broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" with 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 21st day of October 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., and Betty Alexander, General Manager, 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

DANIEL D. WEINSTEIN ET AL.

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

Docket 7956. Complaint, June 16, 1960—Decision, Oct. 21, 1960

Consent order requiring sellers of corneal contact lenses in Oakland, Calif., to cease advertising falsely that their contact lenses could be worn successfully by all in need of visual correction and without discomfort, would correct all defects in vision and protect the eye, could be worn for a lifetime without change of prescription, etc.

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 Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading

under their own names, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Daniel D. Weinstein and Irwin R. Title are individuals trading under their own names as copartners with their principal offices and place of business located at 1212 Broadway, Suite 538, Oakland 12, California.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising and in the sale to the public of corneal contact lenses known as "Micro-Thin" and "Star-Vault" contact lenses. Contact lenses are designed to correct errors and deficiencies in the vision of the wearer and are devices as "device" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, advertisements concerning their said devices, by the United States mail and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in newspapers and by means of circulars and pamphlets, for the purpose of inducing, and which were and are likely to induce, directly or indirectly, the purchase of said devices; and respondents have also disseminated, and caused the dissemination of, advertisements concerning their said devices by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of their said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in advertisements disseminated and caused to be disseminated, as aforesaid, are the following:

Any one who wears glasses, no matter how slight the correction, can wear contact lenses.

See—the new invisible, comfortable way without glasses.

* * * designed for comfortable all-day wear.

* * * freedom from old-fashioned spectacles—with all new Micro-Thin Contact Lenses.

You too can take off your glasses and see with invisible contact lenses.

Completely grooved Micro-Thins are specially designed to allow normal tear and air flow for all day comfort.

For a lifetime investment in better looks and more natural vision.

Question: How safe are contact lenses?

Answer: It is safer to wear contact lenses than regular spectacle lenses because the plastic lens acts as a protective covering for the eye.

PAR. 4. By and through the statements made in said advertisements, and others of similar import not specifically set out herein, respondents represent and have represented, directly and by implication that:

1. All persons in need of visual correction can successfully wear respondents' contact lenses.

2. There is no discomfort in wearing their contact lenses.

3. Said contact lenses can be worn all day with complete comfort.

4. Eyeglasses can be discarded upon the purchase of their contact lenses.

5. Their contact lenses will correct all defects in vision.

6. Their contact lenses differ from other contact lenses in that they permit tear and air flow.

7. Said lenses may be worn for a lifetime without change of prescription.

8. Said lenses protect the eye.

PAR. 5. The advertisements containing the aforesaid statements and representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

In truth and in fact:

1. A significant number of persons in need of visual correction cannot successfully wear respondents' contact lenses.

2. Practically all persons will experience some discomfort when first wearing respondents' contact lenses. In a significant number of cases discomfort will be prolonged and in some cases will never be overcome.

3. Many persons cannot wear respondents' contact lenses all day without discomfort, and no person can wear said lenses all day in complete comfort until he or she has become fully adjusted thereto.

4. Eyeglasses cannot always be discarded upon the purchase of respondents' contact lenses.

5. Respondents' contact lenses will not correct all defects in vision.

6. Many competitive contact lenses permit tear and air flow to the same extent as respondents' lenses.

7. In the case of certain individuals, prescriptions for contact lenses must be changed during their lifetime.

8. Respondents' lenses provide protection to only a small portion of the eye.

PAR. 6. The dissemination by the respondents of the aforesaid false advertisements constitutes unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Frederick McManus 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) issued its complaint herein, on June 16, 1960, charging the above-named respondents with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On August 30, 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 counsel supporting the complaint, under date of August 12, 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. Respondents Daniel D. Weinstein and Irwin R. Title are individuals trading under their own names as copartners with their principal offices and place of business located at 1212 Broadway, Suite 538, Oakland 12, California.

