respondents maintain full and 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 29th day of August, 1959, 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

LINK SALES COMPANY, INC., ET AL.

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

Docket 7400. Complaint, Feb. 6, 1959—Decision, Sept. 1, 1959

Consent order requiring Washington, D.C., suppliers of watches, jewelry, cutlery, etc., to retailers for resale, to cease selling merchandise with attached tags printed with fictitious prices represented thereby as the regular retail prices, and to cease supplying to their customers unattached tags printed with fictitious retail prices.

Mr. Frederick McManus for the Commission.
Mr. Irving Turner, of Washington, D.C., 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 on February 6, 1959, charging the above-named respondents with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On July 8, 1959, 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 all respondents, except Selma Link, and the attorneys for both parties, under date of July 2, 1959, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Link Sales Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal location at 1126 North Capitol Street, Washington, D.C. Its former address was 811 Third Street, South East, Washington, D.C.

Individual respondent Victor Link is president of the corporate respondent and formulates, directs, and controls the acts, practices, and policies of the corporate respondent. His address is the same as that of the corporate respondent.

2. 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.

3. This agreement disposes of all of this proceeding as to all parties. It is recommended that the complaint be dismissed as to Selma Link for the reason that she has had no part in formulating, directing, or controlling the acts, practices, or policies of the corporate respondent as is set forth in affidavit attached hereto and made a part hereof.

4. 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.

5. 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.

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

7. 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.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified, or set aside in the

manner provided for other orders. The complaint may be used on 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," said agreement is hereby approved and accepted and is ordered filed if and when said agreement shall have become a part of the Commission's decision. The hearing examiner finds from the complaint and the said agreement 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 legal causes 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 the issues in this proceeding as to all of the parties hereto; and that said order, therefore, should be and hereby is entered as follows:

ORDER

It is ordered, That respondents Link Sale Company, Inc., a corporation, and its officers, and Victor Link, individually, and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of watches, jewelry, cutlery and other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, by preticketing or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail;

2. Supplying tags bearing fictitious retail prices to customers, or putting any plan in operation or engaging in any act and practice whereby others may misrepresent the usual and regular retail price of merchandise.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent Selma Link.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision herein, filed July 10, 1959, and having now determined that said decision is appropriate to dispose of this proceeding:

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

It is further ordered, That the respondents, Link Sales Company, Inc., a corporation, and Victor Link, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in said initial decision.

IN THE MATTER OF

S. KANN SONS CO.

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

Docket 7398. Complaint, Feb. 6, 1959—Decision, Sept. 2, 1959

Consent order requiring a Washington, D.C., department store to cease violating the Fur Products Labeling Act by failing to set forth on invoices the term "Persian Lamb" as required and otherwise failing to comply with invoicing requirements; by advertising which failed to disclose the names of animals producing certain fur, to reveal that some fur products were composed of artificially colored fur, to use the term "Broadtail-processed Lamb" as required, and represented fictitious prices as usual retail prices; by failing to keep adequate records as a basis for such pricing claims; and by failing in other respects to comply with invoicing and advertising requirements.

Mr. Thomas F. Howder for the Commission.

Mr. Charles W. Mander, of Washington, D.C., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondent with falsely and deceptively invoicing and advertising certain of its fur products, in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act.

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that Respondent S. Kann Sons Co. is a corporation existing and doing business under and by virtue of the

laws of the State of Maryland, with its office and principal place of business located at 8th and Market Space, N.W., in the City of Washington, D.C.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; 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; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act. Accordingly, the Hearing Examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent S. Kann Sons Co., a corporation, and its officers, and respondent's representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, offering for sale, transportation or distribution in commerce, of fur products, 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:

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 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 and address of the person issuing such invoice;

(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;

2. Setting forth on invoices the name of an animal other than the name of the animal that produced the fur contained in the fur product;

3. Setting forth on invoices information required under §5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form;

4. Failing to use the term "Persian Lamb" as required by Rule 8 of the said Rules and Regulations promulgated under said Act;

B. Falsely or deceptively advertising fur products through the use of any advertising, representation, 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:

(a) The name or names of the animal or animals which produced the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide and as prescribed under the said Rules and Regulations;

(b) That the fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

2. Fails to use the term "Broadtail-processed Lamb" as required by Rule 10 of the Rules and Regulations promulgated under the Fur Products Labeling Act;

3. Fails to set forth all the information required under §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;

4. Represents, directly or by implication, that the retail prices of

fur products are reduced from respondent's usual or regular prices, or that fur products are being offered for sale at prices affording savings, when such is not the fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 2nd day of September, 1959, become the decision of the Commission; and, accordingly:

It is ordered, That respondent S. Kann Sons 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 to cease and desist.

IN THE MATTER OF

AUDIVOX, INC., ET AL.

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

Docket 7345. Complaint, Jan. 5, 1959—Decision, Sept. 8, 1959

Order requiring Boston, Mass., manufacturers to cease advertising falsely that their air conduction hearing aids—which required use of a plastic tube leading to a button-like ear mold—had no buttons, wires, or cords attached, were invisible, hidden behind the ear or concealed within an eyeglass temple and required nothing in the ear; that their advertising booklet "Hearing Aid Digest" was a public service; and that their hearing aid Model 8750 was invented by one of their own executives.

Mr. Kent P. Kratz for the Commission.

Mr. A. Benjamin Cohen, of Boston, Mass., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On January 5, 1959, the Commission issued its complaint in the above-entitled proceeding, charging the respondents named above with the dissemination in commerce of false, misleading and deceptive statements and representations concerning their hearing aids, in violation of the Federal Trade Commission Act. No answer was submitted by the Respondents, but at a hearing held in Boston, Massachusetts, on May 13, 1959, respondents admitted all of the allegations of the complaint, except as to respondents R. C. Alexander

and W. Walters. As to them, counsel stipulated that these two respondents have no financial interest in the respondent corporation, are nominal officers only, and have not in the past and do not now formulate, direct or control the acts and practices of the corporate respondent. Counsel supporting the complaint stated that he would not oppose the dismissal of the complaint as to those two respondents. Counsel supporting the complaint submitted proposed findings as to the facts, whereas counsel for the respondents submitted only an argument concerning one phase of a proposed order to cease and desist. Each proposed finding has been duly considered, adopted and, in substance, incorporated herein.

The hearing examiner, having considered the entire record herein, make the following findings as to the facts:

Identity of Respondents

Respondent Audivox, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 123 Worcester Street, Boston, Massachusetts.

Respondents Rolf Stutz and R. R. Wagner are officers of the corporate respondent, and they formulate, direct and control the acts and practices thereof, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate Respondent.

Although Respondents R. C. Alexander and W. Walters are officers of the corporate Respondent, they are nominal officers only. They have no financial interest in the corporate Respondent herein, and have not in the past and do not now formulate, direct or control the acts and practices of said corporate respondent.

Respondents' Business Organization

Respondents, except as stated above, are now, and for some time last past have been, engaged in the manufacture, sale and distribution of hearing aids, which come within the classification of devices as "device" is defined in the Federal Trade Commission Act. Among said devices are those designated as Model 78 Contour, Model 8750 and Model 75 Spec-tacular Hearing Aid Spectacles.

Respondents cause the said hearing aids, when sold, to be transported from their place of business in the State of Massachusetts to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein, have maintained, a course of trade in said hearing aids in commerce, as "commerce" is defined in the

Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

Advertisements of Respondents' Hearing Aids

In the course and conduct of their business Respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said hearing aids by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers, magazines and other advertising media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said hearing aid instruments; and have disseminated, and caused the dissemination of, advertisements concerning said hearing aids by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Through the use of said advertisements, and others similar thereto but not specifically set out herein, including depictions of persons wearing said hearing aids, Respondents have represented, and now represent, directly and by implication:

1. That there are no buttons, wires or cords attached to their hearing aids;

2. That their hearing aids are invisible when worn;

3. That their hearing aids are either hidden behind the ear or concealed within an eyeglass temple;

4. That Respondents offer a valuable booklet known as Hearing Aid Digest to the public as a public service;

5. That an executive of Audivox, Inc. invented their hearing aid Model 8750.

Said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. Respondents' hearing aids require the use of a plastic tube, which is in the nature of a wire or cord, leading from the device to an ear mold, which is in the nature of a button;

2. Said hearing aids are not invisible when worn;

3. Respondents' hearing aids that are worn behind the ear are not hidden and those that are contained in an eyeglass temple are not entirely concealed as a visible plastic cord leads from the temple to a visible ear mold which fits in the outer ear;

4. The booklet known as Hearing Aid Digest, which is published by the Respondents ostensibly as a public service, is instead a piece of advertising literature for Audivox;

5. An executive of Audivox did not invent the hearing aid designated as Model 8750.

On the basis of the foregoing findings as to the facts and applicable principles of law, the hearing examiner makes the following conclusions:

The dissemination by the Respondents of the false advertisements as hereinabove found constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

The Hearing Examiner, on the basis of the entire record, finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; that this proceeding is in the public interest; and that a cease-and-desist order should be issued.

THE ORDER

In view of the admissions made at the hearing and the evidence there presented, the only question in controversy involves the exact language to be used in one paragraph of the proposed order to cease and desist. Counsel supporting the complaint contends that the order to be issued herein should contain a provision forbidding Respondents to represent in their advertising that:

"(a) There are no buttons, wires, or cords attached to their hearing aids, unless in close connection therewith and with equal prominence it is stated that a plastic tube runs from the device *and is attached to an ear mold or nipple fitted in the ear;*".

On the other hand, counsel for the Respondents contends that the words "to the ear" should appear in this provision of the order instead of the underscored phrase. In justification thereof, he cites two recent decisions of the Commission. One is in the matter of *Tonemaster Manufacturing Company, et al.*, Docket No. 7301, wherein the phraseology used in a similar order was:

"(a) That said devices are cordless or do not require the use of a cord unless in close connection therewith and with equal prominence it is stated *that a plastic tube runs from the device to the ear*;" (emphasis supplied).

The other is in the matter of *Otarion, Inc., et al.*, Docket No. 6757, wherein the order, while varying somewhat in phrasing, is semantically to the same effect.

Unlike the orders to cease and desist in both of the aforementioned

cases, however, an order containing the provision proposed by counsel for respondents would not prohibit respondents herein from representing, either directly or by implication, that their devices do not require anything to be inserted in the user's ear.

The complaint herein alleges, in effect, and it has been found, that through use of representations that no buttons, wires or cords are attached to their hearing aids, respondents have impliedly represented, contrary to fact, that nothing in the nature of a cord or wire is attached to their hearing aids and that nothing in the nature of a button is required to be placed in the user's ear. Consequently, a full disclosure of the fact that a plastice tube runs from the device to an ear mold or nipple fitted in the ear is necessary to prevent deception resulting from the use of the aforementioned representations. The provision proposed by counsel supporting the complaint would require a full disclosure of this information, whereas the wording suggested by respondents would not adequately inform the public that respondents' hearing aids require the use of an accessory to be fitted in the user's ear. The provision proposed by counsel supporting the complaint should therefore be adopted.

It is ordered, That respondents Audivox, Inc., a corporation, and its officer, and Rolf Stutz and R. R. Wagner, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hearing aid devices now known as Models 75, 78, 8750 or any other air conduction hearing aid device, whether sold under the same or any other model designation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, any advertisement, by means of United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products, which advertisement represents, directly or by implication, that:

(a) There are no buttons, wires, or cords attached to their hearing aids, unless in close connection therewith and with equal prominence it is stated that a plastic tube runs from the device and is attached to an ear mold or nipple fitted in the ear;

(b) Any of their hearing aids are invisible when worn;

(c) Any of their hearing aids are either completely hidden behind the ear or completely concealed within an eyeglass temple;

(d) Their booklet known as Hearing Aid Digest is offered to the public as a public service; or that any other booklet or publication is so offered, unless such is the fact;

(e) That an executive of respondent Audivox, Inc., invented their hearing aid model 8750; or that any other hearing aid was invented by anyone connected with respondents, unless such is the fact;

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

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondents R. C. Alexander and W. Walters individually, but not as officers of said corporation.

ORDER MODIFYING INITIAL DECISION, ADOPTING INITIAL DECISION AS MODIFIED AS COMMISSION'S DECISION, AND DIRECTING THAT REPORT OF COMPLIANCE BE FILED

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision herein; and

The Commission being of the opinion that the hearing examiner's conclusions as to the form of subparagraph (a) of paragraph 1 of the order to cease and desist contained in the initial decision are incorrect and that said order to cease and desist is not appropriate in all respects to dispose of this matter:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, modified by striking therefrom the last paragraph on page 4 thereof, beginning with the words "A comparison of the two proposals," and the first paragraph on page 5 thereof, beginning with the words "We conclude," and substituting therefor the following:

Unlike the orders to cease and desist in both of the aforementioned cases, however, an order containing the provision proposed by counsel for respondents would not prohibit respondents herein from representing, either directly or by implication, that their devices do not require anything to be inserted in the user's ear.

The complaint herein alleges, in effect, and it has been found, that through use of representations that no buttons, wires or cords are attached to their hearing aids, respondents have impliedly represented, contrary to fact, that nothing in the nature of a cord or wire is attached to their hearing aids and that nothing in the nature of a button is required to be placed in the user's ear. Consequently, a full disclosure of the fact that a plastic tube runs from the device to an ear mold or nipple fitted in the ear is necessary to prevent deception resulting from the use of the aforementioned representations. The provision proposed by counsel supporting the complaint

would require a full disclosure of this information, whereas the wording suggested by respondents would not adequately inform the public that respondents' hearing aids require the use of an accessory to be fitted in the user's ear. The provision proposed by counsel supporting the complaint should therefore be adopted.

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

(a) There are no buttons, wires, or cords attached to their hearing aids, unless in close connection therewith and with equal prominence it is stated that a plastic tube runs from the device and is attached to an ear mold or nipple fitted in the ear.

It is further ordered, That the initial decision, as so modified shall, on the 3rd day of September, 1959, become the decision of the Commission.

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

IN THE MATTER OF

LIGGETT & MYERS TOBACCO COMPANY, INC.

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

Docket 6642. Complaint, Sept. 28, 1956—Decision, Sept. 9, 1959

Order requiring a manufacturer of cigarettes and other tobacco products, with nationwide distribution, to cease violating Sec. 2(d) of the Clayton Act by such practices as (1) making payments to a New York City tobacco wholesaler for promotional services but not making any such payments to its wholesale competitors; (2) paying money to vending machine operators for their services without making such payments available on any terms to competing over-the-counter retailers; and (3) paying point-of-sale allowances to some over-the-counter retailers through individual negotiation and not on a proportionally equal basis, while not making such allowances to others.

Mr. William J. Boyd, Jr., *Mr. Jerome Garfinkel* and *Mr. Arthur J. Hessburg* for the Commission.

Simpson Thacher & Bartlett, by *Mr. Whitney North Seymour* and *Mr. Armand F. Macmanus*, of New York, N.Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondent manufactures, sells and distributes tobacco products, including cigarettes. The charge is that in connection with its cigarette business respondent has violated §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, §13); specifically, that during the three years prior to issuance of the complaint on September 28, 1956, the respondent

1. paid advertising allowances in varying amounts to some customers, but did not do so or offer to do so, in any amount, to other competing customers;

2. paid allowances to some customers, but did not make payments, or offer to make payments, to competing customers in amounts equal to the same percentage of such competing customers' net purchases, or proportionally equal upon any other basis or by any other test.

The complaint alleges that respondent granted allowances or made payments to certain retail customers for placing, in their business establishments, framed cards, posters, signs, change trays and counter displays advertising respondent's cigarettes; that such allowances were determined by individual negotiations between respondent's sales representatives and such customers, and were not made available to other customers who competed with such favored customers in the resale of respondent's cigarettes. Also it is alleged that respondent, through an agent, the Harrough Corporation, granted advertising allowances and made payments to certain cigarette vending-machine operator customers for the distribution, through their machines, of matches advertising respondent's cigarettes; and that such vending-machine operators compete with other vending-machine operators, with tobacco wholesalers and with retailers—customers of respondent—who have not been paid or offered this type of allowance by respondent.

By answer respondent admits the allegations of the complaint as to its corporate organization; the general nature of its business; that it engages in interstate commerce; that it has paid some retail customers during the past three years for space for the display of its advertising cards, posters, signs, trays and counter displays; and that the total of such payments to customers and non-customers in 1955 amounted to more than $1,400,000. Respondent denies the other material allegations of the complaint, and denies violation of the Clayton Act as amended. Further, the respondent alleges seven "complete defenses" and three "partial defenses," as follows:

As "complete defenses":

1. §2(d) of the Clayton Act is unconstitutional and void for vagueness, in violation of the due-process clause of the Fifth Amendment;

2. §2(d) is unconstitutional and void because its provisions are unreasonable, arbitrary, and capricious, also in violation of the due-process clause of the Fifth Amendment;

3. §2(d) is unconstitutional and void in that the provisions thereof are an unwarranted and improper delegation of legislative power by Congress to administrative officials, in violation of §1 of Article I of the Constitution;

4. the attempted application of §2(d) to the acts and practices of respondent, within the subject-matter of the complaint, violates the due-process clause of the Fifth Amendment;

5. §2(d) is unconstitutional and void if construed to make unlawful the acts complained of without regard to whether the effect of such acts may substantially lessen competition, or tend to create a monopoly or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of the alleged discrimination, or with customers of either of them;

6. the complaint does not allege and the Commission has the burden of establishing that the effect of respondent's acts and practices may be substantially to lessen competition or may tend to create a monopoly, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of the alleged discrimination or with customers of either of them, and the effect of said acts and practices is not of that character; and

7. respondent's acts and practices have been engaged in, in good faith, to meet the similar acts and practices of its competitors.

