IN THE MATTER OF

# MEYRICH TEXTILE CO.

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

*Docket 6985. Complaint, Dec. 13, 1957—Decision, Apr. 26, 1958*

Consent order requiring a manufacturer of wool products in New York City to cease violating the Wool Products Labeling Act by labeling as "100% Wool Except of Ornamentation", interlining materials which consisted of reprocessed wool or reprocessed wool and nonwoolen fibers; by failing to label certain wool products as required; and by misrepresenting wool products in sales invoices, shipping memoranda, and letters to garment manufacturers as "100% Stitched Wool" and "100% Wool."

*Garland S. Ferguson*, Esq., for the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued December 13, 1957, charges the respondent above named with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and of the rules and regulations promulgated under authority of the said Wool Products Labeling Act, in connection with the introduction or manufacture for introduction into commerce, sale, offering for sale, transportation and distribution, and delivery for shipment in commerce of interlinings or other wool products in commerce, as "commerce" is defined in said Acts.

After the issuance of said complaint respondent, on January 29, 1958, entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation of the Federal Trade Commission. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondent may otherwise be entitled under the Federal Trade Commission Act or the rules of practice of the Commission.

By said agreement, respondent further agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as though made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by statute for other orders of the Commission.

Said agreement recites that respondent Eli Meyrich is an individual trading and doing business as Meyrich Textile Co., with his office and principal place of business located at No. 302 West 37th Street, New York, N.Y.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and, without further notice to respondent is ordered filed upon becoming part of the Commission's decision in accordance with sections 3.21 and 3.25 of the rules of practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, and that this proceeding is in the interest of the public, wherefore he issues the following order:

ORDER

*It is ordered*, That the respondent Eli Meyrich, trading as Meyrich Textile Co., or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of interlinings or other "wool products" as "wool products" are defined in and subject to the Wool Products Labeling Act do forthwith cease and desist from:

A. Misbranding such product by:

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

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

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

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

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

*It is further ordered*, That respondent Eli Meyrich, trading as Meyrich Textile Co., or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of his products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the constituent fibers of which his products are composed, or the percentages or amounts thereof, in sales invoices, shipping memoranda or in any other manner.

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 26th day of April 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# BLACK & CO., INC., ET AL.

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

*Docket 6913. Complaint, Oct. 9, 1957—Decision, Apr. 29, 1958*

Order requiring two associated mail order sellers of general merchandise in Rockville Center, Long Island, N.Y., to cease representing falsely in advertising that they had in stock the merchandise advertised or that it was readily available and that they would deliver it within a reasonable time; that when it was out of stock and unobtainable, the customer's check would be returned promptly or the payment promptly refunded with complete satisfaction to the customer in all cases.

*Mr. Charles S. Cox* supporting the complaint.
*Respondents* appearing without Counsel.

## INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

On October 9, 1957, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violation of the Federal Trade Commission Act as set forth in said complaint. From the record it appears that service of the complaint and of the order designating the undersigned as hearing examiner herein was obtained on December 3, 4, and 5, 1957.

On December 6, 1957, the hearing examiner, upon examination of the record found that no proof of service had been filed and cancelled the hearing set in the notice portion of the complaint for New York on December 19, 1957. Later on December 19, 1957, proof of the service obtained on December 3, 4, and 5, 1957 being in the record, the hearing examiner issued an order setting the initial hearing herein for 10 a.m. on January 13, 1958 in room 511–C, United States Court House, Foley Square, New York, N.Y.

The hearing was held at the time and place mentioned and respondents Leslie F. Black, Hans Jensen and John M. Zwicki (erroneously called Swicki in the complaint) appeared in person at said hearing in response to subpoenas served on them. None of the respondents were represented by counsel at said hearing.

At said hearing each of said individual respondents stated on the record that they admitted all the material allegations of the complaint. Subsequent to said hearing, it was ascertained that no service had ever been obtained on any of the respondents of the hearing examiner's order of December 19, 1957, setting the initial hearing for January 13, 1958.

In view of the circumstances set forth above, no initial decision was issued as a result of what transpired at said hearing.

On February 10, 1958, all respondents filed answer to the complaint herein, each admitting all the material allegations of fact set forth in the complaint and waiving all intervening procedure and further hearing as to the said facts.

In accordance with section 3.7(2) of the Commission's rules of practice the hearing examiner now makes the following findings as to the facts, conclusions and order:

FINDINGS AS TO THE FACTS AND CONCLUSIONS

PARAGRAPH 1. Respondents Black & Co., Inc. and Home Merchandise Co., Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, and individual respondents Leslie F. Black, Hans Jensen, and John M. Zwicki are president, vice president, and secretary-treasurer, respectively, of each of said corporate respondents. The individual respondents have dominant control of advertising policies and business activities of the corporate respondents, and all of the respondents have cooperated with each other and have acted in concert in doing the acts and things hereinafter set forth. The office and principal place of business of the corporate respondents is located at 125 Merrick Road, also described as Merrick Road and Sunrise Highway, Rockville Center, Long Island, N.Y. The address of the individual respondents are as follows: Leslie F. Black, 111 Horton Street, Malverne, Long Island, N.Y.; Hans Jensen, The Canterbury House, 15 Canterbury Road, Great Neck, Long Island, N.Y.; John M. Zwicki, 116-33 218th Street, Queens, Long Island, N.Y.

PAR. 2. Respondents for more than 2 years prior to the issuance of the complaint herein were engaged in the business of selling general merchandise through mail order catalogs, circulars, letters or other printed media. Respondents caused their said catalogs, circulars, letters or other printed media to be sent through the United States mails from their place of business in Rockville Center, Long Island, N.Y., to various members of the purchasing public located in the various States of the United States and in the District of Columbia. At all times mentioned herein various members of the purchasing public located in the various States of the United States and in the District of Columbia received said catalogs, circulars, letters, or other printed media and, as a result thereof, sent in to respondents at their said place of business at Rockville Center, Long Island, N.Y., through the United States mails and otherwise, orders with accompanying checks or money orders for various articles of general merchandise listed therein. Respondents caused said ordered merchandise, when shipped, to be transported from their said place of business in Rockville Center, Long Island, N.Y., or from the factory producing or the warehouse storing same, by or through the United States mails or otherwise, to purchasers and other persons located in the various States of the United States and in the District of Columbia. Respondents at all times mentioned herein maintained a substantial course of trade in said general merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their said business in commerce, through the use of catalogs and other advertising media, respondents represented, directly or by implication, that they would have in stock the merchandise advertised therein during the period of time such catalogs or advertising were in effect, or that such merchandise was readily available and that they would obtain and deliver the same within a reasonable period of time. Respondents further represented in circulars, form letters and other printed matter circulated generally among purchasers and prospective purchasers that when merchandise ordered was out of stock and unobtainable, the customer's check would be returned promptly or the amount paid would be promptly refunded and that in all cases the order would be handled to the complete satisfaction of the customer.

PAR. 4. The foregoing statements and representations, direct and implied, were false, misleading, and deceptive. In truth and in fact, during the period of time said catalogs and other advertising were in effect respondents did not have many of the articles of merchandise listed therein in stock nor were they readily available. Further, in many instances, they did not obtain and deliver such articles within a reasonable period of time after they were ordered. In many other instances when the ordered merchandise was shipped, it was only after unreasonable delay. There were many cases where the ordered merchandise was not shipped and the money paid therefor was not refunded.

In those cases where the merchandise ordered was out of stock and unobtainable, respondents did not return the customer's check. It was their practice to cash all checks on receipt. If the merchandise was not shipped, respondents did not make refunds in many cases. In those cases where refunds were demanded, it was respondents' practice to send the customer a merchandise credit certificate, often after great delay.

Respondents represented that they would redeem the merchandise certificate for cash, when requested, upon receipt of the endorsed merchandise certificate. However, in fact, respondents in many instances failed to redeem the certificates. Also, in many instances, where the orders were filled, and the merchandise was not satisfactory to customers, respondents refused or neglected to make refunds or made them only after unreasonable delay.

When a complaint or demand for refund was made respondents requested the customer to return all papers evidencing the transaction. Thereafter, in many cases, they failed to answer inquiries and requests made by customers.

PAR. 5. The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

*It is ordered*, That the respondents Black & Co., Inc., a corporation, Home Merchandise Co., Inc., a corporation, and their officers and Leslie F. Black, Hans Jensen, and John M. Zwicki, individually and as officers of said corporations and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commision Act of any goods or merchandise do forthwith cease and desist from directly or indirectly:

1. Advertising goods or merchandise for sale that are not carried in stock or readily available for delivery to purchasers.

2. Accepting payment for ordered goods or merchandise which are not in stock or readily available for delivery to purchasers.

3. Failing to make prompt shipment of advertised goods or merchandise upon receipt of orders and payment therefor.

4. Failing to make prompt refund of the purchase money paid where the goods or merchandise ordered are not shipped.

5. Making refunds to customers in merchandise certificates without having obtained the prior consent of such customers.

6. Failing to promptly redeem merchandise certificates in cash, when requested, after having represented that they would do so.

7. Failing to make refunds for unsatisfactory goods or merchandise after having represented that they would do so.

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 29th day of April 1958, 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

# BERT GOODMAN ET AL. TRADING AS INTERSTATE EXCHANGE CO.

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

*Docket 6964. Complaint, Nov. 27, 1957—Decision, Apr. 29, 1958*

Consent order requiring a Chicago real estate firm to cease telling would-be sellers that their property was undervalued and that the asking price should be increased, in order to increase listing fees collectible in advance; refusing to make promised refunds when the property was not sold; and representing falsely that it had prospective buyers interested in the purchase of sellers' specific properties, that its salesmen were bonded and insured, that it maintained a finance department and would finance the purchase of listed properties, and that it would furnish expert appraisers to evaluate listed properties.

*Mr. John W. Brookfield, Jr.*, and *Mr. Thomas A. Sterner* for the Commission.

*Mr. Milroy R. Blowitz*, of *Blowitz & Osmon*, of Chicago, Ill., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondents, Bert Goodman, and Melvin C. Crown, individually and as copartners trading as Interstate Exchange Co., with having violated the provisions of the Federal Trade Commission Act, in certain particulars. Respondents were duly served with process.

On February 26, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement containing consent order to cease and desist," which had been entered into by and between the respondents Bert Goodman and Melvin C. Crown, and attorneys for both parties, under date of February 20, 1958, subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

On due consideration of the said "Agreement containing consent order to cease and desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with section 3.25 of the Commission's rules of practice for adjudicative proceedings and that by said agreement the parties have specifically agreed that:

1. Respondents Bert Goodman and Melvin C. Crown are individuals and copartners trading and doing business as Interstate Exchange Co., with their office and principal place of business located at 30 North LaSalle Street in the city of Chicago, State of Illinois. The home addresses of respondents are as follows: Bert Goodman, 7606 North Kilbourn Street, Chicago, Ill., and Melvin C. Crown, 7530 North Ridge Avenue, Chicago, Ill.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 27, 1957, issued its complaint in this proceeding against respondents.

3. 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.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) 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.

6. 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.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This 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.

Upon due consideration of the complaint filed herein, and the said "Agreement containing consent order to cease and desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement containing consent order to cease and desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondents signatory to said agreement; that the complaint states a legal cause for complaint under the Federal Trade Commission

Act both generally and in each of the particular charges alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the full disposition of all the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order, therefore, should be, and hereby is, entered as follows:

ORDER

*It is ordered*, That respondents Bert Goodman and Melvin C. Crown, individually or as copartners trading as Interstate Exchange Co., or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, or sale, of advertising in newspapers and in other advertising media, or of other services and facilities in connection with the offering for sale, selling, buying or exchanging of business or any other kind of property, 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 respondents have available prospective buyers who are interested in the purchase of specific property;

(b) That property will be sold as a result of respondents' efforts.

(c) That the property sought to be listed is underpriced or that the asking price should be increased, or that respondents can or will sell the property at the increased price;

(d) That respondents' sales representatives are bonded or insured;

(e) That respondents maintain a financial department, or that they finance the purchase of listed property;

(f) That the listing fee is an advance on the selling commission or will be refunded to the property owner;

(g) That respondents furnish qualified, experienced or expert appraisers to evaluate property listed with them.

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 29th day of April 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents Bert Goodman and Melvin C.

Crown, individually or as copartners trading as Interstate Exchange Co., 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

# HAMBURG BROS., INC.

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

*Docket 6721. Complaint, Feb. 5, 1957—Decision, Apr. 30, 1958*

Order dismissing—for the reason that price differences were justified on the basis of cost of sale or sale of distress merchandise or were so small that they could not substantially lessen competition—complaint charging the exclusive wholesale distributor of RCA television receivers to retail dealers in a tri-State area covering parts of Pennsylvania, Ohio, and West Virginia, with discriminating in price in violation of subsection 2(a) of the Clayton Act by selling television receivers to some of its customers at higher prices than to their competitors.

*Mr. Cecil G. Miles* and *Mr. James R. Fruchterman*, supporting the complaint.

*Kaplan, Finkel & Roth* and *Mr. Paul J. Winschel* and *Reed, Smith, Shaw & McClay* of Pittsburgh, Pa., for respondent.

## SECOND INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

### PRELIMINARY STATEMENT

Commission complaint was issued February 5, 1957, charging the respondent with violation of section 2(a) of the Clayton Act as amended in connection with the sale of television receivers. Answer was filed August 19, 1957, which admitted (1) the corporate set up (2) that respondent was engaged in business as a wholesale distributor of household appliances including television receivers as alleged in the complaint, (3) that respondent's said business was substantial, totaling approximately $20 million annually. The other allegations of the complaint were denied.