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

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

4. Respondents waive:

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

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

c. All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

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

7. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

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

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," said agreement is hereby approved and accepted and is ordered filed if and when said agreement shall have become a part of the Commission's decision. The hearing examiner finds from the complaint and the said agreement that the Commission has jurisdiction of the subject matter of this proceeding and of the persons of each of the respondents herein; that the complaint states legal causes for complaint under the Federal Trade Commission Act against each of the respondents, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order, therefore, should be and hereby is entered as follows:

It is ordered, That Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading under their own names or under any other name, or names, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of contact lenses, do forthwith cease and desist from, directly or indirectly:

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

(a) All persons can successfully wear their contact lenses;

(b) There is no discomfort in wearing their contact lenses;

(c) All persons can wear respondents' contact lenses all day without discomfort; or that any person can wear said contact lenses all day without discomfort until such person has become fully adjusted thereto;

(d) Eyeglasses can always be discarded upon the purchase of respondents' lenses;

(e) Their contact lenses will correct all defects in vision;

(f) Their contact lenses differ from other contact lenses in that they permit tear and air flow;

(g) Said contact lenses may be worn for a lifetime without change of prescription; or misrepresenting the time that they may be so worn;

(h) Said contact lenses protect the eye unless limited to the small portion of the eye that is covered thereby.

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

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 21st day of October 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading under their own names, 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

ALFONSO GIOIA & SONS, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a), 2(d), AND 2(e) OF THE CLAYTON ACT

Docket 7790. Complaint, Feb. 25, 1960—Decision, Oct. 22, 1960

Consent order requiring a macaroni manufacturer in Rochester, N.Y., with annual sales exceeding $2,500,000, to cease discriminating in price in violation of the Clayton Act by giving some customers but not their competitors substantial discounts, such as special prices and free goods granted to Foodtown Purchasing Co., The Kroger Co., and Stop-N-Shop Super Markets, thus violating Sec. 2(a); and by paying advertising allowances and furnishing demonstrators to favored customers, in violation of Secs. 2(d) and 2(e), respectively.

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 subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Alfonso Gioia & Sons, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 89 Canal Street, Rochester, New York.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of macaroni and macaroni products.

Respondent sells its products of like grade and quality to a large number of customers located throughout the United States for use, consumption, or resale therein, including wholesalers, retailers, and chain stores. Respondent's sales of its products are substantial, exceeding $2,500,000 annually.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of New York to customers located in other states of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business, respondent is in substantial competition with other corporations, partnerships, individuals, and firms engaged in the manufacture, sale and distribution of macaroni and macaroni products.

Many of respondent's purchasers are likewise in competition with each other in the resale of respondent's products within the same trading areas.

PAR. 5. In the course and conduct of its business in commerce, since January 1, 1957, and continuing to the present, respondent is now and has been discriminating in price between different purchasers of its products by selling said products to some purchasers at substantially higher prices than the prices charged competing purchasers for such products of like grade and quality.

PAR. 6. For example, in Cleveland, Ohio, trading area, respondent gave substantial discounts on certain of its products, through the use of special prices and free goods, to Foodtown Purchasing Company, The Kroger Company, and Stop-N-Shop Super Markets but did not offer or grant such discounts to other purchasers who compete with the above-named favored purchasers in the sale and distribution of respondent's products.

PAR. 7. The effect of such discriminations in price made by respondent, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged, or to injure, destroy or prevent competition with respondent and with purchasers from respondent who receive the lower prices.

PAR. 8. The discrimination in price, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT II

PAR. 9. Paragraphs 1 through 4 of Count I hereof are hereby set forth by reference and made a part of this Count II as fully and with the same effect as if quoted here verbatim.

PAR. 10. In the course and conduct of its business in commerce, since January 1, 1957, and continuing to the present, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 11. For example, during the year 1959, respondent contracted to pay, and periodically did pay, amounts of $350.00 to Stop-N-Shop Super Markets of Cleveland, Ohio, as compensation or as allowances for advertising or other services or facilities furnished by or through Stop-N-Shop Super Markets in connection with their offering for sale or sale of products sold to them by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Stop-N-Shop Super Markets in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 12. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT III

PAR. 13. Paragraphs 1 through 4 of Count I hereof are hereby set forth by reference and made a part of this Count III as fully and with the same effect as if quoted here verbatim.

PAR. 14. In the course and conduct of its business in commerce, since January 1, 1957, and continuing to the present, respondent has discriminated in favor of some of its purchasers buying its commodities by contracting to furnish, or furnishing, or by contributing to the furnishing of, such favored competing purchasers services or facilities connected with the handling, sale, or offering for sale such commodities so purchased upon terms not accorded to all other competing purchasers on proportionally equal terms.

PAR. 15. As illustrative of such practices, respondent has furnished certain of its purchasers the services and facilities of special personnel known as "demonstrators", while not according such services and facilities to all other competing purchasers on proportionally equal terms. Such personnel, compensated and furnished by respondent, are installed in the places of business of favored purchasers to assist in promoting the sale of respondent's products to customers of said favored purchasers.

