IN THE MATTER OF

SPECIALTY RECORDS, INC., ET AL.

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

Docket 7885. Complaint, May 12, 1960—Decision, July 28, 1960

Consent order requiring manufacturers of phonograph records in Hollywood, Calif., to cease giving concealed "payola"—money or other material consideration—to disc jockeys of television and radio programs or others to induce broadcasting of their records.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Specialty Records, Inc., a corporation, Specialty Record Sales Co., a limited partnership, and Arthur N. Rupe, individually, as an officer of said corporation and as a general partner in said limited partnership, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Specialty Records, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 8508 Sunset Boulevard, Hollywood 46, Calif.

Respondent Arthur N. Rupe is president of the respondent corporation and formulates, directs and controls the acts and practices of said corporate respondent.

Respondent Arthur N. Rupe is also a general partner in Specialty Record Sales Co., a limited partnership, and said respondent formulates, directs and controls the acts and practices of said limited partnership. The address of the said individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, distribution and sale and/or the offering for sale, sale and distribution of phonograph records to retail outlets and jukebox operators in the various States of the United States.

In the course and conduct of their business, respondents now cause, and for some time last past have caused, the records they manufacture, sell and distribute, when sold, to be shipped from their place of business in the State of California, to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, at all times mentioned herein, the respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the manufacture, sale and distribution of phonograph records.

PAR. 4. After World War II, when television and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry, with a sales volume of approximately $400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as six to ten times a day, substantially increase the sales of those records so "exposed". Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and television programs.

"Payola", among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records in which the payer has a direct financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 5. In the course and conduct of their business in commerce during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone, or with certain unnamed record distributors, neogtiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs, or to the radio station.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents, by participating individually or in a joint effort with certain collaborating record distributors, have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts, or to the radio station.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selections of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they otherwise might not have purchased and, also, to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 6. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public, and to hinder, restrain and suppress competition in the manufacture, sale and distribution, and/or the offering for sale, sale and distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors, and substantial injury has thereby been done and may continue to be done to competition in commerce.

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

Mr. John T. Walker and *Mr. James H. Kelley* supporting the complaint.

Respondents, *pro se.*

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on May 12, 1960, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act, by negotiating for and disbursing "payola" (money and other valuable consideration) to disk jockeys broadcasting musical programs, and causing such fact to be withheld from the public. After being served with said complaint respondents appeared and entered into an agreement, dated June 21, 1960, containing a consent order to cease and desist purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by all respondents, and by counsel supporting the complaint, and approved by the Director, Associate Director, and Assistant Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive 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 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 herein 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 respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all the 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 Specialty Records, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the

State of California, with its principal office and place of business located at 8508 Sunset Boulevard, Hollywood 46, Calif.

Respondent Arthur N. Rupe is president of the respondent corporation and formulates, directs and controls the acts and practices of said corporate respondent.

Respondent Arthur N. Rupe is also a general partner in Specialty Record Sales Co., a limited partnership, and said respondent formulates, directs and controls the acts and practices of said limited partnership. The address of the said individual respondent 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 Specialty Records, Inc., a corporation, and its officers, and Arthur N. Rupe, individually and as an officer of said corporation, and Arthur N. Rupe, as a general partner trading as Specialty Record Sales Co., a limited partnership, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 28th day of July 1960, 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

THORNDIKE MILLS, INC., ET AL.

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

Docket 7726. Complaint, Jan. 6, 1960—Decision, Aug. 5, 1960

Consent order requiring a manufacturer of rugs and floor coverings in Thorndike, Mass., to cease misrepresenting the fiber content and quality of its products by such practices as labeling rayon rugs as "100% Viscose Face Wool Blend Filler", and by overstating the wool content in mixed fiber rugs on price lists, invoices, and labels.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Thorndike Mills, Inc., a corporation, and Gabriel M. Garabedian, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Thorndike Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located in the City of Thorndike, State of Massachusetts. Respondent Gabriel M. Garabedian is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices as hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in manufacturing, advertising, offering for sale, sale and distribution of rugs and floor coverings to distributors and jobbers and to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped 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, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of rugs and floor coverings of the same general kind and nature as that sold by respondents.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase of their rugs and floor coverings, respondents have made certain statements with respect to the fiber content of said rugs and floor coverings by means of labels attached thereto and on price lists and other sales literature and on invoices. Typical and among such representations, but not limited thereto, are the following:

1. Pattern 603-A:

On labels: "Contents: 100% Viscose Face Wool Blend Filler".

2. Pattern 700:

On price lists: "Made of Wool Blend Approx. 60%Wool—40% Viscose".

On invoices: "Thornglo Wool Braided Rug".

On labels: "Contents: Approx. 60% Wool—40% Viscose—Wool Blend Filler".

3. Pattern 1700:

On price lists: "Made of New Wool Fabric Reinforced with Wool Blend Felt".

On labels: "Made of New Wool Fabric—Reinforced With Wool Blend Felt".

4. Pattern 500:

On price lists: "Made of 60% Reprocessed Wool and 40% Viscose".

On labels: "Contents: Approx. 60% Reprocessed Wool—30% Viscose—10% Nylon—Wool Blend Filler".

PAR. 6. Through the use of the aforesaid statements, and others of the same import not herein set forth, respondents represent, directly or indirectly:

1. Through the use of the term Viscose that the covering or face of Pattern 603–A is composed of a fiber other than rayon.

2. That the filler of each of the aforesaid rugs is composed entirely of wool.

3. That the wearing surface of Pattern 700 is composed of 60% Wool and 40% of some fiber other than rayon.

4. That the wearing surface of Pattern 1700 is composed entirely of wool.

5. That the wearing surface of Pattern 500 is composed of 60% reprocessed wool, 30% viscose, 10% nylon.

PAR. 7. Said statements and representations were and are false, misleading and deceptive. In truth and in fact:

1. The covering or face of Pattern 603–A is composed entirely of rayon.

2. The fillers of each of the foregoing rugs is not composed entirely of wool but is composed of substantial quantities of acetate, rayon, cotton and other miscellaneous fibers. Furthermore, said fillers contain substantial amounts of reprocessed and reused wool which fact is not revealed on said label.

3. The wearing surface of Pattern 700 contains substantially less than 60% wool and substantially more than 40% rayon. Furthermore, the label implies that the entire rug is composed of 60% wool and 40% rayon. The filler is composed of substantial quantities of reused wool, reprocessed wool, acetate, rayon, cotton and miscellaneous other fibers. When the contents of the filler are combined with the contents of the aforesaid covering the label becomes a gross misrepresentation of the fiber content of the rug.

4. The wearing surface of Pattern 1700 is composed of substantially less than 100% wool.

5. The wearing surface of Pattern 500 is composed of substantially less than 60% reprocessed wool and substantially more than 30% viscose.

PAR. 8. Respondents further engage in the practice of setting out the sizes of their various rugs and floor coverings on labels attached thereto. Certain of the aforesaid labels contain the representation "Approximately 9′ x 12′". A large number of the rugs so labeled are substantially less than the stated size. Such rugs are substandard both in length and in width by up to eight inches. Respondents thereby place in the hands of the retailer the means and instrumentality through and by which the purchaser may be misled as to the actual size of the said rugs and floor coverings.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Terral A. Jordan, Esq., for the Commission.

Respondents, for themselves.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on January 6, 1960, issued its complaint herein, charging respondents Thorndike Mills, Inc., a corporation, and Gabriel M. Garabedian, individually and as an officer of said corporation, with having violated the provisions of the Federal Trade Commission Act, and respondents were duly served with process.

On June 13, 1960, 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 attorney supporting the complaint, under date of June 7, 1960, 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 Thorndike Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located in the City of Thorndike, State of Massachusetts. Respondent Gabriel M. Garabedian is an officer of the corporate re-

spondent. His address is the same as that of the corporate respondent.

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

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", this agreement is hereby approved, accepted and ordered filed. The hearing examiner finds from the complaint and the aforesaid "Agreement Containing Consent Order To Cease And Desist" and that Commission has jurisdiction of the subject-matter of this proceeding and of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act against 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:

It is ordered, That respondents Thorndike Mills, Inc., a corporation, and its officers, and Gabriel M. Garabedian, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of rugs, floor coverings or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "viscose" to describe the rayon content of said products unless the word "rayon" appears in immediate conjunction therewith in type or lettering of equal size and conspicuousness;

2. Using the term "wool" or any other word or term indicative of wool to designate or describe any product or portion thereof which is not composed wholly of wool, the fiber from the fleece of a sheep or lamb, or hair of the Angora or Cashmere goat, or hair of the camel, alpaca, llama, or vicuna, which has never been reclaimed from any woven or felted product; provided, that in the case of products or portions thereof which are composed in part of wool and in part of other fibers or materials, the term "wool" may be used as descriptive of the wool content of the product or portion thereof if there are used in immediate connection or conjunction therewith, in letters of at least equal size and conspicuousness, words truthfully designating each constituent fiber or material thereof in the order of its predominance by weight; provided further, that if any fiber or material so designated is not present in a quantity of five percentum or more of the total fiber weight of the product, the percentage thereof shall be stated. Nothing herein shall prohibit the use of the terms "reprocessed wool" or "reused wool" when the products or those portions thereof referred to are composed of such fibers;

3. Representing, directly or indirectly, that the percentage amount of a given fiber contained in said products is other than what it is in fact;

4. Representing, directly or indirectly, the size of said products to be of larger dimensions than is the fact;

Provided, however, That nothing herein shall relieve the respondents from their obligation to comply with the requirements of the Textile Fiber Products Identification Act or forbid the respondents from labeling and otherwise offering products subject to that Act in the manner prescribed thereby and the rules and regulations promulgated thereunder by the Commission.

The terms "reprocessed wool" and "reused wool", as herein used, are to be defined as in § 2 (c) and (d) of the Wool Products Labeling Act.

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 5th day of August 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

RAYMOND SCHMIDT TRADING AS FREE ENTERPRISE ASSOCIATES

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

Docket 7854. Complaint, Mar. 31, 1960—Decision, Aug. 5, 1960

Consent order requiring an individual in Brooklyn, N.Y., to cease misrepresenting his services in obtaining loans or financial assistance for customers, as in the order below indicated.

COMPLAINT

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

PARAGRAPH 1. Respondent Raymond Schmidt is an individual, trading and doing business as Free Enterprise Associates, with his office and principal place of business located at 817 51st Street, in the City of Brooklyn, N.Y.

PAR. 2. Respondent is now, and for more than two years last past has been, engaged in the business of soliciting fees for services to be rendered in connection with obtaining loans for or financing businessmen or others. In connection therewith, respondent has been and is transmitting and receiving through the United States mail advertising matter, pamphlets, circulars, letters, contracts, checks, money orders and other written instruments which are sent and received between respondent's place of business in the State of New York and persons, firms and corporations located in various other States of the United States, and thereby has engaged in extensive commercial intercourse in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The volume of the aforesaid business conducted by respondent has been, and is, substantial.

PAR. 3. In the course and conduct of his business, respondent, through the use of circulars, form letters and other written instruments circulated in the various States of the United States and through oral representations and statements, all for the purpose of obtaining contracts and agreements for his services in obtaining loans or financial assistance for businessmen and collecting substantial sums of money as fees therefor, has represented, directly and by implication, to persons who desired to obtain loans or financial assistance, that:

1. Respondent will obtain loans or financial assistance within a short period of time for those paying his fees.

2. Respondent will continue his efforts to secure a loan or financial assistance until told by his customer to stop.

3. Respondent has buyers for large, established business enterprises that are for sale.

4. The fee paid respondent is for required travel expenses to contact his sources of financing.

5. Respondent has nationwide facilities for raising funds.

6. Respondent is associated with or has close connection with underwriters, brokers, investment banking firms, securities dealers and other sources of financing, and, thus, shopping for funds is avoided.

7. Respondent has completed the financing of every deal he has undertaken, with the exception of one transaction.

8. It is easy for respondent to obtain large amounts of money for his customers.

9. Respondent maintains six divisions handling financial contacts.

10. For the fee paid, respondent will set the buyer up in business, obtain financing, and furnish the "know how" for the business.

PAR. 4. The aforesaid statements and representations were, and are, false, misleading and deceptive. In truth and in fact:

1. Respondent does not obtain loans or financial assistance for his customers within a short period of time, and in most instances does not obtain any financing.

2. Respondent does not continue his efforts to obtain financial assistance for his customers until told to stop.

3. Respondent does not have available buyers who are ready, willing and able to purchase businesses offered for sale through him.

4. The fee collected by respondent is not for travel expenses but, in most instances, is devoted to his own use.

5. Respondent does not have nationwide facilities for raising funds.

6. Respondent is not associated with nor has he close connection with underwriters, brokers, investment banking firms, securities dealers and other sources of financing.

7. Respondent has not secured financing in most or every instance for his customers.

8. It is not easy for respondent to obtain large amounts of money for his customers and in most instances he has failed to obtain any financing for them.

9. Respondent does not maintain any divisions in his business for handling financial contracts, or otherwise, but operates a one man business.

10. Respondent has not set any of his customers up in business, nor has he obtained financial or other assistance for them.

PAR. 5. The use by respondent of the aforesaid acts and practices, in connection with the conduct of his aforesaid business, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the public and to induce many owners of property, because of said false, deceptive and misleading representations, to enter into contracts respecting the obtaining of loans or financial assistance and to pay over substantial sums of money to respondent in connection therewith.

PAR. 6. The acts and practices of respondent, as alleged herein, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. John W. Brookfield, Jr., for the Commission.

Mr. Benjamin Lichterman, of Brooklyn, N.Y., for respondent.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on March 31, 1960 charging him with having violated the Federal Trade Commission Act in the sale of his services in obtaining loans or financial assistance for businessmen or others.

An agreement has now been entered into by respondent, his attorney and counsel supporting the complaint which provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the making of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in this proceeding without further notice to the respondent and when entered shall have the same force and effect as if entered after a full hearing, respondent specifically waiving all the rights he may have to challenge or contest the validity of the order; that the order may be altered, modified or set aside in the manner provided for other orders; that the complaint may be used in construing the terms of the order; that the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint; and 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 hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Raymond Schmidt is an individual, trading and doing business as Free Enterprise Associates, with his office and principal place of business located at 817 51st Street, in the City of Brooklyn, State of New York.

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 Raymond Schmidt, an individual, trading as Free Enterprise Associates, or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, and sale of his services in obtaining loans or financial assistance for businessmen or others 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. Respondent will obtain loans or financial assistance for his customers within a short period of time, or in any other period of time that is not in accordance with the fact.

2. Respondent will continue his efforts to obtain loans or financial assistance for his customers until told by them to desist.

3. Respondent has ready buyers for the purchase of his customers' property that is for sale.

4. The fee paid respondent is for required travel expenses.

5. Respondent has nationwide facilities for raising funds for his customers.

6. Respondent is affiliated or connected with underwriters, brokers, investment banking firms, securities dealers, and other sources of financing.

7. Respondent has completed the financing of every deal he has undertaken or obtained loans or financing for any customer that is not in accordance with the fact.

8. Respondent can easily obtain large amounts of money for those paying for his services.

9. Respondent will set the purchaser of his services up in business, obtain financing, or furnish the necessary knowledge or information required to successfully operate the business sought to be established.

10. Respondent's organization consists of six or any number of divisions.

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 5th day of August 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

HAROLD F. REED, JR.

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

Docket 7879. Complaint, May 4, 1960—Decision, Aug. 5, 1960

Consent order requiring an individual in Boston, Mass., to cease violating the Wool Products Labeling Act by failing to label woolen stocks, and by invoicing certain woolen stocks as of higher cashmere content than was the fact.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Harold F. Reed, Jr., an individual, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, Harold F. Reed, Jr., is an individual whose last known address was 311 Summer Street, Boston, Mass.

PAR. 2. For several years prior to December 31, 1958, respondent was an employee of Forte, Dupee, Sawyer Company, wool dealers, serving in the Wool Waste Department. From 1956 to December 31, 1958, respondent's duties, among other things, involved purchasing wool stock for the aforesaid company. Respondent also was the principal planner and executor of the various textile waste blends made up by said Department for resale during that period.

PAR. 3. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since 1956, respondent participated in the manufacture for introduction into commerce, the introduction into commerce, the sale, transportation, distribution, delivery for shipment, and offering for sale in commerce, as "commerce" is defined in said Act, of wool products as "wool products" are defined therein.

PAR. 4. Certain of said wool products, namely, woolen stocks including wool, wool waste and specialty fibers, were misbranded by respondent in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

PAR. 5. The respondent, in the course and conduct of his business, as aforesaid, was in substantial competition in commerce with other individuals and with firms and corporations likewise engaged in the manufacture and sale of wool products, including woolen stocks.

PAR. 6. The acts and practices of respondent, as above set forth, were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. In the course and conduct of his business operations in commerce, as aforesaid, the respondent invoiced certain woolen stocks containing wool and cashmere fibers as "51% cashmere, 49% wool," "51% cashmere," "75% cashmere," and "82% cashmere," whereas, in truth and in fact, said products contained quantities of reprocessed cashmere and substantially less cashmere than was represented.

PAR. 8. The acts and practices set out in Paragraph Seven, have had and now have the tendency and capacity to mislead and deceive the purchasers of said products as to the true fiber content thereof, and to misbrand products manufactured by them in which said materials were used.

PAR. 9. The acts and practices of respondent set out in paragraph 7 were all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DeWitt Puckett, Esq., for the Commission.

Withington, *Cross*, *Park & McCann*, by *Charles C. Worth*, Esq., Boston, Mass., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on May 4, 1960, charging him with having violated the Wool Products Labeling Act of 1939, the rules and regulations issued thereunder, and the Federal Trade Commission Act, by misbranding and falsely invoicing certain of his woolen stocks, including wool, wool waste and specialty fibers. Respondent appeared by counsel and entered into an agreement, dated June 1, 1960, containing a consent order to cease and desist, disposing of all the issues in this proceeding without further hearings, which agreement has been duly approved by the Director, Associate Director and Assistant Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with § 3.25 of the Rules of Practice of the Commission.

Respondent, pursuant to the aforesaid agreement, has admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondent waives all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

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

1. Respondent Harold F. Reed, Jr., is an individual whose principal place of business was located at 311 Summer Street, in the City of Boston, State of Massachusetts. His present location is 113 Country Way, Needham, Mass.

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 Wool Products Labeling Act of 1939 and the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondent Harold F. Reed, Jr., an individual, his agents, representatives 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 waste 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 failing to affix labels to such products showing each element of information required to be disclosed by § 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondent Harold F. Reed, Jr., an individual, his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of wool waste or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the constituent fibers of which his products are composed, or the percentages or amounts thereof, on invoices, shipping memoranda or in any other manner.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 5th day of August 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

GIFT PRODUCTS, INC., ET AL.

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

Docket 7025. Complaint Jan. 10, 1958—Decision, Aug. 8, 1960

Order requiring a Chicago distributor of various articles of merchandise to cease supplying push cards to others for use in distributing its merchandise by games of chance, and itself selling merchandise by such means.

Mr. William A. Somers for the Commission.

Mr. Horace J. Donnelly, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Respondents are charged with having violated the Federal Trade Commission Act in connection with the sale and distribution of merchandise by means of pushcards involving a game of chance, gift enterprise or lottery scheme; it is also charged that by furnishing to others such pushcards, accompanied by order blanks, instructions and other printed matter, respondents have placed in their hands the means of conducting lotteries and games of chance in the sale of merchandise, contrary to an established public policy of the United States Government.

The respondents have denied generally the allegations of the complaint, and have alleged "as separate and additional affirmative defense" that (1) the complaint fails to state a cause of action; (2) the Federal Trade Commission lacks jurisdiction in that intrastate transactions only are involved; (3) the acts and practices complained of are not unfair acts and practices and do not violate any public policy of the United States Government; and (4) the statute as sought to be interpreted is unconstitutional and void and an unwarranted delegation of power, and impinges upon the right of due process.

After the case-in-chief in support of the allegations of the complaint was rested, counsel for the respondents stated that respondents did not desire to present further evidence and the taking of evidence in this proceeding was closed. Thereafter various motions were filed on behalf of respondents, all of which have been disposed of excepting a motion to strike certain exhibits and a motion to dismiss which was accompanied by a "Memorandum of Points and Authorities". Counsel supporting the complaint filed answer to these motions, to which reply was made on behalf of the respondents. Proposed findings and conclusions were submitted by counsel supporting the complaint; a request by defense counsel was granted that paragraphs 1 and 2 of his motion to dismiss and the supporting memorandum be accepted in lieu of formal proposals. Insofar as said proposed findings and conclusions are accepted, they have been embodied in the initial decision. Those not so embodied are hereby rejected.