As "partial defenses," respondent alleges that:

1. it sells cigarettes to customers who sell at retail, and to wholesaler and jobbers who, in turn, sell to their own customers who sell at retail. To the extent that payments have been made by respondent to customers of said wholesalers and jobbers, said payments were not made to customers of respondent within the meaning of §2(d);

2. the Harrough Corporation, referred to in the complaint, is not, and at no time mentioned was, a customer of respondent, but was employed as an independent contractor and not as an agent; its services did not involve the sale of cigarettes or any other commodity. Respondent's payments to it were not in the course of interstate commerce, nor were its services, or any payments made by it to others, in the course of interstate commerce. The transactions between respondent and the Harrough Corporation, and between the Harrough Corporation and others, are not within the provisions of §2(d), and the Federal Trade Commission is without jurisdiction with respect thereto; and

3. the acts and practices of respondent relating to vending-ma-

chine operators and operations were primarily to enable respondent to have its cigarettes in at least one dispensing column of each machine, and were reasonably and necessarily required for that purpose in the light of competitive practices. Such acts and practices are not advertising allowances, and do not come within the purview of §2(d).

Hearings were held in this proceeding in New York, Buffalo, and Boston, at which evidence was received as to respondent's acts and practices in those cities and in the surrounding areas, that being deemed adequate to show respondent's conduct generally as it relates to the matters charged in the complaint. After the close of the reception of evidence, counsel supporting the complaint and counsel for the respondent submitted proposed findings of facts, conclusions of law and legal memoranda in support thereof, and were heard in oral argument thereon. Upon the basis of the entire record, the following findings are made and conclusions reached:

FINDINGS OF FACT

1. Respondent, Liggett & Myers Tobacco Company, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey, with its executive offices located at 630 Fifth Avenue, New York, New York.

2. Respondent is now and for a number of years past has been engaged in the business of manufacturing, selling and distributing cigarettes, cigarette tobacco, pipe tobacco and chewing tobacco. Said products are and have been sold to customers—wholesalers, jobbers and retailers—whose places of business are located in the several States of the United States and in the District of Columbia, for ultimate resale to the purchasing public. Respondent is a substantial factor in the tobacco industry; in 1955, it accounted for approximately 15 percent of the manufacture and sale of cigarettes in the United States, and ranked third in the industry. It has branch offices, factories, and warehouses located in a number of states. Its annual sales exceed $500,000,000. Its principal competitors are American Tobacco Company, R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Company, Philip Morris, Inc., and P. Lorillard Co.

3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped its products from the place or places where such products are manufactured to customers having places of business located in other States of the United States and in the District of Columbia. There is and has been a constant course of trade in

commerce in respondent's products. The approximately 70,000,000 cigarette-smokers in the United States have a variety of preferences as to cigarettes, to which cigarette manufacturers cater by manufacturing cigarettes of different blends of tobacco; different sizes such as the 70 mm. regular size, the 80 mm. hard-package size and 85 mm. king-size; different types such as non-filter, filter, menthol, and denicotinized; and different packages such as the soft and the crush-proof types. As a result there are more than fifty different brands and packages of cigarettes on the market.

4. The evidence in this proceeding was, in the main, confined to the period from January 1, 1953, to September 28, 1956. During this period, new brands and types of cigarettes were placed on the market by all manufacturers, including respondent, who made payments and allowances to promote their introduction to the public. Such payments and allowances are not material to the issues in this proceeding, since no issue is raised as to introductory allowances and payments. However, respondent made other types of payments in the regular course of its business.

Payments and Allowances to Respondent's Wholesaler Customers:

5. To one of its customers, Metropolitan Tobacco Company, a wholesale tobacco dealer of New York, under an agreement entered into February 13, 1956, and terminated February 13, 1957, respondent paid $1,300 per week for promotional services in connection with the sale and distribution of Chesterfield and L & M cigarettes. The weekly payment was based upon $6.50 per week per salesman. Metropolitan operated in the Greater New York area, which includes parts of Connecticut, New Jersey and Pennsylvania. It had 12 branches and approximately 200 salesmen who called on approximately 50,000 retail establishments weekly. Its purchases from respondent during the 12 months covered by the contract was in excess of ten million dollars; total payments by respondent amounted to $67,600.

6. In return for this payment, Metropolitan agreed to, and did, issue a weekly bulletin to its branch managers, urging that all its salesmen push Chesterfield and L & M sales. Retailers' stocks were checked, the quality of respondent's brands was emphasized, respondent's consumer advertising program was explained, special displays of its brands were urged and wherever possible installed. Oral reports of the results were made to respondent by Metropolitan.

7. Although respondent had accounts with more than 4,500 wholesale distributors, no announcement of the Metropolitan arrangement was made to the trade, and none of respondent's other wholesaler customers were offered a similar agreement or payment, although

several operated competitively with Metropolitan in all or in some part of the geographical area served by Metropolitan;

Gotham Tobacco Company of New York operated in the Bronx and Manhattan districts, serving approximately 200 retail outlets, and did business with respondent amounting to about $500,000 annually;

Samuel Sobel, Inc. of New York operated in the Manhattan, Brooklyn and Queens areas, serving 1,700 or 1,800 retail accounts through seven salesmen, and did business in excess of $800,000 annually with respondent;

A. Oriel Company, of New York, operated primarily in the Bronx, Manhattan, Queens and Long Island areas, serving approximately 1,000 retail accounts through eight salesmen, and did business averaging about one million dollars per year with respondent;

Eagle Candy Company and West Side Tobacco Company, two other New York wholesalers, also operated within the trading area competitively with Metropolitan.

None of these wholesaler customers received any payments or offers of payments for promoting respondent's brands of cigarettes.

8. Respondent says its payments to Metropolitan were on a temporary and experimental basis for special promotional service in the Greater New York area through the use of facilities which only this wholesaler was in a position to supply, and that they were discontinued in good faith under such circumstances that there is no likelihood of their revival. There is no evidence that similar payments have been made in the past to any other wholesale distributor, or are likely to be made to any wholesale distributor in the future. It would seem that all that can be accomplished in this respect by a cease and desist order has been accomplished. The record shows, and respondent offers in justification of its action, that for a period of time starting prior to the dare of respondent's agreement with Metropolitan and continuing after the termination of that agreement, Metropolitan was paid $50,000 per year by Philip Morris, Inc., for promoting its products; also that a similar arrangement between Metropolitan and P. Lorillard had existed prior to the Metropolitan-Liggett & Myers contract. During the concurrent periods of the dual arrangements, Metropolitan would promote the brands of the competing manufacturers during alternate weeks.

9. Since there is but the one instance of payment by respondent to a wholesaler, and since there has been good-faith discontinuance of the practice and no likelihood that it will be renewed, respondent urges that under all the circumstances this issue be considered as moot. The Commission has held that a cease-and-desist order will

not be issued if complete abandonment of the questioned practices has been established and if the special circumstances of the case indicate that in the public interest a cease-and-desist order is not required. The special circumstances shown to exist in the instant proceeding do not, in the hearing examiner's opinion, meet the requirements for dismissal after abandonment set by the Commission in its recent decisions. Respecting its relationship with its wholesaler customers, as shown by its payments to Metropolitan and to no others, respondent is found to have violated §2(d) of the Clayton Act. The fact that similar acts and practices had been or were engaged in by respondent's competitors does not constitute a defense.

Payments and Allowances to Vending-Machine Operator Customers:

10. Automatic merchandising machines for dispensing cigarettes came on the market in the 1920's. The growth of automatic merchandising has increased rapidly, especially since World War II. By the year 1955 there were in the United States approximately 526,000 cigarette-vending machines owned by more than 2,600 operators, of whom 215 were on the respondent's customer list. At that time approximately 15 percent of all cigarettes sold at retail were dispensed through automatic machines. These machines have columns which dispense cigarettes upon the insertion of a coin or combination of coins, but no machine has been designed or marketed with enough dispensing columns to provide one for each brand, size and type of package sold on the domestic market. As of January 1, 1953 the great majority of cigarette-vending machines had from seven to nine columns. There may as many as fifteen or more columns in the later models.

11. It was early established as a custom for cigarette-manufacturers, including the respondent, to make payments in kind or in cash to vending-machine operators for the right to have one or more of their brands represented in the columns of each machine. Such payments are frequently referred to as "placement payments."

12. When king-size cigarettes were introduced in 1953 by respondent and other manufacturers, a new difficulty arose in vending-machine operation because the columns in the machines were not large enough for the new size, and the increased price at which they were sold required an adjustment in the change-making mechanism. The conversion of the machines then being used, to accommodate the changing pattern, was a costly operation. More columns could not be added to the old machines; hence there was a need for larger and more modern machines. The problem of getting as many brands as possible in each machine became more acute for all the cigarette

manufacturers. In an attempt to overcome the competitive, economic and practical obstacles, and to obtain what it considered to be adequate representation in vending machines, the respondent on April 14, 1953, engaged The Harrough Corporation, of New York, New York, to obtain representation for it in vending machines.

13. Harrough neither purchased nor sold cigarettes, and was not a customer of respondent. Its April 14, 1953, contract with respondent provided that it was "to enter into appropriate arrangements, on its own behalf but not on behalf of Liggett" with various operators of cigarette vending machines, whereby each such operator would adjust his vending machines so that with each package of cigarettes sold there would be dispensed a book of matches advertising Chesterfield cigarettes. Respondent agreed to pay Harrough $1.25 per month per machine dispensing the Chesterfield matches, up to a maximum of 100,000 machines, upon being furnished, subject to verification, a written statement of the number and locations of such machines. Payments to Harrough were made on a per machine basis, regardless of the identity of the operator and whether or not he was a customer of respondent. Harrough was not required to disclose the identity of the operators of the machines. Subsequently this agreement was renewed without limitation upon the number of machines, and in June of 1954 a similar arrangement was made for distribution of book matches advertising king-size L & M cigarettes, the monthly payment to Harrough to be one dollar per month per machine. Subsequently the contract was extended to cover the advertising of king-size Chesterfields. The agreements were canceled late in 1956.

14. Pursuant to the provisions of these agreements, respondent, as of March, 1956, was paying Harrough on the basis of arrangements effected as to machines carrying Chesterfield cigarettes and machines carrying L & M cigarettes. For that month respondent paid Harrough $399,790 for distributing Chesterfield advertising matches in 319,832 machines at $1.25 per month, and $206,056 for distributing L & M advertising matches in 206,056 machines at one dollar per month. From the date of the first contract, April 14, 1953, to the end of 1953, respondent paid Harrough over $590,000; for the calendar year 1954, over $2,560,000; and for 1955, over $5,270,000.

15. The Harrough Coporation effected its arrangements with vending-machine operators on a uniform contract and payment basis. Each operator received the same amount of payment per machine per month for the same brand. For carrying Chesterfield advertisements and dispensing Chesterfield cigarettes, payments were at the rate of $1 per month per machine; for carrying and dispensing L & M cigar-

etttes, $8.50 per machine per year. The vending-machine operator was obligated under his contract with Harrough to keep his machines stocked exclusively with respondent's matches, "and at all times stock each Machine with the brand and size of cigarettes advertised on the Advertising matches." The contract expressly provided that payments to the operator should "in any event cease to accrue as of such date when Company [Harrough] ceases to be entitled to receive any fees or payments from a match advertiser with respect to such Machine." The match advertiser was given the right to verify any statement of a vending-machine operator as to the number and location of machines in which the advertising matches were used.

16. In April, 1955, respondent entered into another agreement with Harrough relating to the exclusive use of advertising space provided by the manufacturer on Corsair cigarette-vending machines. Prior to this date a contract had been entered into between the manufacturer and Harrough giving Harrough the exclusive control of such space. Harrough agreed in its contract with respondent to enter into "appropriate arrangements on its own behalf but not on behalf of Liggett," with operators of such machines whereby respondent's advertising would be used exclusively. For this service respondent agreed to pay Harrough one dollar per month per machine up to a maximum of 30,000 machines, plus an initial fee of $15 per machine. As in the other contracts, Harrough was required to furnish respondent a writen statement of the number and locations of the machines bearing such advertising. As a part of this arrangment, the manufacturer was to install in its machines, up to 30,000 in number, advertising material submitted by Harrough and requested jointly by Harrough and the purchaser of such machine. Harrough paid the manufacturer $15 for "the exclusive use and insertion of advertising material in each Corsair." The cigarette-vendors who purchased such machines were paid $7.50 per year by Harrough for each such machine used in their operations. Under this arrangement, respondent paid Harrough for the month of February, 1956, $3,852. The total amounts paid by Harrough to the operators of these machines is not disclosed in the record but it is established that such payments were on a uniform basis.

17. Respondent avers that Harrough, in its negotiations with the operators of vending machines, acted as an independent contractor, not as an agent of respondent, and that therefore the payments to the vending-machine operators were made by Harrough, not by respondent. This argument is fatuous. The money used by Harrough to pay the vending-machine operators came from respondent. The benefit accrued to respondent, and whether Harrough acted as agent

or in some other capacity is immaterial. Whether the payments to the vending-machine operators were paid directly or indirectly or by subterfuge is not important. The pawments were by respondent. The applicability of the provision of §2(d) of the Clayton Act cannot so easily be averted. Furthermore, the record shows that since the respondent-Harrough contracts were canceled, payments to vending-machine operators have been made directly by respondent.

18. There is no contention by counsel supporting the complaint that respondent's vending-machine operator customers were not all treated alike. No discrimination is shown in this respect. Therefore the charge that respondent granted advertising allowances and made payments to certain cigarette vending-machine operator customers for services or facilities furnished by them, and did not grant such allowances or make such payments on the same or a proportionally equal basis to other such customers competing in the distribution of respondent's cigarettes is not established or supported by the record.

Competition between Vending-Machine Operators and Wholesaler Customers of Respondent:

19. Counsel supporting the complaint contend that cigarette vending-machine operator customers of respondent compete with respondent's wholesaler customers in the distribution of respondent's cigarettes and that payments were not made or offered to the competing wholesaler customers on the same or proportionally equal basis.

20. The respondent has on its customer list approximately 215 operators of cigarette-vending machines and 4,853 wholesale disributors who handle its brands and the brands of all manufacturers which they resell to sub-jobbers and retailers for ultimate resale to the public. The wholesalers are not ordinarily in a position to favor the brands of any one manufacturer. Retailers, for convenience, frequently get their supplies of cigarettes from more than one distributor. Because of this arrangement it has been the practice in the cigarette business for each manufacturer, rather than the wholesaler or the retailer, to create consumer demand for its particular brands. This is done by employing various advertising media, including radio, television, newspaper and magazine advertising, as well as billboard advertising and point-of-sale (display) advertising. Point-of-sale advertising includes the placement of placards, signs, change trays, counter displays and the like, in or at premises where cigarettes are available to the smoking public.

21. Counsel supporting the complaint contend that within the framework of §2(d) the cigarette vending-machine operator customers of respondent are in competition with its cigarette wholesaler customers in that both classes of customers are engaged in the busi-

ness of distributing the same products in the same geographical areas and through the same general class of retail locations or outlets. They urge that the retail outlet is the objective of both; that they are "seeking to gain the same goal, the favor of the owner or proprietor of retail outlets, as to the method to be employed in the distribution of cigarettes at such outlets."

22. In support of their proposition, counsel supporting the complaint cite the Commission's decision in the cases of *Fruitvale Canning Company*, Docket 5989, and *The Curtiss Candy Co.*, Dockets 4556 and 4673, saying that in those cases the Commission determined competition by using geographical trading areas as a guide. But the fact of competition is determined not entirely by geography. Manufacturers, wholesalers, and retailers may operate in adjacent buildings or even in the same building but that does not establish that they are competitors. They do not cater to the same class of customers and the functions that they perform are significantly different.

23. The 215 vending-machine operators on the respondent's customer list purchase cigarettes in quantity and accept bulk delivery thereof from the manufacturer. They process the merchandise by breaking the bulk shipment, affixing appropriate state and city tax stamps to each package, and inserting in each package the approximate number of coins to make change where required; their service-men then distribute the cigarettes to the machines which are out on location, taking care that each machine is stocked with an adequate supply of the various brands which the operator wishes to dispense; their sales are to the consuming public. They do not resell to others who then retail the cigarettes to the public.

24. The function of vending machines in the cigarette distribution process is the day-to-day sale and delivery of cigarettes, in individual packages, to ultimate consumers. The machines are used strictly in the retail phase of the distribution of cigarettes. The bulk delivery of cigarettes by vending machines is an impossibility, as those machines are currently constructed.

25. The function of wholesale distributors is the more or less regular sale and delivery of cigarettes in bulk, by cases, half-cases or in carton lots, to proprietors of stores or stands or to the operators of vending machines, or to both, for subsequent resale by those proprietors and operators to the ultimate consumers. The two functions are different, and those who perform one of these functions cannot be said to be in competition with those who perform the other. Only when they both exercise the same functions and seek the trade of the same class of customers do they become competitive. This occurs only when they engage in both types of operations.

26. The evidence shows that from time to time owners of bars and grills, luncheonettes, factories and other business establishments, where cigarettes have theretofore been sold over-the-counter, conclude that it would be to their advantage to go out of the cigarette selling business and to have all cigarettes sold on their premises through vending machines. They find a vending-machine operator who is willing to install and operate such machines. They accept from him, for furnishing location, a commission based on the amount of sales made through the machines. Thus the vending-machine operator replaces the owner of the establishment as the retailer of cigaretttes at that location. Under these circumstances, if the wholesaler is to retain a customer at such a location, he must now sell the machine operator who has superseded the owner of the over-the-counter operation. No competition exists between the machine operator and the wholesaler. The situation is as simple as this. If the machine operator procures his cigarettes through wholesalers then the wholesaler is still in competition with other wholesalers who serve the area; if the machine operator is a direct-buying customer of respondent then the wholesaler's business at that location will have been lost to respondent. In neither instance does the machine operator become a competitor of the wholesaler.

27. The evidence in this proceeding does not establish that cigarette vending-machine operator customers of respondent are engaged competitively with wholesaler customers of respondent in distributing respondent's products within the intent and meaning of §2(d) of the Clayton Act as amended. Since such competition does not exist, respondent is under no obligation to make payments or offer to make payments or allowances to its wholesaler customers merely because some payments or allowances are made to its cigarette vending-machine operator customers.

