chicago 5, Illinois.

PAR. 2. Respondents are now and have been for more than two years last past engaged in the sale and distribution of bunion plasters designated as Fairyfoot for Bunions. Respondents' said product comes within the classification of both "drug" and "device" as those terms are defined in the Federal Trade Commission Act. According to the manufacturer, the formula is 98% rubber adhesive base and 2% benzocaine. On the label of the product as sold by respondents it is stated:

This formula in combination contains 1% Benzocaine

The directions for use are as follows:

When applying the plaster, be sure the foot is dry. Moisture prevents plaster from sticking properly. A little alcohol or witch-hazel rubbed on the skin just before applying will make it perfectly dry.

Now remove the special new covering from the face of the plaster.

THE ENTIRE PLASTER SHOULD BE APPLIED.

Plaster adheres smoothly when applied in a diamond shape * * * Rub gently from center toward edges.

* * *

FOR BEST RESULTS A FRESH PLASTER SHOULD BE APPLIED EVERY TWO DAYS.

After two days remove the plaster.

DO NOT LEAVE IT ON LONGER OR TAKE IT OFF SOONER!

* * *

After removing the plaster bathe foot in hot water. Dry foot and with palm of hand try and rub bunion for a few minutes. Then apply a fresh plaster.

* * *

A few applications of Fairyfoot for Bunions relieves pain. This is only the first step.

Do not make the mistake of stopping too soon. Immediately upon finding relief you should purchase another package of Fairyfoot and continue your treatment without interruption until the redness, pain and inflammatory swelling is subdued.

PAR. 3. The respondents cause said bunion plasters, when sold, to be transported from their place of business in the State of Illinois to the purchasers thereof located in various States of the United States. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said preparation in commerce between and among various States of the United States.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, advertisements concerning said bunion plasters by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondents' bunion plasters; and respondents have also disseminated, and caused the dissemination of, advertisements concerning said bunion plasters by various names for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said bunion plasters in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements, principally in newspapers and other periodicals, leaflets and form letters, disseminated and caused to be disseminated as hereinabove set forth, are the following:

A sensational advance in miracle science was hailed with the startling announcement of a simple treatment developed to stop Bunion Pain almost at once and reduce the aching, enlarged hump at the sides of the big toe, then you walk in comfort. Hundreds of letters have been received telling of prompt comforting relief as bunions get smaller and smaller until sufferers may wear regular shoes again. * * * Almost overnight relieves terrible stinging itching Bunions. The ugly swelling is reduced so you can wear the smart shoes you like.

Fairyfoot—Quick pain relief for bunions. Terrible stinging, itching pain goes away—swelling goes down quickly.

* * * While of course it is necessary to remove the pressure immediately, the relief cannot be accomplished by this means alone. Inflammation must first be subdued. Fairyfoot contains an effective type of pain reliever that relieves the inflammation and therefore the pain.

PAR. 5. Through the use of the above statements and representations and others similar thereto, not specifically set out herein, respondents have represented directly and by implication that said bunion plasters are a sensational and miraculous scientific achievement; that their use (1) permanently stops the pain of a bunion, (2) causes the swelling to quickly subside, (3) subdues inflammation and inflammatory swelling through a pain relieving ingredient, (4) corrects the deformity of the foot associated with a bunion by reducing the enlarged hump on the side of the big toe, and (5) causes a bunion to get smaller and smaller until the sufferer is able to wear regular shoes again in comfort.

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, respondents' bunion plasters are not a sensational miraculous scientific achievement nor sensational or miraculous. (1) The use of respondents' bunion plasters does not permanently stop the pain of a bunion; (2) does not cause the swelling to quickly subside; (3) does not subdue inflammation or inflammatory swelling through a pain relieving ingredient. (4) The "enlarged hump" referred to in respondents' advertising is usually caused by a deviation of the big toe towards the little toe in relation to the first metatarsal bone (which is the bone that forms a joint with the big toe) and an accompanying bony enlargement on the side of the first metatarsal near the big toe. The use of respondents' bunion plaster does not correct the deformity of the foot or the "enlarged hump" caused by the deviation of the big toe and the bony enlargement on the side of the first metatarsal. (5) The use of respondents' bunion plasters do not cause a bunion to get smaller and smaller until the sufferer is able to wear regular shoes again in comfort.

PAR. 7. The use by respondents of the foregoing false and misleading statements and representations, disseminated as aforesaid, has

had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to cause them to purchase respondents' bunion plasters.

PAR. 8. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 8, 1955, charging them with having violated the Federal Trade Commission Act through the making of false and misleading representations concerning the medical properties of their products. In lieu of submitting answer to the complaint, respondent Myrtle F. Swift on April 9, 1956, entered into an agreement for a consent order disposing of all the issues in this proceeding as to said respondent without hearing, which agreement has been duly approved by the Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission. In addition, counsel supporting the complaint has moved to dismiss it without prejudice as to respondent Cyrus Swift, upon the grounds, as evidenced by a supporting medical statement, of mental incompetence with the likelihood of retrogression rather than improvement. Having fully considered same, the motion to dismiss the complaint as to Cyrus Swift should be granted.

Respondent Myrtle Swift, pursuant to the aforesaid agreement, has admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondent that she has violated the law as alleged in the complaint, that said order to cease and desist

shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement, together with the aforesaid motion to dismiss, cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the order and agreement are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondent Myrtle F. Swift is an individual doing business under the trade name of Fairyfoot, with office and principal place of business located at 1223 South Wabash Avenue, Chicago 5, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That the respondent Myrtle F. Swift, individually and doing business under the trade name of Fairyfoot or under any other name, and respondent's agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of bunion plasters or of any other product of substantially the same composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

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 indirectly:

(*a*) That said product is a sensational or scientific achievement, or sensational or miraculous;

(*b*) That the use of said product,

(1) permanently stops the pain of a bunion,

(2) causes the swelling to quickly subside,

(3) subdues inflammation or swelling through a pain relieving ingredient;

(4) corrects the deformity of the foot associated with a bunion or reduces the bony enlargement,

(5) causes a bunion to get smaller and smaller until the sufferer is able to wear regular shoes again in comfort.