Upon the basis of the entire record, the following findings of fact are made, conclusions drawn and order issued.

1. Respondent Gift Products, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with offices and places of business located at 210 South Clinton Street and 555 West Adams Street, Chicago, Ill. Respondent Joseph Freeman is president of respondent corporation and directs and controls its policies, acts and practices; his home office is at 5451 North Menard Street, Chicago, Ill.; he has an office at 210 South Clinton Street, Chicago, Ill. The literature and return envelopes used by respondents bear the address, 555 West Adams Street, Chicago 6, Ill.

2. Respondents were at the time of issuance of the complaint, and for some time prior thereto had been engaged in the sale and distribution of various items of merchandise, including radios, pens, clocks, watches, knives, electric frying pans, mixers, razors and other

products, some of which were transported, or caused to be transported by respondents in interstate commerce. For more than two years a substantial course of business in commerce has been carried on by respondents, mostly by correspondence. During one three-months' period—September, October and November, 1957—the record shows that 24 orders were given on Gift Products stationery over the signature of Joseph Freeman (or J. Freeman) directing Capitol Mailers, 555 West Adams Street, Chicago, Ill., to mail a total of approximately 840,000 letters, each containing a circular describing a product, a pushcard, an order referring thereto, and a Gift Products return envelope addressed to 555 West Adams Street, Chicago. There is no reason to believe that these activities have been discontinued.

3. Typical of Gift Products' mailing orders are the following:

Commission's exhibit	Dated	For a mailing—
17-A	9/13/57	"of 74,000 names * * * for our $32.95 Stantex Radio mailing";
17-B	9/18/57	"of 102,000 names * * * for our $24.95 Georgian Clock & Lamp set mailing"; Permit No. 2035;
17-D	9/18/57	"of 15,500 names * * * for our $32.95 Stantex Radio mailing"; Permit No. 2035;
17-E	9/18/57	"of 50,000 names * * * for our $7.95 Bridal Doll Lamp mailing"; Permit No. 2035;
17-F	9/23/57	"of 72,000 names * * * for our $12.95 Honey Bear mailing";
17-G	9/23/57	"of 40,000 names * * * for our $32.95 Stantex Portable Radio mailing";
17-H	9/23/57	"of 45,000 names * * * for our $24.95 Georgian Clock & Lamp set mailing";
17-I	9/30/57	"of 14,000 names * * * for our $32.95 Stantex Portable Radio mailing";
17-J	9/30/57	"of 14,000 names * * * for our $24.95 Georgian Clock & Lamp set mailing";
17-K	9/30/57	"of 10,000 names * * * for our $24.95 Mama & Baby Bear mailing."

In October, 1957, there were similar orders for mailings to 27,000 names, 5,000 names, 18,000 names, 103,000 names, 50,000 names, 24,500 names, 9,750 names "to go 3d class mail", 9,750 names "*to go first class mail*", 4,000 names ($29.95 card), 4,000 names ($32.95 card), and 9,750 names (Commission's Exhibit 17 L–V). In November, 1957, the record shows three similar orders to send Honey Bear mailings to 147,000 names. These several orders were filled by Capitol Mailers, one of whose coowners stated that during 1957 he did not remember making mailings for any one else who "would insert punchboards in their literature".

4. The names used in these various mailings were obtained from various mailing list brokers. Four of these lists, containing, respectively, 50,000 names, 10,000 names, 100,000 names and 30,000 names, were described as containing the names of persons of whom "the greatest majority", "more than 60%", "60% or more" and "more than 90%" had addresses outside the State of Illinois. A coowner of Capitol Mailers testified that prior to mailing "we have a 48-State

separation * * * we get a mixed list of 48 states. We sort it that way." While there is no evidence of a sale to any of the persons to whom these particular mailings were sent, it is inconceivable that so many letters were mailed without producing some substantial returns for respondents. There is in the record testimony of witnesses who had received, in the mailboxes at their residences outside the State of Illinois, promotional materials, including pushcards, accompanying circulars and return envelopes, identical to some that were mailed pursuant to the orders above described.

5. The hearings in this proceeding were held between April 18, 1958, and August 6, 1958, and numerous motions and other pleadings and documents have been filed on behalf of respondents up to May 10, 1960. At no time has there been any evidence or suggestion that the respondents have ceased these business activities; hence it is normal and proper to assume that they are still being continued and are profitable. However, no conclusions are drawn from these assumptions, and the decision herein is not based thereon.

6. Samples of pushcards and literature which were contained in respondents' mailings and which had been received by the persons who testified are in the record as exhibits. For example, Commission's Exhibit 9A is a leaflet describing a "Giant 2-foot Honey Bear"; Commission's Exhibit 9B is a respondents' order blank for two musical Honey Bears and two retractable ballpoint pens—it provides for a "free additional valuable surprise gift if order is received within 20 days"; Commission's Exhibit 9C is a Honey Bear pushcard. On the pushcard is a centrally located seal bearing the legend "Do not remove seal until entire card is sold"; around the edge are 37 perforated discs which can be pushed out by purchasers who pay for the privilege of punching according to the printed scale, which is: "No. 1 pays 1¢ No. 6 pays 6¢ No. 14 pays 14¢ No. 19 pays 19¢ No. 22 pays 22¢ No. 24 pays 24¢. All others pay 39¢. None higher." "No's 1 and 24 receive a beautiful Ball Point retractable pen", according to the legend. Each of the 37 discs contains a name, and these 37 names are printed on the back of the card so that the purchaser of a punch or punches can enter his own name opposite the appropriate disc name or names. After the sale and removal of all the discs the center seal is removed and a name is then revealed, corresponding to one of the names on the discs. Whoever punched out this disc is the winner of a Honey Bear. The persons who punched numbers 1 and 24 win and receive ballpoint pens, and the vendor of the punches gets the other Honey Bear and a surprise gift, upon remitting $12.95 to respondents within a limited time.

7. On the back of the card is the statement:

This card is given to you absolutely free. If you wish you can use this as a sales card.
It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so.
IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME. TOTAL $12.95.

Other cards contain statements: "Lucky name under seal receives this beautiful Dormeyer Electric Food Mixer" (CX 4B); "superb Shave King Electric Razor" (CX 6B); "Dinette Set" (CX 11B); "Blend King" mixer (CX 15B); or "Dormeyer Electri-Fri Pan" (CX 16A).

8. The sales of respondents' merchandise by means of said pushcards are made and the articles of merchandise are allotted to the participants in the lottery in accordance with the legends or instructions on the various cards. Whether the purchaser of a chance or push receives an article of merchandise or nothing for the amount paid is determined wholly by lot or chance. The principal prize offered has a value substantially greater than the price paid for any one chance or push, and the "lucky" person who receives it gets it for much less than its stated or actual value. Those who are not "lucky" get nothing except the opportunity to participate in the lottery by making a push. The articles of merchandise are thus distributed to the public wholly by lot or chance.

9. The distribution of respondents' free pushcards and other literature is an invitation to or solicitation of those who receive them to engage in a lottery scheme or game of chance and thus to procure merchandise at no cost to themselves. This is only a slight modification of the method of merchandising of those who engage in the *sale* of pushcards and punchboards and, incidental thereto, offer to provide for an additional sum of money the merchandise to be used as premiums or prizes. The respondents' plan definitely supplies to and places in the hands of others the means of conducting lotteries and games of chance in the sale of merchandise. The law applicable to these various schemes was discussed extensively in the Commission's decision in the Matter of *R. B. James*, *et al.*, *trading as Chicago Board Company*, 53 F.T.C. 1119, which was upheld on review by the United States Court of Appeals, Seventh Circuit, February 7, 1958, 253 F. 2d 78; rehearing denied 3/31/58; *cert. denied* 358 U.S. 821; *rehearing denied*, 358 U.S. 896.

10. The Commission has held that the distribution in commerce of devices which aid and encourage merchandising by gambling is contrary to the interest of the public. The United States Court of

Appeals for the Eighth Circuit, *Zitzerman* v. *FTC*, December 18, 1952, 200 F. 2d 519, said, citing numerous cases:

It is now well settled by controlling decisions that the sale of goods by a plan or method which involves the use of a game of chance, gift enterprise, or lottery is a practice which is contrary to the established policy of the Government of the United States and violative of the Federal Trade Commission Act. It is equally well established that selling in interstate commerce the means or instrumentalities by which merchandise can or may be sold by games of chance, gift enterprise or lottery is an unfair method of competition. Placing in the hands of others the means of engaging in such acts or practices is contrary to the public policy and the public interest.

11. The United States Court of Appeals for the Seventh Circuit, in *Modernistic Candies, Inc., et al.* v. *FTC*, 145 F. 2d 454, November 15, 1954, said:

It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and deliberately aid and abet this practice * * * (S & D 1945–1948, p. 291).

12. The law is not equivocal or uncertain. Respondents cannot be said to have distributed their pushcards on such a widespread scale as is indicated by their voluminous mailings, unintentionally or without design. They have sold their own merchandise in commerce by the use of pushcards; they have distributed pushcards in commerce and thus placed in the hands of others the means to engage in the practice of selling merchandise by lottery, game of chance or gift enterprise, all of which is contrary to public policy. The respondents are thus guilty of having engaged in unfair acts and practices in commerce in violation of the Federal Trade Commission Act. The allegations of the complaint have been established by substantial, reliable, probative evidence. The Federal Trade Commission has jurisdiction, and the proceeding is in the public interest.

13. There remain to be disposed of the two pending motions. The request to strike certain exhibits is supported in respondents' memorandum by the argument that there is no evidence of record establishing that respondents are engaged in interstate commerce and that certain exhibits had never been in the possession of the witness, Mrs. Petroff, of Gary, Ind., who testified particularly concerning Commission's Exhibits 2D and 2E that she had received an order

blank like Commission's Exhibit 2D and a return envelope like Commission's Exhibit 2E; that she had received a pushcard through the mail, which she sold; that afterward she sent the money to the Gift Products Company and received in return two portable radios, one of which she kept and one she gave to the person who won. She said that she received "Two ballpoint pens and a bunch of literature". The radios she thought were "Sanotex or Sanitex, something like that". She testified also that she had sold other cards and received other merchandise from Gift Products Company. There was other evidence relating to the various exhibits to which the motion to dismiss pertains which convinced the hearing examiner that the exhibits which were admitted emanated from respondents, were relevant to the proceeding and therefore admissible in evidence. Their materiality and weight were not determined by their admission.

14. The memorandum also refers to the testimony of other witnesses and recites some comments made by the hearing examiner during the course of the proceeding relative to their statements that certain proposed exhibits had been found in their mailboxes. The fact, however, that such exhibits had been found in mailboxes does not constitute proof that such exhibits had been placed there by a mailman, by a messenger, or by a delivery-boy. The conclusion that the respondents were or had been engaged in interstate commerce is based on other facts. The statements and incidents mentioned do not warrant the striking of the exhibits referred to in respondents' motion, nor do they impinge upon or in any manner affect the rulings made in the record as to the admission of exhibits. Nothing has been presented in respondents' motion to strike which was not given consideration at the time the exhibits were received in evidence or has not been carefully reviewed and reconsidered since. The motion of respondents to strike will be denied.

15. One of the grounds for respondents' motion to dismiss is that "Respondents have been deprived of their right to a fair and unbiased adjudication herein by virtue of the fact that at the behest and on the complaint of the Federal Trade Commission, there has been lodged against the individual respondent a criminal information alleging violation of the first paragraph of Section 10 of the Federal Trade Commission Act (15 U.S.C. 50) growing out of the present proceedings". In this proceeding, respondent Joseph Freeman, appearing as a witness pursuant to subpoena, stated his name, address and business, then declined to testify further, saying, "I believe that any testimony I might give might be incriminating and debasing, and therefore decline to testify any further." Again the witness declined to testify "on the ground that it may tend to in-

criminate me, * * * and degrade me". The fact that said respondent refused to testify and was thereafter prosecuted for such refusal does not establish a lack of due process in this proceeding. The hearing examiner did not originate nor participate in the initiation or prosecution of, or have any other connection with, the criminal prosecution of Joseph Freeman. The decision herein is in no way affected by that proceeding. Based upon the findings of fact and the conclusions hereinabove set forth, respondents' motion to dismiss is also denied. Accordingly,

It is ordered, That respondent Gift Products, Inc., a corporation, and its officers, and respondent Joseph Freeman, individually, 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, radios, knives, electric mixers or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushcards or any other devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme;

2. Selling or otherwise disposing of any merchandise in commerce by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That respondents' Motion To Strike Exhibits be, and the same hereby is, denied.

It is further ordered, That respondents' Motion To Dismiss be, and the same hereby is, denied.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision filed on May 31, 1960, and the Commission having determined that said initial decision is appropriate in all respects to dispose of this proceeding:

It is 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 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

OUTDOOR SUPPLY CO., INC.

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

Docket 7482. Complaint, May 6, 1959—Decision, Aug. 9, 1960

Order requiring a manufacturer of outdoor supply equipment in Long Island City, N.Y., to cease misrepresenting the size of its sleeping bags by labels and advertising describing as "cut size 36 x 72", etc., bags the finished size of which was some five inches shorter and three inches narrower than the "cut size".

Mr. Charles W. O'Connell supporting the complaint.
Respondent, *Pro Se.*

SECOND INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

On May 6, 1959 the Commission issued its complaint in this matter charging respondent with using false, misleading and deceptive statements to describe sleeping bags which it made and sold. A letter from Sidney W. Henschel, vice president of respondent, was received and treated as an answer. In this answer it was asserted that the statements charged to be unfair and unlawful were required to be used in labelling under the regulations of the State of California. It was also asserted that many of respondent's competitors used the same descriptive statements.

A hearing was held and the hearing examiner filed his initial decision on September 15, 1959. Thereafter, the Commission remanded the matter to the hearing examiner for the purpose of receiving additional evidence. Additional evidence has now been taken and counsel supporting the complaint has filed additional proposed findings of fact and order which are adopted herein. An official of respondent who appeared for it has not filed any proposed findings of fact and order.

Upon consideration of the whole record the following findings as to the facts are made.

1. Respondent, Outdoor Supply, Inc., 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 27-01 Bridge Plaza North, Long Island City, N.Y.

2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, sale and advertising of sleeping bags and various other types of outdoor supply equipment.

3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its said products, when sold,

to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained, a substantial course of trade in its said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Respondent, in connection with the sale of its sleeping bags, has represented the size of such bags by use of the descriptions "cut size 36 x 72″" or "full cut size 36 x 72″" and has prefaced other dimensions with the terms "cut size" and "full cut size". The sizes following such descriptions are invariably larger than the actual size of the bags in question. The finished size is approximately five inches shorter than the "cut size" and approximately three inches narrower than the "cut size".

5. Bags carrying size descriptions as set out above are placed in the hands of retailers by respondent.

6. In the course and conduct of its business at all times mentioned herein, respondent has been engaged in substantial competition in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondent.

7. Respondent by use of labels and advertising carrying the description "cut size" or "full cut size", has represented the size of their sleeping bags through the instrumentality of having such labels and advertising placed in the hands of retailers who deal directly with the public.

8. Respondent's practice of marking sleeping bags so as to show the cut sizes thereof has the tendency and capacity to mislead the public into believing that such dimensions are the actual dimensions of the finished product.

9. Respondent's advertising and labeling of the "cut sizes" of its sleeping bags instead of their actual or finished sizes has a tendency to lead to the purchase of substantial quantities of these products and may result in a diversion of business from competitors who clearly disclose the actual sizes of their sleeping bags.

10. It appears that bedding regulations of at least one state require labels of sleeping bags to show the cut size of the material forming the outer layer of the bag. Apparently this requirement was considered to be reasonably informative and this assumption and the assumption that it is commonplace in the industry to advertise and label the cut size rather than the finished or actual size have been considered in arriving at the conclusion that such repre-

sentations are half-truths and misleading. See *Royal Oil Corporation, et al.* v. *F.T.C.*, 262 F. 2d 741. The same State also requires that "the size stated on labels of articles of bedding other than comforters and sleeping bags shall be the minimum finished size". (Page 57 of Respondent's Exhibit 2.) The record does not explain why these regulations permitted comforters and sleeping bags to be labeled differently from other bedding articles. It is concluded that in order to prevent purchasers from being misled it is important that the finished size be shown either in addition to, or instead of, the "cut size", if any size is stated.

The conclusion is inescapable that there is an element of deception in the practice of advertising or labeling the cut sizes without stating, with at least equal prominence, the finished size. It is difficult to understand the reason for informing prospective customers for this product of the cut size of the material used in its production. In the matter of size it is the size of the finished product that is of primary importance to the consumer just as it is with articles of wearing apparel. In a sense a sleeping bag is worn and one that is too small is less suitable and more uncomfortable than most articles of apparel. There is no doubt that this practice can cause considerable inconvenience and monetary loss to users and is a deceptive practice. It may be as respondent contends that the practice is widely followed in this industry but there is no reason to believe that the buying public is aware of the significance of the term cut size or of the amount the finished size is reduced from the cut size. This difference will vary depending upon the thickness of the insulation used, tufting and the amount of the outside material folded before sewing. Many buyers of camping equipment are young people or their fathers, neither of whom are notorious for careful buying, and they are more easily misled than are housewives who may be familiar with cutting and sewing fabrics.

It also appears probable that uninformed or careless retail clerks would be likely to state the cut size as the actual or finished size to customers.

Respondent has not falsely represented its product but its practice does have the capacity to mislead or deceive and places in the hands of retailers the means to mislead or deceive. A substantial number of the witnesses were misled and deceived by the terms "cut size" and "full cut size". It is reasonable to assume that the use of these terms in reference to sleeping bags has the tendency and capacity to mislead and deceive purchasers into believing that they are the actual dimensions of the finished products.

CONCLUSION

The acts and practices of the respondent, as hereinabove found, were and are, to the prejudice and injury of respondent's competitors and to the public, and constituted, and now constitute, unfair acts and practices and an unfair method of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Outdoor Supply Co., Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the manufacture, offering for sale, sale or distribution of sleeping bags or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising, labeling or otherwise representing the "cut size" or dimensions of materials used in their construction, unless such representation is accompanied by a description of the finished or actual size, with the latter description being given at least equal prominence;

2. Misrepresenting the size of such products on labels or in any other manner.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on September 16, 1959, having filed an initial decision in this proceeding and the Commission having determined upon its review thereof that the record as then constituted did not support the hearing examiner's conclusions, by order dated October 27, 1959, vacated the initial decision and remanded the matter for the purpose of receiving additional evidence; and

The matter now coming before the Commission upon its review of the hearing examiner's second initial decision, filed June 15, 1960; and

The Commission having considered the entire record and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That the hearing examiner's second initial decision, filed June 15, 1960, shall, on the 9th day of August, 1960, become the decision of the Commission.

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

IN THE MATTER OF

DOLORES ENTERPRISES, INC., ET AL.

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

Docket 7832. Complaint, Mar. 18, 1960—Decision, Aug. 9, 1960

Order requiring a New York City manufacturer of phonograph records to cease giving concealed "payola"—money or other valuable consideration—to disc jockeys of television and radio programs as inducement to broadcast its records frequently and thereby increase sales.

Mr. John T. Walker and *Mr. James H. Kelley* for the Commission.
No appearance for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint, issued March 18, 1960, and served on respondents March 22, 1960, charges that respondents, who are engaged in the manufacture, distribution and sale of phonograph records to independent distributors for resale to retail outlets in various States of the United States, have violated the Federal Trade Commission Act, in that they, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola", i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

The initial hearing, set in the complaint for June 2, 1960, in the Federal Trade Commission Building, Washington, D.C., was duly held. No appearance was made at this hearing by respondents or by anyone else in their behalf. In fact, respondents stated by telegram that they would not appear. Respondents are therefore in default for answer and appearance in this proceeding, and, under § 3.7(b) of the Rules of Practice of the Federal Trade Commission, the hearing examiner is authorized, without further notice to respondents, to find the facts to be as alleged in the complaint, and to enter an initial decision containing such findings, appropriate conclusions and order.

Accordingly, the following findings are made, conclusions reached, and order issued:

1. Respondent Dolores Enterprises, Inc., 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 1674 Broadway, in the city of New York, State of New York. Respondents Dolores Fuller and Irving Spice are, respectively, President and Secretary of said corporate respondent, and formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices herein set out. The address of the individual respondents is the same as that of said corporate respondent.

2. Respondents are now, and for some time last past have been engaged in the manufacture, distribution and sale of phonograph records to independent distributors for resale to retail outlets in various States of the United States. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the records they manufacture, sell and distribute, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. Respondents are now, and at all times mentioned herein have been, in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of phonograph records. They have, alone or with certain unnamed record distributors, negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines.