28. Cigarette vending-machines are freely available on the market, and in some instances wholesalers also perform retail functions through ownership and operation thereof. In connection with such vending-machine operations they receive payments from respondent on the same basis as other vending-machine operators. Like all wholesalers who do not also operate machines, they receive no payments in connection with their wholesale operations. There is therefore no discrimination under §2(d) in this respect as between competing customers of respondent.

"Indirect Customers":

29. Counsel supporting the complaint contend and ask a finding that the "indirect retailer customers" of respondent are customers within the meaning of §2(d) and are in competition with the direct-

buying vending-machine operators and with other direct-buying retailers who make over-the-counter sales, "indirect customers" being defined as those retailers who purchase respondent's products from wholesalers or jobbers. It is urged that these "indirect customers" are entitled to payments and allowances the same as, or proportionally equal to, those paid by respondent to its direct-buying vending-machine operators, and to other direct-buying retailers. These contentions require an examination of the status of these "indirect customers."

30. There were in the United States approximately 873,750 such "indirect customers" in 1955—proprietors of stores and stands at which respondent's cigarettes and those of other manufacturers were sold at retail. These stores and stands constitute the last link between manufacturer and consumer in the chain of cigarette distribution. Their supplies were procured from one or more of the 4,853 concerns which then were distributing cigarettes at wholesale. None of the 873,750 proprietors was carried on its books or listed as a customer by respondent. The price at which they purchased their cigarettes was determined by the wholesale distributors from whom their purchases were made and by whom their accounts were carried and served. Each retailer determined the price at which he sold cigarettes to the public.

31. The term "indirect customer" does not appear in §2(d) of the Clayton Act, nor in any other part of the Act.[1] The obligations imposed by §2(d) are expressly limited to transactions with "'customers." The term is used three times in the section, which may have some significance in view of the fact that in §2(a) and §2(e) the obligations imposed relate to transactions in which "purchasers" are involved. Respondent urges that the term "purchaser" is specifically applicable where a single transaction may be involved, whereas "customer" carries the connotation of a continuing relationship. This distinction is not particularly applicable or necessary to be noted in this proceeding, except as it may aid in interpreting the decisions upon which reliance is placed by counsel.

32. The cases in which it has been decided that those who procured a respondent's products through an intermediate source were actually customers of or purchasers from such respondent within the meaning

[1] §2(d) of the Clayton Act, as amended, provides:

"(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."

of the Clayton Act are not numerous, and most of them have involved §2(a) or §2(e) violations. All have been decided upon the principle that where such purchases were so made, the respondent must have exercised such a degree of control over the transaction that the sales were actually sales by respondent.

33. In the Matter of *Dentists' Supply Co.*, 37 F.T.C. 345 (1943), the Commission, at page 358, said:

> Respondent through its sales representatives not only personally solicits such dental laboratories for both regular teeth orders and for bonus contract agreements, but also makes effective its special price policies and schedules as applied to them, which price policies and schedules are reduced to writing and formally executed by both respondent and such dental laboratories.

Under these circumstances the dental laboratories were found to be purchasers from respondent within the meaning of §2(a).

34. In the matter of *Luxor Limited*, 31 F.T.C. 658 (1940), retail druggists who procured respondent's products through drug jobbers were held to be purchasers within the meaning of §2(e) where respondent's salesmen called on such retail druggists and respondent fixed and controlled prices "in the same manner in which they are maintained in the case of druggists who are under contract to maintain prices and receive direct shipments from respondent."

35. In the matter of *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89 (1954), a §2(d) proceeding, merchandise was shipped directly from the manufacturer to the retailers, invoiced by the manufacturer to the retailers, and paid for by the retailers directly to the manufacturer. Such retailers were found to be the manufacturer's customers.

36. In the matter of *Kraft-Phenix Cheese Corporation*, 25 F.T.C. 537 (1937), a §2(a) proceeding, it was found that the respondent had exercised control over the distributive channel through which the products moved, until they came into the hands of the retailer. The Commission said:

> A retailer is nonetheless a purchaser because he buys indirectly, if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.

37. In the *General Motors Corporation* matter, 50 F.T.C. 54 (1953), at pages 62 and 63, the Commission said, in discussing price-discrimination charges,

> The prices and terms and conditions applicable to such indirect purchasers were fixed and controlled by respondent. Representatives of respondent personally solicited the business of such indirect accounts and sales to such accounts were essentially sales by respondent.

38. In a related price-discrimination case, the *Electric Auto-Lite Co.* matter, 50 F.T.C. 73 (1953), the Commission found that

Respondent exercised such a degree of control over sales * * * (even though made through an intermediate distributor) that such sales were essentially sales by respondent. Such indirect customers are considered as "purchasers" within the meaning of the Clayton Act.

39. The foregoing cases are those most favorable to the position taken by counsel supporting the complaint, but none are applicable as precedents to the instant proceeding, because the facts are different. No finding is made herein, nor can be made upon substantial, reliable, probative evidence of record, that respondent has exercised such a degree of control over the transactions in which these "indirect customers" were involved as to warrant a conclusion that they were at any time customers of respondent within the intent and meaning of §2(d). The other cited cases have also been examined, and do not lend support to counsel's contentions.

40. Respondent's only contact with the 873,750 retail outlets was through its "missionary men," who called upon most of them three or four times a year to build good will, to encourage them to stock and handle adequate quantities of respondent's cigarettes, and otherwise to be more alert in promoting the sale thereof. Whenever possible these "missionaries" placed point-of-sale advertising and arranged store displays. If stocks of respondent's brands were low, so that there might not be enough to meet consumer demand until the retailer's wholesale supplier would make his next delivery, respondent's representative supplied the retailer, at the prices fixed by the retailer's supplier, with a limited quantity of cigarettes which he himself had purchased at that price from a local wholesaler. If the retailer did not desire to pay cash for this merchandise, the account was handled by his own wholesale supplier, to whom the transaction was reported, and by whom the retailer was billed. Such transactions were not frequent and involved only small quantities of cigarettes. Respondent did not fix or control in any way the prices at which its 4,853 wholesale distributors sold their products to the retailers, nor limit in any respect the manner in which or the persons to whom their sales were made.

Competition Between Cigarette Vending-Machine Operators and Over-the-Counter Cigarette Retailers:

41. Automatic merchandising is a comparatively recent innovation in retailing, and is increasing in effectiveness. It has been estimated that sales through vending-machines now exceed a billion dollars annually. The automatic vending industry has its own distinctive characteristics, its own national trade association, its own trade magazine, its own business terminology, and its own problems relating to licensing, taxation, machine maintenance and other matters. That

the sale of cigarettes through vending machines is a retail operation is not disputed.

42. Automatic merchandising of cigarettes is different in many respects from traditional store or stand retailing. Stores and stands have permanent locations with storage and display facilities; they have, or may have, many items other than cigarettes to offer, and may sell cigarettes in single packs or in quantity; salesmen make personal contact with customers, anticipate their needs, make change and otherwise encourage their trade; prices may be altered as frequently as desired to meet competition or to increase sales. On the other hand, cigarette-vending machines are not permanent fixtures, but may be moved from place to place; are not conspicuous; have little space for storage and can stock only small quantities of a limited number of brands of cigarettes, the only items which they can sell; can dispense single packs only; afford no opportunity for personal contact with customers; price changes are embarrassing because each price change requires mechanical adjustment of all machines or the insertion of change coins in every package of cigarettes offered; are subject to mechanical breakdowns and difficulties which require the services of skilled technicians. These and other differences affect operational costs, frequently to the advantage of the over-the-counter retailer, and have a bearing upon the suitability of vending-machine locations.

43. Operators of cigarette vending machines frequently locate their machines in places where it would be uneconomic or impracticable to have over-the-counter sales. They tend to avoid putting machines in close proximity to attended stores and stands. If possible, they select locations where potential customers constitute a captive group, as in factories, institutions, theatres, gas stations, bars and grills, restaurants, luncheonettes, department stores, clubs, rest-rooms, apartment houses, and the like, where the impulse purchaser of a package of cigarettes is likely to be unable or unwilling to leave the premises because it would be inconvenient, uneconomic or against company rules for him to do so.

44. Respondent contends that the automatic merchandising industry "is so distinctly different, in organization and merchandising methods and techniques, from the over-the-counter retail merchandising industry, that compliance with §2(d) does not require that their display advertising and promotional payment fates be inexorably linked together by manufacturers and wholesalers who sell to them in common"; and that these differences "warrant their consideration as separate classes for purposes of compliance with §2(d)." It is sug-

gested that the role of the vending machine is supplementary to rather than competitive with the store or stand operation.

45. These two contentions are not identical. The first ignores the question of competition and adopts the position that the two types of operations are separate classes just as are manufacturers, wholesalers and retailers, who operate at different competitive levels. Respondents first contention is untenable. Two manufacturers may engage in widely different types of manufacturing processes and marketing methods, but if they have comparable products which they offer to the same groups of purchasers, they are competitively engaged and subject to the restrictions of the antitrust statutes. Two wholesalers, likewise, may vary widely in organizational and marketing characteristics, but if competition exists between them, the provisions of the statutes are nevertheless applicable. Likewise, two retailers—a vending-machine operator retailer and an over-the-counter retailer—if they offer the same or comparable products to the same groups of purchasers and therefore compete with each other, are equally entitled to the protective provisions of §2(d) of the Clayton Act if they are customers of the same manufacturer.

46. Respondent's second contention raises the suggestion, and respondent contends, that it has not been established that vending-machine operator customers of respondent competed with over-the-counter retailing customers of respondent in the distribution of respondent's cigarettes. The evidence with respect to such competition is mostly of a general nature—that a cigarette-vending machine in a subway station will compete with over-the-counter selling in a store or stand at the surface entrance to the subway; that one in an office-building entrance will compete with selling in a next-door restaurant, drugstore or cigar counter; that there will be competition between a vending machine and any nearby over-the-counter operation where the two are reasonably equal in accessibility to a cigarette-smoker whose supply is exhausted.

47. Instances of such situations were shown without specific data as to ownership of the over-the-counter operations or as to whether or not the proprietors were customers of respondent—this under the assumption, hereinabove found to be false, that "indirect customers" were actually customers of respondent within the intent and meaning of §2(d). There was evidence also that some customers of respondent operated vending machines in the same geographical trading areas that were served by other customers of respondent who engaged in over-the-counter selling of cigarettes, often in the same shopping center, sometimes in adjacent buildings. More specifically, the record shows that in the New York area A & P and Rexall Drug, both

customers of respondent, sold cigarettes through many retail outlets located in the same areas where Herald Vending Corporation, New York Service, and Long Island Tobacco Company, Inc., all customers of respondent, sold cigarettes through vending-machines. In the Boston-New Haven area, A & P had stores next door, within one city block and within three city blocks of cigarette-vending machines operated by Obie-Elm Sales Corporation and Cochin Tobacco Corporation, customers of respondent. In Buffalo, A & P and Loblaw, Inc. had stores selling cigarettes in the same trading areas where cigarette-vending machines were operated at one time by Empire Vending Company, respondent's customer.

48. There is substantial, reliable, probative evidence that some vending-machine operator customers of respondent competed with other customers of respondent who were engaged through over-the-counter operations in the distribution of respondent's cigarettes. Under and through the Harrough arrangement, respondent made payments to all vending-machine operator customers for carrying one or more brands of its cigarettes in the vending columns of their machines, but respondent did not make nor offer to make equal or proportionaally equal payments to the competing over-the-counter retailing customers, including those named in the preceding paragraph, for similar services, to wit, the carrying of respondent's cigarettes on their counters, or in their display racks. In this respect respondent failed to comply with §2(d) of the Clayton Act. As hereinafter shown, such payments as were made by respondent to its over-the-counter customers were for point-of-sale advertising displays or services.

Payments and Allowances to Respondent's Retailer Customers Who Did Not Operate Vending Machines:

49. Respondent sold cigarettes to approximately 355 cutomers who resold such cigarettes at stores or stands to consumers. Primarily these customers were operators of chain grocery-stores, chain drugstores, news-stand chains, and other like organizations which purchased and resold large quantities of merchandise at one location or at several stores in scattered locations. Through its sales organization respondent negotiated individual agreements with some of these customers whereby, for a consideration to be paid by respondent, they agreed to advrtise and promote the sale of respondent's cigarettes through the use of posters, signs, change trays, counter displays and other point-of-sale promotional aids.

50. The record shows specifically that among these customers (full names given later) there was, in the New York area, competition in the sale of respondent's cigarettes between A & P on the one hand

and Rexall, Union News and Bohack on the other, and competition between Rexall and Union News; in the Buffalo area, Loblaw and A & P competed with each other and with Quality, Lee Drugs, and Harvey & Carey, who also competed with each other; and at Dunkirk, Cease and A & P were in competition; in the Boston-New Haven area, Stop & Shop competed with Daniel Frank Co., Estabrook & Eaton, and ABC Vending Co. in its stand operations. To some extent the latter three competed with each other; and at some points, particularly at the railroad stations where there were also subway stations, Union News competed with ABC.

51. In the New York area during the period involved in this proceeding, payments were made by respondent to various retailer customers as follows:

H. C. Bohack Company, Inc., in 1953, was paid 50c per carton per store for a one-week display of two cartons of cigarettes on a display device furnished by respondent. There were about twelve separate like arrangements in each of the years 1953, 1954 and 1955. Bohack is a food chain having 184 retail outlets in Kings, Queens, Nassau and Suffolk counties, New York. Under the display arrangement it received from respondent in 1954, $2,050; in 1955, $3,000; amounts for other years are not in the record. Between 1953 and 1956 its tobacco business with respondent exceeded one million dollars annually.

Union News Company, which operates news-stand and cigar counters chiefly in railroad and subway stations in New York and throughout the United States, also did in excess of one million dollars' business with respondent annually. In 1954, it entered into an agreement with respondent whereby it received $18,500 for advertising space used by respondent in a company magazine and for carton displays of respondent's products on the counters of each of its 2,000 retail stands. The contract was not in effect in 1955 and 1956, and no payments were made by respondent to this company during those years. The reason for the abandonment of the payments is not clear, but the strong inference is that it was by agreement of parties.

The Charlie Landau Company operated a single cigarette-selling retail outlet at 132 Nassau Street, Manhattan, and between 1953 and 1956 did business in excess of $40,000 annually with respondent, from whom it received payments at the rate of $25 per month for permitting respondent to place inside its store a sign, and outside the store two posters, advertising respondent's brands of cigarettes. The payments amounted to $300 in each of the years 1954 and 1955, but were subsequently discontinued. During the period involved this dealer had similar arrangements with Philip Morris, Brown &

Williamson, and occasionally with Lorillard. It is not established that Landau competed to any substantial extent with other over-the-counter selling customers of respondent.

52. In the Buffalo area, payments were made as follows:

Quality Cash Stores, Inc., operating 44 stores in Jamestown and Salamanca, New York, averaged, during the period involved in this proceeding, $50,000 annual business with respondent, and received for displaying respondent's window posters $504 in 1954, $450 in 1955. Similar sums were received in 1953 and 1956.

Cease Commissary Service, Inc., Dunkirk, New York, is an industrial caterer operating cafeterias and canteens in and around Buffalo. Most of its trade is captive. Its business with respondent amounted to about $8,000 annually, and between January 1, 1953, and June, 1955, it was paid $2 per month for each sign it displayed advertising respondent's brands of cigarettes. The arrangement was discontinued just before June, 1955. The record shows only that Cease was paid $100 in 1954. Shortly thereafter Cease discontinued being a customer of the respondent and procured its cigarettes from a wholesale distributor. Since Cease, as a customer, competed only for a short period and only with A & P at one point, Dunkirk, the Cease situation may be considered as *de minimis*. At Dunkirk it had a public restaurant close to an A & P store.

Harvey & Carey, Incorporated, operated 25 drugstores in the Buffalo metropolitan area and did business with respondent from 1953 to 1955 in excess of $97,000 annually. It was paid during this period $3 per store per month for displaying a framed card advertising respondent's cigarettes in four retail outlets; $144 in 1954 and $144 in 1955; 1953 figures not available. The offer was open but not accepted as to the other Harvey & Carey stores. In March, 1956, this company was taken over by Lee Drug Stores, Inc., to whom payments had been made by respondent at the same rate for eleven stores in 1953, twelve stores in 1954 and thirteen in 1955. The payments were $432 in 1954, $468 in 1955, and $685 (approximately) in 1956. Lee Drug's business with respondent was over $240,000 annually.

William A. Mathias, Incorporated, with four retail outlets, consisting of a specialty tobacco store in downtown Buffalo and three stands in hotels and clubs, received payments from January 1, 1953, through September, 1956, at the rate of $2 per month, $24 per year, for displaying an advertising card in its specialty store. The three stands enjoyed a select or captive trade and were not paid. Its annual business with respondent averaged over $14,000.

R. J. Seidenberg Company, a wholesaler with two retail outlets located in the same building in downtown Buffalo, was paid $10 per

month, $120 for each of the years 1953, 1954, 1955 and 1956, for displaying respondent's advertising sign in its two outlets. Its business with respondent was over $40,000 annually. To some extent Seidenberg also enjoyed a select if not a captive trade. It cannot be found that the three stands of Mathias, or the two outlets of Seidenberg, were operating competitively to any substantial extent with other of respondent's customers.

Loblaw, Inc., operated from 144 to 160 stores, some of which were in the Buffalo area. Its purchases from respondent averaged over $700,000 annually. It received for point-of-sale display and advertising for a six-weeks' period in 1953, $690.

53. In the Boston area payments were made as follows:

Estabrook & Eaton, who operated five or six concessions, some of which were located in chain stores, was paid $600 in 1954 and again in 1955 for using respondent's change trays and displaying advertisements featuring respondent's cigarettes. It was not a regular customer of respondent. In 1953 it purchased directly from respondent merchandise amounting to $2,505; in 1954 it purchased nothing; in 1955 it purchased only during one two-months' period, merchandise amounting to $473; in 1956 (first ten months) it made no purchases. It is obvious that during most of the period involved respondent's cigarettes were procured by this operator other than by direct purchases, and it was not a customer of respondent.