In an initial decision filed September 20, 1957, the complaint was dismissed without prejudice. This action was based on motion of respondent and answer thereto by counsel supporting the complaint. The answer did not oppose the motion to dismiss and gave the reasons, which were: (1) since the issuance of the complaint, the data in regard to respondent's pricing practices had been submitted to and reviewed by the accounting division of the Bureau of Investigation of the Commission, (2) that division after a review of the data submitted had reported that respondent's pricing practices, challenged in the complaint, were justified in all significant respects and (3) in view of this report the Bureau of Litigation did not think the public interest justified proceeding further. The data in regard to respondent's pricing practices submitted by respondent was not at that time examined by the hearing examiner, nor was it made a part of the official record for consideration by the Commission.

In an order issued November 12, 1957, the Commission vacated the initial decision and remanded the case to the hearing examiner for further proceedings looking toward the development of an official record on the basis of which the merits of the case could be determined.

Since the remand, the data submitted by respondent in justification of its pricing practices together with the report thereon by the accounting division mentioned above has been admitted into the record by stipulation as respondent's exhibit No. 1. With the filing of said stipulation, respondent moved that the documentary material submitted by it in justification of its pricing practices be sealed, impounded, or otherwise held confidential and safe from disclosure to persons other than the hearing examiner, members of the Commission and its staff. The ground stated was that the disclosure of such information to the public would be prejudical to the business of respondent. Counsel supporting the complaint did not oppose the motion and the hearing examiner included such a provision in the order admitting respondent's exhibit No. 1 into evidence. An additional stipulation, dated December 30, 1957, and covering all material allegations of the complaint not admitted in the answer was entered into and admitted into the record. Both sides waived the filing of proposed findings, conclusions and order and submitted the matter for a decision on the record as above set forth. The hearing examiner therefore makes the following findings as to the facts, conclusions and order.

## FINDINGS AS TO THE FACTS AND CONCLUSIONS

1. Respondent Hamburg Bros., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania. It is engaged in business as a wholesale distributor of various household appliances, including television receivers, radios, electric washing machines, electric dryers, vacuum cleaners, toasters and other items. Its principal place of business is located at 213 Galveston Avenue, Pittsburgh, Pa. Respondent also maintains branch offices and warehouses in the cities of Youngstown, Ohio, and Wheeling, W. Va., from which sales and deliveries are made.

2. Respondent sells and distributes its products to retail dealers in a tri-state area covering parts of Pennsylvania, Ohio, and West Virginia. It is the exclusive wholesale distributor of RCA television receivers in this area in which respondent does a substantial wholesale business, with sales totaling approximately $20 million annually.

3. In the course and conduct of its business as aforesaid respondent is now and for the past several years has been engaged in commerce as "commerce" is defined in the Clayton Act, having sold and distributed its products, including television receivers, obtained from manufacturers located in the various States of the United States and transported said products, or caused the same to be transported, across State lines either to its places of business located in Pittsburgh, Pa., Youngstown, Ohio, and Wheeling, W. Va., or to its customers located in said States. Said products were and are sold for use, consumption or resale within the various States of the United States.

4. In the course and conduct of its business in television receivers during the year 1956, respondent sold said receivers to some of its customers at higher prices than it sold its said receivers of like grade and quality to other customers who were competitively engaged in the resale of said products within the United States with customers paying the said higher prices.

5. It has been stipulated in the record of this proceeding that the price differences made by respondent to competing customers of television receivers of like grade and quality, during the year 1956, constitute price discriminations prohibited by subsection (a) of section 2 of the Clayton Act as amended except as the same are justified by reason of differences in the cost of sale resulting from the different methods and quantities in which such television receivers are sold to respondent's customers as reflected in the cost justification studies and material submitted by respondent and set forth in respondent's exhibit No 1.

6. It is therefore found that the facts in regard to respondent's pricing practices in the sale in interstate commerce of television receivers of like grade and quality to competing customers in said tri-state area establish a prima facie case of violation of subsection (a) of section 2 of the Clayton Act as amended. Unless respondent has successfully rebutted the prima facie case by showing justification of its pricing practices in accordance with the provisions of said act, an order to cease and desist should be issued. Such justification, if shown, is shown in respondent's exhibit No. 1.

7. Respondent's exhibit No. 1 has been reviewed and considered in detail. The differences in price between competing customers were based on a division of respondent's television receiver customers into two groups. In group I were those customers purchasing more than a certain dollar amount of such merchandise per year from respondent. In group II were those customers purchasing less than that amount of such merchandise per year from respondent. Respondent sold television receivers to their customers in group I at a substantially lower price per receiver than it sold television receivers of like grade and quality to their customers in group II. There are included in this exhibit affidavits of certain salesmen of respondent and an article in Fortune magazine which have some bearing on the issues. The statements in the affidavits and in the magazine article must be accepted at their face value because they went into the record by agreement and there is no evidence to the contrary. The report of the accounting division of the Commission's Bureau of Investigation, which is a part of respondent's exhibit No. 1 finds that except for a small number of receivers, the price differences in favor of respondent's customers in group I have been justified on the basis of cost of sale or on the basis of a sale of distress merchandise. The hearing examiner is in agreement with this finding. Considering the volume of respondent's business with both group I and group II customers, the price differences in favor of those customers in group I in those sales which have not been cost justified or justified on the basis of a sale of distress merchandise are so small, figured either on a percentage basis or on a total dollar basis, that they could not substantially lessen, injure, destroy or prevent competition between respondent's customers.

## ORDER

*It is therefore ordered*, That the complaint herein be and the same hereby is dismissed without prejudice to the right of the Commission to take such other action against respondent in the future as the facts may warrant.

## DECISION OF THE COMMISSION

The Commission having determined that the hearing examiner's initial decision, filed January 22, 1958, dismissing the complaint without prejudice constitutes an appropriate disposition of this proceeding:

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

IN THE MATTER OF

# TARGET SPORTSWEAR, INC., ET AL.

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

*Docket 6995. Complaint, Dec. 17, 1957—Decision, Apr. 30, 1958*

Consent order requiring a manufacturer in New York City to cease violating the Wool Products Labeling Act by falsely labeling men's jackets as "all wool;" failing to tag certain wool products and to tag others in the manner required, abbreviating required information on tags on some, and failing to set forth separately on labels on certain jackets the constituent fibers contained in interlinings.

*Mr. John T. Walker* for the Commission.

*Mr. Murray L. Halpern*, of New York, N.Y., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with misbranding men's jackets and other wool products sold by them, in violation of the Wool Products Labeling Act and the rules and regulations promulgated thereunder and the Federal Trade Commission Act. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; 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 hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Target Sportswear, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York. Respondents Jack Levinson and Jesse Bayer are president and vice president and treasurer, respectively, of said corporate respondent. The office and principal place of business of all respondents is 1140 Broadway, New York, N.Y.

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, Target Sportswear, Inc., a corporation, and its officers, and Jack Levinson and Jesse Bayer, individually and as officers of said corporation, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of men's jackets or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

1. Misbranding such products by falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein;

2. 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 product, exclusive of ornamentation not exceeding 5 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 5 percentum or more, (5) the aggregate of all other fibers;

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

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

3. Misbranding such products by using words or terms to set forth the required information descriptive of fiber content which is abbreviated in any way.

4. Misbranding such products by failing to label or mark sample wool products used to promote or affect sales in commerce with the respective fiber contents and other information required by law.

5. Misbranding such products by failing to separately set forth on the required stamp, tag, or label or other means of identification the character and amount of the constituent fibers appearing in the interlinings of such wool 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 30th day of April 1958, 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

# CARL'S

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

*Docket 6946. Complaint, Nov. 19, 1957—Decision, May 1, 1958*

Consent order requiring a furrier in San Antonio, Tex., to cease violating the Fur Products Labeling Act by failing to comply with the invoicing and labeling requirements; and by advertising in newspapers which failed to disclose the names of animals producing certain furs or named other animals, failed to disclose that certain products were artificially colored or composed of cheap or waste fur, and to disclose the country of origin of imported furs and to set forth other information as required; and in such advertising, representing fictitious prices as the usual prices and sale prices as reduced without maintaining the required records as basis for such pricing claims.

*Mr. John T. Walker* supporting the complaint.
*Respondent, pro se.*

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On November 19, 1957, the Federal Trade Commission issued a complaint charging Carl's, a corporation, hereinafter called respondent, with misbranding and falsely and deceptively invoicing and advertising fur products in violation of the Federal Trade Commission Act and the Fur Products Labeling Act.

After issuance and service of the complaint, the respondent and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent Carl's is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 221 East Houston Street, San Antonio, Tex.

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

ORDER

*It is ordered*, That respondent, Carl's, a corporation, its officers, representatives, agents, and employees, directly or indirectly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the offering for sale, sale, advertising, transportation or distribution of fur products which have been made in whole or in part of fur which had been shipped and received in commerce as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(f) The name of the country of origin of any imported furs used in the fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is a fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is a fact;

(e) The name and address of the person issuing such invoices;

(f) The name of the country of origin of any imported furs contained in the fur product.

(g) The item number or mark assigned to a fur product.

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

1. Fails to disclose the name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide, and as prescribed under the rules and regulations;

2. Fails to disclose that fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur when such is the fact;

3. Fails to disclose that fur products are composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

4. Contains the name or names of any animal or animals other than the name or names of the animal or animals that produced the fur from which the fur product was manufactured;

5. Represents through comparative pricing claims that the regular or usual retail prices charged by respondents for fur products of similar grade and quality in the recent regular course of their business are the prices designated as the regular or usual prices when such is not the fact.

6. Fails to disclose the name of the country of origin of the imported furs contained in fur products.

7. Fails to set forth all the information required under section 5(a) of the Fur Products Labeling Act and the rules and regulations thereunder in type of equal size and conspicuousness and in close proximity with each other.

D. Makes price claims or representations in advertisements respecting comparative prices and reduced prices of furs or fur products unless there is maintained by respondents adequate records disclosing the facts upon which such claims or representations are based.

## 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 1st day of May 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# OMEGA CHEMICAL CO., INC.

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

*Docket 6753. Complaint, Mar. 28, 1957—Decision, May 2, 1958*

Consent order requiring a manufacturer in Jersey City, N.J., to cease advertising falsely that its "Omega Oil" drug preparation was an effective teatment for, and would afford complete and permanent relief of, the symptoms and pains of all kinds of arthritis, rheumatism, backache, neuritis, and disorders of muscles and joints, etc.; and provided a new type of relief, different and more extensive than that provided by competitive products.

*Mr. Morton Nesmith* and *Mr. Berryman Davis* for the Commission.
*Mr. Aaron M. Weinstein*, of Jersey City, N.J., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter, as amended, charges the respondent with violation of the Federal Trade Commission Act through the use of certain statements in advertising its medicinal preparation known as "Omega Oil." An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint, as amended; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint, as amended, and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondent specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint, as amended, may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint, as amended.

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

1. Respondent Omega Chemical Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 257 Cornelison Avenue in the city of Jersey City, State of New Jersey.

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

ORDER

*It is ordered*, That respondent, Omega Chemical Co., Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of the drug preparation "Omega Oil" or any preparation of substantially similar 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, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that Omega Oil:

(a) Is an adequate, effective or reliable treatment for, or will afford complete relief of, any kind of arthritis or other disorder of joints, rheumatism, backache or neuritis, or the symptoms or manifestations thereof; or has any beneficial effect in any of such conditions or disorders in excess of affording temporary relief of the minor aches or pains thereof or the discomforts caused by such aches or pains.

(b) Penetrates into areas or structures below the skin or has a substantial direct effect upon structures of the body underlying the area of application; but this is not to be construed as prohibiting respondent from representing that this product affords temporary relief of the minor aches and pains arising in structures underlying the area of application.

(c) Provides a new type of relief, or a different or more extensive type of relief than that provided by competitive products.

(d) Provides any relief of pain for many hours or for any specific number of hours.

2. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "com-

merce" is defined in the Federal Trade Commission Act, of said drug preparation, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

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 2d day of May 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# AMERICAN HOME PRODUCTS CORP.

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

*Docket 6755. Complaint, Mar. 28, 1957—Decision, May 2, 1958*

Consent order requiring a manufacturer in New York City to cease representing falsely in advertising that its drug products "Infra Rub" and "Heet" were effective treatments for, and would afford complete relief of, the pains and discomforts of all kinds of arthritis, rheumatism, backache, and muscle aches; that they penetrated below the skin and had a substantial effect upon the underlying body structures, etc.

*Mr. Morton Nesmith* and *Mr. Berryman Davis*, Counsel Supporting the Complaint.

*Mr. Vincent A. Kleinfeld*, Washington, D.C., Counsel for Respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that American Home Products Corp.,[1] a corporation, hereinafter referred to as respondent, violated the provisions of the Federal Trade Commission Act by the use of alleged false advertisements in newspapers, radio and television broadcasts concerning the efficacy of two preparations sold and distributed by respondent, "Infra Rub" and "Heet," as being adequate and effective treatments for the aches and pains of arthritis, rheumatism, backaches, muscular aches, and discomforts thereof.