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

It is further ordered, That the complaint, as to respondent Cyrus Swift, be and hereby is dismissed without prejudice.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 19th day of June, 1956, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

ELVIN P. COURANT TRADING AS COURANT DISTRIBUTING COMPANY

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

Docket 5867. Complaint, Mar. 27, 1951—Decision, June 20, 1956

Order dismissing, as not supported by substantial evidence, complaint charging a seller with false advertising concerning its "Sav-A-Battery" treatment or conditioner for automotive storage batteries.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. Jesse D. Kash and *Mr. William M. King* for the Commission.

Mr. R. H. Moore, and *Reeder, Gisler & Griffin*, of Kansas City, Mo., and *Wheeler & Scoutt*, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Elvin P. Courant, an individual trading as Courant Distributing Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent Elvin P. Courant is an individual trading as Courant Distributing Company having his principal office and place of business located at Nowata, Oklahoma.

PAR. 2. Respondent is now and for more than two years last past has been engaged in the sale and distribution of a product represented as a treatment or conditioner for automotive storage batteries. Said product is designated "Sav-A-Battery."

The formula for said product according to information supplied by respondent is as follows:

29% Magnesium
70% Sodium sulfate
1% Trisodium phosphate

An analysis of the product shows the ingredients to be as follows:

13.2% Magnesium sulfate
75.0% Sodium sulfate

1.4% Trisodium phosphate
0.7% Sodium carbonate

PAR. 3. Respondent causes said product when sold by him to be transported from his aforesaid place of business in the State of Oklahoma to purchasers located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce among and between the various States of the United States. His volume of business in such commerce has been substantial.

PAR. 4. In the course and conduct of his aforesaid business and for the purpose of inducing the purchase of his said product, respondent has made many claims and representations concerning said product in advertisements inserted in trade journals, in sales literature, circulars, testimonials, on labels and in other advertising matter. Among and typical of such claims and representations are the following:

TERRIFIC MONEY-MAKER!

A battery chemical that ends recharging! Adds years of satisfactory service to battery! Simply put SAV-A-BATTERY into each cell of battery, that's all there is to do. It prevents sulphation which causes 90% of battery failures. Makes lights whiter and brighter, lets driver use radio without fear of battery trouble. SAV-A-BATTERY also may be used with amazing results in used batteries as well as new ones.

8 REASONS WHY
CAR OWNERS BUY
SAV-A-BATTERY

1. Insures Quicker Starting
2. Increases Power
3. Prolongs Battery Life
4. Gives Brighter Lights
5. Reduces Recharging
6. Prevents Overheating
7. Non-Injurious
8. Fully Guaranteed

SAV-A-BATTERY chemical is amazing in its action—it actually doubles the efficiency of new batteries and restores life to used batteries. Makes them last longer. Because of its remarkable effect, it does away with battery troubles almost entirely—it eliminates bothersome 'dead' batteries and saves recharging bills. SAV-A-BATTERY never fails, always performs! Through long period tests, this unusual battery chemical has been perfected and proven! It's action is due to the combination of the chemical with battery sulphuric acid which forms a new and extra-efficient electrolite, thus reducing battery failures to a minimum. Lights are whiter and brighter and driver can use radio safely when SAV-A-BATTERY is at work! It can easily be added to any sulphuric acid battery, old or new!

PAR. 5. Through the use of the foregoing statements and representations hereinabove set forth and others similar thereto not specifically set out herein, the respondent represented, directly or by implication, that the use of his product, as directed, in lead acid storage

batteries will end recharging of batteries; that it will add years of satisfactory service to a battery; that it will prevent sulphation in the battery; that it will make automobile lights whiter and brighter; that it is effective in used batteries as well as new batteries; that its use will insure quicker starting, increased power, prolonged battery life, and will prevent overheating of battery; that it will double the efficiency of new batteries, restore life to used batteries and eliminate dead batteries.

PAR. 6. In truth and in fact, respondent's product under either of the formulae hereinabove set out, when used as directed or in any other manner, has no beneficial effect in the preservation, operation or maintenance of lead acid storage batteries. The claims made for said product by respondent in his advertising and particularly set out above are consequently false, misleading and deceptive.

PAR. 7. The use by the respondent of the foregoing false, misleading and deceptive statements and representations had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true, and to induce the public to purchase substantial quantities of respondent's product as a result of such erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

Per Curiam:

This matter is before the Commission upon appeal by the respondent from the hearing examiner's initial decision. The Commission is of the opinion that the issues raised by this appeal are substantially the same as those decided *In the Matter of Pioneers, Inc., et al.*, Docket No. 6190. We find here that the decision of the hearing examiner is not supported by reliable, probative, and substantial evidence of record.

Accordingly, upon the basis of our review of the whole record herein, respondent's appeal is granted and the complaint dismissed for failure of proof. This disposition of the case renders it unnecessary for us to rule more specifically on the respondent's exceptions to the initial decision.

Commissioner Kern did not participate in the decision of this matter.

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ORDER DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon the respondent's appeal from the hearing examiner's initial decision and briefs in support of and in opposition to said appeal; and

The Commission having determined that the allegations of the complaint are not supported by substantial evidence and having set forth its reasons therefor in the accompanying written opinion:

It is ordered, That the respondent's appeal from the hearing examiner's initial decision be, and it hereby is, granted.

It is further ordered, That the initial decision be, and it hereby is, vacated and set aside.

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

Commissioner Kern not participating.

In the Matter of

HENRY ROSENFELD, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d) OF THE CLAYTON ACT

Docket 6212. Complaint, June 14, 1954—Decision, June 21, 1956

Order requiring a New York City distributor of women's suits and dresses to retailers throughout the United States, with annual sales exceeding $10,000,000 in 1949-1951, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act, by making to some of its customers promotional allowances amounting to 50% of the retailer's local advertising costs up to $1.00 per garment in connection with the resale of its dresses, while not making such credits or payments available to all other competing customers.