Daniel Frank Company was a wholesaler who operated a retail specialty store and a stand in downtown Boston. Its average annual business with respondent was $7,000. It received through Associated Greater Boston Tobacco Retailers, Incorporated, $9 per month for displaying respondent's advertising material in its two retail outlets.

ABC Vending Corporation operated 50 to 55 news-stand concessions throughout the Boston subway system under an exclusive arrangement, and for 1954 and 1955 received payments of $1,296 yearly for displaying respondent's advertising materials—at the rate of $2 per news-stand per month. Similar payments were received in 1953 and 1956. Its annual business with respondent averaged approximately $100,000.

54. Payments were not made by respondent in the New York area to the following customers:

The Great Atlantic & Pacific Tea Company, which has a number of retail grocery outlets in each of the geographical areas in which evidence was taken, received no payments whatsoever from respondent for point-of-sale advertising or for any other services of the type involved in this proceeding. A & P sells a large number of products under its own brand names. It has a consistent policy, widely

known, that it will not use point-of-sale display material advertising merchandise which was not manufactured by or for it. There is no evidence in the record that any manufacturer of cigarettes or of any other merchandise sold by A & P over succeeded in breaking or modifying this policy. Under these circumstances respondent asserts, and we believe rightly, that it was not obligated to make offers of payments, similar to those it made to other customers, for services or accommodations of the character involved in this proceeding.

Liggett-Rexall Drug Company also has stores throughout the United States, including the areas involved in this proceeding. It purchased merchandise from respondent amounting to approximately $400,000 annually, but received no payments from respondent. That display advertising arrangements were offered Liggett-Rexall Drug Company by respondent for the period covered by the complaint, but not accepted, is established. The evidence shows that, during the period involved, Rexall had an exclusive display advertising agreement with the Philip Morris Tobacco Company, which precluded it from accepting arrangements similar to those respondent had with other customers.

55. In the Buffalo area, besides A & P and Rexall, which have already been discussed, payments were not made to the following:

Loblaw, Inc., received no payments from respondent, except for the six-weeks' period heretofore mentioned. It was a commonly-known policy of the company not to accept, or place in its stores, point-of-sale display-advertising materials such as that supplied by respondent and most other tobacco manufacturers. For in-store advertising, Loblaw used a Beamcast system which part of the time played music and part of the time made advertising announcements. The only cigarette advertisements used over the system were those of Philip Morris, and, in connection therewith, Loblaw displayed Philip Morris cards and Philip Morris cigarettes. Although Loblaw was called upon by one of respondent's division managers, no arrangement was entered into. The conclusion is that respondent's point-of-sale display advertising arrangements were offered to Loblaw, but that the Philip Morris arrangement was exclusive.

56. In the Boston area, excluding again A & P and Rexall, no payments were made to the following:

The Stop & Shop Corporation, in 1953, was offered an advertising arrangement by respondent which was not accepted. Respondent's representative stated that up to the time of hearing he was still calling on and had close connections with Stop & Shop, and had been informed that they wanted no posters. During his visits he had seen no manufacturer's cigarette advertising whatsoever. It was an estab-

lished policy of the Stop & Shop Corporation not to utilize the types of point-of-sale display advertising materials offered by the respondent. Further offers under the circumstances would have been useless gestures. Stop & Shop operated over 90 retail stores in the Boston area, and did business with the respondent in excess of $314,000 annually.

57. The fact that respondent did not make payments for point-of-sale advertising to some of its over-the-counter retailing customers is not conclusive that such payments were not available. In some instances offers were made and not accepted; in other instances there were well-known established policies against the acceptance and use of such types of advertising; in still other instances the customer had exclusive arrangements with one of respondent's competitors. In such cases the making of an offer or the repeated repetition of an offer previously made would have been embarrassing as well as futile. The law does not require a useless gesture.

58. It has not been established that point-of-sale display advertising arrangements were not available to all of respondent's customers who were engaged competitively in the over-the-counter distribution of its cigarettes. However, it is clear that respondent's payments or offers of payments for the type of services involved in this proceeding, so far as its customers were concerned, excluding vending-machine operators, were not made on a uniform or proportionally equal basis. They were arranged through individual negotiations between respondent and its various customers. Such payments were not based on number and size of stores, on amount of advertising or space used, on amount of purchases or sales, or upon any other basis through which uniformity or proportional equality might be accomplished as between customers who were in competition with each other in the distribution of respondent's cigarettes. In this respect respondent has not met the requirements of §2(d).

59. Respondent's contention is that "it has related its point-of-sale display advertising payments to the correct single standard, to wit, the value of the advertising." It is alleged that the substitution of any other standard such as those mentioned in the preceding paragraph would be an unwarranted perversion of the intent of the framers of §2(d), and would result in the sanctioning of payments which would be in fact discriminatory and potentially subject to the provisions of §2(a) of the Act. The record does not support a conclusion that advertising value was the controlling standard applied in determining amounts of payment. The negotiations in each instance were carried on in behalf of respondent by one or more of its sales representatives, and the strong inference from the evidence of

record is that the amounts arrived at were those which were necessary to meet competition and to keep the good will of the particular customer. Respondent's contentions in this respect are theoretically plausible, but cannot be accepted on the basis of the facts disclosed by the record in this proceeding.

60. Without discussion, respondent's seven "complete defenses" set forth in its answer are rejected. §2(d) is not unconstitutional, as alleged in "complete defenses" 1, 2, 3 and 5. The application of § 2(d) to the acts and practices of respondent which have hereinabove been found to be in violation of said section is not in violation of the due-process clause of the Fifth Amendment. Under §2(d) it is not necessary that it be established that the effect of the acts and practices found to be in violation thereof may be substantially to lessen competition or may tend to create a monopoly, or to injure, destroy or prevent competition with any person who either grants or knowlingly receives the benefit thereof, or with customers of either of them. That respondent's acts and practices may have been engaged in "in good faith" to meet the similar acts and practices of respondent's competitors is not a defense. The law in all these respects is well settled. The partial defenses set forth in respondent's answer have heretofore been fully discussed and ruled upon.

SUMMARY OF FINDINGS AND CONCLUSIONS

61. The substantial, reliable, probative evidence in this proceeding does not establish

(a) that respondent has made payments to some cigarette vending-machine operator customers for services or facilities furnished by or through them without having made such payments available on the same or proportionally equal terms to all other vending-machine operator customers competing in the distribution of its cigarettes;

(b) that cigarette vending-machine operator customers of respondent are engaged competitively with wholesaler customers of respondent in the distribution of its cigarettes;

(c) that retailers who purchase respondent's cigarettes from wholesalers or jobbers are in fact customers of respondent within the intent and meaning of §2(d) of the Clayton Act;

(d) that payments or allowances made by respondent to some of its customers who were engaged in selling its cigarettes in stores and stands over the counter were not available to all its other customers who were engaged competitively in over-the-counter distribution of its cigarettes.

62. There is substantial, probative evidence in this proceeding to establish—

(a) that by making payments to its wholesaler customer, Metropolitan Tobacco Company, for services rendered by or through such customer in connection with the sale of its cigarettes without making such payment available on proportionally equal terms to all its other wholesaler customers competing in the distribution of its cigarettes, respondent violated the provisions of §2(d) of the Clayton Act—the fact that respondent's competitors engaged in the same practice by making payments to the same wholesaler does not constitute a defense; nor do the facts and circumstances of abandonment negate the requirements or necessity of issuance of a cease-and-desist order under the policy announced by the Commission in its decisions in substantially similar cases;

(b) that operators of cigarette-vending machines who are customers of respondent are engaged in retail operations and some are in competition in the distribution of respondent's cigarettes with other customers of respondent who sell cigarettes over the counter in stores or stands;

(c) that respondent made payments to its cigarette vending-machine operator customers for services or facilities furnished by them in connection with the sale of its cigarettes without making such payments available on proportionally equal terms to all its other competing customers who sold its cigarettes over the counter, in violation of §2(d) of the Clayton Act;

(d) that respondent made payments to some of its customers who sold its cigarettes over the counter for services or facilities furnished by them in connection with such sales without making such payments available on proportionally equal terms to other over-the-counter selling customers who competed in the distribution of respondent's cigarettes, in violation of §2(d) of the Clayton Act;

(e) that this proceeding is in the public interest; the Federal Trade Commission does have jurisdiction; and respondent has violated §2(d) of the Clayton Act as above set forth.

Upon the basis of all the facts of record and findings made, the following order is issued:

It is ordered, that respondent, Liggett & Myers Tobacco Company, Inc., a corporation, and 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 its cigarettes (hereinafter called "products") 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.

OPINION OF THE COMMISSION

By TAIT, *Commissioner*:

The complaint in this proceeding alleges that respondent violated the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

The hearing examiner in his initial decision filed November 26, 1958, found and concluded that respondent had violated Section 2(d) in several respects, but not in each respect asserted by the complaint. The initial decision includes an order directing respondent to cease and desist the practices found to be unlawful. The parties have taken cross-appeals from this initial decision.

Respondent, Liggett & Myers Tobacco Company, Inc., a corporation, is engaged in the business of manufacturing, selling and distributing cigarettes and other tobacco products. These products are sold to customers, including wholesalers and retailers, located in the several states of the United States and in the District of Columbia, for ultimate resale to the purchasing public. Respondent, in 1955, accounted for approximately fifteen percent of the manufacture and sale of cigarettes in the United States and ranked third in the industry. Its annual sales exceed $500,000,000.

On April 30, 1957, respondent had 5902 accounts, of which 4853 were wholesalers, 355 retailers, 215 vending machine operators and the balance institutions and military installations.

The hearing examiner held that respondent had violated Section 2(d): (1) by making payments to Metropolitan Tobacco Company, a wholesaler customer, for services rendered by or through such customer in connection with the sale of its cigarettes, without making such payments available on proportionally equal terms to all other wholesaler customers competing with Metropolitan in the distribution of its cigarettes, (2) by making payments to its cigarette vending machine operator customers for services or facilities furnished by them in connection with the sale of its cigarettes [the payments include sums paid directly or indirectly to the vending machine operators for the placing of respondent's cigarettes in the machines and for the furnishing of other services or facilities], without making such payments available on proportionally equal terms to all other

competing customers who sold its cigarettes over the counter in stores or stands, and (3) by making payments to some of its customers who sold its cigarettes over the counter for services or facilities furnished by them in connection with such sales, without making these payments available on proportionally equal terms to other over-the-counter selling customers competing with the favored customers in the distribution of respondent's cigarettes. The payments to the favored customers in this last instance include the consideration given for the advertising and promotion of the sale of respondent's cigarettes through the use of posters, signs, change trays, counter displays and other point-of-sale promotional aids.

The examiner additionally found, among other things, that Section 2(d) was not shown to have been violated in the following connections: (1) through payments made to cigarette machine operator customers and not made to wholesaler customers, it having been determined by the examiner that vending machine operator customers of respondent are not competitively engaged with wholesaler customers of the respondent, and (2) through payments made to some customers such as vending machine operators and not made on proportionally equal terms to certain retailers [the so-called "indirect customers"] purchasing respondent's cigarettes from wholesalers or jobbers, for the reason that such retailers were not shown to be customers of the respondent within the meaning of Section 2(d).

RESPONDENT'S APPEAL

The respondent appeals from the hearing examiner's holding that the vending machine operator customers compete with the over-the-counter retail customers and that respondent has violated Section 2(d) by granting promotional payments to the former and not making such payments available to the latter on any terms. Respondent argues that the over-the-counter selling and automatic vending are separate and distinctly different modes of retail selling and should be given, therefore, a separate functional classification. The following are among the differences in the two operations pointed out by the respondent; the proprietor leases a store or stand, the machine operator sells through a vending machine; the proprietor can spread his costs over a number of items, the machine operator is limited to cigarettes; the proprietor can carry a variety of cigarettes, the machine operator is limited by dispensing columns; the proprietor can make change for bills, the machine operator cannot; the proprietor can sell in cartons, the machine operator cannot; and the proprietor usually sells at a lower price than the machine operator.

The proportional equality required by Section 2(d) relates to customers competing in the distribution of the products involved. There is no other basis in the subsection for classifying customers. Consequently, we reject respondent's contention for a separate functional classification solely because of the differences between the two operations such as in organization and selling methods.

Respondent argues, however, that even if no distinctions in classification are recognized, the record still will not support a finding of competition on an individual basis as between vending machine operators on the one hand and over-the-counter retailers on the other. This argument is likewise rejected. The record clearly shows generally as well as with particularization the competition in the resale of respondent's cigarettes between the two groups of retailers. It is conceded by the respondent that vending machine operators and over-the-counter retailers are both retailers of respondent's cigarettes. The distance between retailers selling the identical product may not always be the sole determinative of competition. In this case, however, where it has been clearly shown that both groups seek to retail respondent's cigarettes to substantially the same class of trade or segment of the public, the reasonable proximity of such resellers is enough to establish competition. See *Simplicity Pattern Co., Inc.* v. *Federal Trade Commission*, 258 F. 2d 673 (1958). The hearing examiner found and the record shows specific examples of over-the-counter retailer customers, who were not favored, doing business in the same locality as the favored vending machine operator customer locations. In some instances, the outlets were within a block of or next door to each other. We believe that competition between the groups has been sufficiently demonstrated.

There are two additional points raised by the respondent which are to some extent related. They concern the proportionalizing of payments among retailer customers, including vending machine operators, competing in the distribution of respondent's cigarettes.

The first point involves the question of alleged alternative payments. According to the respondent, the hearing examiner in substance found that the availability of point-of-sale display advertising payments to over-the-counter customers was qualitatively an incompetent alternative to a placement payment made to a vending machine operator customer. Respondent cites the case of *Lever Brothers Company*, 50 F.T.C. 494 (1953), for the proposition that the law does not prohibit a seller from paying for services of various types. In *Lever Brothers*, the newspaper advertising allowance was only part of a comprehensive plan of payment for promotional services. The respondent therein offered alternative promotional allowances

for the customers who did not for any reason use advertising allowances, and it made its several plans known to all.

Since respondent had no alternative allowance program, the principle of the *Lever Brothers* matter is not controlling here. The evidence shows that respondent had a specific plan for paying allowances to vending machine operator customers for the placement of its cigarettes in the vending machines and for other services or facilities. These were made under and through arrangements with Harrough Corporation. The system or plan for the making of placement payments was designed particularly for vending machine operator customers, and the payments thereunder were confined to this customer group. On the other hand, respondent made payments to certain over-the-counter customers for point-of-sale advertising displays or services. Such allowances, however, were not alternatively available to the respective customer groups. There was no comprehensive plan, for example, whereby a customer in either group could avail himself of one type of payment or the other depending upon which suited him best. To the contrary, the allowance programs were separate and distinct. In the circumstances, we think the hearing examiner could properly consider the several allowances individually and apart from other allowances and determine whether each meets the test of "availability" under Section 2(d).

Respondent, finally, takes issue with the hearing examiner's ruling to the effect that payments for point-of-sale display advertising to over-the-counter retail customers engaged competitively in the distribution of respondent's cigarettes were not made on a uniform or proportionally equal basis. The hearing examiner held that such payments were not given on any basis upon which proportional equality might be accomplished; they were arranged through individual negotiations between respondent and its various customers.

The examiner in his initial decision describes in detail the arrangements made with various retailer customers for over-the-counter advertising in the several markets covered. It appears evident from this showing that respondent made such allowances at random and on the basis of individual negotiation. As an example, Union News Company, which operates newsstands and cigar counters, in 1954 entered into an agreement with respondent whereby it received $18,500 for advertising space used by respondent in a company magazine and for carton displays at the counters of its stands. Union News came to respondent to make the arrangement. This was a deal expressly tailored for the Union News Company. It was one in which there was no basis or standard other than the seller's discretion or favor.

Respondent argues, however, that it did employ a standard: the value of the advertising as allegedly determined by the forces at play in the market place. Stated otherwise, the position apparently is that a facility or service such as a counter space has a value determined by what various competitors will pay for it and that such value is an adequate standard for proportionalizing under Section 2(d).

The question of the availability of payments to others on proportionally equal terms is a matter of defense to be established by the respondent upon the prima facie showing of discriminatory payments as between customers competing in the distribution of respondent's products. *Cf. State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831 (1958). To put it simply, it is not enough for respondent to assert only that there is a basis for proportional equality. Respondent must also prove that the payments were in fact available on proportionally equal terms to other customers competing with the favored customers in the distribution of its product, and this it has not done. Thus, regardless of the validity of any standard which might have existed, respondent has not met its burden of showing the proportional equality as required by Section 2(d).

APPEAL OF COUNSEL IN SUPPORT OF THE COMPLAINT

The principal ground for the appeal of counsel in support of the complaint is the hearing examiner's failure to find that respondent violated Section 2(d) in making certain promotional payments to vending machine operator customers without making such payments available on proportionally equal terms to wholesaler customers distributing respondent's cigarettes in the same market area. Counsel asserts that the wholesaler customers are competing with the vending machine operator customers in the distribution of respondent's cigarettes within the meaning of Section 2(d) because there is competition for the various sales outlets.

In support of their position, counsel rely heavily on the language of Section 2(d) reading: "unless such payment or consideration is available on proportionally equal terms to all other customers *competing in the distribution* of such products or commodities." [Emphasis supplied.] Aforesaid counsel aver, in substance, that while the vending machine operators and wholesalers are not competing in the sale of respondent's cigarettes, they are competing in the distribution of such products; that wholesalers lose business when an over-the-counter retailer determines to use vending machines to sell cigarettes which are not supplied by the former wholesaler.

It is obvious that vending machine operators and wholesalers are engaged in different operations. They do not cater to the same class of customer: the vending machine operator sells to the ultimate consumer, whereas the wholesaler sells to the retailer who in turn sells to the ultimate consumer. Since they do sell to different classes of customers, the functions they perform in the distribution of cigarettes are different.