Respondent filed an answer in which it denied in substantial part the allegations set out in the complaint. After the disposition of several preliminary motions, hearings were held and the receipt of testimony in support of the complaint was completed. Thereafter, hearings were held and oral testimony was received on behalf of respondent. However, before the completion of the oral testimony for respondent, counsel for the parties and the respondent corporation entered into an agreement for a consent order pursuant to the provision of section 3.25 of the rules of practice and procedure. The order disposes of the matters complained about. The agreement has

[1] On February 21, 1958, pursuant to a motion filed by counsel supporting the complaint, the examiner ordered that the complaint be amended by substituting American Home Products Corp. as respondent in lieu of and in place of Whitehall Pharmacal Co., the original respondent.

been approved by the director and assistant director of the Bureau of Litigation.

The pertinent provisions of the agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent American Home Products Corp. is a corporation organized and doing business under the laws of the State of Delaware with its office and principal place of business located at 22 East 40th Street, New York, N.Y.

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

ORDER

*It is ordered*, That respondent, American Home Products Corp., 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 the drug preparations "Infra Rub" and "Heet," or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same names or under any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated, by means of the

United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(a) That Infra Rub is an adequate, effective, or reliable treatment for, or will afford complete relief of, any kind of arthritis, rheumatism, backache, or the congestion or pressure thereof; or has any beneficial effect in any of such conditions or disorders in excess of affording temporary relief of the minor aches or pains thereof or the discomforts caused by such aches or pains.

(b) That Heet is an adequate, effective, or reliable treatment for or will afford complete relief of, any kind of arthritis, rheumatism or backache; or has any beneficial effect in any of such conditions or disorders in excess of affording temporary relief of the minor aches or pains thereof or the discomforts caused by such aches or pains.

(c) That InfraRub or Heet:

(1) Penetrates into areas or structures below the skin or has a substantial direct effect upon structures of the body underlying the area of application; but this is not to be construed as prohibiting respondent from representing that these products, or either of them, affords temporary relief of the minor aches and pains arising in structures underlying the area of application.

(2) Provides any relief of pain for many hours or for any specific number of hours.

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

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 2d day of May 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# WINDSOR PEN CORP. ET AL.

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

*Docket 6939. Complaint, Nov. 15, 1957—Decision, May 2, 1958*

**Consent order requiring three associated enterprises in New York City engaged in selling, principally to wholesalers and jobbers, pens, pencils, tie clasps, cuff links, watches, and other merchandise, to cease representing excessive, fictitious amounts as the regular retail prices of their products on price tags and in brochures and display sheets placed in the hands of their purchasers, and using the words "Advertised In Life" misleadingly in the same way; and to cease failing to disclose that gold-appearing bezels on certain watch cases were actually composed of base metal.**

*Kent P. Kratz*, Esq., for the Commission
*Martin J. Forgang*, Esq., for respondents

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued November 15, 1957, charges the respondents Windsor Pen Corp., Windsor Pen Manufacturing Co., Inc., and Manor Merchandise Corp., all corporations existing and doing business under and by virtue of the laws of the State of New York, and Morris Fink, individually and as an officer of said corporations, with violation of the Federal Trade Commission Act in connection with the sale and distribution of pens, pencils, tie clasps, cuff links, watches or other merchandise. The office and principal place of business of all the respondents is located at 111-119 West 19th Street, New York, N.Y.

After the issuance of said complaint respondents, on February 10, 1958, entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation of the Federal Trade Commission. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may otherwise be entitled under the Federal Trade Commission Act or the rules of practice of the Commission.

By said agreement, respondents further agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as though made after a full hearing, presentation of evidence and findings and conclusions theron, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by statute for other orders of the Commission.

Said agreement recites that respondents Windsor Pen Corp., Windsor Pen Manufacturing Co., Inc., and Manor Merchandise Corp., are all corporations existing and doing business under and by virtue of the laws of the State of New York. The complaint charges that respondent Morris Fink is an individual and as president of each of the respondent corporations excercises a substantial degree of authority and control over the policies, affairs and activities of each corporation. The office and principal place of business of all respondents is located at 111–119 West 19th Street, New York, N.Y.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and, without further notice to respondents, is ordered filed upon becoming part of the Commission's decision in accordance with sections 3.21 and 3.25 of the rules of practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of all the respondents named herein, and that this proceeding is in the interest of the public, wherefore he issues the following order:

ORDER

*It is ordered*, That respondents Windsor Pen Corp., a corporation, Windsor Pen Manufacturing Co., Inc., a corporation, Manor Merchandise Corp., a corporation, and their officers, and Morris Fink, individually or as an officer of any of these corporations and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of pens, pencils, tie clasps, cuff links, watches or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that certain amounts are the usual and regular retail prices of merchandise when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail.

2. Representing, directly or by implication, that any item of merchandise has been advertised in Life magazine, or any other advertising medium, or has been advertised at a stated price, when such is not a fact.

3. Engaging in any practice or plan which would provide retailers of their merchandise with means of misrepresenting the usual and regular retail prices or the extent of the advertising of such merchandise.

4. Failing to reveal the true metal content of watch cases or portion thereof which has the appearance of a different metal.

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 2d day of May 1958, 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

# THE MENTHOLATUM CO., INC.

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

*Docket 6754. Complaint, Mar. 28, 1957—Decision, May 3, 1958*

Consent order requiring a manufacturer in Buffalo, N.Y., to cease advertising falsely that its "Mentholatum Rub" drug preparation was an effective treatment for, and would afford complete and permanent relief of, the aches and discomforts of all kinds of arthritis, rheumatism, bursitis, neuralgia, and disorders of the muscles and joints; provided a new type of relief, different and more extensive than that provided by other products, etc.

*Mr. Morton Nesmith* and *Mr. Berryman Davis* supporting the complaint.

*Mr. Samuel D. MaGavern* of *MaGavern, MaGavern, Lowe & Gorman*, of Buffalo, N.Y., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding alleges that the Mentholatum Co., Inc., a corporation, hereinafter referred to as respondent, violated the provisions of the Federal Trade Commission Act by the use of false advertising in newspapers, magazines and through the medium of radio and television broadcasts concerning the effectiveness of its preparation "Mentholatum Deep Heat Rub" for the treatment of arthritis, rheumatism, bursitis, neuralgia, and disorders of muscles and joints.

After issuance and service of the complaint, the respondent and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the Director and Assistant Director of the Bureau of Litigation. The agreement disposes of the matters complained about.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

### JURISDICTIONAL FINDINGS

1. Respondent, The Mentholatum Co., Inc., is a corporation organized and doing business under the laws of the State of Delaware, with its office and principal place of business located at 1360 Niagara Street, Buffalo, N.Y.

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

### ORDER

*It is ordered*, That respondent, The Mentholatum Co., Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the drug preparation "Mentholatum Deep Heat Rub," or any preparation of substantially similar 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, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that Mentholatum Deep Heat Rub:

(a) Is an adequate, effective or reliable treatment for, the cure of, or will afford complete relief of, any kind of arthritis or other disorder of joints, rheumatism, bursitis or neuralgia, or has a therapeutic effect on the symptoms or manifestations thereof; or has any beneficial effect in any of such conditions or disorders in excess of affording temporary relief of the minor aches or pains thereof or the discomforts caused by such aches or pains.

(b) Penetrates into areas or structures below the skin or has a substantial direct effect upon structures of the body underlying the area of application; but this is not to be construed as prohibiting respondent from representing that this product affords temporary relief of the minor aches and pains arising in structures underlying the area of application.

(c) Provides any relief of pain for many hours or for any specific number of hours.

(d) Provides a new type of relief, or a different or more extensive type of relief than that provided by competitive products.

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

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 3d day of May 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# KAUFMAN CARPET CO., INC., ET AL.

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

*Docket 6963. Complaint, Nov. 27, 1957—Decision, May 3, 1958*

Consent order requiring a corporation in New York City and its seven wholly owned subsidiaries, all engaged in the retail sale of carpets and floor coverings, to cease misrepresenting in advertising the price, construction, and fiber content of its products; and to disclose clearly that certain of its carpeting was of Japanese origin.

*Mr. Alvin D. Edelson* for the Commission.

*Amster & Levy*, by *Mr. Edward F. Levy*, of New York, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on November 27, 1957, issued its complaint herein under the Federal Trade Commission Act against the above-named respondents, Kaufman Carpet Co., Inc., a corporation, and Harry Kaufman and Daniel Schoen, individually and as officers of said corporation. The complaint charges respondents with having violated in certain particulars the provisions of said act. The respondents were duly served with process.

On March 6, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "agreement containing consent order to cease and desist," which had been entered into by and between respondents, their counsel, and counsel supporting the complaint, under date of February 28, 1958, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by the director and assistant director of that Bureau.

On due consideration of the said "agreement containing consent order to cease and desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with section 3.25 of the Commission's rules of practice for adjudicative proceedings, and that by said agreement the parties have specifically agreed that:

1. Respondent Kaufman Carpet Co., Inc., 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 at 1800 Boston Road, Bronx, New York City, N.Y.

Individual respondents Harry Kaufman and Daniel Schoen are president and secretary-treasurer, respectively, of the corporate respondent. All of the individual respondents have the same business address as that of the corporate respondent.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 27, 1957, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. 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.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) 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.

6. 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.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This 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 parties have further specifically agreed that the proposed order to cease and desist included in said agreement may be entered in this proceeding by the Commission without further notice to respondents; that when so entered it shall have the same force and effect as if entered after a full hearing; that it 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.

Upon due consideration of the complaint filed herein and the said "agreement containing consent order to cease and desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "agreement containing consent order to cease and desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the persons of each of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order therefore should be, and hereby is, entered as follows:

ORDER

*It is ordered*, That respondents Kaufman Carpet Co., Inc., a corporation, and its officers; Harry Kaufman and Daniel Schoen, individually and as officers of the aforementioned corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of carpets, floor coverings, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any amount is the regular or usual price of merchandise when such amount is in excess of the price at which such merchandise has been sold by respondents in their normal course of business;

2. Misrepresenting either the construction or fiber content of their merchandise;

3. Offering for sale or selling carpets, floor coverings or any other merchandise, the whole or any substantial part of which is made in Japan, or in any other foreign country, without clearly disclosing the foreign origin of such product, or of such part, as the case may be.

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 3d day of May 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents Kaufman Carpet Co., Inc., a corporation, and Harry Kaufman, and Daniel Schoen, individually and as officers 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

# GOVERNMENT EMPLOYEES EXCLUSIVELY ET AL.

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

*Docket 6970. Complaint, Dec. 5, 1957—Decision, May 3, 1958*

Consent order requiring furriers doing business in San Francisco and also operating the fur department of a store in Sacramento, Calif., to cease violating the Fur Products Labeling Act by invoicing products falsely; by advertising in newspapers which failed to disclose that certain fur products were artificially colored and to set forth other required information, and which misrepresented selling prices and percentage reductions; and by failing to maintain adequate records as a basis for such pricing claims.

*Mr. John J. McNally* for the Commission.

*Wilke & Sapunor*, by *Mr. Sherman C. Wilke*, of Sacramento, Calif., for the respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondents, Government Employees Exclusively, a corporation, and Dewey Ehrenberg and Charles Ehrenberg, individually and as copartners trading as Ehrenberg Bros., with having violated the provisions of the Federal Trade Commission Act and of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, in certain particulars. Respondents were duly served with process.

On February 25, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "agreement containing consent order to cease and desist," which had been entered into by and between the respondent corporation and Dewey and Charles Ehrenberg, individually and as copartners trading as Ehrenberg Bros., and attorneys for both parties, under date of February 7, 1958, subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

On due consideration of the said "agreement containing consent order to cease and desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with section 3.25 of the Commission's rules of practice for adjudicative proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Government Employees Exclusively is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 2436 Auburn Boulevard, in the city of Sacramento, State of California.

Respondents Dewey Ehrenberg and Charles Ehrenberg are individuals and are copartners trading as Ehrenberg Bros. with their office and principal place of business located at 140 Geary Street, in the city of San Francisco, State of California.

2. Pursuant to the provisions of the Federal Trade Commission Act and of the Fur Products Labeling Act, the Federal Trade Commission on December 5, 1957, issued its complaint in this proceeding against respondents and a true copy thereof was thereafter duly served on respondents.

3. Respondents admit all of 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.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) 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.

6. 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.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This 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.

Upon due consideration of the complaint filed herein, and the said "agreement containing consent order to cease and desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "agreement containing consent order to cease and desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondents signatory to said agreement; that the complaint states a legal cause for complaint under the Federal Trade Commission Act and under the Fur Products Labeling Act and the rules and regulations promulgated thereunder, both generally and in each of the particular charges alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the full disposition of all the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order, therefore, should be, and hereby is, entered as follows:

ORDER

*It is ordered*, That respondents Government Employees Exclusively, a corporation, and its officers, and Dewey Ehrenberg and Charles Ehrenberg, individually and as copartners trading as Ehrenberg Bros. or under any other trade name, and respondents' representatives, agents and emloyees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, offering for sale, transportion or distribution of fur products in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by failing to furnish invoices to purchasers of fur products showing:

(1) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(2) That the fur product contains or is composed of used fur, when such is the fact;

(3) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(4) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) The name and address of the person issuing such invoice;

(6) The name of the country of origin of any imported furs contained in a fur product;

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

(1) Fails to disclose that fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(2) Fails to set forth the information required under section 5(a) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other;

(3) Represents, directly or by implication, the aggregate retail prices of fur products when such claims and representations are not true in fact;

(4) Represents through percentage savings claims that the regular or usual retail prices charged by respondents for fur products of similar grade and quality in the recent regular course of their business are reduced in direct proportion to the percentage of savings stated when such is not the fact;

(5) Contains any qualifying statement or statements in regard to representations concerning the retail selling prices of fur products unless such qualifying statement or statements are set forth prominently, conspicuously and in sufficiently close conjunction with said representations as to avoid deception;

C. Making percentage savings claims in advertising unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims are based.

### 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 3d day of May 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents Government Employees Exclusively, a corporation, and Dewey Ehrenberg and Charles Ehrenberg, individually and as copartners trading as Ehrenberg Bros., 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

# WASHINGTON FORGE, INC., ET AL.

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

*Docket 7053. Complaint, Jan. 27, 1958—Decision, May 3, 1958*

**Consent order requiring manufacturers of tableware and cutlery in Englishtown, N.J., to cease—in catalogs, promotional literature and letters, on containers, and on tags and labels affixed to their products—representing fictitious and excessive amounts as the usual retail prices, and representing falsely that certain products, actually coated with a thin finish by electrolysis, were "24 karat gold plated."**

*Mr. Terral A. Jordan* for the Commission
*Mr. Simon J. Trosty*, of New York, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondents, Washington Forge, Inc., a corporation, and Milton Berger and Anna Berger, individually and as officers of said corporation, with having violated the provisions of the Federal Trade Commission Act in certain particulars. Respondents were duly served with process.