Mr. Peter J. Dias for the Commission.

Marshall, Bratter, Klein, Greene & Option, of New York City, for respondents.

Initial Decision By Frank Hier, Hearing Examiner

Complaint herein was issued June 14, 1954, charging respondents with making promotional payments to aid in the resale of respondents' dresses to some of their customers but not making such payments available on proportionally equal terms to all of respondents' customers competing in the distribution of respondents' products in violation of Section 2 (d) of the Clayton Act (U.S.C., Title 15, Sec. 13). Respondents' answer admitted jurisdictional and descriptive facts alleged, denied violation and pleaded meeting competition in good faith as an affirmative defense.

After five hearings in New York, Philadelphia and Washington, counsel for proponent rested and counsel for respondents moved to dismiss, asserting insufficiency of the record to constitute a prima facie case of the violation charged, which motion, after briefing, was denied by the hearing examiner. Thereafter, four more hearings in New York City completed respondents' defense and proof taking was closed on June 30, 1955. Thereafter, Proposed Findings of Fact and Conclusions were filed by all counsel and the case closed on August 24, 1955. Upon consideration of the entire record herein and from his observation of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACTS

1. Respondent, Henry Rosenfeld, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the

State of New York with its warehouse, office and principal place of business located at 498 Seventh Avenue, New York City.

2. Respondent, Henry Rosenfeld, is an individual with his principal office and place of business located at 498 Seventh Avenue, New York City and is now and, since its organization in 1942, has been president of Henry Rosenfeld, Inc., and, as such, controls, directs and is responsible for the acts and practices of respondent, Henry Rosenfeld, Inc. Because of this unity, both respondents are hereinafter treated jointly.

3. Respondent, Henry Rosenfeld, Inc., is now and has, for many years past, been engaged in the merchandising of women's suits and dresses under the registered trade name of Henry Rosenfeld to retail outlets such as department stores and women's specialty shops and dress shops in ten million dollar volume for resale to wearers. Such suits and dresses are widely advertised and otherwise publicized and are widely and favorably known to such resale outlets and to their customers.

4. Corporate respondent's distribution of its ready-to-wear is in commerce, as "commerce" is defined in the aforesaid Clayton Act throughout the United States.

5. Respondents sell mainly through their New York City showrooms to which buyers for retail outlets come for inspection, selection and purchase, but they also maintain an average of eight traveling salesmen who visit and solicit retailers throughout the country.

6. Dress manufacturers traditionally and customarily price their products wholesale in brackets of $5.75, $6.75, $8.75, etc., on which the retailers' markup to the consumer is customarily 40%. Respondents' prices range from $5.75 to $10.75 uniform to all purchasers, without discounts of any kind, except for cash. Respondents' dresses are not "fair-traded."

During the period from 1949 through 1951 and from 1951 through 1954, respondent Henry Rosenfeld, Inc. had five seasonal lines of its merchandise per year; and each line consisted of from 60 to approximately 100 dress styles, making an approximate total of from 300 to 500 different styles per year during each of the years aforesaid.

7. To promote both the sale and resale of their dresses, respondents engaged in cooperative localized advertising, stressing the name of Henry Rosenfeld and over the name of the customer. Respondents pay 50% of the cost of the advertisement up to $1.00 per garment, regardless of the size of the purchase, the size or character of the customer, the present or past purchase volume of that customer and without any requirement that the customer purchase any minimum number of garments before qualifying for the contribution.

The mechanics involve the store placing the advertisement over its name in a local newspaper and paying therefor, then submitting the receipted bill with a tear sheet of the advertisement to respondents, with reimbursement up to 50% of the cost being made by the latter to the former, either by deduction from respondents' invoice for the garments sold or by respondents' separate reimbursement check to the customer.

8. These contributions by respondents, however, are only on three categories of garments:

(1) Those where respondents' profit margin is "huge."

(2) Slow sellers, or unpopular styles.

(3) Those made from leftover or excess piece goods which respondents are anxious to get rid of.

9. It was respondents' practice to advise its salesmen, in its showrooms and in the field, which garments carried advertising allowances and, further, to hang on the display model thereof a tag marked "M—," signifying "Mat." Respondents' salesmen were instructed to advise prospective purchasers which garments carried advertising allowances. Individual respondent testified he always did so, believed his salesmen did, and pointed out it was to the salesmens' interest to do so as it furthered the sale.

10. Respondents, however, did not formally announce, publicize or circularize the policy set out above and the terms and conditions under which retailers could secure advertising allowances were never brought to their attention by respondents in printed form. Obviously the policy could not have been thus formalized because it was highly flexible, subject to constant change and was decided upon solely by the individual respondent "when, as and if." Although the "huge mark-up" numbers could be determined prior to or at the beginning of the season's offering, slow moving numbers and left-over piece goods numbers could not be ascertained until sales effort had progressed far enough to evaluate results. The question of which style numbers would carry the allowance was, in the nature of things, in a constant state of flux, with a particular model carrying no allowance for weeks and then suddenly being promoted with one.

There is, of course, no requirement in the law that a seller give advertising allowances on all his products if he gives it on one—the requirement is that, if he gives it on one or more, he make the same allowance available on proportionally equal terms to all buyers of that product or products.

11. To sustain the complaint charge that these advertising allowances were not made available on proportionally equal terms by respondents to all their customers competing in the resale of respond-

ents' dresses, there was offered a tabulation from respondents' records of its net annual sales for 1950, 1951, 1952, 1953, and 1954 and amounts of advertising allowances paid in each of these years by respondents to all purchasers in Baltimore, Philadelphia, Newark and Boston. Without setting out here unnecessary detail, such tabulation shows that respondents paid advertising allowances to some of its customers in each city but not to others. Some of these advertising allowances were in substantial sums, others insignificant. Some of the non-recipients purchased in very substantial amounts from respondents. There was, as testified, no mathematical relationship between amount of purchases and amount of allowances paid.