The function of the vending machine operator in the cigarette distribution process is the day-to-day sale and delivery of cigarettes through machines, in individual packages, to ultimate consumers. The machines are used strictly in the retail phase of such distribution. The function of wholesale distributors is the more or less regular sale and delivery of cigarettes in bulk, by cases, half cases or in carton lots, to proprietors of stores and stands or to the operators of vending machines, or to both, for subsequent resale by those proprietors and operators to the ultimate consumers.

In view of the different functions performed by the two groups, the question arises as to whether there can be competition between them within the meaning of Section 2(d). It is immediately obvious that the view pressed upon us by counsel in support of the complaint, that is, that retailing, vending machine operators and wholesalers may be in competition within the meaning of Section 2(d) is one which has no precedent in prior Commission cases brought under the subsection. *Cf. Lever Brothers Company*, 50 F.T.C. 494 (1953); *Kay Windsor Frocks, Inc.*, et al., 51 F.T.C. 89 (1954); *Henry Rosenfeld, Inc., et al.*, 52 F.T.C. 1535 (1956); *Atalanta Trading Corporation*, Docket No. 6464 (1956); *Chestnut Farms Chevy Chase Dairy*, Docket No. 6465 (1957); *General Foods Corporation*, 52 F.T.C. 798 (1956). In the latter case, the Commission recognized that the Robinson-Patman Act was written against the background of the distribution system then in effect, including groups having particular status and performing particular functions, such as wholesalers and retailers.

In the matter of *Curtiss Candy Company*, 44 F.T.C. 237 (1947), with respect to the Section 2(a) charge, there is a reference to competition between jobbers and vending machine operators. This citation is not necessarily controlling here. There was no development of the nature of this competition in the pertinent findings in the case, and in any event it does not appear that it was essential to the outcome of the case to find such competition.

To construe Section 2(d) as requested by counsel in support of the complaint clearly would have far-reaching effects in the cigarette

industry and indirectly in other segments of the economy as well.[2] We would hesitate to adopt an interpretation resulting in such a change, with its partly unforeseeable impact upon the economy, without more convincing evidence.

In this case there are complicating factors. The record indicates and the hearing examiner found that cigarette vending machines are freely available on the market. In some instances wholesalers also perform retail functions through the ownership and operation of such machines. It is not clear here to what extent wholesalers, either directly or through affiliated companies, engage in the sale of cigarettes through vending machines.

In addition, we note that the chief argument of counsel in support of the complaint is that there is competition between wholsalers and vending machine operators in vying for sales outlets. In support of this position, counsel refers to the fact that each time a retailer permits the installation in his store of a vending machine to replace the over-the-counter selling of cigarettes, the wholesaler who formerly supplied the retailer loses a customer. This, however, fails to fully point up the competitive realities. And we need only mention that the concern of Section 2(d) is with competition in the distribution of products and not with rivalry for sales outlets, as such.

In the circumstances, we are of the opinion that the record does not support a conclusion that the respondent has violated Section 2(d) by making promotional allowances to vending machine operators and not to wholesalers. There is no necessity, therefore, to decide whether a seller need make its promotional allowances available only to those of its customers who are operating at the same functional level. To the extent that the initial decision indicates that there is no violation of Section 2(d) as regards this issue for reasons other than those mentioned above, it is to that extent rejected.

The other point raised by counsel in support of the complaint concerns the meaning of the word "available" in Section 2(d). As above noted, the examiner ruled that respondent violated Section 2(d) in not granting point-of-sale advertising allowances to its over-the-counter retail customers competing in the resale of its products on a proportionally equal basis. Certain customers, such as the Great Atlantic & Pacific Tea Company, Liggett-Rexall Drug Company, Loblaw, Inc., and The Stop & Shop Corporation, received no payments and the examiner found that in some of these instances offers

[2] Reference is made to pending companion matters, as follows: In the Matter of *R. J. Reynolds Tobacco Company*, Docket No. 6848; In the Matter of *The American Tobacco Company*, Docket No. 6830; In the Matter of *Philip Morris, Inc.*, Docket No. 6750. See also In the Matter of *P. Lorillard Company*, Docket No. 6600, affirmed *P. Lorillard Company* v. *Federal Trade Commission*, United States Court of Appeals for the Third Circuit (June 4, 1959).

were made and rejected; in other instances, there were well known policies against the acceptance of such allowances and, in still other instances, the customer had exclusive arrangements with one of respondent's competitors. The respondent has stated in effect that, in such cases, the making of an offer or the repeating of an offer previously made would be futile and that the law does not require a useless gesture.

The question in this connection is whether, in the circumstances disclosed by this record, the point-of-sale allowances were "available" within the meaning of Section 2(d) to the Great Atlantic & Pacific Tea Company and other such customers. In some cases, we have held that a customer must be informed of an allowance before it can be deemed to be available. *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89 (1954); *Henry Rosenfeld, Inc., et al.*, 52 F.T.C. 1535 (1956); *Chestnut Farms Chevy Chase Dairy*, Docket No. 6465 (1957).

We do not believe, however, that it is necessary to make known a promotional plan where such would be a useless or futile gesture. The question of whether the gesture would be futile is one of fact. Where it is disclosed that a seller generally does not want promotional allowances, it may be shown by the party charged with the violation that in such a case to offer an allowance would be a futile act. In this instance, the examiner has found that such a gesture would have been futile. He has had an opportunity to see and hear the witnesses. We cannot say that his findings on this issue are in error.

The appeal of counsel in support of the complaint and the appeal of the respondent are both denied. The findings, conclusions and order contained in the initial decision are adopted as those of the Commission, except to the extent modified by the views expressed in this opinion. It is directed that an appropriate order issue herewith.

Chairman Kintner and Commissioner Secrest did not participate in the decision of this matter.

Commissioner Kern dissents in part.

OPINION OF COMMISSIONER KERN DISSENTING IN PART

I am unable to agree with what has been said by Commissioner Tait in his opinion and I differ from the majority in their disposition of the appeal of counsel in support of the complaint. I particularly disagree with the opinion of the majority in sustaining the hearing examiner's failure to find that the respondent has violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act by making promotional payments to vending machine

operator customers without making such payments available to wholesaler customers in the same market area. It seems to me that the opinion of the majority issued this day blinks at the facts of record, misinterprets the section of the act in question and seriously weakens the effectiveness of the act in a very critical and important area.

The record shows that vending machine operators who are customers of the respondent have received from the respondent substantial promotional payments on a sustained basis. It further shows that during the same period of time wholesalers who are also customers of the respondent in the same market area have not been paid or offered any payments on proportionally equal terms. This obviously constitutes a violation of the statute if the vending machine operators and the wholesalers are, in the words of the statute, "competing in the distribution" of the respondent's cigarettes. And they are so competing, counsel in support of the complaint argues, because they seek the same outlet. Almost invariably when a vending machine operator places a vending machine in a retail store, that store discontinues selling cigarettes over the counter. Thus the wholesaler who formerly supplied it loses the business. The facts are quite clear on this. The record is replete with instances of wholesalers losing retail accounts because vending machines have been installed. To me a situation where vending machine operators destroy over-the-counter selling with the result that the business is lost to the wholesaler constitutes not only competition, but competition of a singularly vigorous nature.[3]

Moreover unlike the majority, I find persuasive the case of *In the Matter of Curtiss Candy Co.*, 44 F.T.C. 237 (1947) where the hearing examiner and the Commission found that vending machine operators and wholesalers in a given area do in fact compete with each other in the distribution of a product. Nothing in the present record suggests justification for the repudiation of this previous sound exercise of the Commission's expertise. And this is especially true where the initial decision of the hearing examiner is predicated upon the fallacious legal conclusion that "the two functions are different and those who perform one of these functions cannot be said to be in competition with those who perform the other. Only when they both exercise the same functions and seek the same trade of the same class of customers do they become competitive." The prop-

[3] The primary definition of competition in Webster's New International Dictionary (2d Ed.) is "Act of competing, esp. of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time. * * *" It is apparent that the relationship existing between wholesalers and vending machine operators is competition in the ordinary sense of the word.

osition that functional labels determine the existence or absence of competition has been urged and rejected by the Commission and the courts on several occasions. See *In the Matter of General Foods Corp.*, 52 F.T.C. 798, 824 (1956); *Federal Trade Commission* v. *The Ruberoid Company*, 343 U.S. 470, 474–475 (1951). Yet the majority opinion only repudiates this grave error on the part of the hearing examiner by indirection.

My difference with the majority likewise rests on a slightly different and somewhat broader basis. Section 2(d) must be read in the light of the objectives sought to be accomplished by it. The purpose of the Robinson-Patman amendments and the specific place of Section 2(d) in this purpose was discussed in the opinion of the Supreme Court in the case of *Federal Trade Commission* v. *Simplicity Pattern Company*, 360 U.S. 55, 69 (1959). Among other things, the Court stated:

> A lengthy investigation conducted in the 1930's by the Federal Trade Commission disclosed that several large chain buyers were effectively avoiding §2 by taking advantage of gaps in its coverage * * *. "Advertising allowances" were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers. Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage.
>
> The Robinson-Patman amendments were enacted to eliminate these inequities. * * *

It is apparent that such inequities cannot be eliminated if Section 2(d) is interpreted in such a way as to prevent discrimnation only as among different wholesalers on the one hand or as among different vending machine operators on the other. If the wholesaler may be disregarded in the granting of promotional allowances to the vending machine operators, then the small independent stores who purchase through the wholesaler are entirely without recourse.

Moreover, a construction of the statute which in effect limits its application to customers competing at the same level of distribution renders Section 2(d) inconsistent with other provisions of the Act. Congress intended by Section 2(d) to prevent the circumvention of the prohibitions of Section 2(a) by the employment of alternatives for price concessions. "The Commission's Chain Store Investigation Report found that some buyers were securing price advantages concealed as brokerage advertising allowances and services, and Congress in enacting these subsections [Sections 2(c), (d) and (e)] directed specific provisions against such practices." *In the Matter of Henry Rosenfeld, Inc.*, Docket No. 6212 (1956). In view of the interrelationship of these subsections, it seems reasonable to conclude

that circumstances amounting to a violation of Section 2(a) if they involved a direct price discrimination violate Section 2(d) if the discrimination takes the form of disproportionate allowances or services.

This means that Section 2(d) is violated where the facts show a discrimination by the payment of an advertising allowance to a large retailer and the failure to make such payment to wholesalers whose customers compete with the favored retailer. *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230 (D.C.N.J., 1956), and see *State Wholesale Grocers*, v. *The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (7 Cir., 1958), *cert. denied sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947 (1959). Any other construction, it seems to me, permits businessmen to so manipulate their concessions to selected customers as to completely frustrate the nondiscriminatory objectives of the statute.

The following language in the *Krug* case, *supra*, 142 F. Supp. at 236–237, in my view is peculiarly apposite:

> The second cause of action avers that I.T. & T. granted or paid allowances to "favored retailers," particularly Vim, for alleged advertising and promotional purposes, but denied such allowances to Krug or its customers.
>
> Again, defendant I.T. & T. emphasizes that Krug was not in competition with Vim or any other retailer and that consequently there can be no violation of the Act since I.T. & T. did not discriminate between "customers competing in the distribution" of its products. The answer already given above to this argument will suffice here, if the meaning and scope of Section 2(d) is similar to that of Section 2(a). On the one hand, it would, upon first reading, seem that the language chosen by Congress for Section 2(d) is more limited than that for Section 2(a). The latter embraces within the area of competitive protection "different purchasers * * * or * * * of either of them," while the former uses the phrase "customers competing in the distribution" of a particular product. On the other hand, it would seem that Congress intended by Section 2(d), as well as by Sections 2(c) and (e) for that matter, to prevent circumvention of the prohibitions of Section 2(a) by the employment of alternatives for price concessions.
>
> As observed by the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 1953, 346 U.S. 61, 65, 78, 73 S. Ct. 1017, 1020, 97 L. Ed. 1454, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." And, as in that case, although a "confident answer cannot be given; some answer must be given." The conclusion reached by the Supreme Court was arrived at by reading the "infelicitous language * * * as enacting what we take to be its purpose." That approach will be followed here.
>
> It is concluded that the purpose of Section 2(d) is to place discriminatory allowances on the same basis as price discriminations prohibited by Section 2(a) and that consequently the same set of circumstances give rise to a cause of action under Section 2(d), if the discrimination takes the form of unequal allowances or services, as would be the case if the discrimination were a direct price discrimination under Section 2(a). This means that violation of

Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer * * *.

The facts in this record show that vending machine operator customers are retailers and that they compete with other retailers who are supplied with the respondent's cigarettes by wholesaler customers who do not receive the placement payments made to the favored vending machine operator customers. It would be my conclusion that by failing to make the payments available to the wholesalers the respondent has violated Section 2(d) and that the findings of the hearing examiner should be modified accordingly.

With respect to whether the respondent has made its point-of-sale allowances "available" to all of its over-the-counter customers competing in the resale of its products, the Commission in its opinion states that a seller need not offer an allowance to a particular customer where it is shown that the offer would, in any event, be a useless or futile gesture. Accepting this by way of argument as correct, nevertheless it is well established, on the other hand, that ordinarily an allowance cannot be considered to be "available" to a customer unless the customer is made aware of it. Thus, the burden of demonstrating the futility of the offer rests squarely on the party charged with a violation of the statute. In this case it seems clear to me that this burden has not been met. The vague, general testimony to the effect that certain of the customers had policies against the use of point-of-sale advertising and that others had exclusive arrangements with the respondent's competitors, relied on by the hearing examiner and accepted by my colleagues, is not convincing. As I view the record, it is the respondent, and not the customers, who has determined that offering its allowances would be futile, and on this point also I would reverse the hearing examiner.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision, and upon briefs and oral argument in support of and in opposition to the appeals; and

The Commission, for reasons stated in the accompanying opinion, having denied the appeals and having adopted the initial decision as the decision of the Commission, except to the extent modified by views expressed in the opinion:

It is ordered, That the respondent, Liggett & Myers Tobacco Company, 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 to cease and desist.

Chairman Kintner and Commissioner Secrest not participating, and Commissioner Kern dissenting in part.

IN THE MATTER OF

PHILIP MORRIS, INC.

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

Docket 6750. Complaint, Mar. 27, 1957—Decision, Sept. 9, 1959

Consent order requiring a major manufacturer of cigarettes and other tobacco products to cease violating Sec. 2(d) of the Clayton Act by such practices as paying allowances for services to some customers but not to others competing with them and not on a proportionally equal basis but by individual negotiation with each, including payments for placement in favored retail outlets of floor, window, and counter displays and for other advertising, and payments to certain vending machine operators and a favored wholesaler.

COMPLAINT

The Federal Trade Commission, having reason to believe that Philip Morris, Inc., a corporation, hereinafter designated as respondent, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Philip Morris, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Virginia, with its executive offices located at 100 Park Avenue, New York, New York.

PAR. 2. Respondent is now and for a number of years past has been engaged in the business of manufacturing, selling and distributing cigarettes and pipe tobaccos, hereinafter sometimes referred to as products. Said products are sold to customers with places of business located in the several States of the United States and in the District of Columbia, for resale to the purchasing public. Respondent is a substantial factor in the tobacco industry. It has branch offices, factories, and warehouses located in a number of states. Its net sales in 1956 exceeded $300,000,000.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act,

as amended, having shipped its products from the place where such products are manufactured in various States of the United States to its customers having places of business located in other States of the United States and in the District of Columbia. There is and has been a constant stream of trade and commerce in respondent's products among the various States and the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or contracted to pay, money, goods, or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers in connection with the processing, handling, sale or offering for sale of the products which respondent manufactures, sells, or offers for sale; and respondent has not made or contracted to make such payments or considerations (hereinafter referred to as allowances) available on proportionally equal terms to all its other customers competing in the sale and distribution of such products.

PAR. 5. Specifically, respondent during the past three years:

1. Paid allowances in varying amounts to some customers, but did not do so or offer to do so, in any amount, to other competing customers.

2. In paying such allowances to competing customers, did so in amounts not equal to the same percentage of such competing customers' net purchases and not proportionally equal by any other test; and did not offer or otherwise accord or make available such allowances to all such competing customers in amounts equal to the largest of such percentages, or proportionally equal by any other test.

3. In paying such allowances to competing customers, required some of them to comply with certain terms and to furnish or make certain reciprocal service or payments, but did not require others to do so in any manner or amount, or required them to do so in a less burdensome manner or in lesser amounts, and not proportionally equal by any test.

4. In determining allowances to be paid competing customers, did so on the basis of individual negotiations with each such customer, which resulted in proportionally unequal, different and arbitrary terms.

PAR. 6. Allowances, paid by respondent in the manner alleged in Paragraph 5, include those offered and granted to certain favored customers, but not to other competing customers, in consideration for the placement in such favored customers' retail outlets of posters, carton displays, signs, stickers, floor, window and counter displays,

change trays and other like items advertising respondent's various brands of cigarettes. Examples of such allowances paid during 1956 may be listed as follows:

Trading Area	Customer	Purchases	Allowance
Kansas City, Mo.	Katz Drug Company	$218,418	$9,000
Kansas City, Mo.	Milgram Food Stores, Inc.	59,028	1,248
Los Angeles, Calif.	Thrifty Drug Co.	718,669	18,000
Los Angeles, Calif.	Ralph's Gro. Co., Inc.	439,872	1,300
New York, N.Y.	Grand Union (all outlets)	1,307,032	2,350
New York, N.Y.	Liggett Drug Co. (all outlets)	756,148	75,000
New York, N.Y.	R. H. Macy Co.	174,563	25
New York, N.Y.	Gimbel Bros.	60,936	600

PAR. 7. Allowances paid by respondent, in the manner alleged in Paragraph 5, include those granted to certain favored customers who operate vending or merchandising machines in consideration for the distribution and promotion of respondent's brands of cigarettes by such customers in their machines. Instances where such allowances were paid by respondent during the year 1956 to some customers but not to other competing customers include the following:

Trading Area	Customer	Purchases	Allowance
Chicago, Ill.	Automatic Canteen of America	$1,719,999	$102,500
Chicago, Ill.	Automatic Merchandising Company	45,148	None
Milwaukee, Wisc.	Stacy Bros. Co.	42,878	4,000
Milwaukee, Wisc.	Friedman Tobacco Co.	164,222	None
Washington, D.C.	G. B. Macke Corp.	269,153	7,000
Washington, D.C.	Tidewater Macke, Inc.	6,538	None

A great majority of respondent's customers who received these allowances compete with other cigarette vending machine operators, tobacco wholesalers, and retailers who are customers of respondent. These other customers have not been offered, nor have they received, this type of allowance from respondent.