PAR. 16. The acts and practices of respondent, as alleged herein, are in violation of subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John Perechinsky for the Commission.

Mr. E. Willoughby Middleton, Jr., of *Forsyth, Gianniny & Middleton*, of Rochester, N.Y.; *Mr. Alexander M. Lankler* of *Chapman, Walsh & O'Connell*, of Washington, D.C.; and *Mr. Alexander Akerman, Jr.*, of *Shipley, Akerman & Pickett*, of Washington, D.C., for respondent.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

The complaint in this matter charges the respondent with violation of subsections (a), (d), and (e) of Section 2 of the Clayton Act as amended.

An agreement has now been entered into by respondent, its attorneys 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 conclusion 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 it may have to challenge or con-

test 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 it 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 complaint insofar as it concerns the allegation of "primary line injury" namely, that the effect of respondent's discriminations in price may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with respondent, should be dismissed on the ground that the evidence in the light of subsequent developments is insufficient to substantiate that allegation.

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 Alfonso Gioia & Sons, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 89 Canal Street, Rochester, New York.

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

ORDER

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

1. Discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser competing in fact in the resale or distribution of such products.

2. Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's products, unless such payment or con-

sideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

3. Furnishing, contracting to furnish, or contributing to the furnishing of services or facilities in connection with the handling, processing, sale or offering for sale of respondent's products to any purchaser from respondent of such products bought for resale, when such services or facilities are not accorded on proportionally equal terms to all other purchasers from respondent who resell such products in competition with such purchasers who receive such services or facilities.

It is further ordered, That the allegations of "primary line injury" in the complaint, namely, that the effect of respondent's discriminations in price may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with respondent, be dismissed.

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 22d day of October 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

KOLSTAD CANNERIES, INC., ET AL.

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

Docket 7807. Complaint, Mar. 4, 1960—Decision, Oct. 22, 1960

Consent order requiring a canner of fruits and vegetables in Silverton, Ore., to cease discriminating in price in violation of the Clayton Act by such practices as granting some wholesalers in Seattle and Yakima, Wash., substantially lower prices than their competitors—charging at least one large grocery chain in the Seattle area much less than some wholesalers whose retailer-customers competed with the chain's outlets—thus violating Sec. 2(a); and by paying some direct-buying wholesale grocers so-called advertising allowances of 2½ and 3%, which were actually discounts in lieu of brokerage, thus violating Sec. 2(c).

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof have been and are now violating the provisions of subsections (a) and (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Kolstad Canneries, Inc., sometimes hereinafter referred to as respondent corporation or as corporate respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at Front and D Streets (P.O. Box 67), Silverton, Oregon.

Respondent corporation is now, and for the past several years has been, engaged in business as a canner or packer, seller and distributor of fruits and vegetables, such as Blue Lake beans, corn, pumpkin and purple plums, with the bulk of its canning activities in Blue Lake beans. All of these items are hereinafter referred to as food products.

PAR. 2. Respondent Leonard E. Kolstad, hereinafter referred to as respondent Kolstad or as the individual respondent, is an individual and is president, manager, and majority stockholder of the corporate respondent named herein, with his principal office and place of business the same. Respondent Kolstad, along with his wife and brother, is also a partner in the L. E. Kolstad Brokerage Company operated from the same address as that of Kolstad Canneries, Inc.

PAR. 3. Respondents, both corporate and individual, sell and distribute their food products of like grade and quality to a large number of purchasers located in various states of the United States other than the State of Oregon. Respondents ship or cause the said food products, when sold, to be shipped from respondents' canning plant or warehouse located in Silverton, Oregon, to purchasers located in other states. Thus there has been at all times mentioned herein a constant current of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act, between the respondents named herein and the purchasers of these food products.

PAR. 4. In the course and conduct of their business in commerce as aforesaid, respondents have in the past and are at the present time selling their food products of like grade and quality to wholesale grocers who resell said products to retail grocers for sale to the consumer. Respondents also sell said food products of like grade and

quality to at least one large retail grocery chain. Many of respondents' wholesale purchasers are engaged in competition with each other in the sale and distribution of said food products, and this large retail grocery chain is engaged in competition with many of the customers of some of the wholesale purchasers of respondents' food products. The food products mentioned herein are sold for use, consumption, or resale within the United States.

PAR. 5. In the course and conduct of their business as alleged herein, respondents have in the past and are at the present time discriminating in prices charged to various purchasers of their food products by charging substantially higher prices to some of their purchasers than they do to other purchasers for food products of like grade and quality.