12. During the years 1950-54, respondents sold to two department stores in Newark, New Jersey—L. Bamberger & Co. and Hahne & Company—giving advertising allowances in each year to the former but not to the latter and the buyers for each so testified, the buyers for Hahne & Co. stating that with one exception they were never offered any advertising allowance although one of them went to respondents' showroom twice a month, the other three or four times in two years. They testified there were only style tags on the dresses, nothing else to show whether or not the dresses carried an advertising allowance; that they were never told about such allowances except on one occasion. Neither of them ever asked for an allowance. One of them had heard that such allowances were given by dress manufacturers.

13. The buyers for Bamberger's in Newark, which competes with Hahne & Co. on the resale of respondents' dresses, testified on the contrary that they were always told what models carried advertising allowances; that they were affirmatively offered them and received them; that they knew that dress manufacturers offer such allowances; that they had asked for them and been refused on certain dress or suit numbers; and that all the buyers for other stores whom they knew were well aware of the practice among dress manufacturers of giving advertising allowances.

14. Substantially the same situation was developed in Philadelphia. There, John Wanamaker, Bonwit Teller, Strawbridge & Clothier and others received advertising allowances from respondents, whereas Snellenberg & Co. did not. The buyers for the latter store covering 1950 through part of 1954 all testified that they bought dresses from respondents at the latter's showroom, were neither offered nor given any advertising allowance, although, on several occasions, the purchase was for a special promotion; that Snellenberg's on one or more occasion advertised the dresses at its own cost; that the same dresses were locally advertised by one of its competitors. Two of the three

buyers did not ask for any advertising allowance from respondents; the third did and was refused but without explanation as to any terms, conditions or restrictions on their grant. All of them knew that dress manufacturers did give advertising allowances and had obtained them from some, but two of them did not know that respondents gave them. On the other hand, the buyers for department stores and dress shops in Philadelphia, who received allowances from respondents on purchases which they resold in competition with Snellenberg's, testified they asked for such allowances—at times received them and at other times were refused without explanation. They had all received allowances from other dress manufacturers at times and knew of course that respondents did grant them because they asked for such allowances. Apparently the terms of 50% of the advertisement or $1.00 per garment were not mentioned with one exception. It was a case of individual negotiation between the buyer and respondents' salesman in each instance as to the selection by the former as to which garment the buyer wanted to advertise. All but one of these buyers did not know whether an allowance was available or on what terms until asking. The buyer for Bonwit Teller's was affirmatively offered advertising allowances on certain garments; she did not have to ask for them.

15. This testimony (pp. 12 and 14, supra) was denied, categorically in part, by implication as to the remainder by the individual respondent, Henry Rosenfeld, who asserted he had never refused these stores (Hahne's and Snellenberg's) on advertising allowances, had never given orders to do so, nor to his knowledge had his salesmen done so. He stated that when he sold personally he always advised prospective purchasers on what dresses such allowances were available, that he always instructed his salesmen to do likewise and that he believed they did and that he believed these buyers who visited his showrooms knew such allowances were available. These testifying buyers of Hahne's and Snellenberg's did not deal with Henry Rosenfeld but with his salesmen and their testimony is positive and unequivocal as opposed to the belief of what happened given by the individual respondent. The preponderance is clearly with that of the buyers. Full credibility is given to all this testimony—it is a question of weight, decided as indicated, supra.

16. From this evidence it is found as a fact that respondents did not affirmatively offer to pay advertising allowances to all of its customers who bought for resale in competition with one another; that respondents did not publicize the terms and conditions on which these allowances were granted in such manner that all of its customers were aware thereof in advance of purchase; that the terms themselves

vary so constantly from garment to garment and from time to time solely at the direction of Henry Rosenfeld that they can hardly be said to be terms at all—certainly not any reliable standard by which to judge proportionality and that generally the requirements of the statute under which the charge is made have not been met.

17. Counsel for respondents stressed, during cross-examination of adverse buyer witnesses, that their purchases from respondents were small in amount. Since respondents' advertising allowances are neither based on, geared to, nor conditioned by, the amount of purchases, this is immaterial. The purchases of nonrecipients were certainly not de minimis. Equally immaterial on this record is the point that these buyers who were neither offered nor paid these allowances did not attend the "opening" showing of respondents' seasonal lines because respondents do not restrict, according to Rosenfeld's own testimony, advertising allowances to any season, any time or any particular line.

18. Respondents' counsel have consistently insisted throughout this case that if a buyer knows there are such things as advertising allowances in the dress manufacturing industry, the burden is upon such buyer to inquire as to each dress in which he may be interested or which he may be shown as to whether or not he can secure an advertising allowance thereon, if he purchases it, from each manufacturer with whom he deals. Reliance for this position is put on the admission by most of the witnesses that they knew various dress manufacturers do give advertising allowances and by some of them that they knew these respondents gave them. Counsel supporting the complaint, on the contrary, contends that there is an affirmative burden on the grantor to advise his customers generally of the availability thereof and the terms of grant. The Commission has definitely ruled in favor of the latter contention in the matter of Kay Windsor Frocks, Inc., in Docket No. 5735. The conclusion here is accordingly the same.

19. As an affirmative defense, respondents assert, and offered evidence from their competitors to prove, that respondents' advertising allowances were granted to meet competition. At the outset of this defense, and since, counsel in support of the complaint has objected to such evidence contending that the provisions of Sec. 2 (b), limited as they are to "discriminations *in price or services or facilities*," obviously apply only to Sections 2 (a), 2 (e) and 2 (f) of the Clayton Act and not to Sections 2 (c) or 2 (d). This same contention was made to, and sustained by, the hearing examiner (then, a pristine issue) in Docket No. 5482, Carpel Frosted Foods, Inc. On appeal (the Commission then entertained case-end and case-wide appeals),

the Commission held the tendered evidence "material and revelant for consideration by the Commission without regard to the question as to whether or not such evidence constitutes a substantive defense to charges brought under Section 2 (d) of the Clayton Act." Since such evidence can obviously not have any materiality except defensive, and since it was so offered and argued, the hearing examiner in that case treated it as a defense and there was no reversal of such treatment. Hence, the objections of counsel in support of the complaint in this proceeding were overruled and are again overruled and the evidence of respondents on this point is hereinafter considered as a substantive defense. That evidence comes from five competitors of respondents, all of substantial size and all selling nationally, one of them doing in excess of twenty million a year.