4. After World War II, when television and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry, with a sales volume of approximately $400,000,000 in 1958.

5. Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as six to ten times a day, substantially increase the sales of those records so "exposed". Some

record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and television programs.

6. "Payola", among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records in which the payer has a financial interest. Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

7. In the course and conduct of their business in commerce during the last several years, the respondents have thus engaged in unfair and deceptive acts and practices and unfair methods of competition. Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

8. "Payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selections of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they otherwise might not have purchased and, also, to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records. The respondents, by participating individually or in a joint effort with certain collaborating record distributors, have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them.

9. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public, and to hinder, restrain and suppress competition in the manufacture, sale and distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and substantial injury has thereby been done and may continue to be done to competition in commerce.

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

11. The Commission has jurisdiction over the respondents and over their acts and practices as herein found. This proceeding is in the public interest. Therefore,

It is ordered, That respondent Dolores Enterprises, Inc., a corporation, and its officers, and respondents Dolores Fuller and Irving Spice, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, any such records in which respondents, or any of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

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

August 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Dolores Enterprises, Inc., a corporation, and Dolores Fuller and Irving Spice, 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

HAT CORPORATION OF AMERICA

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

Docket 7422. Complaint, Feb. 26, 1959—Decision, Aug. 11, 1960

Consent order requiring a manufacturer of hats in South Norwalk, Conn.—including the well-known brands "Dobbs", "Knox", "Champ", and "Cavanagh"—with sales in excess of $19,000,000 for the year ending Oct. 31, 1957, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act through use of an annual cumulative quantity discount system which resulted in discriminatory net sales prices as between competing purchasers in the different volume and discount brackets, and which had even greater discriminatory effect in connection with its practice of allowing chain purchasers, including The May Department Stores Company and Allied Stores Corporation, to combine the purchases of their various outlets—many of whose purchases were not sufficient to warrant any discount—so as to qualify for a higher discount.

COMPLAINT

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

PARAGRAPH 1. Respondent, Hat Corporation of America, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office located on Van Zandt Street in the City of South Norwalk, State of Connecticut.

PAR. 2. Respondent is engaged in the manufacture, sale, and distribution of hats. Among the various well known brands of hats manufactured and sold by respondent are Dobbs, Knox, Champ, and Cavanagh. Respondent is a substantial factor in the hat industry, ranking as the second largest company in the industry, with a sales volume in excess of $19,000,000 for the fiscal year ending October 31, 1957. The principal manufacturing facilities of respondent are located in the States of Connecticut, Pennsylvania, and Tennessee.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its hats when sold for use, consumption, or resale to be shipped from its manufacturing plants in the aforesaid States to purchasers thereof located in various other States of the United States and maintains and at all times mentioned herein has maintained a substantial course of trade in said hats in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent in the course and conduct of its business, has discriminated in price between different purchasers of its hats of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the favored purchasers.

PAR. 5. The following example is illustrative of respondent's discriminatory pricing practices.

Respondent now has, and for the past several years has had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the amount of the customer's annual purchases for the fiscal year ending October 31 of each year as follows:

Annual Purchases	*Discount (percent)*
Up to $4,999	0
$5,000 to $9,999	1
$10,000 to $14,999	2
$15,000 to $24,999	3
$25,000 to $99,999	4
Over $100,000	5

Respondent's aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondent's products for competitive resale unable to reach an annual purchase volume of $5000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondent's application of the above discount schedule to chain stores, for example, such as The May Department Stores Company and Allied Stores Corporation.

Respondent allows said chain purchasers to combine the purchase volumes of their various outlets so as to qualify for a higher discount. In many instances the purchase volumes of the different individual stores of the chain are not sufficient to warrant any discount at all, but because of the policy of the respondent in granting the rate of discount on the combined purchase volumes of all the chain outlets, each individual store is allowed this higher discount.

For example, in the fiscal year ending October 31, 1956, total net purchases from respondent by The May Department Stores Company were $165,865.67 on which a rebate of 5% or $8,293.28 was paid. The purchase volume of none of the individual stores in The May chain was large enough to earn the 5% rebate paid. Based on the non-aggregated individual purchase volumes of the eleven participating May stores, the total rebate would have been only $5,239.70 or $3,053.58 less than the amount paid. In the case of Allied Stores Corporation, in the fiscal year ending October 31, 1956, purchases from respondent totaled $63,961.22 and a rebate of $2,558.45 computed at the rate of 4% was paid. Individually eight of the twelve Allied stores participating failed to qualify for any rebate. Of the remaining four stores, two stores each qualified for rebates of but 1% and 2%, respectively.

In many instances respondent's nonchain customers are purchasing individually from respondent in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount or at best a low-bracket discount corresponding with their actual volume of purchases, while the competitive individual chain store is allowed the larger discount not related to its actual individual purchase volume. The products sold under respondent's different product lines are of like grade and quality in its respective product line, and these independent nonchain customers purchase the same grade and quality of merchandise from respondent as do its chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and nonchain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative price discriminations occasioned between the said favored and nonfavored competing customers on commodities of like grade and quality sold by respondent in commerce during the fiscal year ending October 31, 1956, are as follows:

Los Angeles trade area—Knox hats

Customer	Purchase volume	Rebate	Rebate
			Percent
The May Co.	$18,539.37	$926.27	5.00
Mullen & Bluett, Inc.	20,623.00	602.87	2.92
Charlies Clothing and Shoe Store	12,807.00	227.02	1.77
Ricks Store For Men	6,186.00	60.56	0.98
Broadway Hale Stores	4,189.00	None	

Cleveland trade area—Knox hats

Customer	Purchase volume	Rebate	Rebate
			Percent
The May Co.	$14,174.42	$708.72	5.00
Halle Bros. Co.	21,205.00	539.05	2.54
Sterling-Linder-Davis (Allied)	7,720.77	308.83	4.00
Baer Hat Co.	7,264.00	61.36	0.84
Hatlo's Squire Shop	6,465.00	None	

Par. 6. The effect of the discriminations in price by respondent as hereinbefore set forth may be substantially to lessen competition in the lines of commerce in which the purchasers receiving and those denied the benefits of the more favorable prices are engaged, and to injure, destroy or prevent competition between purchasers receiving the benefit of said more favorable prices, and the purchasers from whom such more favorable prices are withheld.

Par. 7. The aforesaid discriminations in price by respondent as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup for the Commission.

Wolf, Block, Schorr & Solis-Cohen, by *Mr. Louis J. Goffman*, of Philadelphia, Pa., for respondent.

Initial Decision by Walter R. Johnson, Hearing Examiner

In the complaint dated February 26, 1959, the respondent is charged with violating the provisions of subsection (a) of section 2 of the Clayton Act, as amended.

On June 1, 1960, the respondent and its attorney entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondent admits 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 respondent 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 respondent that it has 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 being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the 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 following jurisdictional findings are made and the following order issued.

1. Respondent Hat Corporation of America 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 on Van Zandt Street in the City of South Norwalk, State of Connecticut.

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

ORDER

It is ordered, That respondent Hat Corporation of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, of hats or related items, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, diretcly or indirectly, in the price of any such products of like grade and quality:

By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 11th day of August 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

CHARLES GLICKMAN TRADING AS CHARLES GLICKMAN

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

Docket 7809. Complaint, Mar. 10, 1960—Decision, Aug. 11, 1960

Consent order requiring a New York City furrier to cease violating the Fur Products Labeling Act by failing to comply with invoicing provisions.

COMPLAINT

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

PARAGRAPH 1. Charles Glickman is an individual trading as Charles Glickman with his office and principal place of business located at 270 Seventh Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and the sale, advertising and offering for sale, in commerce, and the transportation and distribution in commerce, of fur, as the terms "commerce" and "fur" are defined in the Fur Products Labeling Act.

PAR. 3. Certain fur was falsely and deceptively invoiced by the respondent in that such fur was not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act.

PAR. 4. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and constitute unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

Mr. DeWitt T. Puckett supporting the complaint.
Respondent, *Pro Se.*

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on March 10, 1960 charging him with having violated the Fur Products Labeling Act, the rules and regulations issued thereunder and the Federal Trade Commission Act by falsely and deceptively invoicing certain fur products.

On June 9, 1960 there was submitted to the undersigned hearing examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order.

Under the terms of this agreement, the respondent admits 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 respondent 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 respondent that he has violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all 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 Charles Glickman is an individual trading as Charles Glickman with his office and principal place of business located at 270 Seventh Avenue, New York, N.Y.

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

ORDER

It is ordered, That respondent Charles Glickman, an individual trading as Charles Glickman, or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, offering for sale, transportation or distribution, in commerce, of fur, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur which has been shipped and received in commerce, as "commerce" and "fur" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing fur by failing to furnish to purchasers of fur an invoice showing all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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 did, on the 11th day of August 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

BOND UPHOLSTERING CO., INC., TRADING AS BOND FURNITURE MANUFACTURING CO., ET AL.

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

Docket 7882. Complaint, May 11, 1960—Decision, Aug. 11, 1960

Consent order requiring two associated corporate manufacturers of household furniture, with main offices in Baltimore and Philadelphia and retail outlets in and around those cities and Washington, D.C., to cease such false representations in advertising as that sofas they offered for sale at $129 and $129.50 sold at retail for $300 and purchasers of their furniture would save the difference, and that because of a "Manufacturers' Close-Out", a particular line of sofas could be bought at the manufacturers' wholesale price.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bond Upholstering Co. Inc., a corporation, trading as Bond Furniture Manufacturing Co., and Bond Furniture Manufacturing Company, Inc., a corporation, and Melvin Weisberg and Seymour S. Weisberg, individually and as officers of each of said corporations, and Herbert Kaplan and Anthony Trifilletti, individually and as officers of said Bond Furniture Manufacturing Company, Inc., hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bond Upholstering Co. Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 431 North Colvin Street, Baltimore, Md. Bond Upholstering Co. Inc. also trades and does business under the name of Bond Furniture Manufacturing Co.

Respondent Bond Furniture Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 235 Chestnut Street, in the City of Philadelphia, State of Pennsylvania.

Respondents Melvin Weisberg and Seymour S. Weisberg, are individuals and are the sole officers and stockholders of the aforesaid Bond Upholstering Co. Inc. Their principal office and place of business is the same as that of the said Bond Upholstering Co. Inc.

Respondents Melvin Weisberg and Seymour S. Weisberg in addition to their afforesaid individual and corporate capacities, are also officers of and the owners of a substantial portion of the stock of the respondent Bond Furniture Manufacturing Company, Inc. In their official capacity as officers and stockholders of the said Bond Furniture Manufacturing Company, Inc., their principal office and place of business is the same as that of the said Bond Furniture Manufacturing Company, Inc.

Respondents Herbert Kaplan and Anthony Trifilletti are officers of the said Bond Furniture Manufacturing Company, Inc., with their principal office and place of business being the same as that of the said Bond Furniture Manufacturing Company, Inc.

The said individual respondents in their aforesaid respective corporate capacities, formulate, direct and control the acts and practices of each of the said corporate respondents.

PAR. 2. The respondents are now and for some time last past have been engaged in the manufacturing, advertising, offering for sale, sale and distribution of household furniture to distributors and jobbers, to retailers for resale to the public, and to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Maryland to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondents furthermore advertise, offer for sale and sell said products at retail to the ultimate consumer from retail outlets operated by them within the confines of the District of Columbia. Such acts and practices thereby constituting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Said household furniture is manufactured by respondent Bond Upholstering Co. Inc. at its plant in Baltimore, Maryland. Said household furniture is sold to distributors and jobbers and to retailers for resale to the public.

Respondents also maintain a number of retail outlets in and around Washington, D.C., Baltimore, Md. and Philadelphia, Pa., and in the States adjoining said cities wherein said products are offered for sale and sold at retail to the ultimate consumer. For the most part purchasers inspect display samples of said household furniture and place orders therefor. The said orders are filled from respondents' said plant located in Baltimore, Md. Business is transacted and advertisements are disseminated under the names of each of the corporate respondents and under the trade name of Bond Furniture Manufacturing Co.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the sale of their said furniture, respondents have made numerous statements in advertising with respect to the price of the furniture, manufacturer's close out of furniture, savings, status of respondents' business operations and numerous other statements and representations.

Typical and illustrative of the foregoing are the following:

FACTORY-TO-CONSUMER This is the identical sofa we sell to some of the East's leading furniture stores, retailing for $300.00 . . . The Kimball . . . $129 . . . we can save you the complete retail markup.

No Middleman! *Buy Factory Direct!* . . . Kimball . . . Sectional Sofas. Compare at $300. $129.50. All three pieces . . . You can avoid paying the complete retail markup . . . Buy directly from the maker and put the difference in your pocket.

Manufacturers' Close-Out . . . Foam Rubber Sofas Made of Fine Fabrics Left Over From Large Furniture-Store Purchases . . . Buy Direct From Factory $129.50 Complete . . . you can buy at manufacturers' actual wholesale price . . . Buy right at the factory show room and put the difference in your pocket.

PAR. 6. Through the use of the aforesaid statements and others of similar import and meaning, not specifically hereinabove set out, respondents represent:

(1) That said sofas offered for sale by respondents at $129.00 and $129.50, have an established retail selling price of $300.00

(2) That savings equal to the difference between the aforesaid alleged established retail selling price of $300.00 and respondents selling prices of $129.00 and $129.50, are afforded to purchasers.

(3) Through the use of the expression "Manufacturers' Close-Out" that a particular line, style or kind of sofa is being discontinued or removed from stock and offered at savings from the usual and customary retail price for said sofas in the trade area in which offered.

PAR. 7. Said statements and representations are false, misleading and deceptive. In truth and in fact:

(1) Said sofas offered for sale by respondent at $129.00 and $129.50 do not have an established retail selling price of $300.00. With few, if any, exceptions the retail selling price of said sofas is substantially less than $300.00.

(2) Purchasers of respondents' said furniture are not afforded savings in an amount equal to the difference between respondents retail price of $129.00 or $129.50 and the alleged retail selling price of said furniture of $300.00.

(3) The said furniture represented as offered at "Manufacturers' Close-Out" was not and did not constitute a discontinuance or removal from stock of a particular line, style or kind of sofa and was not offered at savings from the usual and customary retail price in the trade area in which offered.

PAR. 8. In the conduct of this business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of household furniture of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements and representations and practices has had, and now has, the capacity and tendency to mislead the members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken beliefs. As a consequence thereof, substantial trade in commerce has been, and is being unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Terral A. Jordan for the Commission.
Mr. Frank Kaufman, of Baltimore, Md., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on May 11, 1960, charging Respondents with violation of the Federal Trade Commission Act by the use of false, misleading and deceptive statements and representations in their advertising of the household furniture which they manufacture, offer for sale, sell and distribute to distributors and jobbers, to retailers for resale to the public, and to the public.

Thereafter, on June 16, 1960, Respondents, their counsel, and counsel supporting the complaint herein entered into an Agreement Containing Consent Order to Cease and Desist, which was approved by the Director, Associate Director and Assistant Director of the Commission's Bureau of Litigation, and thereafter, on June 21, 1960, submitted to the hearing examiner for consideration.

The agreement identifies Respondent Bond Upholstering Co., Inc., as a Maryland corporation also trading and doing business under the name of Bond Furniture Manufacturing Co., with its office and principal place of business located at 431 North Colvin Street, Baltimore, Md.; Respondent Bond Furniture Manufacturing Company, Inc., as a Pennsylvania corporation, with its office and principal place of business located at 235 Chestnut Street, Philadelphia, Pa.; Respondent Melvin Weisberg and Seymour S. Weisberg as individuals and officers of each of the said corporate respondents, their principal office and place of business as individuals and officers of each corporate respondent being, respectively, the same as that of the said corporate respondent; and Respondents Herbert Kaplan and Anthony Trifilletti as individuals and officers of corporate Respondent Bond Furniture Manufacturing Company, Inc., their principal office and place of business being the same as that of the said corporate respondent.

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

Respondents waive any further procedure before the hearing examiner and the Commission; the making of findings of fact and 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. All parties agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the order to cease and desist, as contained in the agreement, when it shall have become a part of the decision of the Commission, shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; that the complaint herein may be used in construing the terms of said order; 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.

After consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the hearing examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the Agreement Containing Consent Order to Cease and Desist, finds that the Commission has jurisdiction over the respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That Bond Upholstering Co., Inc., a corporation and its officers, trading and doing business under the name of Bond Furniture Manufacturing Co., or trading and doing business under any other name or names, and Bond Furniture Manufacturing Company, Inc., a corporation, and its officers, and Seymour S. Weisberg and Melvin Weisberg, individually and as officers of each of said corporations, and Herbert Kaplan and Anthony Trifilletti, individually and as officers of said Bond Furniture Manufacturing Company, Inc., 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 household furniture or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

(a) That any amount is the usual and regular retail selling price of said merchandise when such amount is in excess of the price at which said merchandise is or has been usually and customarily sold at retail in recent, regular course of business by retailers and dealers regularly selling said merchandise;

(b) That purchasers at retail of said merchandise are afforded savings in an amount greater than the difference between respondents' retail selling price for said merchandise and the usual and customary retail selling price of said merchandise in the normal course of business in respondents' trade area; or that savings in any amount are afforded purchasers of said merchandise unless such is the fact;

(c) Through the use of the term "Manufacturers' Close-Out" or any other words or phrases, that because of some unusual event or manner of business said merchandise is offered for sale at a savings from respondents' usual and customary price of said merchandise in the recent, regular course of respondents' business 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 11th day of August 1960, become the decision of the Commission; and, accordingly:

It is ordered, That Respondents Bond Upholstering Co., Inc., a corporation, trading as Bond Furniture Manufacturing Co., Bond Furniture Manufacturing Company, Inc., a corporation, and Melvin Weisberg and Seymour S. Weisberg, individually and as officers of each of said corporations, and Herbert Kaplan and Anthony Trifilletti, individually and as officers of Bond Furniture Manufacturing Company, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

THE GRAND UNION COMPANY

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

Docket 6973. Complaint, Dec. 5, 1957—Decision, Aug. 12, 1960

Order requiring a 340-store eastern supermarket chain to cease inducing or receiving from a number of its suppliers advertising payments and other benefits—not made available to all its competitors on proportionally equal terms—in connection with the suppliers' advertising on a "combined electric spectacular and animated cartoon display" in the Times Square area of New York City for which some 30 firms each paid Grand Union $1,000 a month for advertising one minute of each 20 of the sign's advertising cycle, receiving in return assurance of in-store promotion of their products, agreement to take on additional items of their lines, or the handling of their products on an exclusive or preferential basis.

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

Sullivan & Cromwell, by *Mr. John F. Dooling, Jr.*, and *Mr. Frederick A. Terry, Jr.*, of New York, N.Y., for respondent.

Initial Decision of John Lewis, Hearing Examiner

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on December 5, 1957, charging it with having violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45). A copy of said complaint with notice of hearing was duly served upon respondent. Said complaint charges respondent with having knowingly induced many of its suppliers to make payments to or for its benefit as compensation or in consideration for services and facilities furnished by or through it, in connection with the sale of the products of such suppliers. It is alleged that such payments were not made available by the suppliers on proportionally equal terms to all their other customers competing with Grand Union. As an example, the complaint cites the inducing of payments by various suppliers for participation in an illuminated "spectacular" advertising sign leased to respondent by Douglas Leigh, Inc. (an advertising agency), which resulted in respondent's receiving advertising on the sign, as well as cash and valuable advertising in other media in exchange for time to which it was entitled on the sign. It is alleged that the suppliers, in addition to receiving advertising on the spectacular sign as a result of such payments, received additional services and facilities furnished by or through Grand Union in consideration of their participation in the sign, including special in-store promotional displays and an agreement in certain instances to exclude from respondent's stores certain products competing with those of the participating advertisers. Following service of the complaint upon it, respondent appeared by counsel and filed answer to such complaint denying, in substance, the violations charged.

Following the holding of a pretrial conference on February 3, 1958, and a series of postponements to enable counsel for the parties to negotiate a stipulation covering the material facts in the proceeding, a hearing was held on April 29, 1958, in Washington, D.C. At said hearing a stipulation of facts covering certain of the facts in this proceeding was spread upon the record, in lieu of the calling of witnesses, and a number of documentary exhibits were offered, subject to objection by respondent as to the receipt of several documents on grounds of relevancy and materiality. In lieu of further hearings to receive testimony with respect to other facts at issue, a Supplemental Stipulation of Facts, dated July 14, 1958, was entered into between counsel, which stipulation was made a part of the record herein by order of the undersigned hearing examiner dated July 18, 1958.