For example, respondents sold large quantities of their food products of like grade and quality to some wholesale purchasers in Seattle and Yakima, Washington, at prices substantially lower than the prices charged other wholesale purchasers competing in these areas with the wholesale purchasers paying the lower prices for products of like grade and quality. During this same period of time respondents have likewise made sales of their food products of like grade and quality to at least one large retail grocery chain in the Seattle, Washington, area at prices substantially lower than those charged some, but not all, wholesale purchasers in that area who resell to retail customers competing with many of the retail outlets of the chain.

The discrimination in prices mentioned above is not a fixed and certain amount, but varies from time to time, and also varies as between or among the many purchasers from respondent.

PAR. 6. The effect of such discriminations in price, as herein alleged, has been or may be substantially to lessen competition in the lines of commerce in which respondents and their customers are respectively engaged, or to injure, destroy, or prevent competition between respondents' favored and non-favored wholesale purchasers, and between respondents' favored retail chain purchaser and the customers of respondents' non-favored wholesale purchasers competing with said retailer.

PAR. 7. The aforesaid acts and practices of respondents as herein alleged constitute a violation of subsection (a) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Section 13).

COUNT II

PAR. 8. The allegations of paragraphs 1 through 4 of Count I of this complaint are hereby adopted and incorporated in Count II, and

made a part hereof by reference the same as if they were repeated here verbatim.

PAR. 9. The major part of respondents' food products is sold and distributed through brokers, generally located in the various selling areas of the United States where the customers are located, and for their services in connection with these sales said brokers are paid a brokerage fee or commission, usually at the rate of 2½ percent or 3 percent of the net selling price of the merchandise, depending on the section of the country in which the broker operates. The practices of respondents as hereinafter described are separate from and in addition to the practices outlined in Count I of this complaint.

PAR. 10. In the course and conduct of their business as aforesaid, respondents, both corporate and individual, acting either through the corporate respondent named herein, or through the L. E. Kolstad Brokerage Company, sell and distribute their food products in substantial quantities to at least two wholesale grocers direct, without utilizing the services of brokers in their respective general areas, and on these sales respondents have paid, granted or allowed to said customers, discounts or allowances in lieu of brokerage. These discounts are paid to these two customers by way of a so-called advertising allowance in the amount of 2½ percent to one customer, and 3 percent to the other, both deducted from the face of the invoices at the time of billing, with no proof of advertising required of the customers in order to get the allowance. This discount or allowance is the usual rate of brokerage paid by respondents to brokers in the respective general areas of these two customers. It is not a true advertising allowance but is merely designated as such to avoid disclosing its real purpose. It is, therefore, alleged that this so-called advertising allowance is nothing but a discount in lieu of brokerage and was intended as such by respondents.

PAR. 11. The acts and practices of respondents, both corporate and individual, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Section 13).

Mr. Cecil G. Miles for the Commission.

Goodenough, Clark & Marsh, by *Mr. Malcolm F. Marsh*, of Salem, Oreg., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated March 4, 1960, the respondents are charged with violating the provisions of subsections (a) and (c) of Section 2 of the Clayton Act, as amended.

On August 16, 1960, the respondents and their attorney entered into an agreement with counsel in support of the complaint for a consent order.

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

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

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 Kolstad Canneries, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at Front and D Streets (P.O. Box 67), in the City of Silverton, State of Oregon.

Respondent Leonard E. Kolstad is an individual and is an officer of respondent corporation with his office and principal place of business located at Front and D Streets (P.O. Box 67), in the City of Silverton, State of Oregon.

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

ORDER

It is ordered, That respondents Kolstad Canneries, Inc., a corporation, and its officers, and Leonard E. Kolstad, individually and as an officer of said respondent corporation, and respondents' agents, representatives and employees, directly or through any corporate, partnership, or other device, in connection with the sale and distribution of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from

discriminating, directly or indirectly, in the price of food products of like grade and quality:

1. By selling at different prices to wholesalers who compete with each other in the resale and distribution of such food products; and

2. By selling to any retailer at prices lower than prices charged any wholesaler who competes, or whose customers compete, with such retailer in the sale and distribution of such food products.

It is further ordered, That respondents Kolstad Canneries, Inc., a corporation, and its officers, and Leonard E. Kolstad, individually and as an officer of said respondent corporation, and respondents' agents, representatives and employees, directly or through any corporate, partnership (including the L. E. Kolstad Brokerage Company), or any other device, in connection with the sale and distribution of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf, or subject to the direct or indirect control, of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with the sale of food products to such buyer for his own account.