On March 10, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "agreement containing consent order to cease and desist," which had been entered into by and between the respondent corporation and Milton and Anna Berger, individually and as officers of said corporate respondent, and attorneys for both parties, under date of March 4, 1958, subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

On due consideration of the said "agreement containing consent order to cease and desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with section 3.25 of the Commission's rules of practice for adjudicative proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Washington Forge, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey. Respondents Milton Berger and Anna Berger are

individuals and are, respectively, president-treasurer and secretary of said corporate respondent. Respondents' office and principal place of business is located in the City of Englishtown, State of New Jersey.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on January 27, 1958, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. 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.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondents waive:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. 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.

6. 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.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This 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 parties have further specifically agreed that the proposed order to cease and desist included in said agreement may be entered in this proceeding by the Commission without further notice to respondents; that when so entered it shall have the same force and effect as if entered after a full hearing; that it 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.

Upon due consideration of the complaint filed herein, and the said "agreement containing consent order to cease and desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "agreement containing consent order to cease and desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondents signatory to said agreement; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, both generally and in each of the particular charges alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the full disposition of all the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order, therefore, should be, and hereby is, entered as follows:

ORDER

*It is ordered*, That respondents, Washington Forge, Inc., a corporation, and its officers, and Milton Berger and Anna Berger, individually and as officers of said corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of tableware, cutlery or other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Representing, by preticketing or in any other manner, that a certain amount is the customary or usual retail price of said merchandise when said amount is in excess of the price at which said merchandise is customarily and usually sold at retail;
2. Furnishing said merchandise to others which has been preticketed with a price or amount in excess of the price or amount at which such merchandise is customarily and usually sold at retail;
3. Representing that the finish of any part of said merchandise is rolled gold plate unless said finish is of the designated carat fineness applied in the manner and to the thickness characteristic of rolled gold plate, or otherwise representing that said finish is other than what it is in 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 3d day of May 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That Washington Forge, Inc., a corporation, Milton Berger and Anna Berger, individually and as officers 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

# FOOD MART, INC., ET AL.

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

*Docket 6910. Complaint, Oct. 7, 1957—Decision, May 6, 1958*

Consent order requiring a large Southwest grocery chain operating some 60 retail stores in Texas and New Mexico, along with its two subsidiaries—a frozen foods distributor and a broker of frozen food products—to cease violating section 2(c) of the Clayton Act through receiving payments of brokerage from suppliers as an independent broker through said broker-intermediary acting in fact for said grocery chain.

*Mr. Fredric T. Suss* for the Commission.

*Sullivan & Cromwell*, by *Mr. Howard T. Milman*, of New York, N.Y., for respondents.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described have been, and are now, violating the provisions of subsection (c) of section 2 of the Clayton Act (U.S.C. Title 15, sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Food Mart, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex. It is directed and controlled by the respondents J. Spencer Weed, Gordon W. Foster, Robert H. Hoy, and Lawrence M. Davis, who are responsible for its acts and practices and who own or control more than 20 percent of its outstanding shares of stock. Respondent Food Mart, Inc. is engaged in the operation of a large chain of retail grocery stores, selling all types of grocery products to the consuming public. It purchases all of the grocery products, including all types of canned goods, frozen foods, fresh vegetables, all types of meats, canned, fresh and frozen, dairy products and numerous other food items and household articles, which it resells, from a large number of manufacturers, processors and handlers of such products. Sales made by Food Mart, Inc. are substantial, being approximately $35 million for the 53-week period ending

March 31, 1956. Respondent Food Mart, Inc. has approximately 60 retail grocery stores located in the States of Texas and New Mexico.

Respondent Del Norte Frozen Foods, Inc. is a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex. Its capital stock consists of 500 shares, 497 of which are owned by the respondent Food Mart, Inc. and 1 share each is owned by the repondents J. Spencer Weed and Lawrence M. Davis, which stockholders direct and control the respondent Del Norte Frozen Foods, Inc. and are responsible for its acts and practices. Respondent Del Norte Frozen Foods, Inc. is a wholesale distributor of frozen vegetables, fruits, poultry, and fish with 85 percent of its sales being made to the respondent Food Mart, Inc. For the 53-week period ending March 31, 1956, respondent Del Norte Frozen Foods, Inc. made sales in the amount of approximately $784,000 to Food Mart, Inc. and approximately $105,000 to others.

Respondent Davis Brokerage Co., Inc., is a corporation organized and existing under the laws of the State of Texas with its official office located at 1529 Howze Avenue, El Paso, Tex., but with its actual office and place of business located at 1000 Valley View Road, El Paso, Tex. The capital stock of the respondent Davis Brokerage Co., Inc. consists of 25 shares of common stock, 15 of which are held by respondent J. Spencer Weed, 6 of which are held by respondent Gordon W. Foster, 2 of which are held by respondent Robert H. Hoy, and 2 of which are held by respondent Lawrence M. Davis, which stockholders direct and control Davis Brokerage Co., Inc. and are responsible for its acts and practices. Respondent Davis Brokerage Co., Inc. is engaged in business as a broker in connection with the sale to wholesalers and retailers of frozen food products. During the year ending September 30, 1956, respondent Del Norte Frozen Foods, Inc. purchased through the respondent Davis Brokerage Co., Inc. approximately $508,869 in frozen foods.

Respondent J. Spencer Weed is an individual, with an office located at 233 Broadway, New York, N.Y., and is chairman of the board and director of respondent Food Mart, Inc.

Respondent Gordon W. Foster is an individual residing at 1619 Elm Street, El Paso, Tex., and is president and director of respondent Food Mart, Inc. and vice president and director of Del Norte Frozen Foods, Inc.

Respondent Robert H. Hoy is an individual residing at 4208 Altura Boulevard, El Paso, Tex., and is executive vice president and director of respondent Food Mart, Inc.

Respondent Lawrence M. Davis is an individual residing at 1529 Howze Avenue, El Paso, Tex., and is president and director of respondent Del Norte Frozen Foods, Inc. and of Davis Brokerage Co. Inc.

PAR. 2. In the course and conduct of their business as grocery retailers, respondents Food Mart, Inc., J. Spencer Weed, Gordon W. Foster, and Robert H. Hoy have been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, purchasing products from vendors whose places of business are located in States other than Texas and New Mexico and causing them to be shipped to their places of business within the States of Texas and New Mexico.

In the course and conduct of their business as a frozen foods distributor, respondents Del Norte Frozens Foods, Inc., Lawrence M. Davis and Gordon W. Foster have been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, purchasing products from vendors whose places of business are located in States other than Texas and causing them to be shipped to their place of business within the State of Texas.

In the course and conduct of their business as frozen foods broker, respondents Davis Brokerage Co., Inc. and Lawrence M. Davis are and have been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act, arranging sales of products from vendors whose places of business are located in States other than Texas and causing them to be shipped to their place of business within the State of Texas.

PAR. 3. In the course and conduct of their said business in commerce, the respondents are receiving and accepting something of value as a commission, brokerage, or other compensation on purchases for their own account from the other party to the transaction. Said compensation is paid to and received by intermediaries who are acting in fact for or in behalf of, or are subject to the direct or indirect control of, a party to the transaction other than the person by whom such compensation is so granted or paid.

PAR. 4. For example, during the year 1956, respondent Food Mart, Inc. has made substantial purchases of food products from its suppliers through its subsidiary, respondent Del Norte Frozen Foods, Inc., and through its controlled intermediary, respondent Davis Brokerage Co., Inc., on which purchases respondent Davis Brokerage Co., Inc. and, through their ownership of said brokerage company, those officers and stockholders of Food Mart, Inc. and Del Norte Frozen Foods, Inc., which are named as respondents herein, received something of value as a commission, brokerage or other compensation, or allowance or discount in lieu thereof. In these transactions respondent Davis Brokerage Co., Inc. received and accepted payments of brokerage from said suppliers as an independent broker, whereas, said respondent was acting, in fact, for or in behalf of, or was subject to, the direct or indirect control of the buyer respondents Food Mart, Inc. and its subsidiary Del Norte Frozen Foods, Inc.

PAR. 5. The acts and practices of Food Mart, Inc., and its subsidiary Del Norte Frozen Foods, Inc., the buyer respondents, Davis Brokerage Co., Inc., the broker respondent, and the individual respondents acting in behalf of said buyer respondents as their officers, in receiving and accepting something of value as a commission, brokerage or other compensation on their purchases of food products through a brokerage company owned and controlled by said individual respondents, as herein alleged and described, are in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, sec. 13).

## INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of subsection (c) (relating to brokerage) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act. An agreement for disposition of the proceeding by means of a consent order has now been entered into by respondents and their attorney and counsel supporting the complaint.

With respect to respondent Robert H. Hoy, the agreement states that he has had no part in the organization, management or policies of respondent Davis Brokerage Co., Inc., the statement being supported by an affidavit executed by respondent Gordon W. Foster. The agreement and proposed order therefore provide for the dismissal of the complaint as to respondent Robert H. Hoy, and in the circumstances such action appears appropriate.

As to all of the other respondents, the agreement states, among other things, that these respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any other procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding as to these respondents, such order to have the same force and effect as if entered after a full hearing, said respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by said respondents that they have violated the law as alleged in the complaint.

The hearing examiner being of the view that the agreement and proposed order provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Food Mart, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex.

Respondent Del Norte Frozen Foods, Inc., is a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business located at 1000 Valley View Road, El Paso, Tex., and is a subsidiary of respondent Food Mart, Inc.

Respondent Davis Brokerage Co., Inc., is a corporation organized and existing under the laws of the State of Texas with its official office located at 1529 Howze Avenue, El Paso, Tex.

Respondent J. Spencer Weed is an individual, with an office located at 233 Broadway, New York, N.Y., and is chairman of the board and director of respondent Food Mart, Inc.

Respondent Gordon W. Foster is an individual residing at 1619 Elm Street, El Paso, Tex., and is president and director of respondent Food Mart, Inc., and vice president and director of respondent Del Norte Frozen Foods, Inc.

Respondent Lawrence M. Davis is an individual residing at 1529 Howze Avenue, El Paso, Tex., and is president and director of respondent Del Norte Frozen Foods, Inc., and of respondent Davis Brokerage Co., Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

*It is ordered,* That the respondent Food Mart, Inc., a corporation, Del Norte Frozen Foods, Inc., a corporation, the respondent J. Spencer Weed, individually and as an officer of Food Mart, Inc., the respondent Gordon W. Foster individually and as an officer of Food Mart, Inc., and of Del Norte Frozen Foods, Inc., and respondent Lawrence M.

Davis, individually and as an officer of Del Norte Frozen Foods, Inc., their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid 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 any purchase of food products for their own account or for the account of any of the named corporations with which they are then directly or indirectly related as officer, employee, agent, representative, intermediary or controlling stockholder.

*It is further ordered,* That the respondents Davis Brokerage Co., Inc., a corporation, and Lawrence M. Davis, individually and as an officer of the said Davis Brokerage Co., Inc., and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid 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 any purchase of food products where the individual respondent Lawrence M. Davis or the Davis Brokerage Co., Inc., is the agent, representative or intermediary acting for or in behalf of, or is subject to the direct or indirect control of the buyer, or of any of the officers of said buyer.

*It is further ordered,* That the complaint be, and it hereby is, dismissed as to respondent Robert H. Hoy.

## 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 6th day of May 1958, become the decision of the Commission; and, accordingly:

*It is ordered,* That the respondents Food Mart, Inc., a corporation; Del Norte Frozen Foods, Inc., a corporation; Davis Brokerage Co., Inc., a corporation; J. Spencer Weed, individually and as chairman of the board and director of Food Mart, Inc.; Gordon W. Foster, individually and as president and director of Food Mart, Inc., and vice president and director of Del Norte Frozen Foods, Inc.; and Lawrence M. Davis, individually and as president and director of Del Norte Frozen Foods, Inc., and as president and director of Davis Brokerage

Co., Inc., 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

## GROVETON PAPER CO.

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

*Docket 6592. Complaint, July 19, 1956—Decision, May 7, 1958*

Order requiring a manufacturer in Groveton, N.H., of paper napkins and other paper products selling to independent grocers and grocery chain stores, to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

*Mr. William R. Tincher, Mr. J. Wallace Adair, Mr. Eugene Kaplan* and *Mr. Daniel A. Austin, Jr.*, for the Commission.