20. Margo-Walters, Inc., organized in 1950, selling casuals competitive with respondents in the $5.75, $6.75 and $8.75 wholesale price brackets, paid Strawbridge & Clothier $7,725.00 as an advertising allowance in 1954 on purchases of $72,905.25; $7,008.13 on purchases of $58,158.50; $4,450.00 on purchases of $92,951.50 in 1952 but no allowance in 1951 on purchases of $10,142.00. The basis was one-half the cost of the advertisement with no ceiling or no minimum amount of purchase to qualify. The primary purpose of the allowance was to sell and Margo-Walters, Inc. neither knew nor cared what was done by their competitors about advertising allowances.

21. Puritan Dress Company, organized in 1913, a competitor of respondents on wholesale price line brackets of $5.75 through $10.75, gave advertising allowances since 1950 in unknown amounts on unknown purchase volumes to L. Bamberger & Co. of Newark; Strawbridge & Clothier and John Wanamaker of Philadelphia for the purpose of getting business. The basis was 50% of the cost of advertising with a ceiling that varied from 25–50¢ per dress and without minimum amount of purchase. All of the recipient firms advertised Puritan dresses at times without receiving advertising allowances.

22. Jerry Gilden Specialties, Inc., is competitive nationally with respondents on wholesale price line brackets of $5.75 through $14.75, and gave advertising allowances to Strawbridge & Clothier in June 1950 and January 1954; to John Wanamaker on occasions between July 1949 to April 1954; L. Bamberger & Co. on five occasions from April 1953 to July 1954, the basis being from 50% to 100% of the cost of the advertisement with a ceiling of 50¢ a dress, and to Bonwit-Teller in substantial amounts on five occasions from June 1951 to February 1954.

It was stipulated between counsel that Majestic Specialties, Inc. would testify substantially the same with reference to sales and

advertising allowances in the four stores mentioned as did the officials of Puritan Dress Co. and Jerry Gilden Specialties, Inc.

23. Likewise, McKettrick-Williams, Inc., organized in 1938 and selling casual dresses nationally at $5.75 through $10.75 in competition with respondents, gave a single advertising allowance of $1,000 to Wanamaker in Philadelphia on $38,564.51 of sales; a single advertising allowance of $2600 in 1953 to the same store on $49,183.16 of sales and four advertising allowances totaling $2680 in 1954 on sales of $69,416.43. This was simply a contribution of 50% of the cost of the advertising which was sometimes less, and apparently personally negotiated between the inquiring buyer and the firm. No minimum purchase was required and this firm had no general policy or over-all formula.

24. In each of the above instances, the advertising allowance was given only after it was asked for—no effort was made to advise buyers of its availability. There was no ceiling per garment fixed or allowed in some instances. From the evidence, the practice of these five competitors of respondents was typical and general throughout the dress manufacturing industry. All of these dress manufacturers made the selection of the garments on which advertising allowances would be awarded, which selection would shift or change from time to time and be affected by the size of the account and insistence of the demand. There was not shown specifically what style, type or price bracket any particular advertising allowance was granted upon.

25. In addition to this, the individual respondent, Henry Rosenfeld, testified he had been selling dresses for 26 years; that his contacts with buyers and competitors were frequent; that the five above-named firms were direct competitors of his, as well as a number of others, and that advertising allowances were common in the industry since his advent therein; that they were indispensable to sales and volume; that if he did not give them he would lose both; that he offers them to buyers whether his competitors do or not; that he knows the firms to whom he gave advertising allowances, namely, Bamberger's, Wanamaker's, Bonwit Teller's and Strawbridge and Clothier's, did get and could get such allowances from his competitors because their buyers frequently told him so, although he did not know on what garments, nor when, nor in what amounts except that the general basis is 50% of the cost of the advertisement. He also testified, however, that if a buyer wants an advertising allowance on some low profit garment or on one which, for some other reason, he is not pushing, stating that she can get such an allowance from a competitor on a substantially similar garment, that he will refuse to give it because he would lose money. He was unable to cite an instance

where a buyer refused to buy because he was refused an advertising allowance thereon, stating that he always is able to sell buyers what he wants them to buy. He stated categorically that in giving these allowances he was meeting competition generally, not specifically, obtaining or maintaining volume in an industry where, without high volume, there is little or no profit. He denied that he had refused, or directed any refusal, of allowances to those stores who received none.

26. It is thus evident that advertising allowances are rampant in the dress manufacturing industry; that they are granted on a shifting, individual and unpublicized basis, in some instances on a wholly arbitrary basis; that they generally must be asked for and must be separately negotiated for; that they are customary with respondents' competitors; that they are, in the main, aggressive rather than purely defensive implements used to obtain business; that they are allowed on unknown numbers or styles whose selection is entirely at the constantly changing whim of the grantor's chief official; that they are an integral part of the grantor's pricing policy. It is equally obvious that respondents do not grant an advertising allowance to meet exactly the same allowance on a closely similar garment by a particular competitor in the same amount and for the same duration. In short, respondents are here claiming to meet competition generally, rather than specifically, meeting a practice rather than a price—a defense which has been frequently made and as frequently rejected,[1] the latest ruling thereon being that in Docket No. 5768, C. E. Niehoff & Co., where the facts in support of such defense were far more persuasive than those shown by this record. Lastly, respondents' advertising allowances were aggressive rather than defensive merchandising weapons. Accordingly, the conclusion is that respondents' defense of meeting competition in good faith is not made out.