Pursuant to leave granted, proposed findings of fact, together with supporting briefs or memoranda, were thereafter filed by counsel for both sides. Counsel were also permitted to file replies to the proposals and briefs filed by opposing counsel. Thereafter, pursuant to request therefor, oral argument was had on January 8, 1959, in Washington, D.C., with respect to certain of the issues involved. The examiner has carefully reviewed and considered the proposed findings and briefs, the replies thereto and the oral argument of counsel. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. The Grand Union Company (hereinafter referred to as "Grand Union") is a corporation organized, existing and doing business under the laws of the State of Delaware, and has its headquarters at 100 Broadway, East Paterson, N.J. Grand Union is and for many years has been engaged in operating a chain of retail grocery stores and supermarkets selling a great variety of edible and nonedible household products. It has approximately 340 stores (including supermarkets) which are operated through five divisions located in Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania and other eastern States. It also owns all of the stock of Carroll's, Limited, which operates stores in Canada, and Square Deal Markets, Inc., owning stores in Washington, D.C., Maryland and Virginia. The gross sales volume of Grand Union and subsidiaries for the fiscal year ending March 3, 1956, was $283,003,166.

2. Grand Union purchases for resale a variety of products, including food, grocery, dairy, and nonedible household products, from a large number of manufacturers, suppliers and handlers of such

products. Such suppliers are located throughout the United States and a large part of the products are, under the terms of purchase, shipped by the suppliers to Grand Union stores or Grand Union warehouses located in states other than those from which the supplier shipped the products. Grand Union maintains warehouses in the State of New Jersey and ships goods of the categories identified above from such warehouses into the State of New York for ultimate sale in retail stores to consumers. Grand Union has purchased such products, including those transported across State lines, for resale at retail to customers of Grand Union stores. Grand Union's purchases of these products, including its purchases of products shipped to it across State lines, are now, and for many years have been, constant and substantial.

To attract business to its stores Grand Union engages in advertising. It advertises primarily in daily newspapers, a fraction of the circulation of which is in States other than the State of the newspapers' publication. Grand Union also, from time to time, uses local radio and television advertising and, when it does so, uses radio and television stations, the programs of which can be received outside the state from which the broadcasts originate. It is concluded and found that Grand Union is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. Grand Union in conducting its retail stores is now and has been in competition with other corporations, persons, firms and partnerships in the conduct by them of their retail stores. At all times here in issue Grand Union competed with other chain-owned supermarkets and chain-owned smaller retail stores and with single-unit supermarkets and single-unit smaller retail stores in the New York metropolitan area. Such area includes parts of New Jersey and Connecticut adjacent to New York City. Such competition was in the resale in such supermarkets and smaller retail stores of edible and nonedible household products, including products of certain suppliers who participated as advertisers on a Broadway spectacular sign in the manner hereinafter described.

4. Under date of August 6, 1952, Grand Union entered into a contract with Douglas Leigh, Inc., pertaining to the "use and occupancy" of an electric "spectacular" sign located at the northeast corner of 46th Street and Broadway in New York City. Douglas Leigh, Inc. (herein referred to as "Douglas Leigh"), is in the business of designing spectacular signs, locating suitable rental space on which to erect them and contracting with advertisers for the use of such spectacular signs. Many of the spectacular signs erected in the Times Square area of New York City are Douglas Leigh signs. The spectacular sign which was the subject of agreement between Douglas

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Leigh and Grand Union dated August 6, 1952, was erected and operated by Douglas Leigh, which also owns the leasehold on the realty upon which the sign is located.

5. In the agreement of August 6, 1952, Douglas Leigh granted to Grand Union the "use and occupancy of our combined electric spectacular and animated cartoon display located at 1552–1554 Broadway, New York City, otherwise known as northeast corner of 46th Street and Broadway, New York". The display was described as being composed of "three units", an "illuminated roof bulletin", a "north panel on face of building" and a "south panel on face of building, which includes electronic animated cartoon panel". The following are the material portions of the agreement between Douglas Leigh and Grand Union:

a. The consideration to be paid by Grand Union was the sum of $50.00 and the securing of "the agreements and consents of fifteen (15) participating advertisers to use the south panel animated cartoon part of the display, hereinafter referred to as the 'Epok Panel', for their advertising on this display, such advertising to be approved by you".

b. The term of the agreement was stated to be for a period of one year from the date of its full operation (which was estimated to begin within 60 days from the date of the execution of the agreement), with an option on the part of Grand Union to renew the agreement for two additional periods of one year.

c. The agreement was subject to cancellation by Douglas Leigh on or before August 15, 1952, in the event Grand Union was not successful in securing signed contracts from 15 participating advertisers for the use of the Epok panel.

d. The agreement provided that during its term and any extension thereof, Grand Union would "provide at all times the full quota of fifteen (15) participating advertisers for the Epok Panel without cost or expense to Douglas Leigh, Inc."

e. The illuminated roof bulletin was reserved for the advertising of Grand Union for the term of the agreement. The north panel and the Epok panel were to be developed in accordance with the layout and copy plans prepared by Douglas Leigh for the approval of Grand Union.

f. The Epok panel was to be in use for participating advertisers 75 percent of the hours of its operation and the remaining 25 percent was to be reserved for the advertising of Grand Union. During each 20-minute period of operation of the panel, participating advertisers were to have 15 minutes and Grand Union five minutes. Grand Union could use its five minutes for its own individual advertising or could elect to use it to advertise a brand of merchandise in which it had an interest, or could exchange the time allotted to it for radio or television advertising.

g. All design, layout and copy to be used on the entire display were to be submitted for approval of Grand Union and would not be used unless approved in writing by Grand Union. The cost of the entire display was to be borne by Douglas Leigh.

6. As indicated in the agreement, the so-called spectacular sign consisted of three portions. The first, which was referred to as the "illuminated roof bulletin", consisted of a stylized representation of a Grand Union food market similar to a representation used in other Grand Union advertising, and measured 40 feet by 45 feet in its greatest dimension. The illuminated roof bulletin was 10 feet above the other two elements of the sign and was set back 25 feet from, and approximately parallel to, the plane of the south (animated) element. In addition to the replica of a Grand Union market, the roof bulletin contained the illuminated legend, "Save at Grand Union Food Markets". The second element of the sign, referred to as the "north panel", measured 21 feet by 34 feet, and contained a fixed, illuminated legend "Your Dollar Buys More at Your Grand Union Store". The third portion of the sign, which was referred to as the "south panel", measured 31½ feet by 34 feet, on which was the electrically animated cartoon panel measuring 30 feet by 20 feet, which communicated the messages of the participating advertisers. On the upper portion of the south panel, above the animated portion thereof, was a stationary panel bearing the legend "For Grand Values", and below the animated cartoon panel was another panel bearing the illuminated legend "Grand Union Food Markets".

7. Prior to the spectacular sign's going into operation, agreements were entered into between Douglas Leigh and 15 suppliers of Grand Union, which provided for such suppliers' becoming participating advertisers on the spectacular sign. The general form of agreement between Douglas Leigh and the participating advertisers was submitted to Grand Union by Douglas Leigh before such general form was put into use. The agreements were signed in each instance by the participating advertiser and by Douglas Leigh. Grand Union did not sign such agreements, except in one instance in which it was itself a participating advertiser of a product sold in its stores. The form of agreement entered into between Douglas Leigh and the various participating advertisers recited that Grand Union had "leased from Douglas Leigh, Inc., an Electric Spectacular Display located at the northeast corner of 46th Street and Broadway", one part of which it stated was known as the "Epok Panel". The agreement provided for the "use and occupancy of this Epok Panel by and for

Participating Advertisers" in accordance with specified conditions, which were:

a. Each participating advertiser would have one period of one minute's duration in each 20-minute period for its advertising.

b. All copy-messages and cartoons to be exhibited on the panel for participating advertisers were "to be approved in advance of being used by Grand Union and only such copy-messages and/or cartoons approved by Grand Union shall be used on the Epok Panel".

c. The term of the agreement was for one year commencing from the first day of full operation of the display. However, the agreement was "[c]onditioned upon the basis that Grand Union Company will have secured fifteen (15) contracts from participating advertisers for the use of the EPOK Panel * * *". In the event fifteen signed contracts from participating advertisers were not secured by August 15, 1952, Douglas Leigh had the right to cancel any contracts of participating advertisers that may have been signed.

d. For its services rendered under the agreement the participating advertisers agreed to pay Douglas Leigh the sum of $1,000 a month.

8. Prior to the expiration of the agreement between Douglas Leigh and Grand Union, Douglas Leigh advised Grand Union by letter dated August 20, 1953, that the "first year of your existing Grand Union combined spectacular display on the northeast corner of 46th and Broadway expires on December 9, 1953," and proposed that the original contract be renewed for a second year upon the same terms and conditions as the existing contract, except for certain modifications, which Grand Union accepted. The modifications were:

a. Instead of there being fifteen participating advertisers each having one minute of advertising, per 20 minutes, with five minutes being reserved for Grand Union's advertising, there would be twenty participating advertisers, each to have a minute of advertising for each twenty minutes.

b. In lieu of the five minutes of advertising available for Grand Union's use under the original agreement (which it had had the right to use for its own advertising or to trade for television or radio advertising) Grand Union was to receive monetary compensation on the basis of five percent of all monies which Douglas Leigh received as monthly rental from the first fifteen participating advertisers, and all monthly rentals paid by the remaining five advertisers (after deducting Douglas Leigh's commission). The provision entitling Grand Union to a commission of five percent on the monthly rentals paid by the first fifteen advertisers was interpreted by the parties as existing only when there were at least fifteen participating advertisers using the sign.

9. By letter-agreement dated December 13, 1954, the arrangement between Douglas Leigh and Grand Union was renewed for a third year to run from January 1, 1955 through December 31, 1955. The agreement was renewed on the same terms as the original agreement of August 6, 1952, as modified by Douglas Leigh's letter of August 20, 1953. The December 1954 agreement gave Grand Union a further option to renew the arrangement for one year at a time for the next five years, from 1956 through 1960.

10. Following the expiration of the original agreements between Douglas Leigh and the participating advertisers, which were for a period of one year, Douglas Leigh entered into new agreements with participating advertisers for another year beginning approximately January 1, 1954. As in the case of the original agreements between Douglas Leigh and participating advertisers, the revised agreements were likewise submitted to Grand Union by Douglas Leigh before the form was put into use. The form of agreement was signed by each one of the participating advertisers and by Douglas Leigh, and was not signed by Grand Union, except in the one instance in which Grand Union was itself a participating advertiser of a product sold in its stores.

The new agreements signed by the participating advertisers in 1954 were substantially the same as the original agreements entered into with Douglas Leigh. The only change which need be noted is that made necessary by the fact that the basic contract between Douglas Leigh and Grand Union had been modified so as to provide for twenty participating advertisers on the Epok panel, instead of fifteen. The renewal agreement stated that it was "[c]onditioned upon the basis that Grand Union will have secured agreements from twenty (20) participating advertisers for the use of the Epok Panel", and that in the event the twenty signed contracts were not secured from participating advertisers by January 1, 1954, Douglas Leigh would have a right to cancel any existing contracts with participating advertisers.

11. The arrangement between Grand Union and Douglas Leigh, Inc., with respect to the spectacular sign terminated on December 31, 1956 and, on or before that date, all arrangements between participating advertisers and Douglas Leigh, with respect to the spectacular sign expired or were terminated. Neither Grand Union nor any of the participating advertisers has used the spectacular sign since December 31, 1956.

12. During the period that the Broadway spectacular sign was in use, i.e., from December 10, 1952 until December 31, 1956, the fol-

lowing suppliers became participating advertisers for the periods hereinafter indicated:

Advertiser	Product	Date started	Expiration
Phillips Packing Co	Phillips Soups	12/10/52	12/31/55
Foster Canning Co	Snappy Dog Food	12/10/52	12/31/55
Continental Baking Co	Wonder Bread	12/10/52	12/31/55
Clinton Foods, Inc., Snow Crop Marketers Division	Snow Crop Frozen Foods	12/10/52	12/31/54
National Paper Corp	Swanee Paper Products	12/10/52	12/31/56
Buitoni Foods Corp	Buitoni Macaroni	12/10/52	12/31/53
Lewal Industries, Inc	Instant Dip Silver Cleaner	12/10/52	12/31/53
The Glamorene Corp	Glamorene Rug Cleaner	12/10/52	12/31/53
Pal Blades Co	Pal Razors & Blades	12/10/52	11/10/53
Lever Bros. Co., Pepsodent Division	Clorodent Tooth Paste	12/10/52	12/31/53
Holiday Brands Inc	Holiday Instant Coffee	12/10/52	12/31/53
Allen B. Wrisley Co	Wrisley Soaps	12/10/52	12/31/53
H. Fox & Company	Ubet Syrup Flavors	12/10/52	12/31/53
Uddo & Taormina Co	Progresso Foods	12/10/52	12/31/56
Seeman Bros. Co	Nylast Hosiery Cleanser	1/21/53	1/20/54
McCormick & Co	McCormick Vanilla	1/ 1/54	12/31/56
Chock Full O'Nuts Co	Chock Full O'Nuts Coffee	2/23/54	2/22/55
Cott Beverages Inc	Cotts Ginger Ale	3/ 3/54	5/31/56
Silver Skillet Corp	Silver Skillet Foods	3/10/54	3/ 9/55
James R. Barry Co	Priority Tuna	3/15/54	3/14/55
H. & M. Packing Co	Coronet Prune Juice	4/ 8/54	4/ 7/55
Southern Biscuit Co	F.F.V. Crackers	4/23/54	12/31/56
Chun King Sales Inc	Chun King Chow Mein	5/21/54	5/20/56
The Gerber Company	Gerber Baby Meats	7/ 1/54	9/30/55
Kleenway Products Inc	Kleenway Sandwich Bags	7/13/54	7/12/55
Knouse Foods Inc	Lucky Leaf Pie Fillings	10/ 1/54	9/30/56
Judson Dunaway Corp	Vanish Bath Room Cleaner	1/ 1/55	12/31/56
General Mills, Inc., O-Cel-O Division	O-Cel-O Sponges	3/15/55	6/15/56
Seabrook Farms Co	Seabrook Frozen Foods	4/13/55	4/12/56
C. Economou Cheese Corp	Aspro Cheese Salad Dressing	11/ 7/55	11/ 6/56

All of the above advertisers appear to be vendors of products which are sold in grocery chains. While it has not been stipulated whether all of them were suppliers of Grand Union, respondent has admitted in its answer that 28 of its suppliers contracted with Douglas Leigh as participating advertisers on the sign. It may be assumed therefore that all of the above 30 advertisers, with possibly two exceptions, were suppliers of Grand Union.

13. The participating advertisers were not supplied with copies of the basic agreement between Grand Union and Douglas Leigh, dated August 6, 1952, nor with the letter of August 20, 1953, amending such agreement. None of the participating advertisers was advised by Grand Union that Grand Union did not pay to Douglas Leigh an amount commensurate with the relative advertising value of the spectacular sign to Grand Union or that Grand Union had rights with respect to the use of five of the 20-minute cycle provided by the contract of August 6, 1952, or that Grand Union was entitled to receive from Douglas Leigh a return in money as provided by the letter of August 20, 1953.

14. Grand Union interested certain but not all of the participating advertisers in entering into contracts with Douglas Leigh to participate in the sign. Some participating advertisers were interested in

the sign in the first instance by Douglas Leigh and at least one participating advertiser was not solicited either by Douglas Leigh or Grand Union, but approached Grand Union with a merchandising program that included participation in the sign. However, the contracts between the participating advertisers and Douglas Leigh were all made with the knowledge of Grand Union and its approbation. In most instances the desirability of using the spectacular sign was discussed between the prospective participating advertisers and Grand Union before the participating advertisers contracted with Douglas Leigh. In a number of instances, as part of the discussions with Grand Union concerning the prospective participating advertiser's becoming a participant on the spectacular sign, a specific schedule of in-store promotions was arranged with Grand Union to tie in with the participating advertiser's use of the spectacular sign. In some instances the decision of participating advertisers to enter into a contract with Douglas Leigh to participate in the Broadway sign or to renew such participation was based on the specific assurance and agreement of Grand Union that they would receive the benefit of certain in-store promotions. In some instances the decision to participate was based on Grand Union's agreement to take on additional items in the supplier's line or to handle the supplier's products on an exclusive or other preferential basis.

15. Examples of the part played by Grand Union in securing the participation of various of its suppliers on the sign and of the understandings had with them, as reflected in the documentary evidence in the record, are as follows:

a. Judson Dunaway Corporation:

(1) An interoffice memorandum from Grand Union's assistant merchandise manager to its director of merchandising, dated September 13, 1954, contains reference to the following conditions sought by Judson Dunaway as the basis for its agreeing to participate in the Broadway spectacular sign:

> * * * In consideration of the Grand Union Company's stocking six (6) moth preventatives, one air refresher, King Size Vanish (we now stock the regular size), Delete Rust and Stain Remover, and Elf Drain Cleaner, Judson Dunaway would take the sign.
>
> * * * The six moth preventatives would replace six items we now stock in this line under various labels at the present time.
>
> The Bug-a-boo Air Refresher would replace Airwick Air Mist.
>
> Acceptance of the Judson Dunaway proposition would mean the addition of three items to our line (add 10 items and discontinue 7 similar items now stocked).
>
> * * * In consideration of the Judson Dunaway Corporation taking the Broadway Spectacular, they ask that the Grand Union Company stage four feature promotions throughout the year as outlined on the attached sheet.

The record does not contain any documentary evidence indicating whether Grand Union accepted the Judson Dunaway proposal. It has been stipulated, however, that Grand Union did carry certain products competitive with some of the above products of Judson Dunaway, but that Grand Union did not carry during the period of that supplier's participation on the sign moth crystals or rust and stain removers or moth repellant closet hangers directly competitive with Bug-a-boo Moth Crystals, Delete Rust and Stain Remover, and Bug-a-boo Closet Hangers.

(2) Prior to the renewal of Judson Dunaway's participation in the spectacular sign, it had further correspondence with Grand Union indicating the basis upon which it would agree to renew its participation in the sign. In a proposal dated November 30, 1955, Judson Dunaway stated that during the current year: "The 'Broadway Spectacular' promotion was tied-in with the following 'in-store' product features" (referring to four in-store promotions which had been agreed on for 1955), and proposed to renew its participation on the sign for another year on the condition, among others, that it receive certain specified " 'in-store' product features" the following year. In a letter dated December 8, 1955, addressed to Grand Union, Judson Dunaway supplemented its presentation of November 30, by indicating that it had omitted to mention in the latter document, that "we would like to continue with the exclusive arrangement on Bug-a-boo products during 1956. Won't you please make this letter a supplement to that presentation." The December 8 letter also referred to the fact that the company's advertising department had advised it that "we must renew our contract for the Broadway Spectacular within the next couple of weeks", and it requested that Grand Union "advise us of your final decision concerning this promotion by December 16 if possible".

b. Swanee Paper Company:

(1) A memorandum from Frederick Gash, the broker for Swanee to the president of the company, dated November 2, 1953, a copy of which was sent to Grand Union, indicates that in April 1952, Grand Union had discontinued the purchase of Swanee's toilet tissues at several of its branches but that "[a]s a result of your arrangement on the Broadway Sign deal in July of last year" Swanee had been able to sell facial tissues, towels and napkins to one of Grand Union's branchs, and that in 1953 had been able to sell facial tissue and towels to two of the other branches. The letter further indicates that "since you went into the Broadway Sign deal and because of the various merchandising display deals, you have increased your business with this company" by 13,400 cases. Despite this increase,

the letter indicates that the account was "too costly for the amount of business we are doing", but suggests that the solution was to increase the amount of its sales to Grand Union rather than "to cut down on the amount of money appropriated for this account". In a letter to Grand Union's director of sales, enclosing a copy of the above letter, Swanee's broker stated that when the Grand Union official talked to Swanee's president "you will find that he is not so much interested in cutting down the program with Grand Union, as he is in getting more business for the money he has allocated to the account."

(2) By letter dated December 7, 1953, Douglas Leigh advised Grand Union that it had received advice from two participants on the Broadway sign, one of which was Swanee Paper Company, that they "do not intend to renew on the Broadway sign." The letter suggested: "Perhaps you may be successful in securing a reversal of these decisions".

(3) Apparently respondent was successful in securing a reversal of Swanee's decision not to participate in the sign. In a letter dated March 18, 1954, from Douglas Leigh to Grand Union reference was made to Swanee Paper Company as being among those with whom arrangements had been completed for participation in the sign. The letter also contained the query: "Are there any other accounts that you have been working on who will be ready for me to see in the near future?"