PAR. 8. Allowances, paid by respondent in the manner alleged in Paragraph 5, also include those granted to certain customers who function as tobacco wholesalers in consideration for advertising and promoting respondent's products and increasing the distribution of such products to the retail accounts serviced by them. An illustration of this practice was the payment of an allowance of $50,000 to the Metropolitan Tobacco Company of New York City during 1956, whereas nothing was offered or paid to any of the other wholesale customers of respondent who compete with that company.

PAR. 9. The acts and practices of the respondent, as above alleged, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

Mr. William J. Boyd, Jr., *Mr. Jerome Garfinkel* and *Mr. Arthur J. Hessburg* for the Commission.

Conboy, Hewitt, O'Brien & Boardman, by *Mr. John Vance Hewitt*, of New York, N.Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint alleges that respondent has paid or contracted to pay money, goods, or other things of value to some of its customers as compensation for services and facilities furnished or contracted to be furnished by or through such customers, in connection with the sale and distribution in commerce of respondent's cigarettes and other tobacco products.

The complaint further alleges that respondent has also granted allowances to certain of its customers who operate vending machines, in consideration for the distribution and promotion by such customers of respondent's brands of cigarettes.

The complaint charges that such compensation and allowances were not made available on proportionally equal terms to all of respondent's other customers who compete with such favored customers in the sale and distribution of respondent's said products, in violation of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, §13).

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

Respondent Philip Morris Incorporated (erroneously named in the complaint as Philip Morris, Inc.) is identified in the agreement as a Virginia corporation, with its office and principal place of business located at 100 Park Avenue, New York, New York.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; and that the order to cease and desist, as contained in the agreement, may be entered in this proceeding by the Commission, without further notice to respondent. All parties agree that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The agreement is entered into subject to the condition that the effective date of the initial decision based thereon shall be stayed by the Commission, and that such initial decision shall not become the decision of the Commission in this matter unless and until the Commission issues an order to cease and desist in the Matter of *Liggett & Myers Tobacco Company, Inc.*, Docket 6642. All parties further agree that in the event the order of the Commission to cease and desist in said Docket 6642 should be more favorable in any respect than the order herein is to respondent, as a result of action by the Commission or a final order by the Courts, then, on application by respondent to the Commission, the order to cease and desist herein shall be modified or set aside in accordance with such order in said Docket 6642; and that if said order in Docket 6642 should be more favorable by reason of any findings of fact or conclusions of law in that proceeding, then the order herein shall likewise be construed in the light of such findings of fact or conclusions of law.

The agreement further provides that the complaint herein may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; 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; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the hearing examiner and the Commission, except as hereinabove set forth; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement, except the right to move for postponement of compliance with said order.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, §13). Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent Philip Morris Incorporated, 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 its cigarettes (hereinafter

called "products") 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 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 AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on July 31, 1958, having filed his initial decision in this proceeding accepting an agreement containing a consent order to cease and desist theretofore executed by respondent and by counsel supporting the complaint, which agreement specified, among other things, that said initial decision was not to become the decision of the Commission until and unless the Commission issued an order to cease and desist in the matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642; and

The Commission, on the 9th day of September, 1959, having adopted as its own the order to cease and desist contained in the initial decision of the hearing examiner in said matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642:

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

It is further ordered, That respondent, Philip Morris, 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 to cease and desist.

Chairman Kintner not participating.

IN THE MATTER OF

THE AMERICAN TOBACCO COMPANY

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

Docket 6830. Complaint, July 8, 1957—Decision, Sept. 9, 1959

Consent order requiring a leading manufacturer of cigarettes and other tobacco products to cease violating Sec. 2(d) of the Clayton Act by such practices

as making allowances in varying amounts to some competing customers but not to others and not on a proportionally equal basis by any test but by individual negotiation resulting in different and arbitrary terms, and including payments to favored retail customers for point-of-sale and newspaper and radio advertising, and payments to vending machine operators.

COMPLAINT

The Federal Trade Commission, having reason to believe that The American Tobacco Company, a corporation, hereinafter designated as respondent, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, The American Tobacco Company, is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey, with its executive offices located at 150 East 42nd Street, New York, New York.

PAR. 2. Respondent is now and for a number of years has been engaged in the business of manufacturing, selling and distributing cigarettes, cigars, and smoking tobaccos, hereinafter sometimes referred to as products. Said products are sold to customers with places of business located in the several States of the United States and in the District of Columbia, for resale to the purchasing public. Respondent is a substantial factor in the tobacco industry. It has branch offices, factories, and warehouses located in a number of states. Its net sales in 1955 exceeded $1,000,000,000.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped its products from the places where such products are manufactured in various States of the United States to its customers having places of business located in other States of the United States and in the District of Columbia. There is and has been a constant stream of trade and commerce in respondent's products among the various States and the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or contracted to pay, money, goods, or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers in connection with the processing, handling, sale, or offering for sale of the products which resopondent manufactures, sells, or offers for sale; and respondent has not made or contracted to make such payments or considerations (hereinafter referred to as allowances) available on

proportionally equal terms to all its other customers competing in the sale and distribution of such products.

PAR. 5. Specifically, respondent during the past three years:

1. Paid allowances in varying amounts to some competing customers, but did not do so or offer to do so, in any amount, to other competing customers.

2. In paying such allowances to some competing customers, did so in amounts not equal to the same percentage of such competing customers' net purchases and not proportionally equal by any other test; and did not offer or otherwise accord or make available such allowances to all such competing customers in amounts equal to the largest of such percentages, or proportionally equal by any other test.

3. In paying such allowances to some competing customers, required some of them to comply with certain terms and to furnish or provide certain reciprocal services or facilities, but did not require others to do so in any manner or amount, or required them to do so in a less burdensome manner or in lesser amounts, and not proportionally equal by any test.

4. In determining allowances to be paid some competing customers, did so on the basis of individual negotiations with each such customer, which resulted in proportionally unequal, different, and arbitrary terms.

PAR. 6. Allowances, paid by respondent in the manner alleged in Paragraph 5, include those offered and granted to certain favored customers, but not to other competing customers, in consideration for the placement of posters, carton displays, signs, stickers, floor, window, and counter displays, change trays, and other like items advertising respondent's various brands of cigarettes in such customers' retail outlets, as well as in consideration for newspaper and radio advertising placed by such customers. Examples of such allowances paid by respondent during 1955 may be listed as follows:

Customer	*Allowance*
Union News Company, 131 Varick Street, New York, N.Y.	$42,869
Interstate Company, Suite 1450 Merchandise Mart, Chicago 54, Illinois	1,916
Fred Harvey, 212 South Canal Street, Chicago 6, Illinois	4,680
Borun Bros., 5051 Rodeo Road, Los Angeles 16, California	504
Cunningham Drug Stores, Incorporated, 1927 Twelfth Street, Detroit 16, Michigan	1,787
Associated Grocers Co-op, 3301 Norfolk Street, P.O. Box 3163, Seattle 14, Washington	6,920
United Cigar-Whelan, 82 39th Street, Brooklyn, N.Y.	5,850
Genovese Drug Stores, 21-12 Newtown Avenue, Long Island City, N.Y.	612

PAR. 7. Allowances paid by respondent, in the manner alleged in Paragraph 5, also include those granted to certain customers who

operate vending or merchandising machines, in consideration for the distribution and promotion of respondent's brands of cigarettes by such customers in their machines. Under this program, during 1955, for example, respondent paid $166,861.96, at the rate of $8 per vending machine, to such customers for the promotion and distribution of its Herbert Tareyton cigarettes. The great majority of respondent's customers who receive allowances under this program compete in the trading areas where their machines are located with tobacco wholesalers and retailers who are likewise customers of respondent. These other customers have not been offered, nor have they received, this type of allowance from respondent.

PAR. 8. The acts and practices of the respondent, as above alleged, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

Mr. William J. Boyd, Jr., *Mr. Jerome Garfinkel* and *Mr. Arthur J. Hessburg*, for the Commission.

Chadbourne, Parke, Whiteside & Wolff, by *Mr. Horace G. Hitchcock*, of New York, N.Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint alleges that respondent has paid or contracted to pay money, goods, or other things of value to some of its customers as compensation for services and facilities furnished or contracted to be furnished by or through such customers, in connection with the sale and distribution in commerce of respondent's cigarettes and other tobacco products.

The complaint further alleges that respondent has also granted allowances to certain of its customers who operate vending machines, in consideration for the distribution and promotion by such customers of respondent's brands of cigarettes.

The complaint charges that such compensation and allowances were not made available on proportionally equal terms to all of respondent's other customers who compete with such favored customers in the sale and distribution of respondent's said products, in violation of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, §13).

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litgation, and thereafter transmitted to the Hearing Examiner for consideration.

Respondent The American Tobacco Company is identified in the agreement as a New Jersey corporation, with its office and principal place of business located at 150 East 42nd Street, New York, New York.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; and that the order to cease and desist, as contained in the agreement, may be entered in this proceeding by the Commission, without further notice to respondent. All parties agree that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The agreement is entered into subject to the condition that the effective date of the initial decision based thereon shall be stayed by the Commission, and that such initial decision shall not become the decision of the Commission in this matter unless and until the Commission issues an order to cease and desist in the Matter of *Liggett & Myers Tobacco Company, Inc.*, Docket 6642. All parties further agree that in the event the order of the Commission to cease and desist in said Docket 6642 should be more favorable in any respect than the order herein is to respondent, as a result of action by the Commission or a final order by the Courts, then, on application by respondent to the Commission, the order to cease and desist herein shall be modified or set aside in accordance with such order in said Docket 6642; and that if said order in Docket 6642 should be more favorable by reason of any findings of facts or conclusions of law in that proceeding, then the order herein shall likewise be construed in the light of such findings of fact or conclusions of law.

The agreement further provides that the complaint herein may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; 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; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the Hearing Examiner and the Commission, except as hereinabove set forth; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order

to cease and desist entered in accordance with the agreement, except the right to move for postponement of compliance with said order.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, §13). Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent, The American Tobacco Company, 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 its cigarettes (hereinafter called "products") 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 wtih 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 AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on July 31, 1958, having filed his initial decision in this proceeding accepting an agreement containing a consent order to cease and desist theretofore executed by respondent and by counsel supporting the complaint, which agreement specified, among other things, that said initial decision was not to become the decision of the Commission until and unless the Commission issued an order to cease and desist in the matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642; and

The Commission, on the 9th day of September, 1959, having adopted as its own the order to cease and desist contained in the initial decision of the hearing examiner in said matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642:

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

It is further ordered, That respondent, The American Tobacco Company, 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 to cease and desist.

Chairman Kintner not participating.

IN THE MATTER OF

R. J. REYNOLDS TOBACCO COMPANY

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

Docket 6848. Complaint, July 24, 1957—Decision, Sept. 9, 1959

Consent order requiring one of the country's leading manufacturers of cigarettes and other tobacco products to cease violating Sec. 2(d) of the Clayton Act by such practices as paying to some customers but not to their competitors, allowances in varying amounts determined by individual negotiation, not proportionally equal by any test, and including payments to vending machine operators but not to their retailer competitors, and allowances to certain customers in consideration for advertising and promoting its cigarettes.

COMPLAINT

The Federal Trade Commission, having reason to believe that R. J. Reynolds Tobacco Company, a corporation, hereinafter designated as respondent, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, R. J. Reynolds Tobacco Company, is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey, with its executive offices located in the Reynolds Building, Winston-Salem, North Carolina.

PAR. 2. Respondent is now, and for a number of years past has been, engaged in the business of manufacturing, selling and distributing cigarettes, pipe and chewing tobaccos, hereinafter sometimes referred to as products. Said products are sold to customers with places of business located in the several States of the United States and in the District of Columbia, for resale to the purchasing public. Respondent is a substantial factor in the tobacco industry. It has branch offices, factories, and warehouses located in a number of States. Its net sales in 1956 exceeded $900,000,000.

PAR. 3. In the course and conduct of its business respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped its products from the place where such

products are manufactured in various States of the United States to its cutsomers having places of business located in other States of the United States and in the District of Columbia. There is now and has been a constant stream of trade and commerce in respondent's products among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or contracted to pay, money, goods, or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers in connection with the processing, handling, sale or offering for sale of the products which respondent manufactures, sells, or offers for sale; and respondent has not made or contracted to make such payments or considerations (hereinafter referred to as allowances) available on proportionally equal terms to all its other customers competing in the sale and distribution of such products.

PAR. 5. Specifically, respondent during the past six years:

1. Paid allowances in varying amounts to some customers, but did not do so or offer to do so, in any amount, to other competing customers.

2. In paying such allowances to competing customers, did so in amounts not equal to the same percentage of such competing customers' net purchases and not proportionally equal by any other test; and did not offer or otherwise accord or make available such allowances to all such competing customers in amounts equal to the largest of such percentages, or proportionally equal by any other test.

3. In offering such allowances to competing customers, conditioned such offers upon the use of advertising displays which could only be used by a restricted number of said customers.

4. In determining allowances to be paid competing customers, did so on the basis of individual negotiations with each such customer, which resulted in proportionally unequal, different and arbitrary terms.

PAR. 6. Allowances paid by respondent, in the manner alleged in Paragraph 5, include those granted to certain customers who operate vending or merchandising machines, in consideration for the distribution and promotion of respondent's brands of cigaretttes by such customers in their vending machines. Under a match distribution program, during 1955, for example, respondent paid approximately $321,000 to such customers for the promotion and distribution of its Winston and Cavalier cigarettes, at the annual rate of either $7.20 or $3.60 per vending machine, depending on whether one or both

brands of respondent's cigarettes were placed and distributed through said vending machines. Under its match distribution program in 1956, respondent paid approximately $900,000 to vending machine operators for the promotion and distribution of its Winston, Cavalier and Salem cigarettes through their vending machines. The great majority of respondent's customers who receive allowances under this program compete in the trading areas where their machines are located with tobacco wholesalers and retailers who are likewise customers of respondent. Respondent has not made any allowances available to some of these other customers, and in instances where allowances have been made available to some of these other customers, such allowances have not been offered nor paid on proportionally equal terms. Examples of allowances paid vending machine operators by respondent are listed as follows:

	Allowances 1st 6 Mos.	
Customers	*1955*	*1956*
Mystic Automatic Sales Co., 55 Salem Street, Medford, Mass.	$1,906	$3,052
Cigarette Service Co., Inc., 179 Sidney Street, Cambridge, Mass.	2,100	1,903
Winrox Vending Co., Inc., 162 Lawton Street, Brookline, Mass.	488	511
Self Service Sales Corp., 196 Capen Street, Hartford, Conn.	347	236
New Haven Tobacco Company, 25 George Street, New Haven, Conn.	315	208

PAR. 7. Allowances paid by respondent, in the manner alleged in Paragraph 5, include those offered and paid to certain customers, but not offered on proportionally equal terms to other competing customers, in consideration for services furnished in advertising and promoting respondent's products and for the placement in such customers' places of business of advertising displays which advertised the respondent's brands of cigarettes. For example, The American News Company in 1955, was paid through an affiliate, Shamrock Matches, Inc., an allowance exceeding $5,000.00 in consideration for advertising respondent's products on book matches and distributing said book matches through the retail establishments of The American News Company and its subsidiaries located throughout the United States, and for the placement of counter displays advertising and featuring respondent's brands of cigarettes in said retail establish-

ments. In 1956, The American News Company was paid through its subsidiary, The American Match Company, an allowance exceeding $10,000 in consideration for advertising respondent's products on book matches and distributing said book matches through the retail establishments of The American News Company and its subsidiaries located throughout the United States, for the placement of counter displays advertising and featuring respondent's brands of cigarettes in said retail establisments, and for maintaing and distributing respondent's brands of cigarettes in vending machines operated by The American News Company and its subsidiaries. Allowances on proportionally equal terms were not made available to other customers of respondent who compete with the retail establishments of The American News Company and its subsidiaries in the resale of respondent's brands of cigarettes.

PAR. 8. The acts and practices of the respondent, as above alleged, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

Mr. William J. Boyd, Jr., *Mr. Jerome Garfinkel* and *Mr. Arthur J. Hessburg*, for the Commission.

Davis, Polk, Wardwell, Sunderland & Kiendl, by *Mr. Taggart Whipple*, of New York, N.Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint alleges that respondent has paid or contracted to pay money, goods, or other things of value to some of its customers as compensation for services and facilities furnished or contracted to be furnished by or through such customers, in connection with the sale and distribution in commerce of respondent's cigarettes and other tobacco products.

The complaint further alleges that respondent has also granted allowances to certain of its customers who operate vending machines, in consideration for the distribution and promotion by such customers of respondent's brands of cigarettes.

The complaint charges that such compensation and allowances were not made available on proportionally equal terms to all of respondent's other customers who compete with such favored customers in the sale and distribution of respondent's said products, in violation of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, §13).

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of

Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

Respondent R. J. Reynolds Tobacco Company is identified in the agreement as a New Jersey corporation, with its office and principal place of business located in the Reynolds Building, Winston Salem, North Carolina.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; and that the order to cease and desist, as contained in the agreement, may be entered in this proceeding by the Commission, without further notice to respondent. All parties agree that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The agreement is entered into subject to the condition that the effective date of the initial decision based thereon shall be stayed by the Commission, and that such initial decision shall not become the decision of the Commission in this matter unless and until the Commission issues an order to cease and desist in the Matter of *Liggett & Myers Tobacco Company, Inc.*, Docket 6642. All parties further agree that in the event the order of the Commission to cease and desist in said Docket 6642 should be more favorable in any respect than the order herein is to respondent, as a result of action by the Commission or a final order by the Courts, then, on application by respondent to the Commission, the order to cease and desist herein shall be modified or set aside in accordance with such order in said Docket 6642; and that if said order in Docket 6642 should be more favorable by reason of any findings of fact or conclusions of law in that proceeding, then the order herein shall likewise be construed in the light of such findings of fact or conclusions of law.