*Appell, Austin & Gay*, by *Mr. Cyrus Austin*, of New York, N.Y.; *Willkie, Owen, Farr, Gallagher & Walton*, by *Mr. Sumner S. Kittelle*, of New York, N.Y.; and *Cann, Taylor, Lamb and Long*, by *Mr. George P. Lamb*, of Washington, D.C., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

### STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

### AMICUS CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc., applied for and was granted permission to submit a brief as *amicus curiae*. This brief supplements the brief of counsel for the respondent, and requests that the complaint herein be dismissed.

### IDENTITY OF RESPONDENT

Respondent, Groveton Paper Co., is a Maine corporation, with its principal office and place of business located at Groveton, N.H.

### ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing its products, including paper napkins and facial tissues, to competing customers, including independent grocers and grocery chains, located throughout some of the States of the United States and in the District of Columbia. Many of such competing grocery customers are located in the New York City metropolitan area, which extends into the adjacent States of New Jersey and Connecticut, and in the Boston metropolitan area. The quantity of the above-mentioned products sold by respondent in those areas during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act as amended.

ORIGIN OF THE SALES-PROMOTION PLAN

At the time when the broadcasting companies began contracting with grocery chains, the sale of broadcasting time had become difficult, and the American Broadcasting Co. and Columbia Broadcasting System, Inc., hereinafter referred to, respectively, as "ABC" and "CBS," devised plans to enable them to promote the sale of such time to manufacturers and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the other.

THE SALES-PROMOTION PLAN

In initiating their sales-promotion plans, ABC negotiated contracts with certain grocery chains in the New York City metropolitan area, and CBS in the Boston metropolitan area, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of one week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing," and the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for one or more week-long promotional displays of its products in the stores of certain grocery chains. The brochures stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the sales-promotion plans as follows:

A WJZ-TV Merchandise Plan for heavier *impact* and pep-up *sales*.

Two great impression-making mass movers of merchandise * * * television and point-of-purchase now teamed up for your benefit.

BETTER BALANCE—the WJZ-TV merchandising plan—greatly increases point-of-purchase promotions * * * an on-the-ball plan which adds to advertiser's sales impact * * * increases the value of an advertiser's time franchise on WJZ-TV.

SELL-A-VISION works * * * SUNKIST ORANGE JUICE: sales increased 25 percent in the first half of the display week. And for 4 weeks following in the second display, sales showed a gain of 10 percent.

CHANNEL 7 SELL-A-VISION IS PROMOTED 7 WAYS;

1. Floor Displays
2. End Displays
3. Dump Displays
4. Basket Displays
5. Shelf Strips
6. Refrigerator Space and Signs
7. Wire Bins at Check-out Counters

As a Sell-A-Vision advertiser you receive one or more of these displays. The particular types are chosen according to your specific requirements. Your product is featured for a full week—from Thursday morning to Wednesday evening. * * *

WJZ-TV's "MASS MERCHANDISING" GETS RESULTS

WJZ-TV's A&P "Mass Merchandising" is a relatively new plan which began in late August 1952. Yet it has already given these extraordinary demonstrations of point-of-purchase selling power:

*         *         *         *         *         *         *

VANITY FAIR TISSUES (Groveton Papers), which started in the "Mass Merchandising" plan October 9, put six carloads (approximately 3,400 cases into A&P's Eastern Division to fulfill commitments for the first week alone.

Despite the six carloads, the *increase* in VANITY FAIR'S A&P *sales* volume was so great that some stores ran out of stock and were obliged to replace less than half-way through the display week.

VANITY FAIR will be getting similar or better results every fourth week from now on through WJZ-TV advertising and A&P display on the "Mass Merchandising" plan.

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

This contract contains the entire agreement between the parties and is not subject to oral modification.

The various payments made by respondent to the two broadcasting companies from 1952 through 1956 were, as follows:

| Year | Broadcasting company | Station | Amount paid | Yearly total |
|---|---|---|---|---|
| 1952 | ABC | WABC-TV (New York) | $36,463.81 | $36,463.81 |
| 1953 | ABC | WABC-TV (New York) | 87,513.13 | 92,340.87 |
| | CBS | WEEI (Boston) | 4,827.74 | |
| 1954 | ABC | WABC-TV (New York) | 94,939.93 | 122,151.86 |
| | CBS | WEEI (Boston) | 27,211.93 | |
| 1955 | ABC | WABC-TV (New York) | 102,366.72 | 112,234.58 |
| | CBS | WEEI (Boston) | 9,867.86 | |
| 1956 | ABC | WABC-TV (New York), to June 30, 1956 | 46,963.00 | 60,371.05 |
| | CBS | WEEI (Boston) | 13,408.05 | |

The two plans under which the above-listed payments were made both required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of both of these plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by them that respondent's paper napkins and facial tissues would be displayed in the stores of certain grocery chains on certain dates. In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contracts described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides, as follows:

SEC. 2. (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits as furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue herein is as follows:

Did respondent pay or contract for the payment of something of value to either of the two broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

THE ISSUE RESOLVED

Counsel supporting the complaint, in effect contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in consideration" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising such store certain broadcasting time for its own purposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purposes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therein. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their interrelationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract. The respondent was required, not merely to purchase radio or television time in order to acquire the right to in-store promotions, but was required to purchase a specified minimum amount of such time in order to so qualify. It is reasonable to conclude, since the plan in question resulted from the difficulty of selling broadcasting time, that it was continued for the same reason, and that respondent would not have purchased broadcasting time at all, or would have purchased it only at a reduced price or in a lesser amount, except for the inducement of the in-store promotion. We also see that the respondent made the only money payment involved in the whole transaction, and was therefore the sole financial support of the plan. Without such support, it is reasonable to assume that the plan would not have matured, but would have proven financially unprofitable, and therefore of short duration. It follows, therefore, that the respondent, as the sole financial supporter of the plan, paid for the broadcasting time granted the chain store for in-store promotional displays, as well as for the broadcasting time purchased for respondent's own use.

The facts show clearly that the responsible officials of the respondent knew, or should have known, when they entered into the plan presented to respondent by the broadcasting company, that respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors. The fact that the payment for the broadcasting time furnished to the favored chain stores was indirect rather than direct does not alter its legal or practical effect; neither does the fact that the respondent made the payment in question primarily in its own behalf and without a prior agreement with the chain store. On these points, counsel supporting the complaint very aptly quotes from the statement of counsel for the respondent, in his book entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, page 116, as follows:

> It is no defense for a seller charged with a violation of either of these sections [Sec. 2(d) and Sec. 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the serivce was a term or condition of sale, or amounted to an indirect price discrimination.

Respondent also contends, as does Columbia Broadcasting System, Inc. as *amicus curiae*, that respondent's payment to the broadcasting company was in fulfillment of a separate, individual contract, and was in no wise a consideration for the in-store promotions later supplied. In fact, respondent contends that the supplying of the in-store promotions to the respondent was a gratuity, and was "free" within the interpretation of the Commission in the matter of *Walter J. Black, Inc.*, Federal Trade Commission docket No. 5571 (1953). This contention is fallacious, because we are not here concerned, as was the Commission in the case cited, with the question of whether a certain advertisement was misleading. On the contrary, we are here concerned with determining, from all the relevant facts, whether the payment made by the respondent to the broadcasting company was in reality compensation only for the broadcasting time purchased by the respondent for its own use, or whether such payment was made for a broader purpose, and did actually serve also as compensation for in-store displays furnished to the respondent by some of its chain-store customers. We are persuaded by the facts that the payment by the respondent included the larger purpose, and was actually not only a self-serving payment, but also a payment on behalf of a few favored customers. We must conclude, therefore, that the case cited is in no way a precedent for the decision in the present proceeding.

Counsel for the respondent further contends that the consideration received by the chain stores in the form of broadcasting time was not contingent or dependent on any act of the respondent, but was dependent solely on the contract between the broadcasting company and the chain store. He points out that this contract provides for the furnishing of broadcasting time to the chain store in compensation for in-store promotions of products to be later designated by the broadcasting company. The facts reveal that such designation was not made by the broadcasting company until after the signing of its contract with respondent for the purchase of broadcasting time. From these facts the conclusion is inescapable that the broadcasting company, when entering into the contract with the chain store, contemplated completing the overall plan, of which that contract was merely a part, only after successful negotiation of a second contract with some manufacturer for the purchase of broadcasting time, which would enable the broadcasting company, thereafter, to designate that manufacturer's products as those to be promoted in the in-store displays. We must conclude, therefore, that the contention stressing the independent character of the first contract is altogether unrealistic, and disregards the fact that the first contract was only preliminary to the contract with the respondent, both contracts being, not independent transactions, but parts of a larger plan.

Counsel for the respondent seeks, in his brief, to invoke the rules of private contract law governing third-party beneficiaries. In connection with this argument, he states that—

> Most of the States recognize the right of a third person to sue upon a contract made for such person's benefit. Under that doctrine as applied by the courts a contract is not regarded as made for the benefit of a third party unless the intent to benefit that person clearly appears. Benefit resulting incidentally from a contract made by others is not sufficient. By these tests, the station contracts here in evidence plainly were not contracts for the benefit of the chains, whether or not the terms of the merchandising plans are read into them.

This argument is specious. We are not here concerned with the application of the rules of private contract law, but with the broader and more realistic principles of public law, which require an examination of the entire plan in question in all its related parts. As hereinbefore stated, the omission from respondent's contract of the benefit intended to be conferred, in the form of broadcasting time, upon the chain store in consideration of the in-store displays promised to respondent as an inducement to purchase broadcasting time for its own use appears, particularly in the light of the contentions herein made by counsel for respondent, to have been intentional, for the purpose of shielding the respondent from the force and effect of the Clayton Act. Such omission appears to be, palpably, an attempt to circumvent that act by effectuating, indirectly through the agency of the broadcasting company, a practice which could not lawfully be effectuated directly.

The fact that this sales-promotion plan was instigated by the broadcasting company rather than by the respondent does not alter the fact that respondent, by accepting it, became a party thereto, and cannot now evade full responsibility therefor. Respondent's acceptance of the broadcasting company's tempting offer of in-store promotion would, of course, have become lawful, had the respondent required, as a condition of its acceptance that the benefit of broadcasting time given in return for such in-store promotion be made equally available to all respondent's customers. Extension of the offer to all respondent's customers might have proved impracticable because of their number; but that factor offers no justification for respondent's unlawful conduct.

Counsel for the respondent cites the case of *State Wholesale Grocers* v. *The Great Atlantic and Pacific Tea Co.* (C.C.H. 1957 Trade Cases, pp. 73145, 73148–9, 73175)a s condemning the contention of counsel supporting the complaint that the broadcasting companies would not continue to offer merchandising plans without the participation therein of manufacturers of grocery products, and that respondent, by its participation in the plan here involved, is contributing to and making possible the continuance thereof. Counsel, in quoting that decision, has disregarded the several basic, factual differences between that case and the instant proceeding. Lengthy analysis of such differences is here deemed unnecessary. Counsel for the respondent has wisely refrained from stating that the case cited is a valid precedent upon which to base a decision herein. We agree with that omission; the case cited is not a precedent nor a parallel to the instant proceeding, and can be of no assistance in the adjudication thereof.

## CONCLUSION

In reaching our conclusion in this proceeding, we recognize that the section of the Robinson-Patman Act amending the Clayton Act with which we are presently concerned was designed by Congress to protect small, independent merchants against unfair and discriminatory competitive advantages, in the form of payments, rebates or advertising allowances, granted by manufactures and distributors to the larger chain stores with which the small stores must compete at the retail level. In other words, as applied to the facts of the present proceeding, the provision of section 2(d) of the Clayton Act as amended was specifically designed to protect the small businessman buying respondent's products from the competitive injury resulting from respondent's large chain-store customers receiving advertising allowances in the form of broadcasting time in return for in-store sales promotion in which the smaller merchants were never given an opportunity to participate.

We recognize, also, that section 2(d) of the Clayton Act as amended makes no distinction between a benefit conferred directly and one conferred indirectly, but expressly forbids the conferring of any discriminatory benefit, by providing that no payment shall be made "for the benefit of a customer" unless the opportunity to share in that benefit is equally bestowed upon all competing customers.

In the light of these principles, we must conclude that in the present proceeding, the respondent, by its payment to the broadcasting company, paid or contracted to pay something of value for its own benefit and also for the benefit of certain chain-store customers in consideration for in-store promotional facilities furnished to respondent by such favored customers, without making the same or similar benefits available on proportionally equal terms to all respondent's other customers who compete in the retail distribution of respondent's products with the customers so favored. These acts and practices clearly violate section 2(d) of the Clayton Act as amended. Accordingly,

*It is ordered*, That respondent, Groveton Paper Co., a corporation, its officers, agents, representatives or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of grocery products, including paper napkins and facial tissues, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale, or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION

Respondent, Groveton Paper Co., having filed an appeal from the hearing examiner's initial decision finding that said respondent has violated the provisions of section 2(d) of the Clayton Act, as amended, and ordering it to cease such violation; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel in support of the complaint and the brief of Columbia Broadcasting System, Inc., as *amicus curiae*, and having determined that the findings and conclusions in the initial decision are fully substantiated on the record and that the order contained therein is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondent's appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision filed October 9, 1957, be and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That respondent, Groveton Paper Co., a corporation, 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 the initial decision.

IN THE MATTER OF

# GENERAL FOODS CORP.

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

*Docket 6596. Complaint, July 19, 1956—Decision, May 7, 1958*

Order requiring a distributor of various food products with principal place of business in White Plains, N.Y., to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

*Mr. William R. Tincher*, *Mr. J. Wallace Adair*, *Mr. Eugene Kaplan* and *Mr. Daniel A. Austin, Jr.*, for the Commission.