(4) An interoffice memorandum from Grand Union's Grocery merchandising manager to its director of merchandising, dated September 8, 1955, indicates that in that year Swanee had again offered resistance to renewal of its participation on the Broadway sign under a contract which would expire in March 1956. The letter contains the statement that: "Swanee advises that, because of pressure from other concerns, they will be unable to renew for another year". The memorandum also contains reference to an offer to Grand Union by a competitor of Swanee to participate on the sign as follows:

Hudson Paper Company is now willing to take the Sign starting in March for one year at a cost of $12,000, providing we stock their toilet tissue. If we accept this proposition, I would ask them to sign up with Douglas Leigh at this time, with their participation starting next March.

(5) A letter from Douglas Leigh to Grand Union dated November 16, 1955, also refers to Swanee's reluctance to renew its participation in the sign which would expire February 14, 1956. The letter refers to the fact that the writer had talked to a representative of Hudson Paper, who had indicated that the latter was willing to enter into a participation on the sign "if, as, and when National

Paper[1] may advise that National will not renew." The letter also inquired if there was anything which Douglas Leigh could do to aid in conversations which Grand Union had had with other suppliers "exploring participation" in the sign.

c. O-Cel-O Division of General Mills:

(1) An interoffice memorandum between Grand Union officials dated December 22, 1954, indicates that the O-Cel-O Division of General Mills had submitted a proposal to participate in the sign project as follows:

> The O'Cello Company is willing to take the Broadway sign at $12,000 and a $2,500 participation in the January, February Sales Drive providing we add their number 25C sponge and discontinue the Du Pont Sponge and the Nylonge and give them five other promotions during the year.

(2) A letter dated January 6, 1955, from O-Cel-O's broker, Frederick Gash, to Grand Union indicates that Grand Union had accepted O-Cel-O's proposal for participation on the Broadway sign on the condition that Grand Union would discontinue the sale of duPont sponges. Respondent did not, however, agree to discontinue the sale of Nylonge sponges, although it agreed to give "serious and sympathetic consideration" to stocking a competitive sponge of O-Cel-O's when it was offered to the trade several months later. The letter contains the following provision with respect to the tie-in between O-Cel-O's agreement to participate on the sign and the affording of in-store promotions by Grand Union:

> * * * The O-Cel-O Company agrees to buy a participation in the Douglas Leigh spectacular sign. We are advised by the Douglas Leigh Sign Company that they have made an arrangement with the Grand Union Company that their participating advertiser will get from the Grand Union Company, what the Grand Union identifies as "five pay-day pay-offs". The "pay-day pay-off" is an obligated mass floor or basket display for one week. These displays will be scheduled periodically throughout the year, and no doubt will be timed to fit into O-Cel-O's merchandising and advertising program.

d. Snow Crop Marketers Division of Clinton Foods, Inc.:

Correspondence between Grand Union and Snow Crop in July and August 1952, indicates that an understanding with respect to the exclusive handling by Grand Union of products advertised on the Broadway sign by participating advertisers was a part of the agreement between Grand Union and at least some of the suppliers who agreed to take a participation on the sign, as follows:

(1) In a letter dated July 3, 1952, from the advertising manager of Grand Union to a representative of Snow Crop, which indicates that the Grand Union representative had discussed participation in

[1] Swanee's former corporate name was National Paper Corporation.

the spectacular sign with the Snow Crop representative, the following statement appears:

> We can use any of your products except the orange juice. The orange juice is eliminated because we are not scheduling any conflicting products and Flamingo has already signed.

(2) Following this, Snow Crop advised Grand Union by letter dated July 29, 1952, that it was not interested in participating in the Broadway spectacular sign. However, the matter was reconsidered after it became apparent that Flamingo was not going to participate in the sign. This appears to be the basis of a letter addressed to Grand Union by Snow Crop dated August 15, 1952, in which it advised Grand Union as follows:

> Confirming my phone conversation with Mr. F. S. Ferry in your office, I have discussed with Mr. Stanley MacArthur of the Doug Leigh Organization the confliction that would arise from the showing of Flamingo Orange Juice and Snow Crop products on the same billboard.
>
> Upon Mr. MacArthur's assurance that Flamingo would remain completely out of the program and that no other Frozen Food or Citrus Concentrate would be represented on the program, we have decided to participate * * *.

(3) A letter from Douglas Leigh to Grand Union dated January 5, 1954, indicates that the former had received advice from Grand Union that "Snow Crop Marketers has agreed to renew their participation on the Broadway sign for a second year."

e. C. Economou Cheese Corporation:

(1) A letter dated October 5, 1955, from the attorney for the above company to Grand Union indicates the following understanding with respect to in-store promotions:

> * * * It is my understanding from you that as part of our renting this sign, we will be entitled to four in-store promotions in each of the Grand Union Stores during the year and also four newspaper advertisements in connection with the promotion of this product. Would you please confirm this to me and further indicate in how many newspapers these four yearly ads are to run * * *.

(2) A reply from Grand Union to the attorney for the above company, dated October 17, 1955, contains the statement that it wished to—

> * * * verify the fact that you will receive in return for participation in the Broadway sign, four in-store promotions during the year, at which times the Salad Dressing will also be featured in our advertising.

16. As a result of the operation of the sign under the terms of the letter of August 20, 1953, which provided that Grand Union would receive five percent of the monthly rentals paid by the first fifteen advertisers and all of the rentals (after deduction of agency commissions) of the remaining five advertisers, Grand Union re-

ceived from Douglas Leigh between July 1954 and February 1955, the sum of $14,633.28.

In addition, Grand Union made certain time and space trades with others, under the provisions of the original agreement which allotted it five minutes of advertising time during every 20-minute cycle. Such trades were made with WCBS-TV, Il Progresso Newspaper, and WRCA-TV. In the case of WCBS-TV and WRCA-TV, Grand Union received, in exchange for the use of parts of the five 1-minute periods to which it was entitled, broadcasting time at "card rates" (standard rates) equivalent to the spectacular sign time, the value of which was computed at the rate of $1,000 for one minute per 20-minute cycle per month. The computed value of the spectacular sign time was approximately $39,000, and Grand Union received at "card rates" approximately $39,000 worth of broadcasting time.

In the case of Il Progresso, an arrangement was made under which Grand Union was to receive, in exchange for use of part of the one-minute periods to which Grand Union was entitled, a credit against the cost of advertising space in Il Progresso, taken at the rate of 30¢ a line. The arrangement was that Il Progresso should receive one minute of the 20-minute cycle, the value of which was computed at the rate of $1,000 a month, and in exchange Grand Union was to receive 1,000 lines of advertising space a week, paying approximately $50.00 a week to Il Progresso to make up for the difference between the values exchanged.

In addition to the cash received by Grand Union and the "trade time" in other media, as described above, Grand Union also received valuable advertising on the spectacular sign. The advertising value of Grand Union's portion of the sign was estimated by Douglas Leigh in letters to Grand Union to be approximately $10,000 per month. While Grand Union has not accepted this estimate, it agrees that the advertising value of the sign was substantial.

17. Although the agreement of August 6, 1952, between Grand Union and Douglas Leigh, estimated that the sign would go into operation within 60 days, and was subject to cancellation by August 15, 1962 if Grand Union did not secure the necessary number of participating advertisers, the sign did not actually go into operation until December 10, 1952. At the time the sign was turned on, representatives of the participating advertisers, the press and others were invited to a ceremonial initiation of the sign, the expense of which was borne equally by Douglas Leigh and Grand Union.

Just before the sign went into service, a press release was issued on November 28, 1952, with the approval of Grand Union, and sent to various newspapers in the New York metropolitan area and to nineteen trade periodicals. The release purported to be a joint statement by Grand Union and Douglas Leigh and referred to the sign as "a new venture in cooperative outdoor advertising * * * to promote Grand Union and fifteen different food store products." The release further stated: "This joint effort with fifteen of our manufacturers is a natural step which follows the success of cooperative radio and television shows * * *."

18. In connection with efforts by Douglas Leigh and Grand Union to sell space on the animated portion of the sign, Douglas Leigh prepared an advertising circular as a sales aid, which it circulated to each participating advertiser and to Grand Union. The advertising circular referred to the sign as "The Grand Union Spectacular" and contained reprints of a number of newspaper articles, some of which referred to the sign as a "Grand Union Sign", or as part of a "new cooperative outdoor advertising program". The circular also contained pictures of the sign in actual operation and showed the animated portion with the products of each of the fifteen participating advertisers displayed thereon. One of the trade papers, an extract of which was contained in the circular, referred to the sign with the legend: "Sky's the Limit in Cooperative Advertising."

19. A copy of the above circular was received by Frederick Gash, broker for a number of participating advertisers on the sign, including Swanee Paper Company and the O-Cel-O Division of General Mills. Frederick Gash on February 11, 1953, addressed a letter to Douglas Leigh stating that he found the circular "objectionable in every respect". The primary basis of the objection was stated to be that the sign "is not a Grand Union sign—it is a Douglas Leigh sign with participating sponsors including Grand Union". The writer objected to the fact that the circular "has now established the sign as a Grand Union Co-op deal and not a straight advertising proposition comparable to NBC's chain lightning or Storecast." The letter further stated that:

> As a result of this stupid publicity every sponsor is now being put on the carpet by Grand Union's competition. And they are right because it has now been made clear as daylight that Grand Union has been given a preference.

The letter referred to the fact that Grand Union "was having trouble getting sponsorship because of the co-op angle" and concluded with the statement that the writer's four sponsors on the sign were "now in jeopardy". A copy of Gash's letter was sent to respondent.

20. Many of the participating advertisers had cooperative advertising and promotional allowance programs which were generally announced to their customers and which were available to such customers. Grand Union did not inquire concerning the advertising or other promotional arrangements or allowances of the participating advertisers with other retailers and was not informed by the partici-

pating advertisers concerning such allowances or arrangements, except in the case of the announced programs of such advertisers. Grand Union believed it was a prevalent practice to deviate from such announced advertising allowance programs. None of the participating advertisers had generally announced terms of sale or announced advertising allowance programs available to all customers that included provision for participation in a spectacular sign, and Grand Union was not informed of any such generally announced programs by said participating advertisers. The judgments of the suppliers concerning the desirability of participating in the spectacular sign program were based, among other things, on the projections of sales and projections of the merchandising value of participating in the program.

21. In general, the arrangements for participation in the spectacular sign by suppliers were not negotiated as uses of any of the announced advertising allowance programs of such suppliers. Except in the case of the Snow Crop Division of Clinton Foods, Inc., the cost of participating in the spectacular sign was not specifically and directly charged against it, or specifically stated to be in substitution for, a standard or regular advertising or promotional allowance stated to be offered by the participating advertiser to all customers alike. In one or more instances, suppliers who were participating advertisers on the sign contemporaneously entered into announced advertising allowance programs with Grand Union distinct from the suppliers' participation in the spectacular sign.

22. So far as Grand Union was informed, none of its suppliers who was a participating advertiser, entered into any other spectacular sign program with any other suppliers in which the spectacular sign carried advertising of a customer of such suppliers competing in the distribution of the suppliers' products with Grand Union.

23. The record contains evidence with respect to the advertising allowance programs of specific suppliers of Grand Union, and with respect to whether it had any knowledge of the nonavailability to other customers of payments made by such suppliers under the Broadway sign program, as follows:

a. O-Cel-O Division of General Mills, Inc.:

(1) During the time it was a participating advertiser the O-Cel-O Division of General Mills, Inc. offered to its retail customers, including those in competition with Grand Union, a cooperative advertising contract under which O-Cel-O agreed to pay for specified advertising or promotional service an amount equal to five percent of the customer's purchase price of O-Cel-O products during the period covered by the contract. Such contracts were initially limited to newspaper advertising but were later amended to cover radio and

television advertising as well. The aforesaid arrangement was the only cooperative advertising program of O-Cel-O generally announced and available to all its customers. In 1955 Grand Union received from, or had billed to, O-Cel-O $881.30 under such contracts.

(2) The amount paid to Grand Union under O-Cel-O's cooperative advertising contract was distinct from amounts paid by O-Cel-O to Douglas Leigh for participating in the spectacular sign. The latter amounts were not charged against or otherwise directly related to the amount payable under O-Cel-O's cooperative advertising contract.

(3) Except for the five percent cooperative advertising allowance described above, O-Cel-O did not pay or offer to pay or contract to pay to certain of its customers conducting retail stores in competition with Grand Union, anything of value to or for the benefit of such customers as compensation or in consideration for any services or facilities furnished by or through such customers, in connection with the processing, handling, sale, or offering for sale of any O-Cel-O products.

(4) As has been previously indicated in paragraph 15, one of the conditions of O-Cel-O's agreement to participate in the Broadway sign was an agreement on the part of Grand Union to discontinue the purchase of duPont sponges, O-Cel-O had also sought to induce Grand Union to cease carrying the Nylonge line of sponges, but Grand Union had refused to accede to this request and the arrangement was nevertheless concluded. In a letter dated January 6, 1955, addressed to Grand Union, O-Cel-O's broker made the following statement:

> Frankly, the O-Cel-O people were considerably let down when they heard that you would continue to stock Nylonge and it required some strong selling on my part to approve the deal. They feel that they have gone on the line for $14,500.00 in the next twelve months. *The whole idea of the deal was unprecedented* and, when one thinks about it, is is very possible that Grand Union did not make a gross profit all of last year of much more than $14,500.00 on their entire sponge business. However, I assured my principals that my own experience with the Grand Union Company has been so excellent these past years that they would not regret going into this *unprecedented kind of a deal.* [Emphasis supplied.]

(5) General Mills' O-Cel-O Division participated in the sign from March 15, 1955, to June 14, 1956, and from September 15, 1956 to December 14, 1956. It paid to Douglas Leigh approximately $18,000.

b. Judson Dunaway Corporation:

(1) The advertising and promotional allowance programs of Judson Dunaway Corporation in effect during 1955 and 1956 were set forth in various bulletins which the company sent to its brokers and sales representatives. For its line of products sold under the Bug-a-

boo label it offered to chain stores a 10 percent allowance based on their Bug-a-boo purchases, for fully paid advertising. A 10 percent promotional allowance was likewise offered on Bug-a-boo products in 1956.

For its products Vanish and Elf, it announced that during the spring of 1955 it planned to keep its cooperative advertising program to "an absolute minimum" due to its "increased national advertising" and "because we know that most cooperative advertising is money wasted * * *." No provision for cooperative advertising was made in the 1955 fall program for Vanish and Elf. For the first six months of 1956 it announced that it would do "little if any co-op newspaper advertising on Vanish and Elf."

On its product Delete, it announced no cooperative advertising allowance program in 1955. For the first six months of 1956 it announced that for "Chains and co-ops" it would pay a "20¢ per dozen cooperative advertising allowance on purchaces January 1 through June 30."

(2) Grand Union did not receive any allowance under the Bug-a-boo promotional allowance program of Judson Dunaway described above or any premium or other arrangement with respect to other items in the Judson Dunaway line. At the time of its dealings with Judson Dunaway, Grand Union did not have specific knowledge as to the scope and nature of Judson Dunaway's Bug-a-boo promotional allowance program, or its premium or other arrangements with respect to Judson Dunaway's other lines.

(3) Except for the promotional programs described above, Judson Dunaway did not pay or contract to pay to certain of its customers conducting retail stores in competition with Grand Union, anything of value to or for the benefit of such customers as compensation or in consideration for any services or facilities furnished by or through such customers, in connection with the processing, handling, sale, or offering for sale of any Judson Dunaway products.

(4) Judson Dunaway's participation in the sign extended from January 1, 1955, to December 31, 1956, and it paid the sum of $24,000 to Douglas Leigh. A Grand Union interoffice memorandum dated September 30, 1954, indicates that because Judson Dunaway would be the nineteenth participant on the sign "all $12,000 will be returned to Grand Union for our account." It does not appear whether this situation continued during the year 1956.

c. Swanee Paper Corporation:

(1) The participation by Swanee Paper Corporation in the spectacular sign was distinct from Swanee's generally announced advertising and promotional program, and the money paid by Swanee to Douglas Leigh, for Swanee's participation in the spectacular sign,

was not charged against the amounts that Grand Union would qualify for under Swanee's generally announced advertising and promotional program.

(2) In 1955, Grand Union received from Swanee, allowances for displays in Grand Union stores equal to $5.00 a month for each store or $2.00 a month for each store (depending on the size and nature of the store) based, respectively, upon a five-case and two-case display of Swanee's toilet tissues during a part of each monthly period in respect of each store to which the display payment or allowance related. Payments for displays on the same basis were made by Swanee to two other grocery chains.

(3) Except for the promotional programs referred to above, Swanee did not pay or offer to pay or contract to pay to certain of its customers conducting retail stores in competition with Grand Union, anything of value to or for the benefit of such customers as compensation or in consideration for any services or facilities furnished by or through such customers, in connection with the processing, handling, sale, or offering for sale of any Swanee products.

(4) As has already been noted, Swanee advised Grand Union around September 1955 that it would not renew its contract on the Broadway sign, which was to expire in March 1954, "because of pressure from other concerns". The "pressure from other concerns" referred to by Swanee was to customers of Swanee competing with Grand Union. After further contacts between representatives of Swanee, Douglas Leigh and Grand Union, Swanee did agree to participate in the sign for another year.

(5) In November 1953, during the first year of its participation on the sign, Swanee's broker advised the president of the company that since it had gone on the sign it had increased its business with Grand Union by 13,400 cases and had paid out during this period $10,000 for the Broadway sign and about $8,000 in various display and cooperative advertising deals. The letter stated that despite the increase in sales the account was "too costly for the amount of business we are doing with them", and the writer suggested that the president in a proposed conference with Grand Union endeavor to increase the business with Grand Union sufficiently to justify the expense. A copy of this letter was sent to Grand Union by Swanee's broker who, in his letter of transmittal, stated:

> The fact is that the Grand Union Co. is the costliest account that National Paper has on its books. It costs them too much money for the amount of business they get.

d. Seabrook Farms Co.:

(1) During the time it was a participating advertiser Seabrook Farms had a regular cooperative advertising allowance of 5¢ per

dozen, under which Grand Union was receiving payments. In addition, Seabrook Farms granted Grand Union a promotion allowance of 10¢ per dozen. These payments were in addition to the payments made to Douglas Leigh for participation by this supplier on the Broadway sign.

(2) On July 8, 1955, a representative of Seabrook Farms wrote to Grand Union calling attention to the payments which had been made of 5¢ per dozen under the regular cooperative advertising program and the 10¢ per dozen promotional allowance program, as well as other concessions which had been granted to Grand Union, and also referred to the fact that its participation in the Broadway sign was costing it more than 5¢ per dozen and that it was likewise granting "quarterly special Grand Union promotions" allowances. The writer of the letter made the following proposal with respect to the 10¢ per dozen promotional allowance:

> As you know, we established the 10¢ prior to our cooperating on the Broadway sign. We believe that we get additional value out of the sign, but based on current volume the cost of the sign is slightly in excess of 5¢ per dozen. We suggest reducing this allowance from 10¢ to 5¢.

It does not appear what response, if any, Grand Union made to the request of Seabrook Farms to reduce the 10¢-promotional allowance to 5¢. However, it does appear that Seabrook ceased to be a participant on the sign in March of 1956, after its one-year contract expired.

e. Snow Crop Marketers:

(1) The only instance in the record involving payments for participation in the Broadway sign which purport to be made pursuant to a generally announced advertising program is that involving Snow Crop Marketers Division of Clinton Foods, Inc. Snow Crop had a generally announced cooperative advertising agreement pursuant to which it agreed to reimburse advertisers for advertising at various rates in an amount not to exceed 5¢ per dozen of Snow Crop products purchased by the advertiser. In June 1952 when Snow Crop submitted its cooperative advertising agreement to Grand Union for signature, representatives of Grand Union conferred regarding the possibility of having Snow Crop participate in the Broadway sign by applying the amounts to which Grand Union would be entitled under the cooperative advertising. It was estimated that Grand Union's annual purchases of about 390,000 dozen of Snow Crop products at a rate of 5¢ per dozen would yield about $20,000 during the term of the contract.

(2) Grand Union advised Snow Crop by letter dated July 3, 1952, that the cost of participation in the spectacular sign would

be $12,000 a year and that it "could very comfortably work the $12,000 into the cooperative advertising agreement we are holding." Snow Crop at first declined to participate in the sign because Grand Union at that time expected the Flamingo Company, another vendor of orange juice, to participate in the sign. However, when it became apparent that Flamingo would remain out of the sign program, Snow Crop agreed to participate on the understanding that the $1,000-a-month contribution toward the sign would be paid out of its regular cooperative advertising program. The arrangement was handled on the basis of Grand Union's signing a contract with Douglas Leigh for the advertising of Snow Crop products on the spetacular sign, with payments to be made by Grand Union and to be reimbursed by Snow Crop out of the regular cooperative advertising allowance of 5¢ per dozen.