27. Respondents have contended throughout this proceeding that to proceed against them alone for a practice which is rampant, traditional and customary in their industry, leaving their competitors free to continue giving allowances on just as arbitrary or hit or miss basis as theirs, is unfair. Of course "everybody's doing it" is no defense and the hearing examiner has neither responsibility for, nor authority over, administrative selection for prosecution. But the record, sketchy as it is on the point, nevertheless sustains respondents' claims on this score and presents a sorry picture of an industry-wide practice apparently as repugnant to Sec. 2 (d) of the Clayton Act as anything found herein against respondents. In only two other cases[2] has the Commission proceeded, as here, against dress

[1] *F. T. C.* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746.

[2] Docket No. 5735, Kay Windsor Frocks, Inc., et al. Docket No. 6215, Jonathan Logan, Inc., et al.

manufacturers. Dozens of others are apparently left free to continue and the rationale of this selectivity does not appear. That is, as it must be, a matter solely for Commission attention or inquiry and the hearing examiner has neither authority nor discretion to suspend this case for possible Commission action on an industry-wide basis. Such a plea must be addressed to the Commission.

Counsel for respondents has most vigorously and ably presented this asserted defense, as indeed he has the rest of the case, and has impressed the hearing examiner with his sincerity and the situation in which this leaves his clients, but the hearing examiner is not only bound by precedent but is limited in the exercise of both power and discretion.

CONCLUSION

1. Respondents have granted, and are now granting, advertising allowances to promote the sale of their dresses to some customers and not to others; hence, not on proportionately equal terms to all their customers competing among themselves in the resale of respondents' dresses.

2. The preponderance of the evidence indicates that respondents have not advised all of their customers or prospective customers of the availability of such advertising allowances and hence have not made them available to all customers competing in the resale thereof as the law requires.

3. The defense of meeting competition in good faith provided by Sec. 2 (b) of the Clayton Act is not sustained where the claimant meets an industry practice rather than an individual and specific allowance situation.

4. The acts and practices of respondents as found above violate subsection (d) of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

ORDER

It is ordered, That respondents, Henry Rosenfeld, Inc., a corporation, its officers, employees, agents and representatives, and Henry Rosenfeld, individually and as president of Henry Rosenfeld, Inc., directly or through any corporate or other device, in or in connection with the sale of women's clothing in commerce, as commerce is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or

through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondents, unless such payment is affirmatively offered or otherwise made available to all competing customers in amounts determined by the same percentage of the same measurable base.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

The initial decision filed by the hearing examiner held that the respondents, when granting advertising allowances to certain of their customers, had not made such allowances available to others who were competing in the resale of the respondents' dresses with those recipients, and that the respondents' acts and practices in that respect have been in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The order to cease and desist contained in the initial decision, in effect, forbids the respondents from compensating customers for facilities or services furnished by them in connection with the resale of respondents' apparel unless payments on proportionally equal terms are affirmatively offered or otherwise made available to all others competing with those afforded allowances. The respondents have appealed and request that we reverse the initial decision.

The respondent, Henry Rosenfeld, Inc., engages in the sale and distribution of women's dresses to retailers located in many cities, including department stores and specialty and dress shops. Mr. Henry Rosenfeld, also a party respondent in this proceeding, directs and controls its policies and is its president. A very substantial portion of respondents' garments are sold through their show room located in New York City. The evidence received related primarily to sales practices pertaining to dresses on which respondents' wholesale prices ranged from $5.75 to $10.75.

In promoting sales of the dresses, cooperative advertising has been engaged in stressing the name of Henry Rosenfeld and the name of the particular retailer sponsoring the advertising. Respondents, when they participate, pay 50% of the cost of local advertising engaged in by the retailer up to $1.00 per garment. Their policy has contemplated, however, that such promotional compensation to retailers be limited to purchases of three categories of dresses, namely, those carrying larger profit margins for respondents, garments which are slow sellers, and those made from leftover or excess piece goods. The law imposes no requirements that a seller give advertising allowances on all his products if he elects to accord them on one or more articles. When granting any promotional payments, however, the law requires

that he make them available on proportionally equal terms to other resellers of that article or articles who compete with recipients of the compensation.

Respondents contend at the outset in their appeal that the only evidence which may be properly considered in determining the merits of this proceeding is that relating to the availability of respondents' promotional allowances in the years 1949, 1950, and 1951, which are the years expressly mentioned in Paragraph 7 of the complaint. Such interpretation of the complaint is unduly restrictive, however; and it is reasonable instead to construe the instances of alleged violations particularized in that paragraph, as to those years, in the light of the complaint's preceding allegations identifying those acts as illustrative of practices followed by the respondents when compensating customers for services and facilities furnished by them. Some of the evidence received related to 1950, but the testimony revealing detailed information on respondents' transactions and dealings with their accounts pertains to a period beginning in 1951 and continuing into 1954. This evidence was properly received into the record and indicates that respondents' policies in respect to promotional allowances did not differ materially in 1951 from those followed in succeeding years.

With bearing also on this aspect of the appeal is the fact that, throughout the hearings, respondents had notice that the hearing officer deemed the evidence relating to activities subsequent to 1951 and up to issuance of the complaint to be relevant and material to the issues presented in the proceeding. The hearings were held at intervals and respondents were afforded full opportunity to cross examine adverse witnesses and present their own case. That their rights of due process were fully observed is clear from the record, and there is no valid basis for the appeal's contentions that our decision on the merits of this case be restricted solely to record matters pertaining to activities by respondents prior to 1952.

Before proceeding to consideration of other aspects of the appeal, brief reference to various additional evidentiary matters is warranted. The record includes a tabulation showing respondents' net annual sales for various years from 1950 into 1954 to all customers in the areas of Baltimore, Boston, Newark and Philadelphia, together with the amounts of advertising allowances accorded by respondents to those purchasers. It attests that respondents paid promotional allowances to some of their customers in each of those cities but not to others. Buyers and other personnel identified with both of respondents' retail store accounts in Newark and certain of its customers in Philadelphia also appeared as witnesses and testified as to their visits

and dealings at respondents' show room at various times from 1951 into 1954. Of the two Newark department stores, one received allowances in each of the years noted above; but the other received none and its buyers testified that, except in one instance, no allowance was ever offered in the course of their various visits to the New York show room. According to the testimony of the buyer representative for a competing Newark store receiving respondents' promotional allowances, she was informed and guided as to what styles carried advertising allowances and affirmatively offered them. The testimony relating to respondents' dealings with their Philadelphia customers, while not identical, was substantially similar in vein.