The agreement further provides that the complaint herein may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; 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; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the hearing examiner and the Commission, except as hereinabove set forth; the

making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement, except the right to move for postponement of compliance with said order.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, §13). Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent, R. J. Reynolds Tobacco Company, 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 its cigarettes, 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 AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on July 31, 1958, having filed his initial decision in this proceeding accepting an agreement containing a consent order to cease and desist theretofore executed by respondent and by counsel supporting the complaint, which agreement specified, among other things, that said initial decision was not to become the decision of the Commission until and unless the Commission issued an order to cease and desist in the matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642; and

The Commission, on the 9th day of September, 1959, having adopted as its own the order to cease and desist contained in the initial decision of the hearing examiner in said matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642:

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

It is further ordered, That respondent, R. J. Reynolds Tobacco

Company, 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 to cease and desist.

Chairman Kintner not participating.

IN THE MATTER OF

BROWN & WILLIAMSON TOBACCO CORPORATION

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

Docket 6908. Complaint, Oct. 7, 1957—Decision, Sept. 9, 1959

Consent order requiring a substantial manufacturer of cigarettes and other tobacco products to cease violating Sec. 2(d) of the Clayton Act by granting allowances to certain favored customers but not to their competitors in consideration for placement of floor, window, and counter displays and other advertising of its cigarettes in retail outlets and for newspaper and radio advertising, and by payments to operators of vending machines but not to their retailer competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Brown & Williamson Tobacco Corporation, a corporation, hereinafter designated as respondent, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Brown & Williamson Tobacco Corporation, is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 1600 West Hill Street, Louisville 1, Kentucky.

PAR. 2. Respondent is now and for a number of years has been engaged in the business of manufacturing, selling and distributing cigarettes, cigarette and pipe tobacco, snuff, plug chewing tobacco and tobacco sundries, hereinafter sometimes referred to as products. Said products are sold to customers with places of business located in the several States of the United States and in the District of Columbia, for resale to the purchasing public. Respondent is a substantial factor in the tobacco industry. It has branch offices,

factories, and warehouses located in a number of states. Its gross sales in 1956 exceeded $350,000,000.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped its products from the place where such products are manufactured in various States of the United States to its customers having places of business located in other States of the United States and in the District of Columbia. There is now and has been a constant stream of trade and commerce in respondent's products among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or contracted to pay, money, goods, or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers in connection with the processing, handling, sale or offering for sale of the products which respondent manufactures, sells, or offers for sale; and respondent has not made or contracted to make such payments or considerations (hereinafter referred to as allowances) available on proportionally equal terms to all its other customers competing in the sale and distribution of such products.

PAR. 5. Specifically, respondent during the past four years:

1. Paid allowances in varying amounts to some customers, but did not do so or offer to do so, in any amount, to other competing customers.

2. In paying such allowances to some competing customers, did so in amounts not equal to the same percentage of such competing customers' net purchases and not proportionally equal by any other test; and did not offer or otherwise accord or make available such allowances to all such competing customers in amounts equal to the largest of such percentages, or proportionally equal by any other test.

3. In offering such allowances to competing customers, conditioned such offers upon the use of advertising displays which could only be used by a restricted number of said customers.

4. In determining allowances to be paid competing customers, did so on the basis of individual negotiations with each such customer, which resulted in proportionally unequal, different and arbitrary terms.

PAR. 6. Allowances paid by respondent, in the manner alleged in paragraph 5, include those offered and granted to certain favored customers, but not to other competing customers, in consideration for the placement of posters, carton displays, signs, stickers, floor, window and counter displays, change trays, and other like items

advertising respondent's various brands of cigarettes in such customers' retail outlets, as well as in consideration for newspaper and radio advertising placed by such customers. Examples of such allowances paid by respondent during 1956 may be listed as follows:

Customer	*Allowance*
Thrifty Drug Stores, Inc. (Borun Bros.), 5051 Rodeo Road, Los Angeles, Calif.	$15,835
Walgreen Company, 4300 Peterson Avenue, Chicago, Ill.	5,599
United Cigar-Whelan Stores Corporation, 82 – 39th Street, Brooklyn, N.Y.	5,000
Peoples Drug Stores, Inc., 77 "P" Street, N.E., Washington, D.C.	3,790
Katz Drug Company, Inc. (Lorber Mercantile Co.) 1130 Walnut, Kansas City, Mo.	3,252
Cunningham Drug Stores, Inc., 1927 Twelfth Street, Detroit, Mich.	1,506
Food Fair Stores, Inc., 2223 East Alleghany Avenue, Philadelphia, Pa.	550
The Union News Company, Inc., 131 Varick Street, New York, N.Y.	1,606

PAR. 7. Allowances paid by respondent, in the manner alleged in paragraph 5, also include those granted to certain customers who operate vending or merchandising machines, in consideration for the distribution and promotion of respondent's brands of cigarettes by such customers in their vending machines. Under this program which was initiated in September 1956, respondent paid vending machine operators in excess of $343,000 during the last quarter of 1956. Respondent made payments to such customers for the promotion and distribution of its Kool Filter and Viceroy cigarettes at the annual rate of either $5.00 or $12.00 per vending machine, depending on whether one or both of these brands of respondent's cigarettes were placed in and distributed through said vending machine. The great majority of respondent's customers who have received, and are continuing to receive, allowances under this program compete, in the trading areas where their machines are located, with tobacco wholesalers and retailers who are likewise customers of respondent. Respondent has not made any allowances available to some of these other customers, and in instances where allowances

have been made available to some of these other customers, such allowances have not been offered nor paid on proportionally equal terms. Examples of allowances paid cigarette vending machine operators by respondent during 1956 are listed as follows:

Customer	*Allowance*
Davidson Bros., 5950 W. Jefferson Blvd., Los Angeles, Calif.	$2,579
Los Angeles Cigarette Service, 4506 W. Jefferson Blvd., Los Angeles, Calif.	1,418
Automatic Merchandising Co., 66 Page Street, San Francisco, Calif.	2,429
San Francisco Cigarette Service, 990 Columbus, San Francisco, Calif.	1,322
Automatic Merchants, 179 Sidney Street, Cambridge, Mass.	617
Metro Tobacco & Candy Co., 21 Station Street, Brookline, Mass.	196

PAR. 8. The acts and practices of the respondent, as above alleged, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

Mr. William J. Boyd, Jr., *Mr. Jerome Garfinkel* and *Mr. Arthur J. Hessburg*, for the Commission.

Mr. James N. Ravlin, of Louisville, Ky., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint alleges that respondent has paid or contracted to pay money, goods, or other things of value to some of its customers as compensation for services and facilities furnished or contracted to be furnished by or through such customers, in connection with the sale and distribution in commerce of respondent's cigarettes and other tobacco products.

The complaint further alleges that respondent has also granted allowances to certain of its customers who operate vending machines, in consideration for the distribution and promotion by such customers of respondent's brands of cigarettes.

The complaint charges that such compensation and allowances were not made available on proportionally equal terms to all of respondent's other customers who compete with such favored customers in the sale and distribution of respondent's said products, in

violation of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, §13).

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

Respondent Brown & Williamson Tobacco Corporation is identified in the agreement as a Delaware corporation, with its office and principal place of business located at 1600 West Hill Street, Louisville, Kentucky.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; and that the order to cease and desist, as contained in the agreement, may be entered in this proceeding by the Commission, without further notice to respondent. All parties agree that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The agreement is entered into subject to the condition that the effective date of the initial decision based thereon shall be stayed by the Commission, and that such initial decision shall not become the decision of the Commission in this matter unless and until the Commission issues an order to cease and desist in the Matter of *Liggett & Myers Tobacco Company, Inc.*, Docket 6642. All parties further agree that in the event the order of the Commission to cease and desist in said Docket 6642 should be more favorable in any respect than the order herein is to respondent, as a result of action by the Commission or a final order by the Courts, then, on application by respondent to the Commission, the order to cease and desist herein shall be modified or set aside in accordance with such order in said Docket 6642; and that if said order in Docket 6642 should be more favorable by reason of any findings of fact or conclusions of law in that proceeding, then the order herein shall likewise be construed in the light of such findings of fact or conclusions of law.

The agreement further provides that the complaint herein may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; 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; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the hearing examiner and the Commission, except as hereinabove set forth; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement, except the right to move for postponement of compliance with said order.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein, as being in violation of §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, §13). Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreemnt containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent, Brown & Williamson Tobacco Corporation, 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 its cigarettes (hereinafter called products) 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 AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on July 31, 1958, having filed his initial decision in this proceeding accepting an agreement containing a consent order to cease and desist theretofore executed by respondent and by counsel supporting the complaint, which agreement specified among other things, that said initial decision was not to become the decision of the Commission until and unless the Commission issued an order to cease and desist in the matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642; and

The Commission, on the 9th day of September, 1959, having adopted as its own the order to cease and desist contained in the initial decision of the hearing examiner in said matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642:

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

It is further ordered, That respondent, Brown & Williamson Tobacco Corporation, 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 to cease and desist.

Chairman Kintner not participating.

IN THE MATTER OF

YORKTOWN TEXTILE & TRIMMING CORP. ET AL.

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

Docket 7372. Complaint, Jan. 23, 1959—Decision, Sept. 9, 1959

Consent order requiring manufacturers in New York City to cease violating the Wool Products Labeling Act by tagging as "100% Wool" and "90% Wool 10% Other Fibers," interlining materials which contained substantial quantities of fibers other than wool, and by failing in other respects to comply with the labeling requirements of the Act.

Mr. John T. Walker for the Commission.

Mr. Louis J. Petta, for *Singer, Levine & Petta*, 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) on January 23, 1959, issued its complaint herein, charging the above-named respondents with having violated the provisions of both the Federal Trade Commission Act and the Wool Products Labeling Act, together with the Rules and Regulations promulgated thereunder, and the respondents were duly served with process.

On July 17, 1959, 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 and the attorneys

for both parties, under date of July 16, 1959, subject to the approval of the Bureau of Litigation of the Commission, which had been subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Yorktown Textile & Trimming Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 313 West 37th Street, New York, N.Y.

The individual respondents, Samuel Levy, and Thomas Dio Guardia, are president and secretary-treasurer, respectively, of the said corporate respondent, and have the same address as the said corporate respondent.

2. 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.

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

4. 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.

5. 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.

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

7. 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.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. 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 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 each of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act and the Wool Products Labeling Act and the Rules and Regulations promulgated by the Commission under the latter 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 as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondents Yorktown Textile & Trimming Corp., a corporation, and its officers, and Samuel Levy and Thomas Dio Guardia, individually, and as officers of said corporation, and respondents' representatives, agents or 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 interlining materials 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 misbranding such products by:

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

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

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

(b) The maximum percentages of the total weight of such wool product of any non-fibrous loading, filling, or adulterating matter;

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 9th day of September, 1959, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

CROTON WATCH CO., INC., ET AL.

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

Docket 7454. Complaint, Mar. 31, 1959—Decision, Sept. 9, 1959

Consent order requiring two associated New York City watch distributors to cease attaching to their watches, tickets printed with exaggerated prices and designating fictitious amounts as "retail prices" in magazine and other advertising and in advertising mats distributed to retailers; advertising certain of their watches falsely as "Railroad" watches; representing falsely as "chrome" or "stainless steel," bezels of watches which were actually composed of base metals treated to simulate precious metals; and representing watches falsely as "fully guaranteed."

Mr. Michael J. Vitale for the Commission.

Paul, Weiss, Rifkind, Wharton & Garrison, of New York, N.Y., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued March 31, 1959, charges respondents Croton Watch Co., Inc., a corporation, located at 404

Fourth Avenue, New York, New York, and William C. Horowitz, Harold I. Horton and Oscar Berlan, individually and as officers of said Croton Watch Co., Inc., their address being the same as that of the corporate respondent; and Arpeggio Watch Co., Inc., a corporation, located at 404 Fourth Avenue, New York, New York, and Harold I. Horton, Oscar Berlan and Gloria Nicholson, individually and as officers of said Arpeggio Watch Co., Inc., their address being the same as that of the corporate respondent, with violation of the Federal Trade Commission Act in the sale and distribution of watches.

After the issuance of the complaint, respondents entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues as to all parties in this proceeding, which agreement was duly approved by the Director and Assistant Director of the Bureau of Litigation.

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 the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

By said agreement, the parties expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the 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 if made after a full hearing.

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 said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

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 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 respondents named herein, that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondents Croton Watch Co., Inc., a corporation, and its officers, and William C. Horowitz, Harold I. Horton and Oscar Berlan, individually and as officers of said corporation, and Arpeggio Watch Co., Inc., a corporation, and its officers, and Harold I. Horton, Oscar Berlan and Gloria Nicholson, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of 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:

(a) By preticketing, or otherwise, that any price is the usual and customary retail price of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail in the normal course of business;

(b) That any merchandise sold or offered for sale is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

(c) That merchandise is guaranteed when a service charge is imposed, unless the amount of such service charge is clearly set forth;

(d) That watches are railroad watches unless such watches are made to the specifications required for railroad watches;

(e) That a watchcase, or any part thereof, is chrome, when it is chrome plated.

2. Failing to reveal the true metal content of watchcases, or portions thereof, which have been treated or processed to simulate or have the appearance of precious metals.

3. Placing in the hands of others means or instrumentalities which may be used to misrepresent the usual and customary retail price of merchandise.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 9th day

of September, 1959, 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

IRVING S. COHEN, INC., ET AL.

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

Docket 7478. Complaint, Apr. 30, 1959—Decision, Sept. 9, 1959

Consent order requiring New York City distributors to cease violating the Wool Products Labeling Act by tagging as "85% wool, 15% other fibers," bolts of fabric which contained a substantial quantity of "reprocessed" wool rather than "wool"; by failing to label other wool products as required by the Act; and by misrepresenting the fiber content of certain products on invoices.

Mr. Alvin D. Edelson supporting the complaint.

Mr. Frederic E. Hammer of *Bernstein, Weiss, Hammer & Parter*, of New York, N.Y., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The complaint herein was issued on April 30, 1959, charging respondents with violating the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder and the Federal Trade Commission Act.

On July 10, 1959, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Irving S. Cohen, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 257 West 39th Street, New York, New York.

2. Individual respondent Irving S. Cohen is president and treasurer of the corporate respondent with his office and principal place of business at 257 West 39th Street, New York, New York.

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

ORDER

It is ordered, That respondents Irving S. Cohen, Inc., a corporation, and its officers, and Irving S. Cohen, individually, and as an officer of the corporation and respondents' representatives, agents and employees directly or through any corporate or other device in connection with the introduction, or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 of "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939 do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers 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 said percentage by weight of

such fiber is five percentum or more, and (5) the aggregate of all other fibers;

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

(c) The name or the registered identification number of the manufacturer of such wool 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.

It is further ordered, That respondent Irving S. Cohen, Inc., a corporation, and its officers, and Irving S. Cohen, individually, and as an officer of the 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 textile fabrics in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from misrepresenting the constituent fibers of which their products are composed or the percentages thereof in invoicing, 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 9th day of September, 1959, 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

COHEN BROS. FUR CORP. ET AL.

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

Docket 7510. Complaint, June 5, 1959—Decision, Sept. 9, 1959

Consent order requiring a New York City furrier to cease violating the Fur Products Labeling Act by designating as "regular," on invoices of fur products, prices which were in excess of the customary resale prices, and

by furnishing a false guaranty that certain of their products were not falsely invoiced.

Mr. Charles W. O'Connell for the Commission.
Respondents, pro se.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on June 5, 1959, issued its complaint herein, charging the above-named respondents with having violated the provisions of both the Federal Trade Commission Act and the Fur Products Labeling Act, together with the Rules and Regulations promulgated thereunder, and the respondents were duly served with process.

On July 24, 1959, 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 and counsel supporting the complaint, under date of July 21, 1959, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Cohen Bros. Fur Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 315 Seventh Avenue, in the City of New York, State of New York.

Individual respondents Leslie L. Cohen and Jack Cohen are officers of the corporate respondent. The individual respondents have their address at the same address as that of the corporate respondent.

2. 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.

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

4. 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.

5. 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.

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

7. 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.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. 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 each of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act and the Fur Products Labeling Act and the Rules and Regulations promulgated by the Commission under the latter 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 as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondents Cohen Bros. Fur Corp., a corporation, and its officers, and Leslie L. Cohen and Jack Cohen, individually and as officers of the corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or the manufac-

ture for introduction into commerce, or the sale, advertising, or offering for sale, transportation or distribution in commerce, of fur products, or in connection with the manufacture for 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 products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Falsely or deceptively invoicing fur products by representing, directly or by implication, on invoices that the former or regular price of any fur product is any amount which is in excess of the price at which respondents have usually or customarily sold such products in the recent regular course of their business;

2. Furnishing false guarantees that certain furs or fur products are not misbranded, falsely invoiced or falsely advertised, when there is reason to believe that said furs or fur products may be introduced, sold, transported or distributed in commerce.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 9th day of September, 1959, become the decision of the Commission; and accordingly:

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

IN THE MATTER OF

PEP BOYS—MANNY, MOE & JACK

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

Docket 7521. Complaint, June 11, 1959—Decision, Sept. 9, 1959

Consent order requiring distributors of automobile accessories, with branches in many States, to cease representing falsely that they guaranteed automobile batteries unconditionally by advertising "30 MONTH GUARANTEE" and "FULLY GUARANTEED" when the actual guarantee was subject to conditions and limitations not disclosed.

Mr. Edward F. Downs for the Commission.