(3) The cooperative advertising agreement which Grand Union entered into with Snow Crop recited: "This agreement is available on proportionately equal terms to all other customers of Seller competing in the distribution of said Snow Crop products in the same trading area."

24. Grand Union's purchases from certain of the suppliers who participated in the Broadway spectacular sign for the periods previously indicated are as follows:

	Judson Dunaway	Swanee Paper	O-Cel-O
1953	$14,586.00	$222,752.45	$14,913.95
1954	21,505.25	266,284.75	19,092.40
1955	94,632.00	285,178.58	45,861.80
1956	101,935.52	221,119.66	60,402.31
Total	$232,658.77	995,335.44	140,270.46

25. The total purchases by Grand Union and subsidiaries from all suppliers during the same periods were as follows:

Fiscal year ending Feb. 28	*Amount*
1953	$151,872,444
1954	164,362,836
1955	177,879,811
1956	229,442,899

26. It has been stipulated and it is, accordingly, found that the transactions between Grand Union on the one hand, and the O-Cel-O Division of General Mills, Inc., Judson Dunaway Corporation and Swanee Paper Corporation, respectively, on the other hand, were in commerce, as defined in the Federal Trade Commission Act.

CONTENTIONS AND CONCLUSIONS

The complaint charges respondent with having violated Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving certain payments and benefits from suppliers which were not made available on proportionally equal terms to its competitors. The making of such discriminatory payments by the suppliers, if established, would constitute a violation by them of Section 2(d) of the Clayton Act. This proceeding in effect, therefore, charges respondent with having knowingly induced various of its suppliers to violate Section 2(d) of the Clayton Act.

Respondent contends that counsel supporting the complaint have failed to establish a violation of law on its part because (a) the payments made by its suppliers toward the Broadway spectacular sign were not illegal under Section 2(d) of the Clayton Act, (b) that even if such payments were found to be a violation of Section 2(d) in a proceeding against the suppliers, the record fails to establish the knowing inducement by Grand Union of any illegal payments, and (c) that in any event, the knowing inducement of payments which are illegal under Section 2(d) of the Clayton Act does not constitute a violation of Section 5 of the Federal Trade Commission Act. It is also contended, additionally, that no cease and desist order should be issued, even if a violation of law exists, because the infraction terminated prior to the issuance of the complaint. To a consideration of these contentions, the hearing examiner now turns.

a. *The Alleged 2(d) Violations*

The basic elements of a Section 2(d) Clayton Act violation are (1) the making of a payment "to or for the benefit of a customer", (2) "as compensation or in consideration for any services or facilities furnished by or through such customer", and (3) the failure to make such payment "available on proportionally equal terms" to all other customers competing with the favored customer. As applied to the facts in this case it would be necessary to show that the payments by Grand Union's suppliers toward the Broadway spetacular sign were "to or for the benefit" of Grand Union, that they were made in return for services or facilities furnished by or through Grand Union, and that the suppliers had failed to make such payments available on proportionally equal terms to competitors of Grand Union with whom they dealt.

Respondent contends that the payments made by the suppliers did not violate Section 2(d) because the "financial and other benefits to Grand Union from the sign represented a fair return for its contribution to the Douglas Leigh sign project and were not in fact 'payments' or 'consideration' *received from the Participating Advertisers*", but were in return for "services rendered by Grand Union * * * to Douglas Leigh, Inc. and not to the Participating Advertisers". Respondent's argument, in effect, is that the first two of the above requirements of a Section 2(d) violation have not been met since (a) there has been no showing of a payment "*to* Grand Union" by the suppliers, and (b) "the only merchandising services involved (the in-store promotions and the alleged 'exclusives') were not a term of, or a consideration for, participation in the sign [by the suppliers] but an exploitation of its value in an overall integrated merchandising program".

While it is true that no payments were made by the participating advertiser-suppliers directly to respondent, it is sufficient under Section 2(d) if the payments were made "for the benefit of" Grand Union. There can be no question that as a result of the suppliers' payments respondent received very substantial benefits, including (a) valuable advertising on the Broadway spectacular sign at nominal cost, (b) valuable advertising in other media in exchange for the advertising time to which it was entitled on the sign and (c) substantial cash payments. There is also no question that as a result of the payments made by them the participating advertisers received not only valuable advertising time on the Epok panel, but in many instances in-store promotions and, in some instances, exclusive or preferential handling of some or all of their products.

Although not clearly spelled out, respondent's position appears to be similar to that taken by its supplier, Swanee Paper Corporation, in a separate proceeding brought against that company for violation of Section 2(d) of the Clayton Act, in which the supplier urged that the payments made by it were not *for* the benefit of Grand Union because they were not made with the intention or purpose of benefiting Grand Union, but were made solely in consideration of the advertising service furnished by Douglas Leigh. The supplier pleaded ignorance of the provisions of the separate contract between Douglas Leigh and Grand Union, and therefore contended that it had no knowledge that Grand Union would receive the various benefits referred to above, in return for a nominal payment on its part. It was further urged that the in-store promotions received by the supplier were not furnished by Grand Union in return for the supplier's agreement to participate in the sign because they were not an explicit provision of any agreement withthe supplier and were not intended to be a quid pro quo for the supplier's payments toward the sign.

In his initial decision in the *Swanee Paper* case, filed August 18, 1959, Docket No. 6927, this examiner has found these contentions to be without merit. The facts in the instant case are, if anything, stronger than those appearing in the *Swanee Paper* record, insofar as establishing that the suppliers' payments were made in violation of Section 2(d) of the Clayton Act. As pointed out in the *Swanee* decision, it is now established that Section 2(d) "does not concern itself with motive or intention", but only "with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden." *P. Lorillard Co.* v. *FTC*, 267 F. 2d 439, 444 (CA 3, 1959). It is the "*fact* of paying or contracting for the payment for the services or facilities * * * [which] is proscribed", and the lack of "any ulterior *motive*" on the part of the supplier or the fact that there was no intention to favor the customer is immaterial. *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831, 837 (CA 7, 1958), cert. denied, *sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947 (1959).

As in the instant proceeding, the *Lorillard* case involved two separate groups of contracts, one between a broadcasting company and various grocery suppliers, and the other between the broadcasting company and certain grocery chains. In addressing itself to the argument of the petitioners that in assessing the consequences of the arrangement the Commission was restricted by the technical principles of private contract law which would be applicable in a private suit between the contracting parties, the court of appeals stated that (at 444)—

> * * * the real question involved * * * is whether the petitioners have made payments to someone which actually are of benefit to their customers and *not whether they have bound themselves to do so by a legally enforceable contract* * * *. [Emphasis supplied.]

It is unmistakably clear that the payments made by the suppliers were of substantial benefit to Grand Union, irrespective of whether it was the intention of the suppliers to benefit Grand Union or merely to pay for their own advertising. Such payments constituted the sole financial support of the program and but for them the plan would not have gone into effect or have survived. It is also clear that, in addition to receiving advertising on the sign, the participating suppliers received various services or benefits from Grand Union, irrespective of whether Grand Union had bound itself to furnish such services or benefits "by a legally enforceable contract" or not. There would appear to be no question, therefore, that the payments of the suppliers fall within the proscription of Section 2(d) of the Clayton Act, unless they were made available on a proportionally equal basis among all their other customers who were competitors of Grand Union. The record establishes that generally speaking they were not made so available.

However, even if it were necessary to find as a fact that the payments made by the suppliers were made with the intent and purpose of benefiting Grand Union, in order to establish that they were *for* the benefit of Grand Union, there is ample evidence in the record to support such finding. The argument that the suppliers' payments were not intended to be *for* the benefit of Grand Union rests largely on the fact that the arrangements concerning the sign projects were handled in two different groups of legal agreements, one between Grand Union and Douglas Leigh, and the other between Douglas Leigh and various of Grand Union's suppliers. Because of this it is insisted that the suppliers were ignorant of the benefits accruing to Grand Union as a result of their payments and that, so far as the suppliers were aware, Grand Union was paying for its own advertising (mainly on the static portions of the sign), while the suppliers were paying for their own advertising on the Epok panel. The hearing examiner cannot accept, as valid, this version of the facts which seeks to artificially fragmentize and compartmentalize an essentially unitary transaction. In the somewhat similar *Chain Lightning* cases (Docket No's. 6592–6600), of which the *P. Lorillard* case was one, the respondent-suppliers likewise sought to hide behind the rampart of the separate contractual arrangements, but the Commission "refuse[d] to wear blinders and insist[ed] that the series of contracts be viewed as a whole." *P. Lorillard* v. *FTC*, *supra*, at 443.

Viewing the transaction here as a whole, there is no doubt that the suppliers understood that they were participating in a sign project which for Grand Union's benefit and that their contributions were making it possible for Grand Union to obtain such benefits. It is also clear that they made such contributions because they expected to receive in return various services and benefits from Grand Union, in addition to advertising on the sign. The very contracts between Douglas Leigh and the suppliers advised the latter that Douglas Leigh had leased the entire "Electric Spectacular Display" (not merely the stationary portions) to Grand Union, and that while the suppliers were to have the use of the Epok panel portion of the sign, their advertisements had to be approved in advance by Grand

Union.[2] The contract also advised the suppliers that unless Grand Union secured "signed contracts" from 15 (later 20) of them, the whole arrangement would not take effect. How it can be said, in the light of such provisions in their own contracts, that the suppliers did not know that their contributions were helping support a sign from which Grand Union was benefiting is difficult to understand. The active part which Grand Union took in securing the participation of its suppliers, and in inducing some to change their minds about renewing a participation, must have made it evident to the suppliers that Grand Union had more than an academic interest in their participation.

Any doubt which the suppliers may have entertained concerning Grand Union's beneficial interest in the sign certainly must have been dissipated by the physical aspect of the sign, which gave every appearance of being a Grand Union sign. Its name dominated the sign and the products flashed on the Epok panel were obviously being advertised as being for sale in Grand Union stores. The publicity issued regarding the sign by Douglas Leigh characterized it as a Grand Union sign, and it was so regarded in the trade. The correspondence between Grand Union and a number of the suppliers also makes it clear that the suppliers were aware that they were contributing to a Grand Union sign and that they did so because of their desire to confer a benefit on an important customer and not merely because of any general desire to advertise their products on a Douglas Leigh sign project.

Even if it were assumed that the suppliers were not aware of all the benefits Grand Union was receiving from their participation, and that they thought Grand Union was making a contribution toward the sign, at the very least they knew they were contributing to a cooperative advertising project in which their contributions made it possible for Grand Union to keep its name before the public. Their contribution in this respect was no different from that of any supplier who contributes toward an ordinary cooperative newspaper advertisement with a customer. Such contributions are clearly proscribed unless made proportionally available to competing customers. The fact that the supplier receives an advertising benefit commensurate with the amount paid by him does not prevent his contribu-

[2] Respondent calls attention to the fact that while the agreement with the participating advertisers refers to the fact that it had "leased" the sign from Douglas Leigh, its own agreement with Douglas Leigh grants it the "use and occupancy" of the sign. In the opinion of the examiner, this is a distinction without a difference. In either event, it is clear that the beneficial use of the entire sign was conveyed by Douglas Leigh to Grand Union, subject to certain stated conditions.

tion from also being for the customer's benefit. *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.*, *supra.* There can be no doubt that the suppliers understood that as a result of the payments made by them, they would receive various services, facilities and other benefits from Grand Union. Not the least of these was valuable advertising on the sign itself, in which Grand Union had a substantial beneficial interest. Other benefits included in-store promotions and, in some instances, the preferential handling of their products. From the discussions which took place with Grand Union, prior to the suppliers' agreeing to participate on the sign, with respect to Grand Union's affording them in-store promotions, it may be inferred that this was an important consideration in the suppliers' decision to participate. In the case of some of the suppliers this need not be left to inference since the correspondence discloses that Grand Union gave some of them an express commitment to afford them in-store promotions in return for their agreeing to go on the sign. In the case of other suppliers a quid pro quo for their agreement to participate was Grand Union's commitment to add various of their products to its line and, in some instances, to handle their products on an exclusive or otherwise preferential basis.

It is accordingly concluded and found that a number of Grand Union's suppliers (a) in the course of commerce paid or contracted to pay something of value for the benefit of their customer, Grand Union, by their contracts with Douglas Leigh to participate in and contribute toward the Broadway "spectacular" sign; (b) that the payments made by said suppliers were for Grand Union's benefit in that the latter received, as a result thereof, valuable advertising on the sign, valuable advertising in other media and substantial cash returns; (c) such payments were made as compensation or in consideration for services or facilities furnished by or through Grand Union to said suppliers in connection with the handling, sale or offering for sale of products manufactured by said suppliers, such services or facilities consisting of the advertising of their products on the Broadway "spectacular" sign, the furnishing of in-store promotions in Grand Union stores, the handling of additional products of said suppliers and the handling of the products, or of some of the products, of said suppliers on an exclusive or preferential basis; and (d) the payments or consideration made or furnished by a number of said suppliers were not made available on proportionally equal terms to all other customers competing in the distribution of their products with Grand Union.

b. *The Knowing Inducement*

In order to establish a violation of law by respondent, as the customer, it must not only appear that it induced a payment by its suppliers which violated Section 2(d) of the Clayton Act, but that it did so knowingly. Respondent contends that in order to establish the latter fact it must appear that it had actual or constructive notice that the payments by the suppliers (1) were not made available on proporionally equal terms to competing customers and (2) were not cost-justified under Section 2(b) of the Clayton Act.

Respondent's contention with respect to the necessity of establishing that the payments were not cost-justified is based on the holding of the court of appeals in *Simplicity Pattern Co., Inc.* v. *FTC*, 258 F. 2d 673, which has since been reversed by the Supreme Court, 360 U.S. 55. It is, therefore, unnecessary to belabor the point that the cost-justification defense under Section 2(b) is not available in proceedings under Section 2 (d) or (e) of the Clayton Act. Accordingly, it is unnecessary to establish, in a proceeding against the customer, that it had knowledge of the lack of cost-justification on the part of its supplier.

The only issue remaining therefore is whether respondent induced payments by its suppliers which it knew or should have known had not been made available on proportionally equal terms to all other customers of the suppliers competing with it. That respondent in most instances induced the participating advertiser-suppliers to participate in the sign project is clearly established by the record. Its contracts with Douglas Leigh obligated it to obtain the participation of the requisite number of participating advertisers, at no cost or expense to Douglas Leigh. Most of the participating advertisers were respondent's suppliers. While there is some ambiguous reference in the stipulated facts to the effect that respondent had "interested certain but not all of the Participating Advertisers in entering into contracts with Douglas Leigh, Inc., to participate in the sign", the correspondence and other documentary evidence in the record establishes that for the most part Douglas Leigh relied upon respondent to interest its suppliers in participating in the sign and used respondent, in some instances, to bring pressure on suppliers who were reluctant to renew their participation in the sign. The question to be decided is whether in inducing a number of suppliers to participate respondent had reason to believe that they had not made equivalent payments to other customers.

Respondent apparently concedes that actual knowledge on its part of the nonavailability of the payments to other customers need not be shown, but that "constructive notice" is sufficient. Under the

Supreme Court's decision in a related situation, knowledge may be imputed from "trade experience" or from the fact that the circumstances "should have provoked inquiry in the mind of a prudent businessman." *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953). While there may be some question as to whether the Court's holding in that case with respect to the Government's burden of going forward with the evidence should be applied here in view of the manifest difference between expecting a buyer to know his seller's costs and expecting him to know whether his seller has made similar payments available to other buyers, the hearing examiner will nevertheless regard the rule in that case as being applicable here.

In the opinion of the hearing examiner, counsel supporting the complaint have adequately established that respondent knew or should have known that the payments which it induced its suppliers to make were not being made available to its competitors. It has been stipulated that many of the participating advertisers had cooperative advertising and promotional allowance programs which were generally announced and available to their customers. It has also been stipulated that, with one possible exception (Snow Crop Marketers), the arrangements for participation in the spectacular sign program were not negotiated as a use of one of the announced advertising allowance programs. There is specific evidence that in the case of at least three suppliers (O-Cel-O, Swanee Paper and Seabrook Farms) respondent was the recipient of advertising allowances under such generally announced advertising allowance programs. It seems clear, therefore, that it knew or should have known that the additional benefits which it was receiving under the Broadway sign program were not part of any general advertising program which was being made available to its competitors.

The stipulated fact that respondent "believed it was customary to deviate from such announced advertising programs" does not negate the fact that it was in possession of information which should, at the very least, have put it on guard as a prudent man familiar with trade conditions and procedures in the handling of advertising allowances. Since it was receiving benefits from some suppliers under both a generally announced program and the special Broadway sign program, there would be no reason for it to expect that these suppliers were offering their other customers benefits equivalent to those under the Broadway sign by deviating from their generally announced programs. In fact, there is evidence that in several instances respondent was advised and actually knew that the benefits under the sign program were not generally available to other customers of its suppliers. Thus O-Cel-O's broker advised it that "the deal was unprecedented". Swanee's broker advised it that as a result of the advertising allowances of which respondent was receiving the benefit, it was the "costliest account" on Swanee's books. It was also later advised that Swanee did not wish to renew its participation "because of pressure from other concerns", which could only be interpreted as meaning that other customers were not receiving similar benefits. Despite this it prevailed upon Swanee to renew its participation. Respondent also was advised that the payments toward the sign by Seabrook Farms were in excess of a generally announced advertising allowance and an apparently special promotional allowance. There is no indication that respondent acceded to the request that the special promotional allowance be cut to give recognition to payments being made under the sign program. From the fact that Seabrook dropped out of the sign program when its contracts expired, it may be inferred that its proposal was unacceptable to respondent.

Respondent has attempted to explain away various of the facts in the record as being subject to an innocent interpretation. Thus it characterizes as mere "puffing" and as a hearsay argument, the statement in the letter of the broker for various participating suppliers that pressure was being put on sponsors to give equivalent allowances to Grand Union's competitors. However, while each fact might, if considered in isolation, be explained away, the cumulative effect is such that they inevitably impel the conclusion that respondent was aware of the general nonavailability of the sign benefits to other customers.[3] The facts must be interpreted in the light of the fact that respondent was not a mere passive recipient of normal advertising allowances, but was an instigator and co-originator of the sign project and, as such, must have been aware that it involved a specially "tailored", negotiated program which it would be very difficult to make generally available on a proportionally equal basis to its competitors. *Atalanta Trading Corp.*, Docket No. 6464, December 20, 1956.

Perhaps most decisive of the issue of knowledge is the fact that the whole program was devised as a method of avoiding the necessity for suppliers' having to proportionalize their payments. There can be no doubt that the idea of two separate groups of contracts was conceived as a device for supporting the claim that the plan did not involve cooperative advertising allowances of the type which would have to be made available to other customers. The plan was apparently patterned after the so-called chain lightning advertising plan in the broadcasting industry which had not yet been declared

[3] The letter above referred to is considered to have evidentiary value not as proof of the facts therein asserted, but as evidence which should have put respondent on notice as to how the program was being interpreted in the industry.

illegal by the Commission. While it may be that the parties were acting in good faith, in the belief that by setting up the plan in the way they did no violation of Section 2(d) would be involved, the fact remains that the whole idea behind the plan was that supplier participation would be encouraged by the assurance that the payments did not have to be proportionalized. It seems clear, therefore, that respondent was proceeding on the assumption that, generally speaking, participation in the program would be outside of regular advertising programs and that the benefits thereunder would not ordinarily be made available to other customers.

It is accordingly concluded and found that respondent induced or received from a number of its suppliers advertising payments and benefits, as heretofore found, which it knew or should have known were not being made available by such suppliers, on proportionally equal terms, to all other customers competing with respondent in the sale and distribution of the products of said suppliers sold to respondent.

c. *Sufficiency of Complaint*

Respondent contends that the knowing inducement or receipt of a discriminatory advertising allowance is not an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Respondent's argument is based largely on the fact that whereas Section 2(f) of the Clayton Act makes it illegal to knowingly induce or receive a discriminatory price (the granting of which would be illegal under Section 2(a) of the Act), there is no equivalent provision in the Act with respect to the knowing inducement or receipt of an advertising allowance, the granting of which would be illegal under Section 2(d) of the Act. Respondent contends that this omission was deliberate and is indicative of an intent on the part of Congress not to make the knowing inducement of a discriminatory advertising allowance an illegal act.