The appeal argues that the evidence establishes that the failure of the foregoing customers to secure promotional payments was due in fact to their lack of satisfaction with garments carrying advertising allowances or interest in conducting advertising promotions for the Rosenfeld line. The initial decision's conclusions to a contrary effect have adequate support in the record, however. One of the unfavored stores inserted newspaper advertisements featuring the Rosenfeld name on at least two occasions, and another, also at its own expense, advertised them during at least one promotion. Nor is there merit in the appeal's contentions that the record supports conclusions that respondents' failure to afford promotional compensation to some stores was due to the inadvertence of respondents' employees and presents a *de minimis* situation warranting dismissal of the proceeding. On one or more occasions, it was the vice-president of the corporate respondent with whom the buyer for a store receiving no allowances conducted her dealings. This store's purchases were substantial and in no sense *de minimis*.

The appeal brief emphasizes, too, that buyers for non-favored stores did not regularly attend the seasonal openings at respondents' show room when optimum opportunity assertedly existed for buyers to obtain advertising allowances. This circumstance is nowise controlling, however. As found in the initial decision, respondents' terms varied so constantly from garment to garment and from time to time, solely at the direction of the respondent, Henry Rosenfeld, that they could scarcely be regarded as terms at all. Testimony presented by respondents indicates that their customary practice was to allocate two higher profit items in each category of dresses for advertising allowances and, in instances when merchandising conditions warranted, to include all garments in an entire group or category for promotional purposes. It is clear that respondents' flexible policies with respect to promotional garments insured the presence of varying but substantial numbers of them on the show room line throughout

the season and rejected are the appeal's contentions as to the record being deficient in this respect.

The hearing officer concluded that the respondents did not affirmatively offer to pay advertising allowances to all their customers buying for resale competitively with others and that the respondents did not publicize the terms on which allowances were available in such manner that all of its customers were aware of them in advance of purchase. In our view, the hearing examiner's interpretation of the testimony of the buyer representatives was accurate and his appraisals of the credibility of the various witnesses and the evidentiary weight properly to be accorded to their testimony were justified and sound.

The respondents' advertising allowances have not been granted by them on proportionally equal terms to their competing customers; and there is clear record showing that their failure to inform all accounts as to the terms under which allowances were being accorded has deprived those so disfavored of equal competitive opportunities in reselling the dresses. It follows, therefore, that respondents' promotional allowances were unavailable, as a matter of law, among competing customers. Under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals. *In the Matter of Kay Windsor Frocks, Inc., et al.*, Docket No. 5735.

The appeal further contends that the hearing examiner erred in failing to find that respondents fully proved their defense that the allowances were granted for the purpose of meeting competition in good faith and were thus excluded from the proscriptions of the Act. This evidence included the testimony of officials connected with five competing distributors of dresses. It appears that the granting of promotional allowances on shifting, individual and unpublicized bases and, in many instances on wholly arbitrary bases, is widespread in the industry. It is apparent, too, that respondents' program is not limited to granting allowances in individual situations where promotional assistance has been offered to a customer by a competitor on a closely similar garment. As held in the initial decision, respondents' allowances are aggressive merchandising weapons designed for securing business and forming an integral part of respondent's pricing policy. Hence, respondents are essentially claiming to meet competition generally rather than specifically and they, in effect, are adopting and perpetuating the discriminatory patterns which they claim exist in the industry.

Analogizing our rulings in Docket 5768, *C. E. Niehoff & Company* to the instant proceeding the examiner correctly held that respondents had failed to make out a defense of meeting competition in good faith through their practices of meeting competition generally rather than specifically, meeting a practice rather than a price, aggressive rather than defensive merchandising methods. However, the defense of good faith meeting of competition is not available to respondents in this proceeding which charges only violation of Section 2 (d) of the amended Clayton Act, as distinguished from the *Niehoff* case which involved charges of discriminations in price in violation of subsection (a) of the amended Clayton Act.

During the course of the proceedings, respondents asserted as an affirmative defense and offered evidence from their competitors to prove that their advertising allowances were granted in good faith to meet the services and facilities furnished by their competitors. At the outset, counsel in support of the complaint objected to the introduction of such evidence, contending that the provisions of Section 2 (b), limited as they are to "discrimination in price or services or facilities" obviously applied only to Sections 2 (a), 2 (e) and 2 (f) of the Clayton Act and not to Sections 2 (c) or 2 (d). The hearing examiner observed that this same contention had been made to and sustained by him (then a pristine issue) in Docket 5482, *Carpel Frosted Foods, Inc.;* that the Commission had overruled his findings therein and had held that the tendered evidence was "material and relevant for consideration by the Commission, without regard to the question as to whether or not such evidence constitutes a substantive defense to charges brought under Section 2 (d) of the Clayton Act." The examiner stated that he subsequently treated such evidence as a defense in the *Carpel* case, since it was so offered and argued and could "obviously not have any materiality except defensive." The Commission did not decide the issue disposing of it by the finding that:

"the respondent Carpel Frosted Foods, Inc., has not rebutted the prima facie case made against it by showing that the said contracts were entered into by it in good faith to meet a competitive offer by a competitor." [3]

The hearing examiner, in this proceeding, overruled the objections of counsel in support of the complaint and considered as a substantive defense respondent's evidence of the practices of five of its competitors in offering similar advertising allowances. We deem this to be error as it is our decision that Section 2 (b) cannot be plead defensive-

[3] Findings as to the Facts and Conclusions, Page 10, Docket 5482, Carpel Frosted Foods, et al.

ly in this proceeding which involves only charges of unlawfully granting promotional allowances.