Mr. John H. Lewis, Jr., of Washington, D.C., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, on June 11, 1959, charging the above-named respondent with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On July 20, 1959, 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 respondent and the attorneys for both parties, under date of July 15, 1959, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Pep Boys—Manny, Moe & Jack is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 32nd Street and Allegheny Avenue, in the City of Philadelphia, State of Pennsylvania.

2. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

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

4. Respondent waives:

(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 it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. 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.

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

7. This 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.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. 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 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 each of the parties hereto; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, 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 as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That Pep Boys—Manny, Moe & Jack, 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 electric storage batteries, and any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that any product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 9th day of September, 1959, become the decision of the Commission; and, accordingly:

It is ordered, That the above-named respondent shall, within sixty (60) days after service upon it of this order, file with the Commis-

sion 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

GENERAL MILLS, INC.

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

Docket 6926. Complaint, Oct. 31, 1957—Decision, Sept. 10, 1959

Consent order requiring an important producer and distributor of flour and grain products, chemicals, household sponges, and related products, with gross sales in 1956 exceeding 516 million dollars, to cease violating Sec. 2(d) of the Clayton Act by making payments for promotion and advertising to some purchasers of its "O-Cel-O" plastic sponges but not to their competitors, through such practices as paying a chain of supermarkets for in-store promotional displays and for advertising on the chain's electric "spectacular" sign in Times Square, and making payments to another chain for advertising of its anniversary sale.

Count II of the complaint charging respondent with entering into illegal exclusive-dealing contracts with the supermarket chain was dismissed on Sept. 19, 1959, page 320, herein.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Mills, Inc., a corporation, has violated the provisions of Section 2, Subsection (d), and Section 3 of the Clayton Act, as amended (15 U.S.C., Sections 13 and 14), hereby issues its complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. General Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. It is now, and for many years has been, engaged in the production and sale of flour and other grain products, feeds, soybean products, chemicals, household sponges and related products. Its principal office is at 400 Second Avenue South, Minneapolis, Minnesota. (It may be referred to hereinafter as General Mills or respondent.) The gross annual sales volume of General Mills in fiscal 1956 was $516,053,000.

PAR. 2. General Mills engages in the manufacture, distribution and sale of cellulose and polyurethane (plastic) sponges through its O-Cel-O Division (hereinafter referred to as O-Cel-O). O-Cel-O,

formerly an independent New York corporation, was acquired by General Mills and established as an integrated division of that corporation in 1952. O-Cel-O has its principal office and plant at 1200 Niagara Street, Buffalo, New York, and a sponge manufacturing plant in Tonawanda, New York. Through O-Cel-O, General Mills sells its sponges to customers with places of business located throughout the several states of the United States and in the District of Columbia for resale in the United States to consumers. Among these customers are retail grocery chains, supermarkets and independent retail grocery stores. Sales through the O-Cel-O Division are substantial, amounting to more than $5,000,000 in fiscal 1956.

PAR. 3. General Mills, through O-Cel-O and otherwise, is now, and for many years has been engaged in commerce as that term is defined in the Clayton Act. It transports or causes to be transported its products from the state of manufacture to customers located in other states of the United States and in the District of Columbia, as well as in the state of manufacture. There is, and has been, a constant stream of trade and commerce in these products among the various states and the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce during the past three years, General Mills, through O-Cel-O, has contracted to pay, and has paid, money, goods or other things of value to or for the benefit of certain of its customers. It has made these payments as compensation or in consideration for services or facilities furnished by or through these customers in connection with the sale or offering for sale of products manufactured, sold or offered for sale by General Mills through O-Cel-O. But such payments or consideration have not been available on proportionally equal terms to all other customers competing in the sale and distribution of such products.

PAR. 5. Among and typical of the discriminations alleged in Paragraph 4 are transactions between O-Cel-O Division of General Mills and The Grand Union Company. Grand Union operates a chain of supermarkets and retail food stores in New York, New Jersey, Pennsylvania, Vermont and other states. General Mills, through O-Cel-O, has paid to or for the benefit of Grand Union, directly or indirectly, substantial sums of money for services and facilities furnished it by or through Grand Union in the form of advertising of O-Cel-O sponges on an illuminated "spectacular" animated sign leased and controlled by Grand Union at 46th Street and Broadway, New York City, and in the form of in-store promotional displays.

PAR. 6. Other instances of the discriminations alleged in Paragraph 4 include a payment to Food Fair Stores, Philadelphia, Penn-

sylvania, on or about June 9, 1955, for advertising and promotion of Food Fair's anniversary sale, and a payment to H. C. Bohack Company, Inc., Brooklyn, New York, on or about June 16, 1955, as a promotional and display allowance.

PAR. 7. In the transactions described in Paragraphs 5 and 6, the payments were made and the services and facilities furnished in connection with the handling, sale and offering for sale of O-Cel-O sponges. These payments were not available, however, on proportionally equal terms to all other customers competing in the distribution and sale of O-Cel-O sponges.

PAR. 8. The acts and practices of General Mills, Inc., as alleged in Count I of this complaint, are in violation of Subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. Section 13).

COUNT II

PARAGRAPHS 1 THROUGH 3: For its charges under paragraphs 1 through 3 of this Count II, the Commission relies upon the matters and things set out in paragraphs 1 through 3 of Count I to the same extent and as though they were set out in full herein, and paragraphs 1 through 3 of Count I are, therefore, incorporated herein by reference and made a part of the allegations of this Count.

PAR. 4. In the course and conduct of its business in commerce, as above described, General Mills, through O-Cel-O, is now, and for many years has been, in substantial competition with other corporations, persons, firms and partnerships in the sale and distribution of household sponges in commerce.

PAR. 5. In the course and conduct of its business in commerce, as above described, General Mills has made sales and contracts for the sale of its products and has fixed a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the purchaser shall not deal in similar products of a competitor or competitors.

PAR. 6. Among such sales and contracts of sale are transactions entered into between General Mills (O-Cel-O) and a large chain store organization, The Grand Union Company, whereby Grand Union agreed to refrain from handling or selling products of one or more competitors of General Mills.

PAR. 7. General Mills' sales of its products pursuant to the conditions, agreements and understandings described in paragraphs 5 and 6 above have been and are substantial. Competitors of General Mills have been and are now unable to make sales of their products to customers of General Mills which they could have made but for the

conditions, agreements and understandings described above in paragraphs 5 and 6.

PAR. 8. The effect of such sales and contracts of sale on such conditions, agreements or understandings may be substantially to lessen competition or to tend to create a monopoly in the line of commerce in which General Mills (through O-Cel-O) has been and is engaged.

PAR. 9. The acts and practices of General Mills, as alleged in Count II of this complaint, are in violation of Section 3 of the Clayton Act (15 U.S.C., Section 14).

Before: *John Lewis*, hearing examiner.

Mr. Donald R. Moore and *Mr. Charles J. Steele* supporting the complaint.

Mr. John Finn and *Mr. Edward K. Thode*, of Minneapolis, Minn., for respondent.

INITIAL DECISION AS TO COUNT I OF COMPLAINT

The Federal Trade Commission issued its complaint against the above-named respondent on October 31, 1957, charging it with having violated Section 2(d), as amended, and Section 3 of the Clayton Act. After being served with said complaint, respondent appeared by counsel and filed its answer thereto. Thereafter the parties entered into an agreement, dated June 5, 1958, containing a consent order to cease and desist purporting to dispose of all of this proceeding as to all parties, except as to Count II of the complaint. Said agreement, which has been signed by respondent, by counsel for said respondent, and by counsel supporting the complaint, and approved by the Director and Assistant Director of the Commission's Bureau of Litigation, was submitted to the above-named hearing examiner for his consideration on July 17, 1959, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondent, pursuant to the aforesaid agreement, has, as to that part of the proceeding which is disposed of thereby, admitted all the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waives any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full

hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record on which this decision shall be based shall consist solely of the complaint and said agreement, and that 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.

This proceeding having now come on for final consideration, as to that portion thereof other than Count II, on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all the remaining allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondent General Mills, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office in Wilmington, Delaware, and its executive office located at 9200 Wayzata Boulevard, in the Village of Golden Valley, State of Minnesota.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under the provisions of the Clayton Act.

ORDER

It is ordered, That respondent General Mills, Inc. a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the sale or offering for sale in commerce (as "commerce" is defined in the Clayton Act) of household sponges or related products do forthwith cease and desist from:

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

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 as to Count I of the complaint shall, on the 10th day of September 1959, 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

PHOTOSTAT CORPORATION

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

Docket 7349. Complaint, Jan. 6, 1959—Decision, Sept. 10, 1959

Consent order requiring the nation's largest seller of photographic copying machines and supplies therefor, with total sales between 1953 and 1956 greater than those of all its competitors combined, to cease using illegal inducements and unreasonable tying arrangements to sell its supplies, including practices of (1) rendering prompt and efficient repairs and servicing without charge for service labor to owners of its machines who purchased all or a substantial part of their supplies from it, while rendering less efficient service to those who did not do so and charging the latter for service labor; (2) utilizing its dominant position to induce owners and operators of its machines to purchase supplies from it and to refuse to purchase them from its competitors; (3) restricting the sale of its repair parts, accessories, and equipment to competitors and thereby causing costly delays in repairing and servicing machines of owners purchasing competitors' supplies; and (4) selling repair parts, etc., to its competitors only on the condition that they furnish the design number, model number, and serial number of machines on which the repair parts were to be used and thereafter contacting owners of such machines and attempting to cause them to discontinue purchasing supplies from its competitors.

Mr. William J. Boyd, Jr., and *Mr. Arthur J. Hessburg* for the Commission.

Herrick, Smith, Donald, Farley & Ketchum, of Boston, Mass., by *Mr. Malcolm D. Perkins;* and *Tillinghast, Collins & Tanner*, of Providence, R.I., by *Mr. Thomas R. Wickersham*, for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued January 6, 1959, charges respondent Photostat Corporation, a corporation, located at 1001

Jefferson Road, P.O. Box 1970, Rochester, New York, with violation of Section 5 of the Federal Trade Commission Act in connection with the sale and distribution of photographic copying machines and accessories, parts and equipment and photocopy paper and chemicals for said machines.

After the issuance of the complaint, respondent entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director and the Assistant Director of the Bureau of Litigation.

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 it has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

By said agreement, the respondent expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the 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 if made after a full hearing.

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 said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

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 is ordered filed upon becoming a 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, that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondent Photostat Corporation, a corporation, and its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale and distribution of photocopy supplies, including specifically photocopy paper and chemicals, for use in photographic copying machines, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Rendering or making available, or offering to render, or make available, service on its photographic copying machines without charge for service labor on the, express or implied, condition, agreement, or understanding that the recipient thereof will purchase photocopy supplies for said machines from respondent.

(2) Differentiating between owners or operators of its photographic copying machines of any particular type or kind by rendering service on said machines without charge, or by charging at lower rates, for service labor to those owners or operators of said machines who purchase all or a substantial part of their photocopy supplies from respondent, and by making a charge at higher rates to other owners and operators of said machines for service labor where such other owners and operators do not purchase all or a substantial part of their photocopy supplies from respondent.

(3) Inducing the sale of, or selling, photocopy supplies for its photographic copying machines on the, express or implied, condition, agreement or understanding that the purchaser thereof will receive service on his photographic copying machine without charge for service labor, except that nothing in this paragraph shall prohibit respondent from granting service without charge for service labor to owners and operators of its photographic copying machines.

(4) Refusing to sell, or restricting and limiting the sale of repair parts, accessories or equipment for its photographic copying machines to competitors, as a means of inducing owners and operators of its machines to purchase photocopy supplies for said machines from respondent.

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 10th day of September, 1959, 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

FRANKLIN SHOCKEY COMPANY ET AL.

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

Docket 7380. Complaint, Jan. 29, 1959—Decision, Sept. 15, 1959

Consent order requiring furniture manufacturers in Lexington, N.C., to cease advertising falsely as "White Mahogany" and "Solid Mahogany"—in trade magazines, and in brochures and photographic albums distributed to dealers, and also on attached tags—furniture made of a Philippine wood of a different genus, unrelated botanically to true mahogany.

Mr. Kent P. Kratz for the Commission.
Mr. Henry W. Sweeney, of New York, N.Y., for respondents.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

On January 29, 1959, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violating the provisions of the Federal Trade Commission Act in connection with the advertising and sale of furniture involving the use of the word "Mahogany." On July 17, 1959, the respondents and their attorney and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist in accordance with Section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and shall have the same force and effect as if entered after a full hearing. The agreement includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, and that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint. The hearing examiner finds that the con-

tent of the said agreement meets all the requirements of Section 3.25(b) of the Rules of Practice.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding as to all parties, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Franklin Shockey Company is a corporation existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located in the City of Lexington, State of North Carolina.

Individual respondent Franklin Shockey is President and principal stockholder of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent. His address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents Franklin Shockey Company, a corporation, and its officers, and Franklin Shockey, individually and as an officer of said corporation, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of furniture or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Mahogany" as the name or designation for any wood other than the genus Swietenia: provided, however, that nothing herein shall be construed as preventing the use of the name "Philippine Mahogany" as a name or designation for the Philippine woods, Tanguile, Red Lauan, White Lauan, Tiaong, Almon, Bagatikan and Mayapis.

2. Furnishing any means or instrumentality to others by and through which they may mislead the public as to the kind or nature of wood or other materials used in the manufacture of their products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rule of Practice, the initial decision of the hearing examiner shall, on the 15th day of September, 1959, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents herein shall, within sixty (60) days after the 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

WOOLART MILLS, INC., ET AL.

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

Docket 7441. Complaint, Mar. 12, 1959—Decision, Sept. 15, 1959

Consent order requiring New York City distributors to cease misrepresenting the fiber content of certain wool products on invoices, and to cease violating the Wool Products Labeling Act by failing to label wool products as required.

Mr. Alvin D. Edelson for the Commission.
Respondents, for themselves.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with misbranding certain of their wool products, and with misrepresenting the fiber content of certain of said products on invoices to their customers, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act.

After the issuance of the complaint, respondents and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and and Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that respondent Woolart Mills, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 419 Fourth Avenue, New York City, New

York, and that individual respondents Fred Kloeckener and Sam A. Spina are officers of the corporate respondent and have the same address as that of the corporate respondent.

The agreement provides, among other things, that 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; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act. Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing the consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondents Woolart Mills, Inc., a corporation, and its officers, and Fred Kloeckener and Sam A. Spina, individually and as officers of the corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. 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 wood, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

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

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

It is further ordered, That respondents, Woolart Mills, Inc., a corporation, and its officers, and Fred Kloeckener and Sam A. Spina, individually and as officers of the 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 textile fabrics in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, on invoices, in advertising, or through any other media, in any manner, directly or by implication, that said fabrics are composed of certain percentages of a particular fiber, or fibers, are substantially composed of a particular fiber, or fibers, unless such is the fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 15th day of September, 1959, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Woolart Mills, Inc., a corporation, and Fred Kloeckener and Sam A. Spina, 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

THE DoALL COMPANY

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

Docket 7415. Complaint, Feb. 19, 1959—Decision, Sept. 17, 1959

Consent order requiring a manufacturer of granite surface plates and gage blocks in Des Plaines, Ill., to cease making such false representations in trade journals, brochures, price lists, etc., as that Bureau of Standards tests revealed that its granite was superior to all others, and in a search for better granite found its black granite to be superior to all; that the Bureau made tests of granite taken from a particular quarry and that it was the owner and exclusive user of the granite quarried therefrom; that its granite was taken from the same quarry as the sample the Bureau tested; and that it was the sole producer of Class 1 Black granite as set out in Federal Specifications.

Mr. William A. Somers and *Mr. Edward F. Downs* supporting the complaint.

Mr. Adelor J. Petit, Jr., of *Petit, Olin, Overmyer & Fazio*, of Chicago, Ill., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On February 19, 1959, the Federal Trade Commission issued its complaint charging the DoAll Company, a corporation, hereinafter referred to as respondent, with violation of the provisions of the Federal Trade Commission Act by making false, misleading and deceptive statements, with respect to the granite of which its products are made, in advertisements in trade journals, brochures, price lists and other media.

After issuance and service of the complaint, the respondent, its counsel and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the Director and the 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 conclusions 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 staute 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 DoAll Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 254 North Laurel Avenue, Des Plaines, Illinois.

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 DoAll Company, a corporation, 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 granite products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. The U.S. Bureau of Standards ascertained by tests, or in any other manner, that the granite used by respondent is superior over all other granites in density, hardness, compression strength and other properties.

2. The respondent is the exclusive producer of Class 1 Black granite as set out in Federal Specifications GGG–P–463; or any other specifications issued or published by a department, division, bureau or branch of the United States Government, unless such be the fact.

3. The U.S. Bureau of Standards made a search for better granites or that the said Bureau ascertained that the granite used by respondent was superior to all other granites.

4. The U.S. Bureau of Standards made tests of granite taken from a quarry named Quarry 115 or that respondent is the owner of the quarry from which the granite tested under Serial No. 115, as shown in Research Paper RP1320, was taken, or that respondent is the exclusive user of said granite.

5. The granite used by the respondent is from the same quarry as the sample tested by the U.S. Bureau of Standards as Serial No. 115 in its Research Paper RP1320.

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 17th day of September, 1959, 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

MARTIN STUART WOOLEN COMPANY ET AL.

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

Docket 7479. Complaint, Apr. 30, 1959—Decision, Sept. 17, 1959

Consent order requiring New York City manufacturers to cease violating the Wool Products Labeling Act by labeling and identifying on invoices and shipping memoranda as "100% Cashmere," fabrics which contained a substantial quantity of fibers other than cashmere, and by failing to label wool products as required.

Mr. Frederick McManus supporting the complaint.

Mr. Sidney Silverstein of *Higgins & Silverstein*, of Woonsocket, R.I., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On April 30, 1959, the Federal Trade Commission issued a complaint charging that Martin Stuart Woolen Company, a corporation, and Abraham Baker, individually and as an officer of said corporation, hereinafter referred to as respondents, had violated the provisions of the Federal Trade Commission Act, the Wool Products