In the opinion of the hearing examiner there is no merit to respondent's argument. There is no question that Section 5 of the Federal Trade Commission Act is broad enough to encompass conduct such as is here the subject of complaint. Congress deliberately left the standard of "unfair methods of competition" broad, general and flexible in order to make it applicable not only to practices which were considered illegal at common law, but to practices and methods of competition yet to be devised by aggressive and vigorous entrepreneurs. *FTC* v. *Keppel & Bro., Inc.*, 291 U.S. 304, 310–312; H.R. Rep. No. 1142, 63d Cong. 2d Sess. 19 (1914). The Act was "designed to supplement and bolster the Sherman Act and the Clayton Act". *FTC* v. *Motion Picture Advertising Service Co., Inc.*, 344

U.S. 392, 394 (1953). Practices of the type which run counter to the policy of the Clayton Act have been held to constitute unfair methods of competition under the Federal Trade Commission Act, even though they may not technically fall within the scope of the former Act. *FTC* v. *Motion Picture Advertising Service Co.*, *supra* at 397; *Fashion Originators Guild of America, Inc.* v. *FTC*, 312 U.S. 457; *Carter Carburetor Corp.* v. *FTC*, 112 F. 2d 722 (CA 8, 1940).

It is the opinion of the hearing examiner that one who knowingly induces another to commit an act which is illegal under the Clayton Act is himself engaging in an unfair method of competition, within the meaning of the Federal Trade Commission Act, unless Congress deliberately intended to exclude such conduct from the category of illegality. The examiner finds no evidence of any such intention on the part of Congress. Such evidence as does exist suggests that the omission of a provision in the Clayton Act with respect to inducing a Section 2(d) violation, similar to that contained in Section 2(f) with respect to inducing a Section 2(a) violation, was inadvertent rather than deliberate since at the stage when Section 2(f) was added to the Act the fate of Section 2(d) and (e) was uncertain.[4] Even if this evidence be disregarded as not constituting reliable legislative history, certainly there is no evidence of a deliberate intention on the part of Congress to exclude such conduct from the category of illegality. Such an intention cannot be inferred from the mere failure to include such conduct in Section 2(f) or from the failure to include an equivalent provision in the Clayton Act with respect to the knowing inducement of a 2(d) type of violation.

Absent convincing evidence of any such specific intent, and in the light of the intention of Congress in phrasing Section 5 of the Federal Trade Commission Act in broad, general terms to give it wide scope and to leave it to the Commission and the courts for definition, and on the basis of existing precedent declaring conduct of the type proscribed by the Clayton Act, but not technically falling within it, as being encompassed by the term "unfair methods of competition", there would appear to be no doubt that the knowing inducement of an advertising allowance in violation of Section 2(d) of the Clayton Act constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. It is accordingly concluded that the complaint states a cause of action.

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[4] Dunn, New York State Bar Association, Robinson-Patman Act Symposium, Sections 2 (d) and (e) (CCH, 1946) pp. 55, 61.

d. *The Issue of Mootness*

Respondent contends that no cease and desist order should issue in view of the fact that its participation in the Broadway sign project ceased as of December 31, 1956, almost a year prior to the issuance of the complaint herein. Counsel supporting the complaint contend that there has been no showing of any unusual facts which would prevent the issuance of the usual cease and desist order. They have also offered to prove that respondent did not discontinue its part in the program until after an investigation by the Commission early in 1956.

In the opinion of the hearing examiner there has been no showing of such unusual or exceptional circumstances by respondent, as to warrant a dismissal of the complaint on the ground that respondent has discontinued the practices alleged therein. *Sheffield Merchandise, Inc.*, Docket 6627, July 7, 1958; *Ward Baking Co.*, Docket 6833, June 23, 1958.

CONCLUSION OF LAW

In knowingly inducing or receiving payments or the benefit of payments from its suppliers, as hereinabove found, which were not made available on proportionally equal terms to its competitors, respondent engaged in acts and practices which are to the prejudice and injury of competitors and the public; which have the tendency and effect of obstructing, hindering, lessening and preventing competition in the sale and distribution of food, grocery, dairy and non-edible household products; which have the tendency to obstruct and restrain and have obstructed and restrained commerce in such products; and which, accordingly, constitute unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

It is concluded that this proceeding is in the public interest and that the following order should issue.[5]

ORDER

It is ordered, That respondent The Grand Union Company, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce (as "commerce" is defined in the Federal

[5] The motion of respondent for a separate hearing on the form of the order, in the event of the issuance thereof, is denied for the reason that no need therefor has been demonstrated.

Trade Commission Act) of grocery products or related merchandise do forthwith cease and desist from:

Knowingly inducing, receiving or contracting for the receipt of anything of value as compensation or in consideration for advertising, promotional displays or other services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to respondent by any of its suppliers, when such payment is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of the suppliers' products.

OPINION OF THE COMMISSION

By SECREST, *Commissioner*:

The complaint herein charges respondent with violating Section 5 of the Federal Trade Commission Act by knowingly inducing or receiving from suppliers special payments and benefits which were not made available on proportionally equal terms to respondent's competitors. The hearing examiner in his initial decision held that the allegations of the complaint were sustained and ordered respondent to cease and desist from the practices found to be unlawful. Respondent has appealed from this decision.

Respondent is a Delaware corporation engaged in the operation of a chain of retail grocery stores and super markets, which sell a wide variety of food, dairy and household products, in the Eastern part of the United States. Respondent's sales are substantial, amounting to $283,003,166 for the fiscal year ending March 3, 1956.

On August 6, 1952, respondent entered into an agreement with Douglas Leigh, Inc., an advertising agency, whereby the latter granted to respondent the use and occupancy of a "combined electric spectacular and animated cartoon display" located in the Times Square area of New York City. As part of the consideration, respondent agreed to secure the consent of fifteen participating advertisers to use the animated cartoon display portion of the sign known as the Epok panel, the static portion of the sign being reserved for the advertising of respondent. The Epok panel was to be used by the participating advertisers for 15 minutes out of each 20-minute period and respondent was entitled to use the remaining 5 minutes for its own advertising or could exchange all or any part of the time allotted to it for radio or television advertising. The term of the agreement was for a period of one year with respondent having an option to renew the agreement for two additional periods of one year.

The following year the contract was renewed with certain modifications. It was agreed that respondent could sell the 5 minutes of advertising reserved to it to five additional participating advertisers and in lieu thereof would receive all monthly rentals paid by such advertisers (after deducting the agency's commission) and 5 percent of the payments made by the first fifteen advertisers, when there were at least fifteen participating advertisers using the sign.

The participating advertisers entered into agreements with Douglas Leigh to use the Epok panel, with each advertiser having one minute in each 20-minute period for its advertising. Each advertiser agreed to pay $1,000 per month for services rendered by Douglas Leigh. The contract also provided that the advertising to be exhibited on the sign was to be approved in advance by respondent.

During the 4-year period, beginning December 9, 1952, when the sign was being operated pursuant to the aforementioned agreement between respondent and Douglas Leigh, thirty different firms used the Epok panel as participating advertisers. The participation of most of these firms was obtained by respondent. At least twenty-eight of them were suppliers of respondent. In some instances, the decision of a supplier to use the sign as a participating advertiser was based on the specific assurance that an in-store promotion of its products would be furnished by respondent. In some instances, the decision to participate was based on respondent's agreement to take on additional items in the supplier's line or to handle the supplier's products on an exclusive or other preferential basis.

The hearing examiner held that the payments made by a number of respondent's suppliers to Douglas Leigh under the aforementioned contracts were "for the benefit" of respondent and that they were made in consideration for advertising and other promotional services provided by or through respondent. He also concluded that the payments or consideration made or furnished by many of these suppliers were not made available on proportionally equal terms to all other customers competing with respondent in the distribution of their products, and that their participation in the sign program, therefore, constituted a violation of Section 2(d) of the Clayton Act. He further held that respondent induced or received such payments or benefits from a number of these suppliers knowing that they had not been made proportionally available to its competitors.

The first question presented on this appeal is whether the knowing inducement or receipt of discriminatory advertising allowances which are prohibited by Section 2(d) of the Clayton Act constitutes an unfair trade practice under Section 5 of the Federal Trade

Commission Act. Respondent concedes that the knowing inducement or receipt of a prohibited price discrimination constitutes a violation of Section 2(f) of the Clayton Act. It contends, however, that Section 5 cannot be used to extend the scope of Section 2(f) to encompass the knowing inducement or receipt of allegedly disproportionate payments for merchandising services.

It is clear from the legislative history of the Federal Trade Commission Act and the long line of court decisions interpreting Section 5 of the Act that the Commission has the authority, subject to review by the courts, to determine in any factual situation before it whether a particular practice or course of conduct is an unfair method of competition or an unfair trade practice. The courts have consistently held that the phrase "unfair methods of competition" does not admit of precise definition but is a flexible concept "to be defined with particularity by the myriad of cases from the field of business." *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934). The courts have also held that this concept of "unfair methods of competition" is not restricted to conduct considered illegal at common law or to methods of law violation disclosed by prosecutions under the Sherman Act. *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc., supra; Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683 (1948).

Respondent concedes the general validity of this principle but contends that it applies only to the evolution of concepts of unfair competition in the non-anti-trust field. It argues in this connection that Section 5 does not operate to extend the policy, scope or range of application of the Sherman Act or the Clayton Act. We cannot accept respondent's contention that the Commission's authority in this field is limited under Section 5 to established illegal practices previously condemned by the antitrust laws.

We think that the court decisions are uniformly opposed to respondent's position. In the *Beech-Nut* case, *supra*, the Supreme Court sustained a cease and desist order against a resale price maintenance plan which had not theretofore been declared to be illegal. The court pointed out that the Sherman Act was not involved in the proceeding brought under Section 5 "except insofar as it shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress." Similarly, in *Carter Carburetor Corp.* v. *Federal Trade Commission*, 112 F. 2d 722 (1940), the court upheld the Commission's order in a Section 5 proceeding against a course of conduct which had not been considered illegal prior to the enactment of the Clayton Act, declaring that "Sections 2 and 3 of the Clayton Act reflect the intent of Congress to prevent courses of action having a tendency to create a monopoly before actual monopoly has been accomplished and the Federal Trade Commission Act supplies means to effectuate the intent."

The Supreme Court in the *Cement Institute* case, *supra*, stated that the legislative history of the Federal Trade Commission Act shows a strong Congressional purpose to supplement the enforcement of the Sherman Act through the administrative process of the Federal Trade Commission. It also observed in that case that the reports and statements of those in charge of the Federal Trade Commission Act "reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at *every trade practice, then existing or thereafter contrived*, which restrained competition or might lead to such restraint if not stopped in its incipient stages." (Emphasis supplied.) And in *Federal Trade Commission* v. *Motion Picture Advertising Service, Inc.*, 344 U.S. 392 (1953), the court in a Section 5 proceeding involving exclusive dealing arrangements succinctly concluded:

> The "unfair methods of competition," which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.*, pp. 310–312. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act (see *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U.S. 441, 453)—to stop in their incipiency acts and practices which, when full blown, would violate those Acts (see *Fashion Guild* v. *Federal Trade Commission*, 312 U.S. 457, 463, 466), as well as to condemn as "unfair methods of competition" existing violations of them. See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 691.

We believe that this and the other decisions cited clearly delineate the authority conferred by Congress upon the Commission to prohibit practices adversely affecting competition in violation of the policy of the antitrust laws, although the practices may not be specifically prohibited by the language of such laws or have been previously adjudged to be illegal by the courts.

Respondent argues, however, that the cases outlining the Commission's broad powers to define and prohibit unfair competitive practices have no applicability to conduct that Congress has intentionally refused to forbid and has excluded from a specific statutory scheme. It contends in this connection that where Congress has affirmatively prohibited certain acts and at the same time has intentionally and expressly declined to render unlawful different but conceptually related acts, there is no room to argue that the acts exempted from proscription may, nevertheless, be considered illegal under the broad and ambulatory language of an earlier law. Since this argument is based on the premise that Congress intentionally and expressly declined to render unlawful practices related to those encompassed by the Robinson-Patman Act, it is necessary to determine whether this premise is sound. We think it is not.

The history of the Robinson-Patman Act discloses that one of the evils at which the legislation was directed was the use of enormous purchasing power by large buyers to obtain from their suppliers discriminatory concessions in the form of advertising allowances. This point is brought out clearly in the following statement by Mr. H. B. Teegarden, author of the original Patman Bill, at a hearing before the House Judiciary Committee on July 10, 1935:

> 1. Question. Is this an "antichain store" bill?
>
> Answer. This is an antichain store bill only insofar as the chains abuse their privilege of serving the American public, and it is aimed at such abuses equally whether practiced by chains or by others.
>
> 2. Question. What are the abuses at which the bill is aimed?
>
> Answer. The use of large buying power in concentrated hands to compel the granting of prices, terms of sale and other concessions and discriminations in connection therewith which are not warranted by corresponding economies in the stream of food and merchandise distribution, which for that reason the seller cannot afford to grant proportionally to all his customers, and which therefore result in unfair preference and advantage to those who exercise this power as against their weaker and less fortunate competitors.
>
> * * * * * * *
>
> 4. Question. Why is the bill aimed at abuses of buying power rather than of selling power?
>
> Answer. Because buying power is the source of the evil. The seller is merely an innocent victim compelled usually in self-defense to grant the concessions demanded. The greater his selling power the less is his compulsion to do so, for the less does he then depend upon the particular business of the buyer demanding the concession.
>
> * * * * * * *
>
> 6. Question. Why does the bill pick out quantity prices, brokerage and advertising allowances for suppression?
>
> Answer. Because these are the three favorite disguises under which large buyers wring their exactions.

Prior to its amendment by the Robinson-Patman Act, Section 2 of the Clayton Act was directed at certain predatory practices of large sellers which would result in injury to their weaker competitors. The Robinson-Patman amendment, however, was designed primarily to curb the predatory use of bargaining power by large buyers. Congressman Patman stated in this connection that the "bill is designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys, from exploitation by his chain competitor." 79 Cong. Rec. 9078. He further observed that "there has grown up in this country a policy in business that a few rich, powerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants under the same and similar circumstance and for the same quantities of goods. Is that right or wrong? It is wrong. * * *" 80 Cong. Rec. 8111.

In explaining the purpose of the Robinson Bill, Senator Logan stated:

> While I do not claim to be a prophet or to have ability to foretell the future, it appears to me to be obvious that the tendencies of those who control large purchasing power are eventually to create a complete monopoly affecting the necessities of life. If great units having tremendous purchasing power are allowed to use that power unfairly and obtain goods, wares, and merchandise at less than the smaller businessman can obtain them, in the course of time these large units will completely drive out of existence those who are engaged in like business with smaller capital. When that is done there will be a complete monopoly, and for the lack of legitimate competition, the consumer will be compelled to buy at prices fixed by the monopoly.
>
> * * * * * * *
>
> The bill does not interfere in any way with legitimate competition. It recognizes that those controlling large aggregations of capital may secure a legitimate advantage by reason of great purchasing power, but this advantage should be restrained by the adoption of sound economic rules, which will not allow the practice of using large purchasing power to destroy those with lesser purchasing power, thereby destroying competition and when, by such practices, competition has been destroyed, then monopoly will result. 80 Cong. Rec. 3117.

The following statement with respect to the competitive situation which led to the enactment of the Robinson-Patman amendment appears in *Federal Trade Commission* v. *Simplicity Pattern Co., Inc.*, 360 U.S. 55 (1959):

> 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. Because of their enormous purchasing power, these chains were able to exact price concessions, based on differences in quantity, which far exceeded any related cost savings to the seller. Consequently, the seller was forced to raise prices even further on smaller quantity lots in order to cover the concessions made to the large purchasers. Comparable competitive advantages were obtained by the large purchasers in several ways other than direct price concessions. Rebates were induced for "brokerage fees," even though no brokerage services had been performed. "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 court also observed that the Act was amended to eliminate these inequities.

Respondent contends, however, that the following comment by Congressman Utterback reveals that Congress deliberately exempted from the reach of the amended Clayton Act practices of the type charged in the complaint in this matter:

> The closing paragraph of the Clayton Act, for which Section 1 of this bill provides, makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass-buyer customers, since it enables him to charge them with the knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.
>
> This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment. That applies both to direct and indirect discrimination; and where, for example, there is discrimination in terms of sale, or in allowances connected or related to the contract of sale, of such a character as to constitute or effect an indirect discrimination in price, the liability for knowingly inducing or receiving such discrimination or allowance s clearly provided for under the later paragraph above referred to. 80 Cong. Rec. 9419 (1936).

This statement, however, is at best ambiguous and may well be interpreted to mean that the knowing inducement or receipt of a disproportionate allowance in violation of Section 2(d) of the amended Act is unlawful under Section 2(f). It cannot in any event be construed as a clear expression of Congressional intent to exempt the practice in question. In view of the clear purpose of the bill, a more plausible argument, advanced by counsel supporting the complaint, is that Congress intended to include the knowing inducement or receipt of a disproportionate allowance within the purview of Section 2(f) and that its failure to do so was the result of an oversight. (See Dunn, "Section 2(d) and (e)," New York State Bar Association, Robinson-Patman Act Symposium (CCH, 1946) 55, 61.)

We think that the most that can be said on this point from the legislative history and from a reading of the Act itself is that the practice charged in the complaint is not specifically prohibited by the Act. Certainly, it cannot be inferred from this fact that Congress countenanced a practice which so clearly violates the spirit of the statute.

In the absence of evidence of Congressional intent not to render unlawful practices related to those specifically prohibited by the Robinson-Patman Act, there is no substance to respondent's argument that the Federal Trade Commission Act cannot be extended to proscribe discriminatory practices which do not come within the purview of the Robinson-Patman Act. The rule of statutory construction is that general and specific statutes should be read together and harmonized, if possible, and that the specific statute will prevail over the general only to the extent that there is conflict between them. There is no dispute as to whether the specific provisions of the Robinson-Patman Act are controlling insofar as they specifically prohibit certain practices. There is nothing in the Act itself, however, which conflicts with the Commission's broad authority under Section 5 to define and proceed against practices which it deems to be unfair, including those which may come within the periphery of the later Act, although not within its letter.

For he foregoing reasons, it is our opinion that it is the duty of the Commission to "supplement and bolster" Section 2 of the amended Clayton Act by prohibiting under Section 5 practices which violate the spirit of the amended Act. Consequently, we believe that if a buyer knowingly engages in a course of conduct that accomplishes the result which one of the provisions of the Act is intended to prevent and which Congress has declared to be injurious to competition *per se*, such course of conduct runs counter to the policy of the Act and, as such, is an unfair trade practice within the purview of Section 5 of the Federal Trade Commission Act.

The second argument presented in respondent's appeal is that Section 2(d) of the Clayton Act is not applicable to the sign program since the payments made by its suppliers under this program were for advertising services rendered by Douglas Leigh and that the benefits which respondent received under the program were in consideration for services which it rendered to Douglas Leigh. We agree with the hearing examiner that this argument is an attempt to "artificially fragmentize and compartmentalize an essentially unitary transaction." We also concur in his conclusion that payments made by participating advertisers were for the benefit of the respondent and that such payments were made in consideration for services and facilities furnished by or through respondent to the participating advertisers in connection with the handling, sale or offering for sale of said advertisers' products. See *P. Lorillard Company* v. *Federal Trade Commission*, 267 F. 2d 439 (1959); In the Matter of *Swanee Paper Corp.*, Docket 6927 (1960).

Respondent also argues that there is no evidence that it knew or should have known that such payments by its suppliers were not made available to its competitors on proportionally equal terms. The record shows, first of all, that payments made to respondent by certain of its suppliers had not been proportionalized. The record also shows that respondent was not a passive recipient of these discriminatory payments but that it had, in fact, solicited them. Respondent, and not the suppliers, originated the plan under which the payments were made and in most instances respondent approached the supplier with the plan. The record shows that suppliers entered into contracts with respondent on the basis of individual negotiations and that in some instances respondent made special arrangements to secure the supplier's participation, such as by agreeing to handle its products on an exclusive or other preferential basis. There is also evidence that respondent brought pressure to bear on suppliers who were reluctant to renew their contracts under the sign program and did so successfully. There can be no doubt from the facts of record that discriminatory payments were made to respondent by its suppliers as a result of respondent's solicitation and inducement.

In this same connection, the record shows that respondent knew that the sign program was a cooperative advertising arrangement. It also knew that certain of its suppliers had promotional allowance programs which were available to their customers. Respondent also knew that, in general, the arrangements for participation in the sign program were not negotiated as part of such announced advertising allowance programs. It also knew that, with one exception, the arrangement was a specially tailored or negotiated deal outside of the supplier's generally announced program. The record also shows that in some instances respondent received from the supplier an allowance under the supplier's generally announced advertising program in addition to the benefits which it received from the sign deal. We think that these circumstances should have at least "provoked inquiry in the mind of a prudent businessman," *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 66 (1952), and that respondent should have iquired whether the participating suppliers were proportionalizing the payments made under the sign arrangement.