Subsections (c), (d) and (e) of Section 2 of the amended Clayton Act are directed against specific forms of discriminatory concessions to favored buyers. The Commission's Chain Store Investigation Report found that some buyers were securing price advantages concealed as brokerage, advertising allowances and services, and Congress in enacting these subsections directed specific provisions against such practices. Section 2 (d) of the Act was directed against payment of advertising allowances as distinguished from the furnishing of services of facilities specified under Section 2 (e). Therefore, Section 2 (d) applies only to payments for the benefit of the customer by or through whom the services are furnished as distinguished from the sellers actually furnishing the service or facility which is proscribed under Section 2 (e).

Judicial interpretation of these subsequent subsections has failed to integrate violations thereof with the standards applicable to the price discrimination provision of the Act.[4] For example, the Third Circuit Court in the *Great Atlantic & Pacific Tea Company* v. *F.T.C.*, 106 F. 2d 667, held that there was no reason to read into sections (c), (d) and (e) the limitations contained in Section 2 (a). The court went on to state that:

"In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the petitioner are within such prohibition. To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent. *For example the language of paragraph (b) relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but are not applicable to proceedings instituted under paragraph (c) or (d).* Thus viewed, the provisions of all the paragraphs of Section 2 are consistent and deal logically with their respective subjects. The respective paragraphs must be read with due regard for the provisions of each."

The legislative history lends little support to the examiner's treatment of the tendered evidence as a substantive defense. H. R. 8442, as introduced in the House on June 11, 1935 contained in Section 2 (c) (1) the provision which ultimately became Section 2 (d) of the amended Clayton Act. The provision achieved its final textual form as Section 2 (d) of the Bill when reported by the House Judiciary Committee (H. Rep. No. 2287, 74th Cong., 2d sess.). The original Patman bill, as reported by the House Judiciary Committee, then contained a section numbered 2 (e) which is identical with the

[4] *Biddle Purchasing Co.* v. *F. T. C.*, 96 F. 2d 687 (2d Cir. 1938), *Cert. den.*, 305 U. S. 364; *Elizabeth Arden, Inc.*, v. *F. T. C.*, 156 F. 2d 306 (2 Cir. 1946) *Cert. den.*, 331 U. S. 806.

present section 2 (b) except it referred only to price and did not contain a reference to a sellers furnishing of services or facilities. Prior to the passage of the Bill, however, an amendment was offered on the floor of the House extending the application of the section to proceedings involving the furnishing of services or facilities as well as to proceedings involving charges of discrimination in price. Mr. McLaughlin, in reciting the purpose of the amendment stated that: "It simply allows a seller to meet not only competition in price of other competitors but also competition for services and facilities furnished (80 Cong. Rec. 8225)." A similar amendment was offered on the floor of the Senate by Senator Moore (80 Cong. Rec. 6435) but the colloquy which followed the offering of the amendment did not explain its purpose.[5] Aside from the two cited instances there is nothing further in the hearings, debates or committee reports to explicate the meaning of the added language. To the contrary, the discussion of the proviso in both the House and Senate appears to be limited to situations involving price discriminations. This is to be expected, however, since neither the Robinson nor Patman bills, as originally introduced, provided for the defense of good faith meeting of competition and the proponents of the defense, in offering their amendments, limited its application only to price. The addition of the language relating the defense to services and facilities apparently was not considered a significant change, nor for that fact was the defense itself so considered, as it was interpreted by many as providing only a procedural as distinguished from a substantive defense.[6] Despite this, the additional language has enlarged and broadened the scope of Section 2 (b), and as indicated by Congressman McLaughlin, the language is now broad enough to cover not only discriminations in price but also services and facilities furnished.

Faced with this exiguous legislative history, we are forced to the "bare-bones" language of the statute which provides:

"that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price *or the*

[5] "Senator MOORE. * * * The milk producers in New Jersey feel that unless this amendment is adopted all of their work for all these years will mean nothing; that they will go back again to where they were. The amendment merely provides that if they charge more to one person than to another, or are accused of discrimination, they shall have a right to prove justification. *I think the amendment goes just a little farther than the Borah-Van Nuys amendment or the amendment of the Senator from Oregon (Mr. McNary).*"

"Mr. ROBINSON. Mr. President, the amendment of the Senator from New Jersey appears to be consistent with the McNary amendment and other amendments which have theretofore been agreed to. There is one feature of the amendment about which I am in doubt; and little opportunity is afforded to study the proposition, as I have not seen the amendment before it was brought forward here. I see no objection to its incorporation in the bill, so that the conferees may consider it along with the McNary and Austin amendments which have theretofore been agreed to."

[6] H. R. Conf. Rep. 2951, p. 7, 74th Cong., 2d sess.

furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, *or the services or facilities furnished by a competitor*."

It is our conclusion that advertising allowances are not within the ambit of the statutory language and that Section 2 (b) cannot constitute a substantive defense to a charge of violation of Section 2 (d) of the amended Clayton Act. To this extent the examiner's findings are overruled and the initial decision modified insofar as it reflects a contrary conclusion.

We also have considered the appeal's request that our decision of this case be suspended pending institution of trade practice conference proceedings in the respondents' industry and promulgation of appropriate rules. Trade practice rules, however, are in the nature of advisory interpretations for the guidance of businessmen. Such rules look to elimination of unfair practices by voluntary and cooperative means and do not have the force and effect of law. Even though rules were ultimately promulgated by the Commission, respondents would be under no legal injunction to refrain from the unfair practices which the evidence shows were engaged in by them. It being our duty under the statute to insure cessation of the practices which it proscribes, the request for suspension is not being granted.

With the exception noted, we find that the hearing examiner's rulings are correct and free from substantial error. Respondents' appeal is accordingly denied, and, as modified by this opinion, the initial decision is adopted as the Commission's decision.

Chairman Gwynne concurs in the result.

FINAL ORDER

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having come on to be heard upon the record, including the briefs and oral arguments of counsel, and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission except as modified by its opinion:

It is 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 contained in the aforesaid initial decision.

Chairman Gwynne concurring in the result.