*Appell, Austin & Gay*, by *Mr. Cyrus Austin*, of New York, N.Y. and *Mr. Lester E. Waterbury*, and *Mr. Frederick F. Mack*, of White Plains, N.Y., for respondent.

## INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

### THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale, and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

AMICI CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc. and National Broadcasting Co., Inc. applied for and were granted permission to submit briefs as *amici curiae*. These briefs supplement the brief of counsel for the respondent, and request that the complaint herein be dismissed.

IDENTITY OF RESPONDENT

Respondent General Foods Corp. is a Delaware corporation, with its principal office and place of business located at 250 North Street, White Plains, N.Y.

ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing grocery products, including instant and regular coffee, cake mixes, frozen foods, cereals, and puddings, to competing customers, including independent grocers and grocery chains, located throughout some of the States of the United States and in the District of Columbia. Many of such competing grocery customers are located in the metropolitan areas of Chicago, Ill.; Washington, D.C.; Cleveland, Ohio; Los Angeles and San Francisco, Calif.; St. Louis, Mo.; and Boston, Mass.; and in the New York City metropolitan area, which extends into the adjacent States of New Jersey and Connecticut. The quantity of the above-mentioned products sold by respondent in those areas during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

### ORIGIN OF THE SALES-PROMOTION PLAN

In 1950 and in 1951, the sale of broadcasting time had become difficult, and the American Broadcasting Co., Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., hereinafter referred to, respectively, as "ABC," "CBS," and "NBC," devised a plan to enable them to promote the sale of such time to manufacturers and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the several broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the others.

### THE SALES-PROMOTION PLAN

In initiating its sales-promotion plan, ABC negotiated contracts with certain groc ry chains in the New York City metropolitan area, and CBS and NBC in the Chicago metropolitan area, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of 1 week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing"; the NBC plan, "Chain Lightning"; and the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for one or more week-long promotional displays of its products in the stores of certain grocery chains. The brochure stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the several plans as follows:

> SEEING TWICE IS SELLING TWICE AND ONLY A *TV*-MERCHANDISING PLAN can deliver the kind of coordinated impact that in-the-home/in-the-store display guarantees.
>
> The Plan is based on a tight contractual arrangement with A & P's Eastern Division Headquarters, providing high frequency of display, regular check back and 100 percent cooperation through a single, central source.
>
> A & P has about three times as many retail outlets as the next food chain in the New York area. A & P, with highly centralized control, delivers the *best* merchandising service to advertisers participating in the "Mass Merchandising" plan.
>
> A total of 864 stores in four States controlling an annual sales volume of more than $1 billion * * * and perhaps even more important * * * is the fact that 737 stores of the WMAQ CHAIN-LIGHTNING chains are located in the Chicago metropolitan area and control approximately 60 percent of all food sales in the area or more than $800 million in annual sales volume.

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

> This contract contains the entire agreement between the parties and is not subject to oral modification.

The NBC contract contains a similar clause, as follows:

> This contract constitutes the entire agreement between the parties relating to the subject matter thereof.

The various payments made by respondent to the several broadcasting companies from 1952 through 1956 were, as follows:

| Year | Broadcasting company | Station | Amount paid | Yearly total |
|---|---|---|---|---|
| 1952 | NBC | WMAQ (Chicago, Ill.) | $13,800.00 | $13,800.00 |
| 1953 | ABC | WABC (New York, N.Y.) | 65,112.00 | 82,827.00 |
| | NBC | WMAQ (Chicago, Ill.) | 17,715.00 | |
| 1954 | CBS | WBBM (Chicago, Ill., 11/4/54 to 12/30/54) | 38,111.48 | 58,636.48 |
| | NBC | WMAQ (Chicago, Ill.) | 20,525.00 | |
| 1955 | ABC | WABC (New York, N.Y.) | 67,637.50 | 206,411.18 |
| | CBS | WBBM (Chicago, Ill., 4/5/55 to 3/29/56) | 109,293.68 | |
| | NBC | WMAQ (Chicago, Ill.) | 29,480.00 | |
| 1956 | ABC | WABC (New York, N.Y., to June 30th) | 24,461.51 | 59,553.47 |
| | CBS | WBBM (Chicago, Ill., 4/5/55 to 3/29/56) | 35,091.96 | |

The three plans under which the above-listed payments were made all required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of all of these three plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by such broadcasting companies that some of the respondent's products would be displayed in the stores of certain grocery chains on certain dates. In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contract described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

## THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides, as follows:

§2(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue herein is as follows:

Did Respondent pay or contract for the payment of something of value to any of the three broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to Respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

THE ISSUE RESOLVED

Counsel supporting the complaint, in effect, contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in consideration" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising such store certain broadcasting time for its own purposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purposes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therein. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their interrelationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract. The respondent was required, not merely to purchase radio or television time in order to acquire the right to in-store promotions, but was required to purchase a specified minimum amount of such time in order to so qualify. It is reasonable to conclude, since broadcasting time in 1950 and 1951 was in fact hard to sell, that respondent would not have purchased broadcasting time at all, or would have purchased it only at a reduced price or in a lesser amount, without the inducement of the in-store promotion. We also see that the respondent made the only money payment involved in the whole transaction, and was therefore the sole financial support of the plan. Without such support, it is reasonable to assume that the plan would not have matured, but would have proven financially unprofitable and therefore of short duration. It follows, therefore, that the respondent, as the sole financial supporter of the plan, paid for the broadcasting time granted the chain-store for in-store promotional displays, as well as for the broadcasting time purchased for respondent's own use.

The facts show clearly that the responsible officials of the respondent knew, or should have known, when they entered into the plan presented to respondent by the broadcasting company, that respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors. The fact that the payment for the broadcasting time furnished to the favored chain stores was indirect rather than direct does not alter its legal or practical effect; neither does the fact that the respondent made the payment in question primarily in its own behalf and without a prior agreement with the chain store. On these points, counsel supporting the complaint very aptly quotes from the statement of counsel for the respondent, in his book entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, page 116, as follows:

> It is no defense for a seller charged with a violation of either of these sections [sec. 2(d) and sec. 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination.

Respondent also contends, as do the broadcasting companies as *amici curiae*, that respondent's payment to the broadcasting company was in fulfillment of a separate, individual contract, and was in no wise a consideration for the in-store promotions later supplied. In fact, respondent contends that the supplying of the in-store promotions to the respondent was a gratuity, and was "free" within the interpretation of the Commission in the matter of *Walter J. Black, Inc.*, Federal Trade Commission docket No. 5571 (1953). This contention is fallacious, because we are not here concerned, as was the Commission in the case cited, with the question of whether a certain advertisement was misleading. On the contrary, we are here concerned with determining, from all the relevant facts, whether the payment made by the respondent to the broadcasting company was in reality compensation only for the broadcasting time purchased by the respondent for its own use, or whether such payment was made for a broader purpose, and did actually serve also as compensation for in-store displays furnished to respondent by some of its chain-store customers. We are persuaded by the facts that the payment by the respondent included the larger purpose, and was actually not only a self-serving payment, but also a payment on behalf of a few favored customers. We must conclude, therefore, that the case cited is in no way a precedent for the decision in the present proceeding.

Counsel for the respondent further contends that the consideration received by the chain stores in the form of broadcasting time was not contingent or dependent on any act of the respondent, but was dependent solely on the contract between the broadcasting company and the chain store. He points out that this contract provides for the furnishing of broadcasting time to the chain store in compensation for in-store promotions of products to be later designated by the broadcasting company. The facts reveal that such designation was not made by the broadcasting company until after the signing of its contract with respondent for the purchase of broadcasting time. From these facts the conclusion is inescapable that the broadcasting company, when entering into the contract with the chain store, contemplated completing the overall plan, of which that contract was merely a part, only after successful negotiation of a second contract with some manufacturer for the purchase of broadcasting time, which would enable the broadcasting company, thereafter, to designate that manufacturer's products as those to be promoted in the in-store displays. We must conclude, therefore, that the contention stressing the independent character of the first contract is altogether unrealistic, and disregards the fact that the first contract was only preliminary to the contract with respondent, both contracts being, not independent transactions, but parts of a larger plan.

Counsel for the respondent seeks, in his brief, to invoke the rules of private contract law governing third-party beneficiaries. In connection with this argument, he states that

> Most of the States recognize the right of a third person to sue upon a contract made for such person's benefit. Under that doctrine as applied by the courts a contract is not regarded as made for the benefit of a third party unless the intent to benefit that person clearly appears. Benefit resulting incidentally from a contract made by others is not sufficient. By these tests, the station contracts here in evidence plainly were not contracts for the benefit of the chains, whether or not the terms of the merchandising plans are read into them.

This argument is specious. We are not here concerned with an application of the rules of private contract law, but with the broader and more realistic principles of public law, which require an examination of the entire plan in question in all its related parts. As hereinbefore stated, the omission from respondent's contract of the benefit intended to be conferred, in the form of broadcasting time, upon the chain store in consideration of the in-store displays promised to respondent as an inducement to purchase broadcasting time for its own use appears, particularly in the light of the contentions herein made by counsel for respondent, to have been intentional, for the purpose of shielding the respondent from the force and effect of the Clayton Act. Such omission appears to be, palpably, an attempt to circumvent that act by effectuating, indirectly through the agency of the broadcasting company, a practice which could not lawfully be effectuated directly.

The fact that this sales-promotion plan was instigated by the broadcasting company rather than by the respondent does not alter the fact that respondent, by accepting it, became a party thereto, and cannot now evade full responsibility therefor. Respondent's acceptance of the broadcasting company's tempting offer of in-store promotion would, of course, have become lawful, had the respondent required, as a condition for its acceptance, that the benefit of broadcasting time given in return for such in-store promotion be made equally available to all respondent's customers. Extension of the offer to all respondent's customers might have proved impracticable because of their number; but that factor offers no justification for respondent's unlawful conduct.

Counsel for the respondent cites the case of *State Wholesale Grocers* v. *The Great Atlantic and Pacific Tea Co.* (C.C.H. 1957 Trade Cases, pp. 73145, 73148–9, 73175) as condemning the contention of counsel supporting the complaint that the broadcasting companies would not continue to offer merchandising plans without the participation therein of manufacturers of grocery products, and that respondent, by its participation in the plan here involved, is contributing to and making possible the continuance thereof. Counsel, in quoting that decision, has disregarded the several basic, factual differences between that case and the instant proceeding. Lengthy analysis of such differences is here deemed unnecessary. Counsel for the respondent has wisely refrained from stating that the case cited is a valid precedent upon which to base a decision herein. We agree with that omission; the case cited is not a precedent nor a parallel to the instant proceeding, and can be of no assistance in the adjudication thereof.

## CONCLUSION

In reaching our conclusion in this proceeding, we recognize that the section of the Robinson-Patman Act amending the Clayton Act with which we are presently concerned was designed by Congress to protect small, independent merchants against unfair and discriminatory competitive advantages, in the form of payments, rebates or advertising allowances, granted by manufacturers and distributors to the larger chain stores with which the small stores must compete at the retail level. In other words, as applied to the facts of the present proceeding, the provision of section 2(d) of the Clayton Act as amended was specifically designed to protect the small businessman buying respondent's products from the competitive injury resulting from respondent's large chain-store customers receiving advertising allowances in the form of broadcasting time in return for in-store sales promotion in which the smaller merchants were never given an opportunity to participate.

We recognize, also, that section 2(d) of the Clayton Act as amended makes no distinction between a benefit conferred directly and one conferred indirectly, but expressly forbids the conferring of any discriminatory benefit, by providing that no payment shall be made "for the benefit of a customer" unless the opportunity to share in that benefit is equally bestowed upon all competing customers.

In the light of these principles, we must conclude that, in the present proceeding, the respondent, by its payment to the broadcasting company, paid or contracted to pay something of value for its own benefit and also for the benefit of certain chain-store customers in consideration for in-store promotional facilities furnished to respondent by such favored customers, without making the same or similar benefits available on proportionally equal terms to all respondent's other customers who compete in the retail distribution of respondent's products with the customers so favored. These acts and practices clearly violate section 2(d) of the Clayton Act as amended. Accordingly,

*It is ordered*, That respondent, General Foods Corp., a corporation, its officers, agents, representatives or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of grocery products, including instant and regular coffee, cake mixes, frozen foods, cereals, and puddings, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's said products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION

Respondent, General Foods Corp., having filed an appeal from the hearing examiner's initial decision finding that said respondent has violated the provisions of section 2(d) of the Clayton Act, as amended, and ordering it to cease such violation; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel in support of the complaint and the briefs of Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., as *amici curiae*, and having determined that the findings and conclusions in the initial decision are fully substantiated on the record and that the order contained therein is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondent's appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision filed October 9, 1957, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That respondent, General Foods Corp., a corporation, 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 the initial decision.

IN THE MATTER OF

# SUNSHINE BISCUITS, INC.

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

*Docket 6597. Complaint, July 19, 1956—Decision, May 7, 1958*

Order requiring a manufacturer of cookies and crackers, with main office in Long Island City, N.Y., to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

*Mr. William R. Tincher, Mr. J. Wallace Adair, Mr. Eugene Kaplan* and *Mr. Daniel A. Austin, Jr.*, for the Commission.

*Appell, Austin & Gay*, by *Mr. Cyrus Austin*, of New York, N.Y., and *Mr. A. W. DeBirny*, of Long Island City, N.Y., for respondent.

## INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

### THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

AMICI CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc. and National Broadcasting Co., Inc. applied for and were granted permission to submit briefs as *amici curiae*. These briefs supplement the brief of counsel for the respondent, and request that the complaint herein be dismissed.

IDENTITY OF RESPONDENT

Respondent Sunshine Biscuits, Inc. is a New York corporation, with its principal office and place of business located at 29–10 Thomson Street, Long Island City, N.Y.

ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing its products, including cookies and crackers, to competing customers, including independent grocers and grocery chains, located throughout some of the States of the United States and in the District of Columbia. Many of such competing grocery customers are located in the Chicago metropolitan area and in the New York City metropolitan area, which extends into the adjacent States of New Jersey and Connecticut. The quantity of the abovementioned products sold by respondent in those areas during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act as amended.

ORIGIN OF THE SALES-PROMOTION PLAN

In 1950 and in 1951 the sale of broadcasting time had become difficult, and the American Broadcasting Co., Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., hereinafter referred to, respectively, as "ABC," "CBS," and "NBC," devised a plan to enable them to promote the sale of such time to manufacturers and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the several broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the others.

THE SALES-PROMOTION PLAN

In initiating their sales-promotion plans, ABC and CBS each negotiated contracts with certain grocery chains in the Chicago metropolitan area, and NBC in the the Chicago and New York City metropolitan areas, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of one week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing"; the NBC plan, "Chain Lightning"; and the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for 1 or more week-long promotional displays of its products in the stores of certain grocery chains. The brochure stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the several plans as follows:

> WBKB'S SHOPPER-STOPPER plan can create week-long displays for a clients product in 300 A&P and/or 300 National Tea stores. This exciting sales impact can be utilized by advertisers whose budgets during a 13-week period are at least $900 per week. * * *
>
> WBKB IS CHICAGO'S MOST MERCHANDISING T.V. STATION!!
>
> Merchandising!—personal contact with Chicago's top food executives! Merchandising!—mailings to the trade. Merchandising!—displays in Chicago's largest chain stores. Merchandising!—free product promotion in TV programs. Merchandising!—prize awards of client's products.
>
> Supermarket displays increase your sales * * * but Supermarket display space is scarce. The average Supermarket has room for ten displays, six of which are reserved for the retailers' own needs. This leaves four displays per week "up for grabs" for your product * * * and three thousand others. In 1953, the 76 leading nationally advertised food products were only able to win display space over and above normal selling space in stores accounting for a meager 3 percent of sales (Nielsen Food Index).
>
> Supermarket display space is costly too! If the value of all of the CHAIN-LIGHTNING displays currently available were conservatively estimated at five dollars per store per week, the total worth would be over $15,000 per week.
>
> CHAIN LIGHTNING is the Radio merchandising plan that puts your product physically in front of the competition in more than three thousand supermarkets in the richest retail areas in the land. It combines the hard hitting selling power of local Radio advertising with the impact of point-of-sale displays to: * * * pre-sell your customers in their homes * * * clinch the sale in the food store * * *.
>
> The average Super Market carries over 3,000 items.
>
> In this vast jungle of brands, sizes, packages, cans and jars, any single product has little chance of capturing the attention of retailer or shopper.
>
> If the retailer divided his day evenly among his 3,000 items—each would receive 10 seconds of his time!
>
> If the shopper divided her 45-minute super-market visit among the 3,000 items—she'd give each less than a second of her attention!

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

> This contract contains the entire agreement between the parties and is not subject to oral modification.

The NBC contract contains a similar clause, as follows:

> This contract constitutes the entire agreement between the parties relating to the subject matter thereof.

The various payments made by respondent to the several broadcasting companies from 1954 through 1956 were, as follows:

| Year | Broadcasting company | Station | Amount paid | Yearly total |
|---|---|---|---|---|
| 1954 | ABC | WBKB (Chicago) | $49, 450. 00 | $88, 406. 25 |
| | NBC | WMAQ (Chicago) | 38, 956. 25 | |
| 1955 | ABC | WBKB (Chicago) | 55, 685. 00 | 132, 775. 50 |
| | NBC | WNBC (New York) | 36, 920. 50 | |
| | NBC | WMAQ (Chicago) | 40, 170. 00 | |
| 1956 | CBS | WBBM (Chicago; Apr. 4 to June 30, 1956) | 13, 824. 00 | 56, 434. 00 |
| | NBC | WNBC (New York; to June 30, 1956) | 29, 350. 00 | |
| | NBC | WMAQ (Chicago; to June 30, 1956) | 13, 260. 00 | |

The three plans under which the above-listed payments were made all required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of all of these three plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by such broadcasting companies that some of the respondent's products would be displayed in the stores of certain grocery chains on certain dates. In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contract described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides, as follows:

SEC. 2. (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue herein is as follows:

Did respondent pay or contract for the payment of something of value to any of the three broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

THE ISSUE RESOLVED

Counsel supporting the complaint, in effect, contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in consideration" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising such store certain broadcasting time for its own purposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purposes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therein. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their inter-relationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract. The respondent was required, not merely to purchase radio or television time in order to acquire the right to in-store promotions, but was required to purchase a specified minimum amount of such time in order to so qualify. It is reasonable to conclude, since the plan in question resulted from the difficulty of selling broadcasting time, that it was continued for the same reason, and that respondent would not have purchased broadcasting time at all, or would have purchased it only at a reduced price or in a lesser amount, except for the inducement of the in-store promotion. We also see that the respondent made the only money payment involved in the whole transaction, and was therefore the sole financial support of the plan. Without such support, it is reasonable to assume that the plan would not have matured, but would have proven financially unprofitable and therefore of short duration. It follows, therefore that the respondent, as the sole financial supporter of the plan, paid for the broadcasting time granted the chain-store for in-store promotional displays, as well as for the broadcasting time purchased for respondent's own use.

The facts show clearly that the responsible officials of the respondent knew, or should have known, when they entered into the plan presented to respondent by the broadcasting company, that respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors. The fact that the payment for the broadcasting time furnished to the favored chain stores was indirect rather than direct does not alter its legal or practical effect; neither does the fact that the respondent made the payment in question primarily in its own behalf and without a prior agreement with the chain store. On these points, counsel supporting the complaint very aptly quotes from the statement of counsel for the respondent, in his book entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, page 116, as follows:

> It is no defense for a seller charged with a violation of either of these sections [section 2(d) and section 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination.

Respondent also contends, as do the broadcasting companies as *amici curiae*, that respondent's payment to the broadcasting company was in fulfillment of a separate, individual contract, and was in no wise a consideration for the in-store promotions later supplied. In fact, respondent contends that the supplying of the in-store promotions to the respondent was a gratuity, and was "free" within the interpretation of the Commission in the matter of *Walter J. Black, Inc.*, Federal Trade Commission docket No. 5571 (1953). This contention is fallacious, because we are not here concerned, as was the Commission in the case cited, with the question of whether a certain advertisement was misleading. On the contrary, we are here concerned with determining, from all the relevant facts, whether the payment made by the respondent to the broadcasting company was in reality compensation only for the broadcasting time purchased by the respondent for its own use, or whether such payment was made for a broader purpose, and did actually serve also as compensation for in-store displays furnished to respondent by some of its chain-store customers. We are persuaded by the facts that the payment by the respondent included the larger purpose, and was actually not only a self-serving payment, but also a payment on behalf of a few favored customers. We must conclude, therefore, that the case cited is in no way a precedent for the decision in the present proceeding.

Counsel for the respondent further contends that the consideration received by the chain stores in the form of broadcasting time was not contingent or dependent on any act of the respondent, but was dependent solely on the contract between the broadcasting company and the chain store. He points out that this contract provides for the furnishing of broadcasting time to the chain store in compensation for in-store promotions of products to be later designated by the broadcasting company. The facts reveal that such designation was not made by the broadcasting company until after the signing of its contract with respondent for the purchase of broadcasting time. From these facts the conclusion is inescapable that the broadcasting company, when entering into the contract with the chain store, contemplated completing the overall plan, of which that contract was merely a part, only after successful negotiation of a second contract with some manufacturer for the purchase of broadcasting time, which would enable the broadcasting company, thereafter, to designate that manufacturer's products as those to be promoted in the in-store displays. We must conclude, therefore, that the contention stressing the independent character of the first contract is altogether unrealistic, and disregards the fact that the first contract was only preliminary to the contract with respondent, both contracts being, not independent transactions, but parts of a larger plan.

Counsel for the respondent seeks, in his brief, to invoke the rules of private contract law governing third-party beneficiaries. In connection with this argument, he states that

> Most of the States recognize the right of a third person to sue upon a contract made for such person's benefit. Under that doctrine as applied by the courts a contract is not regarded as made for the benefit of a third party unless the intent to benefit that person clearly appears. Benefit resulting incidentally from a contract made by others is not sufficient. By these tests, the station contracts here in evidence plainly were not contracts for the benefit of the chains, whether or not the terms of the merchandising plans are read into them.

This argument is specious. We are not here concerned with an application of the rules of private contract law, but with the broader and more realistic principles of public law, which require an examination of the entire plan in question in all its related parts. As hereinbefore stated, the omission from respondent's contract of the benefit intended to be conferred, in the form of broadcasting time, upon the chain store in consideration of the in-store displays promised to respondent as an inducement to purchase broadcasting time for its own use appears, particularly in the light of the contentions herein made by counsel for respondent, to have been intentional, for the purpose of shielding the respondent from the force and effect of the Clayton Act. Such omission appears to be, palpably, an attempt to circumvent that act by effectuating, indirectly through the agency of the broadcasting company, a practice which could not lawfully be effectuated directly.

The fact that this sales-promotion plan was instigated by the broadcasting company rather than by the respondent does not alter the fact that respondent, by accepting it, became a party thereto, and cannot now evade full responsibility therefor. Respondent's acceptance of the broadcasting company's tempting offer of in-store promotion would, of course, have become lawful, had the respondent required, as a condition for its acceptance, that the benefit of broadcasting time given in return for such in-store promotion be made equally available to all respondent's customers. Extension of the offer to all respondent's customers might have proved impracticable because of their number; but that factor offers no justification for respondent's unlawful conduct.

Counsel for the respondent cites the case of *State Wholesale Grocers v. The Great Atlantic and Pacific Tea Co.* (C.C.H. 1957 Trade Cases, pp. 73145, 73148–9, 73175) as condemning the contention of counsel supporting the complaint that the broadcasting companies would not continue to offer merchandising plans without the participation therein of manufacturers of grocery products, and that respondent, by its participation in the plan here involved, is contributing to and making possible the continuance thereof. Counsel, in quoting that decision, has disregarded the several basic, factual differences between that case and the instant proceeding. Lengthy analysis of such differences is here deemed unnecessary. Counsel for the respondent has wisely refrained from stating that the case cited is a valid precedent upon which to base a decision herein. We agree with that omission; the case cited is not a precedent nor a parallel to the instant proceeding, and can be of no assistance in the adjudication thereof.

## CONCLUSION

In reaching our conclusion in this proceeding, we recognize that the section of the Robinson-Patman Act amending the Clayton Act with which we are presently concerned was designed by Congress to protect small, independent merchants against unfair and discriminatory competitive advantages, in the form of payments, rebates or advertising allowances, granted by manufacturers and distributors to the larger chain stores with which the small stores must compete at the retail level. In other words, as applied to the facts of the present proceeding, the provision of section 2(d) of the Clayton Act as amended was specifically designed to protect the small businessman buying respondent's products from the competitive injury resulting from respondent's large chain-store customers receiving advertising allowances in the form of broadcasting time in return for in-store sales promotion in which the smaller merchants were never given an opportunity to participate.

We recognize also, that section 2(d) of the Clayton Act as amended makes no distinction between a benefit conferred directly and one conferred indirectly, but expressly forbids the conferring of any discriminatory benefit, by providing that no payment shall be made "for the benefit of a customer" unless the opportunity to share in that benefit is equally bestowed upon all competing customers.

In the light of these principles, we must conclude that, in the present proceeding, the respondent, by its payment to the broadcasting company, paid or contracted to pay something of value for its own benefit and also for the benefit of certain chain-store customers in consideration for in-store promotional facilities furnished to respondent by such favored customers, without making the same or similar benefits available on proportionally equal terms to all respondent's other customers who compete in the retail distribution of respondent's products with the customers so favored. These acts and practices clearly violate section 2(d) of the Clayton Act as amended. Accordingly,

*It is ordered*, That respondent, Sunshine Biscuits, Inc., a corporation, its officers, agents, representatives, or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of grocery products, including cookies and crackers, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's said products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

## DECISION OF THE COMMISSION

Respondent, Sunshine Biscuits, Inc., having filed an appeal from the hearing examiner's initial decision finding that said respondent has violated the provisions of section 2(d) of the Clayton Act, as amended, and ordering it to cease such violation; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel in support of the complaint and the briefs of Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., as *amici curiae*, and having determined that the findings and conclusions in the initial decision are fully substantiated on the record and that the order contained therein is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondent's appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision filed October 9, 1957, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That respondent, Sunshine Biscuits, Inc., a corporation, 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 the initial decision.

IN THE MATTER OF

# PIEL BROS., INC.

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

*Docket 6598. Complaint, July 19, 1956—Decision, May 7, 1958*

Order requiring a distributor of grocery products including beer, with principal place of business in Brooklyn, N.Y., to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

*Mr. William R. Tincher*, *Mr. J. Wallace Adair*, *Mr. Eugene Kaplan* and *Mr. Daniel A. Austin, Jr.*, for the Commission.

*Appell, Austin & Gay*, by *Mr. Cyrus Austin*, and *Sullivan & Cromwell*, by *Mr. John F. Dooling, Jr.*, all of New York, N.Y., for Respondent.

## INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

### THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

AMICI CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc. and National Broadcasting Co., Inc. applied for and were granted permission to submit briefs as *amici curiae*. These briefs supplement the brief of counsel for the respondent, and request that the complaint herein be dismissed.

IDENTITY OF RESPONDENT

The stipulated facts show that respondent Piel Bros. was incorrectly styled in the complaint as "Piel Bros., Inc.," and that it is a New York corporation, with its principal office and place of business at 315 Liberty Avenue, Brooklyn, N.Y.

ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing grocery products, including beer, to competing customers, including independent grocers and grocery chains, located throughout some of the States of the United States and in the District of Columbia. Many of such competing grocery customers are located in the New York City metropolitan area, which extends to the adjacent States of New Jersey and Connecticut. The quantity of beer sold by respondent in that area during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act as amended.

ORIGIN OF THE SALES-PROMOTION PLAN

In 1950 and in 1951 the sale of broadcasting time had become difficult, and the American Broadcasting Co., Columbia Broadcasting

System, Inc., and National Broadcasting Co., Inc., hereinafter referred to, respectively, as "ABC," "CBS," and "NBC," devised a plan to enable them to promote the sale of such time to manufacturers and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the several broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the others.

### THE SALES-PROMOTION PLAN

In initiating its sales-promotion plan, each broadcasting company negotiated contracts with certain grocery chains in the New York City metropolitan area, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of 1 week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing"; the NBC plan, "Chain Lightning"; and the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for one or more week-long promotional displays of its products in the stores of certain grocery chains. The brochure stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the several plans as follows:

Supermarket displays increase your sales * * * but supermarket display space is scarce. The average supermarket has room for ten displays, six of which are reserved for the retailer's own needs. This leaves four displays per week "up for grabs" for your product * * * and three thousand others.

In 1953 the 76 leading nationally advertised food products were only able to win display space above normal selling space in stores accounting for a meager 3 percent of sales. (Nielsen Food Index)

Chain—lightning is the Radio Merchandising Plan that puts your product physically in front of the competition in more than three thousand supermarkets in the richest retail areas in the land. It combines the hard hitting selling power of local Radio advertising with the impact of point—of—sale displays to: * * * Pre-sell your customers in their homes. * * * Clinch the sale in the food stores. * * *.

Supermarket display space is costly too! If the value of all of the chain—lightning displays currently available were conservatively estimated at five dollars per store per week, the total worth would be over $1,500 per week.

The average supermarket carries over 3,000 items.

In this vast jungle of brands, sizes, packages, cans and jars, any single product has little chance of capturing the attention of retailer or shopper.

If the retailer divided his day equally among his 3,000 items—each would receive ten seconds of his time!

If the shopper divided her 45 minute supermarket visit among the 3,000 items—she would give each less than a second of her attemtion!

Chain lightning will obtain for you point-of-sale and favorite-brand promotions in 1634 supermarkets in metropolitan New York.

It will tie your air campaign on WNBC to a selling floor promotion in 12 blue-chip supermarket chains that do half the food business in New York.

A One-Two punch that gurantees selling success!

As simple as ABC.

[A]dvertise on WNBC. Sign for a saturation campaign of $1,500 per week net for time, for 13 weeks.

[B]ack it up with impulse-packed displays in the leading supermarket chains in New York.

[C]ash in.

How sell-a-vision works.

WABC—TV has firm agreements with the cooperating chains—A & P, Safeway and Gristede. Under these agreements, Channel 7 is advertising and promoting traffic in these chains. In return, the chains have agreed to promote and feature those products which have contracted for WABC—TV's SELL-A-VISION PLAN.

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

This contract contains the entire agreement between the parties and is not subject to oral modification.

The NBC contract contains a similar clause, as follows:

This contract constitutes the entire agreement between the parties relating to the subject matter thereof.

The various payments made by respondent to the several broadcasting companies from 1951 to 1956 were, as follows:

| Year | Broadcasting company | Station | Amount paid | Yearly total |
|---|---|---|---|---|
| 1951 | NBC | WNBC-WRCA (New York) | $49,125.00 | $49,125.00 |
| 1952 | NBC | WNBC-WRCA (New York) | 76,675.00 | 113,659.16 |
| | CBS | WCBS (New York) | 36,984.16 | |
| 1953 | ABC | WABC-TV (New York) | 72,380.00 | 211,795.26 |
| | CBS | WCBS (New York) | 61,090.26 | |
| | NBC | WNBC-WRCA (New York) | 78,325.00 | |
| 1954 | CBS | WCBS (New York) | 27,171.10 | 66,691.10 |
| | NBC | WNBC-WRCA (New York) | 39,520.00 | |
| 1955 | CBS | WCBS (New York) | 69,047.20 | 148,087.20 |
| | NBC | WNBC-WRCA (New York) | 79,040.00 | |
| 1956* | CBS | WCBS (New York) | 34,126.84 | 73,444.84 |
| | NBC | WNBC-WRCA (New York) | 39,318.00 | |

* To June 30th.

The three plans under which the above-listed payments were made all required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of all of these three plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by such broadcasting companies that some of the respondent's products would be displayed in the stores of certain grocery chains on certain dates. In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contract described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

### THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides, as follows:

> §2.(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue is as follows:

> Did respondent pay or contract for the payment of something of value to any of the three broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

### THE ISSUE RESOLVED

Counsel supporting the complaint, in effect, contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in consideration" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising such store certain broadcasting time for its own purposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purpoes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therin. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their interrelationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract. The respondent was required, not merely to purchase radio or television time in order to acquire the right to in-store promotions, but was required to purchase a specified minimum amount of such time in order to so qualify. It is reasonable to conclude, since broadcasting time in 1950 and 1951 was in fact hard to sell, that respondent would not have purchased broadcasting time at all, or would have purchased it only at a reduced price or in a lesser amount, without the inducement of the in-store promotion. We also see that the respondent made the only money payment involved in the whole transaction, and was therefore the sole financial support of the plan. Without such support, it is reasonable to assume that the plan would not have matured, but would have proven financially unprofitable and therefore of short duration. It follows, therefore, that the respondent, as the sole financial supporter of the plan, paid for the broadcasting time granted the chain-store for in-store promotional displays, as well as for the broadcasting time purchased for respondent's own use.

The facts show clearly that the responsible officials of the respondent knew, or should have known, when they entered into the plan presented to respondent by the broadcasting company, that respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors. The fact that the payment for the broadcasting time furnished to the favored chain stores was indirect rather than direct does not alter its legal or practical effect; neither does the fact that the respondent made the payment in question primarily in its own behalf and without a prior agreement with the chain store. On these points, counsel supporting the complaint very aptly quotes from the statement of counsel for the respondent, in his book entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, page 116, as follows:

> It is no defense for a seller charged with a violation of either of these sections [sec. 2(d) and sec. 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination.

Respondent also contends, as do the broadcasting companies as *amici curiae*, that respondent's payment to the broadcasting company was in fulfillment of a separate, individual contract, and was in no wise a consideration for the in-store promotions later supplied. In fact, respondent contends that the supplying of the in-store promotions to the respondent was a gratuity, and was "free" within the interpretation of the Commission in the matter of *Walter J. Black, Inc.*, Federal Trade Commission docket No. 5571 (1953). This contention is fallacious, because we are not here concerned, as was the Commission in the case cited, with the question of whether a certain advertisement was misleading. On the contrary, we are here concerned with determining, from all the relevant facts, whether the payment made by the respondent to the broadcasting company was in reality compensation only for the broadcasting time purchased by the respondent for its own use, or whether such payment was made for a broader purpose, and did actually serve also as compensation for in-store displays furnished to respondent by some of its chain-store customers. We are persuaded by the facts that the payment by the respondent included the larger purpose and was actually not only a self-serving payment, but also a payment on behalf of a few favored customers. We must conclude, therefore, that the case cited is in no way a precedent for the decision in the present proceeding.

Counsel for the respondent further contends that the consideration received by the chain stores in the form of broadcasting time was not contingent or dependent on any act of the respondent, but was dependent solely on the contract between the broadcasting company and the chain store. He points out that this contract provides for the furnishing of broadcasting time to the chain store in compensation for in-store promotions of products to be later designated by the broadcasting company. The facts reveal that such designation was not made by the broadcasting company until after the signing of its contract with respondent for the purchase of broadcasting time. From these facts the conclusion is inescapable that the broadcasting company, when entering into the contract with the chain store, contemplated completing the overall plan, of which that contract was merely a part, only after successful negotiation of a second contract with some manufacturer for the purchase of broadcasting time, which would enable the broadcasting company, thereafter, to designate that manufacturer's products as those to be promoted in the in-store displays. We must conclude, therefore, that the contention stressing the independent character of the first contract is altogether unrealistic, and disregards the fact that the first contract was only preliminary to the contract with respondent, both contracts being, not independent transactions, but parts of a larger plan.

Counsel for the respondent seeks, in his brief, to invoke the rules of private contract law governing third-party beneficiaries. In connection with this argument, he states that

> Most of the States recognize the right of a third person to sue upon a contract made for such person's benefit. Under that doctrine as applied by the courts a contract is not regarded as made for the benefit of a third party unless the intent to benefit that person clearly appears. Benefit resulting incidently from a contract made by others is not sufficient. By these tests, the station contracts here in evidence plainly were not contracts for the benefit of the chains, whether or not the terms of the merchandising plans are read into them.

This argument is specious. We are not here concerned with an application of the rules of private contract law, but with the broader and more realistic principles of public law, which require an examination of the entire plan in question in all its related parts. As hereinbefore stated, the omission from respondent's contract of the benefit intended to be conferred, in the form of broadcasting time, upon the chain store in consideration of the in-store displays promised to respondent as an inducement to purchase broadcasting time for its own use appears, particularly in the light of the contentions herein made by counsel for respondent, to have been intentional, for the purpose of shielding the respondent from the force and effect of the Clayton Act. Such omission appears to be, palpably, an attempt to circumvent that Act by effectuating, indirectly through the agency of the broadcasting company, a practice which could not lawfully be effectuated directly.

The fact that this sales-promotion plan was instigated by the broadcasting company rather than by the respondent does not alter the fact that respondent, by accepting it, became a party thereto, and cannot now evade full responsibility therefor. Respondent's acceptance of the broadcasting company's tempting offer of in-store promotion would, of course, have become lawful, had the respondent required, as a condition for its acceptance, that the benefit of broadcasting time given in return for such in-store promotion be made equally available to all respondent's customers. Extension of the offer to all respondent's customers might have proved impracticable because of their number; but that factor offers no justification for respondent's unlawful conduct.

Counsel for the respondent cites the case of *State Wholesale Grocers* v. *The Great Atlantic and Pacific Tea Co.* (C.C.H. 1957 Trade Cases, pp. 73145, 73148–9, 73175) as condemning the contention of counsel supporting the complaint that the broadcasting companies would not continue to offer merchandising plans without the participation therein of manufacturers of grocery products, and that respondent, by its participation in the plan here involved, is contributing to and making possible the continuance thereof. Counsel, in quoting that decision, has disregarded the several basic, factual differences between that case and the instant proceeding. Lengthy analysis of such differences is here deemed unnecessary. Counsel for the respondent has wisely refrained from stating that the case cited is a valid precedent upon which to base a decision herein. We agree with that omission; the case cited is not a precedent nor a parallel to the instant proceeding, and can be of no assistance in the adjudication thereof.

## CONCLUSION

In reaching our conclusion in this proceeding, we recognize that the section of the Robinson-Patman Act amending the Clayton Act with which we are presently concerned was designed by Congress to protect small, independent merchants against unfair and discriminatory competitive advantages, in the form of payments, rebates, or advertising allowances, granted by manufacturers and distributors to the larger chain stores with which the small stores must compete at the retail level. In other words, as applied to the facts of the present proceeding, the provision of section 2(d) of the Clayton Act as amended was specifically designed to protect the small businessman buying respondent's products from the competitive injury resulting from respondent's large chain-store customers receiving advertising allowances in the form of broadcasting time in return for in-store sales promotion in which the smaller merchants were never given an opportunity to participate.

We recognize, also, that section 2(d) of the Clayton Act as amended makes no distinction between a benefit conferred directly and one conferred indirectly, but expressly forbids the conferring of any discriminatory benefit, by providing that no payment shall be made "for the benefit of a customer" unless the opportunity to share in that benefit is equally bestowed upon all competing customers.

In the light of these principles, we must conclude that, in the present proceeding, the respondent, by its payment to the broadcasting company, paid or contracted to pay something of value for its own benefit and also for the benefit of certain chain-store customers in consideration for in-store promotional facilities furnished to respondent by such favored customers, without making the same or similar benefits available on proportionally equal terms to all respondent's other customers who compete in the retail distribution of respondent's products with the customers so favored. These acts and practices clearly violate section 2(d) of the Clayton Act as amended. Accordingly,

*It is ordered*, That respondent, Piel Bros., a corporation, its officers, agents, representatives or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of grocery products, including beer, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's said products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION

Respondent, Piel Bros., having filed an appeal from the hearing examiner's initial decision finding that said respondent has violated the provisions of section 2(d) of the Clayton Act, as amended, and ordering it to cease such violation; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel in support of the complaint and the briefs of Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., as *amici curiae*, and having determined that the findings and conclusions in the initial decision are fully substantiated on the record and that the order contained therein is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondent's appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision filed October 9, 1957, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That respondent, Piel Bros., a corporation, 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 the initial decision.