The sign deal was not limited to a single transaction, but was a program continuing over a period of four years. During that time respondent was urging its suppliers to become participating advertisers, and the record shows that certain of these suppliers, by participating, granted respondent allowances which they did not make available to respondent's competitors on proportionally equal terms. Under these circumstances, it would have been remarkable if these suppliers had not informed respondent during the course of the negotiations that it was receiving preferential treatment. There is ample evidence in the record that respondent was so informed. The letters of the broker, Frederick Gash, which are referred to in the initial decision, certainly placed respondent on notice that it was receiving benefits under the sign program which were not available to other customers of the participating suppliers represented by Gash.

It is our opinion that the hearing examiner's findings and conclusions with respect to the knowing inducement and receipt of discriminatory allowances are supported by the evidence and we fully concur therein.

Respondent also contends that the practices challenged by the complaint have been terminated and that a cease and desist order is therefore unnecessary. To support this contention respondent relies on the fact that the sign deal between respondent and Douglas Leigh was terminated on December 31, 1956. In so arguing respondent is apparently of the opinion that a showing that a practice has been discontinued is sufficient to render the controversy moot or that such a showing casts upon counsel supporting the complaint the burden of proving that respondent intends to renew the practice.

We think this argument must be rejected. As we pointed out In the Matter of *Ward Baking Company*, Docket 6833 (1958), the Commission is vested with a broad discretion in the determination of whether the practice has been surely stopped and whether an order to cease and desist is proper. The fact that the sign deal was terminated does not support the conclusion that respondent has abandoned the practice of knowingly inducing or receiving discriminatory allowances. Despite the respondent's protestations of innocence, the most charitable view which can be taken of its sign program is that it was a plan whereby its suppliers could attempt to circumvent Section 2(d) of the Clayton Act to respondent's advantages. The fact that this program was terminated after investigation had begun certainly does not create any inferences favorable to respondent. Moreover, respondent has not given any assurances that it will not again engage in the practice challenged by the complaint or some similar practice, nor can it be said that competitive conditions have so changed that respondent is not likely to engage in such practice. The appeal on this point is therefore denied.

The final question presented for our determination concerns the scope of the order to cease and desist. Although respondent does not suggest how the order should be modified, it apparently believes that it should not be prohibited from knowingly inducing or receiving a discriminatory allowance directly from a supplier but that the order should be limited to situations where respondent or its supplier acts through a third person. In other words, its contention seems to be that the order should go no further than to prohibit respondent from engaging in the illegal practice by the means which it had previously employed. We think that such a prohibition would be of little value and that to be effective the order "must proscribe the method of unfair competition as well as the specific acts by which it has been manifested." *Hershey Chocolate Corporation* v. *Federal Trade Commission*, 121 F. 2d 968 (1941); *Federal Trade Commission* v. *Ruberoid Company*, 343 U.S. 470 (1952).

Respondent's appeal is denied and the initial decision will be adopted as the decision of the Commission.

Commissioner Tait dissented to the decision herein.

DISSENTING OPINION

By TAIT, *Commissioner:*

This case was charged and tried on the theory that it is unlawful under Section 5 of the Federal Trade Commission Act for a *buyer* knowingly to induce or receive allowances of the type which are prohibited under Section 2(d) of the Robinson-Patman Act. My able colleagues seem not to have relied upon this theory as had the hearing examiner in reaching his initial decision.

It is unlawful under Section 2(f) of the Robinson-Patman Act for a *buyer* in the course of commerce knowingly to induce or receive a discrimination in price which is prohibited by the section. It is also unlawful under Section 2(c) of such Act for a *buyer* to receive or accept certain types of brokerage payments or allowances or discounts in lieu thereof. It is not unlawful under such Act, however, for a *buyer* knowingly to induce or receive allowances proscribed by Section 2(d). The majority decision makes this latter practice on the part of buyers illegal and, in effect, legislates a new antitrust prohibition. This, I believe, is beyond the authority of the Commission.

But the majority goes even further, for without requiring any factual showing of probable injury to competition, this ruling under the Federal Trade Commission Act applies to a buyer's practice a *per se* doctrine which Congress, for reasons of its own, directed only against a practice on the part of sellers.

The majority agrees that where there is a conflict between a specific and a general statute the specific statute shall govern. In the light of the specific provisions of the Robinson-Patman Act itself, and the inferences to be drawn therefrom, together with an agreed awareness of Congress as to abuses of buying power, the majority should argue that the policy of the specific statute, the Robinson-Patman Act, should govern here. The specific provisions of this Act concededly do not apply to this respondent. And looking at the Act as a whole we see no reason why the policy should differ from the specific provisions. In the same vein it is interesting to note that the failure to include the instant practice under Section 2(f) was considered as a legislative "oversight". Is the majority suggesting that it has the power to correct a Congressional "oversight" where the "oversight" concerns a substantive violation of law? Surely the majority is not advancing the novel theme that when Congress acts—even as fully as it has acted here—it had best explain away any inaction or else this Commission may step in to plug self-asserted gaps and loopholes.

Refusal to adopt the majority thesis does not render the Commission incapable of preserving fair competition. Congress gave us a road to travel in dealing with disproportional allowances and at the same time handed us a very forceful weapon against the sellers to combat the practice. On the very facts which gave rise to this case, the Commission proceeded against various suppliers of respondent in accordance with the Congressional mandate of section 2(d).[1]

I have no disagreement with the concept that "unfair methods of competition" under Section 5 of the Federal Trade Commission Act "is not restricted to conduct considered illegal at common law or to methods of law violation disclosed by prosecutions under the Sherman Act." I also agree to the further general proposition that the Commission's authority in the field of antitrust is not limited under Section 5 "to established illegal practices previously condemned by the antitrust laws." But neither proposition is decisive here. And both propositions are a far cry from the majority's subsequent crucial pronouncement, "... it is the duty of the Commission to 'supplement and bolster' Section 2 of the amended Clayton Act by prohibiting under Section 5 [of the Federal Trade Commission Act] practices which violate the *spirit* of the amended Act." (Underscoring supplied.)

The cases alluded to by my colleagues concerned the well-known "incipiency doctrine", the soundness of which is unquestioned; however, this doctrine and the cases cited are completely irrelevant here,

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[1] See, for example, Matter of Swanee Paper Corporation, FTC Docket No. 6927; Matter of General Mills, Inc., FTC Docket No. 6926; Matter of Judson Dunaway Corporation, FTC Docket No. 6925, complaints issued October 31, 1957.

both from a legal and factual standpoint, since this case—as charged in the complaint and as tried before the hearing examiner—is not founded upon any theories of "incipient" violation of the Sherman Act or the Clayton Act.

Nor are the various cases cited any precedent for the failure to show probable competitive harm. Cases such as *Motion Picture Advertising Service, Inc.*, *Keppel & Bro., Inc.*, *Beech-Nut Packing Co.*, *Fashion Guild*, and *Cement Institute* [2] all contained findings by the Commission that the challenged practices had adverse competitive effects. In the *Motion Picture Advertising Service* case, for example, it was found that the respondent's exclusive contracts unreasonably restrained competition and tended to monopoly. The Commission determined in the respective cases on the basis of injury evidence that the practices constituted unfair methods of competition and the courts agreed. There is no such factual situation here, and no such findings have been made. Moreover, in these authorities cited, the courts did not go so far as to hold, as the majority action herein seems to imply, that the Commission is empowered to declare as unfair methods of competition all practices which it may consider to be contrary to "the policy of the antitrust laws" or "which violate the spirit of the amended [Clayton] Act". I am concerned by what the majority does; I am fearful of the implications of what it says.

If the Commission's authority is so broad that it can declare unlawful any practice which it believes contrary to the spirit of the antitrust laws, it is apparent that all of the provisions of the Robinson-Patman amendment were not needed. Certainly, Section 2(f) dealing with the knowing inducement or receipt of price discriminations was unnecessary. Any alleged gaps which may appear in the Clayton Act provisions, under this principle, will not require legislation; the Commission merely has to declare them contrary to the spirit of the Clayton Act. Furthermore, a businessman in seeking to comply with the often difficult requirements of the Robinson-Patman Act, will now have not only the Act to contend with in this antitrust area, but also declarations of *per se* illegality by the Commission under Section 5. In other words, in attempting to comply with the law, thousands of businessmen must first determine if the business practice is legal under the Robinson-Patman Act. Then they must also determine whether the practice is legal under a vague standard, herein stated to be "the spirit of the amended Act". I am in vigorous disagreement with an approach to the law which has

[2] *Federal Trade Commission* v. *Motion Picture Advertising Service, Inc.*, 344 U.S. 392 (1953); *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Fashion Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); and *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

too much sail and too little anchor, or too much supplement and too little bolster.

As previously indicated, the majority have adopted a rule under which the practice challenged here is even held to be illegal without any showing of adverse competitive effect. Congress, in enacting Section 2(d), in effect found that practices covered thereby were harmful to competition and banned them outright; hence no showing of an adverse effect on competition is required to prove a charge against sellers. But Congress did not ban the practice here challenged of a buyer's knowing inducement of a Section 2(d) violation. Is competitive injury to be imputed in a vacuum? Moreover, if the practice is compared to a Section 2(f) case, it will be observed that the proof of a violation of that subsection requires a showing of a violation of Section 2(a), which itself requires proof of probable competitive injury. Congress was clearly most chary of imposing *per se* sanctions.

I would dismiss the complaint.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

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

Commissioner Tait dissenting.

IN THE MATTER OF

NORTHEAST CAPITAL CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT

Docket 7727. Complaint, Jan. 6, 1960—Decision, Aug. 12, 1960

Consent order requiring two associated corporations in Cincinnati, Ohio, to cease discriminating among their competing customers in the prices they charged for automotive safety parts and supplies by such practices as granting volume discounts to members of group buying associations on the basis of the total volume purchases of all, and selling the same quality merchandise under a different trade name to members of the National Automotive Parts Association at lower prices than to competitors of NAPA; and requiring one of them to cease conspiring with many of its distributors to fix resale prices.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof and hereinafter more particularly designated and described, have violated, and are now violating, the provisions of subsection (a), Section 2, of the Clayton Act, as amended (U.S.C., Title 15, Section 13), and Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Northeast Capital Corporation 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 375 Park Avenue, New York, N.Y.

Respondent K–D Lamp Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 19 Elm Street, Cincinnati, Ohio.

Respondent Vehicle Products Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 19 Elm Street, Cincinnati, Ohio.

Respondent K–D Lamp Company is a wholly owned subsidiary corporation of respondent Northeast Capital Corporation. Respondent Vehicle Products Company is a wholly owned subsidiary corporation of respondent K–D Lamp Company. Respondent Northeast Capital Corporation formulates, directs and controls the policies, acts and practices of both Vehicle Products Company and K–D Lamp Company, including the acts and practices hereinafter alleged.

PAR. 2. Respondent Northeast Capital Corporation is now, and for some years last past has been, engaged in the manufacture, sale and distribution of automotive safety parts and supplies to different purchasers of the same located in various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent Northeast Capital Corporation through its two subsidiary corporations, respondents K–D Lamp Company and

Vehicle Products Company. Said products and supplies are sold by respondents for use, consumption or resale within the United States and the District of Columbia, and respondents cause said products and supplies, so sold, to be shipped and transported from the State or States wherein they are manufactured to the purchasers thereof located in States other than the State or States wherein said products are manufactured. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce of said products and supplies among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondents, in the course and conduct of their business, as aforesaid, are now, and for some time past have been, engaged in active and substantial competition with other corporations, firms and individuals manufacturing, selling and distributing comparable automotive products and supplies in commerce. Many of the purchasers of respondents' products are competitively engaged with each other.

PAR. 4. Respondents, in the course and conduct of their business, as aforesaid, are now and for the past several years, have been, directly or indirectly, discriminating in price between many of the aforesaid purchasers of their automotive products and supplies of like grade and quality. Respondents' methods of discriminating in price on goods of like grade and quality have taken place through various means.

Respondent K-D Lamp Company has discriminated in price on goods of like grade and quality manufactured by its parent, Northeast Capital Corporation, in that it grants volume discounts to members of group-buying associations. Said discounts are granted on the basis of the total volume purchases of the members of each of these various associations. A great number of the individual members of the associations could not, by their individual purchases, be entitled to the various discounts so granted. Respondents do not grant like discounts to competitors of various of the members of the group-buying associations, even though the volume of purchases of these individual purchasers, competing with group-buying members, in many instances is equal to or greater than the volume of the group-buying members.

Respondent Vehicle Products Company sells under the trade name "Visall" the exact quality merchandise as is sold by the K-D Lamp Company under the trade name "K-D". These products, as are the products carrying the trade name K-D, are sold at the warehouse distributive level. "Visall" products are sold to members of the National Automotive Parts Association. The prices at which these products carrying the name "Visall" are sold are substantially lower than the prices at which products carrying the name "K-D" (and sold by the K-D Lamp Company) are sold to competitors of the National Automotive Parts Association. Respondents, thus, have discriminated in price in the sale of goods of like grade and quality to competing purchasers.

PAR. 5. The effect of respondents' aforesaid discriminations in price between different purchasers of their automotive products and supplies of like grade and quality, sold in the manner and method aforestated, may be to substantially lessen competition or tend to create a monopoly in the lines of commerce in which respondents and the aforesaid purchasers are engaged, or to injure, destroy or prevent competition with said respondents and their competitors, between said favored purchasers of respondents who receive discounts and unfavored purchasers who do not, or with customers of either of them.

PAR. 6. The aforesaid acts and practices of respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Section 13).

COUNT II

PAR. 7. The allegations of paragraphs 1 through 3 of Count I of this complaint are hereby adopted and incorporated in this Count by reference and made a part hereof the same as if they were repeated here verbatim, insofar as they relate to respondents Northeast Capital Corporation and K-D Lamp Company.

PAR. 8. In the course and conduct of its business, respondent Northeast Capital Corporation has, through its subsidiary corporation, K-D Lamp Company, conspired with many of the distributors of K-D Lamp Company, individually, to fix resale prices of products sold by respondent Northeast Capital Corporation through respondent K-D Lamp Company to these distributors, through various agreements between K-D Lamp Company and these same distributors wherein the price at which these distributors are to resell products is established and fixed. These agreements hinder and restrain price competition, as K-D Lamp Company itself is engaged in the sale of its products at the same level as, and in competition with, its distributors. Thus, respondents Northeast Capital Corporation and K-D Lamp Company have fixed resale prices to be charged by the distributors of K-D Lamp Company by prior agreement.

PAR. 9. The above-described course of action, as outlined in paragraph 8, between respondents Northeast Capital Corporation, K-D Lamp Company and their various distributors, are all to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Cecil G. Miles supporting the complaint.

Mr. Milton R. Wessel, of *Kaye, Scholer, Fierman, Hays & Handler*, of New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The Federal Trade Commission issued its complaint in this proceeding on January 6, 1960, in which it alleged that respondents had violated Section 2(a) of the Clayton Act as Amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13) by discriminating in price on automotive safety equipment of like grade and quality, manufactured and sold by respondents in interstate commerce. A true and correct copy of the complaint was duly served upon respondents as required by law. Thereafter respondents appeared by counsel and, after several prehearing conferences, entered into an agreement which is represented to be dispositive of all the issues involved in this proceeding. The agreement was received by the hearing examiner on June 10, 1960. It is accompanied by two affidavits of Raymond P. Vogele, President of K–D Lamp Company, and Vehicle Products Company. One affidavit is dated May 27, 1960, and one is dated March 22, 1960.

In and by said agreement the parties 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 the allegations in the complaint. In the agreement respondents K–D Lamp Company and Vehicle Products Company 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 the agreement.

The agreement dated April 6, 1960, containing consent order to cease and desist has been executed on behalf of respondents K–D Lamp Company and Vehicle Products Company by Raymond P. Vogele, president. It has been signed by Milton R. Wessel, counsel for respondents, by Cecil G. Miles, counsel supporting the complaint, and has been approved by the Director and the Associate Director of the Bureau of Litigation of the Federal Trade Commission.

The parties agree: That (1) the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint, the agreement, and the affidavit of Raymond P. Vogele which accompanies it; (2) the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; (3) the agreement and cease and desist order issued pursuant thereto shall not be construed to prohibit respondent K-D Lamp Company from availing itself of its rights, if any, under the Act of Congress of August 17, 1937, commonly known as the Miller-Tydings Act, or the Act of Congress of July 14, 1952, commonly known as the McGuire Act; the order to cease and desist provided for in the agreement may be entered without further notice to respondents and, when so entered, it shall have the same force and effect as though it were entered after a full hearing. Said cease and desist order 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.

The agreement containing consent order to cease and desist, upon which this initial decision is predicated specifically provides that it shall not preclude a further investigation and issuance of a complaint if such should be indicated, based upon respondents' sales of replacement parts to original equipment manufacturers.

This proceeding having now come on for final consideration upon the complaint and the aforementioned agreement containing consent order to cease and desist, and it appearing that the order provided for in said agreement provides for appropriate disposition of the gravamen of the complaint, and is dispositive of this proceeding as to all pertinent parties, the undersigned hearing examiner hereby accepts the aforementioned agreement containing consent order to cease and desist, and orders said agreement filed at the time this decision becomes the decision of the Federal Trade Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The hearing examiner makes the following

FINDINGS

1. The complaint filed herein states a good cause of action and this proceeding is in the public interest.

2. The Federal Trade Commission has jurisdiction over the subject matter and over the parties to this proceeding.

3. The acceptance of the agreement containing consent order to cease and desist is in the public interest.

4. Northeast Capital Corporation, respondent, went out of existence as a separate corporate entity on October 1, 1959. Northeast Capital Corporation had not manufactured automotive safety parts and supplies, nor engaged in any other activity referred to in the

Agreement Containing Consent Order to Cease and Desist since June 30, 1959.

5. The DUPLAN Corporation has been certified by Raymond P. Vogele in an affidavit dated May 27, 1960, to be the owner of all of the outstanding capital stock of K–D Lamp Company and Vehicle Products Company. Raymond P. Vogele, president of both of the said companies and a director of The DUPLAN Corporation has further certified that the DuPlan Corporation is not engaged in the automotive accessory business other than through its ownership of the outstanding capital stock of K–D Lamp Company and Vehicle Products Company, and has no intention of going into the automotive accessory business.

6. Respondent Vehicle Products Company sells automotive safety parts to warehouse distributor members of the National Automotive Parts Association under the private brand of the National Automotive Parts Association, at a price that has ranged from 1% to 2% lower than the price at which respondent K–D Lamp Company has sold K–D branded products to K–D Lamp Company's own independent warehouse distributors. The parties in their agreement state that at least a large part of these price differentials can be cost justified, as set forth in the affidavit of Raymond P. Vogele, dated March 22, 1960, accompanying the agreement. An additional non-cost-justified price difference of 1% or less between privately branded automotive safety products sold to members of the National Automotive Parts Association and K–D branded products sold to independent warehouse distributors, as applied only to automotive safety products, appears not to constitute an unlawful price discrimination under Section 2(a) of the Clayton Act as amended, nor violative of the cease and desist order hereinafter entered.

7. Respondent K–D Lamp Company is a corporation existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at *1910* Elm Street, in the City of Cincinnati, State of Ohio. (This was incorrectly shown in the complaint as being located at *19* Elm Street, Cincinnati, Ohio.)

8. Respondent Vehicle Products Company is a corporation existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at *1910* Elm Street, Cincinnati, Ohio. (This address was also incorrectly shown in the complaint as *19* Elm Street.)

Now therefore,

It is ordered, That respondents K-D Lamp Company, a corporation, and its officers, Vehicle Products Company, a corporation, and its officers, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale to the jobber trade for replacement purposes of automotive safety parts and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale or distribution of respondents' products.

It is further ordered, That the term "purchaser" as used in this order shall include any purchaser buying directly or indirectly from respondents by means of group buying or any related device, but shall not be construed in this proceeding to include original equipment manufacturers purchasing automotive parts from respondents for replacement use or sale.

It is further ordered, That respondent K-D Lamp Company, a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale and distribution of automotive safety parts and supplies in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Entering into, continuing, cooperating in, or carrying out any planned common course of action, agreement, understanding, combination, or conspiracy with distributors of said respondent or others engaged in the resale of respondent's products, or with any other third person, whereby the resale price of respondent's products is established, fixed, or agreed upon.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Northeast Capital Corporation as a respondent herein.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of August 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents K-D Lamp Company, and Vehicle Products Company, 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.