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 22d day of October 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

ATLAS SEWING CENTERS, INC., ET AL.

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

Docket 7697. Complaint, Dec. 21, 1959—Decision, Oct. 27, 1960

Consent order requiring a large sewing machine and vacuum cleaner chain, with headquarters in Miami, Fla., transacting business through 36 subsidiary corporations which operated some 50 retail stores in 22 States, to

cease using bait advertising, fictitious pricing, and deceptive contests to obtain leads to prospective purchasers, and to cease claiming that repossessed or traded-in sewing machines and vacuum cleaners were new and that merchandise was guaranteed.

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 Atlas Sewing Centers, Inc., a corporation, and Herbert Kern, Theodore O. Kaplen and Charlotte L. Blackburn, individually and as officers of said corporation, and Leo Kern, individually and as Chairman of the Board of Directors 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, Atlas Sewing Centers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7630 Biscayne Boulevard, Miami, Florida. Corporate respondent Atlas Sewing Centers, Inc., transacts its said business through 36 subsidiary corporations which operate approximately 50 retail stores in 22 states and the District of Columbia.

Respondents Herbert Kern, Theodore O. Kaplen and Charlotte L. Blackburn are officers of the corporate respondent. Respondent Leo Kern is Chairman of the Board of Directors of said corporation. These individual respondents formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

Respondent Herbert Kern is located at 320 S. Hibiscus Drive, Miami Beach, Florida. Respondent Theodore O. Kaplen is located at 1506 Main Street, Houston, Texas. Respondent Charlotte L. Blackburn is located at 108 Daniels Street, Wilson, North Carolina. Respondent Leo Kern is located at 3912 Roseneath Drive, Houston, Texas.

PAR. 2. Respondents are now, and for a number of years last past have been, engaged in the advertising, sale and distribution of new and used sewing machines and vacuum cleaners to the purchasing public.

PAR. 3. In the course and conduct of their business, respondents purchase said products from sources in the States of New York, Connecticut, Florida, and other locations, and have said products

shipped across state lines directly to their various retail stores. Payments for purchases of said products are made from the main office at Miami, Florida, except that the Houston, Texas, office maintains the records regarding purchases for the stores located in the midwest and western parts of the United States. In addition, used sewing machines and vacuum cleaners, including trade-ins on new machines or those which have been repossessed, are shipped from one store to another store across state lines.

In a large percentage of the sales of said products credit is extended. In such cases, a conditional sales contract is used, which sets out the amount and time of future payments, and after being signed by the purchasers, is forwarded to Atlas Sewing Centers, Inc., at its office in Miami, Florida, or Houston, Texas, depending on the section of the country in which the transaction occurs. Thereafter, so-called "verification letters" are mailed to each purchaser from the office in Miami or Houston as soon as either office has been notified of the sale to that customer and the credit department has made all the necessary computations and filled out all the appropriate records. In addition to the "verification letter," another letter is sent enclosing the payment booklet and advising the purchaser where the payments are to be made. There is a constant flow of payments to respondents' offices in Miami and Houston through their retail stores from the purchasers of both new and used machines located in the several states and the District of Columbia.

Respondents have further engaged in extensive commercial intercourse in commerce with their various retail stores, consisting of the transmission and receipt of letters, checks, reports, contracts, accounting and inventory forms and other documents of commercial nature, and various forms of advertising matter sent to their retail stores which is used by the retail stores in the conduct of their business, all in connection with the sale of respondents' products.

PAR. 4. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their products, have made certain statements and representations with respect thereto in advertisements inserted in newspapers, magazines, radio and television, direct mail advertising and through other advertising medias. By and through the use of such statements and representations, and others of similar import but not specifically set forth herein, and through oral statements made by their salesmen, respondents have represented, directly or by implication:

(a) That they are making a bona fide offer to sell new and used sewing machines, ranging in price from approximately $12.50 to $29.50, and new and used vacuum cleaners, ranging in price from approximately $9.95 to $14.95;

(b) That they are conducting a bona fide contest, the winners of which are to receive a sewing machine or vacuum cleaner and other prizes, including gift certificates;

(c) That the usual and regular retail selling prices of their Atlas sewing machine, Cinderella sewing machine, and Atlas vacuum cleaner are $199.50, $69.50 and $169.95, respectively;

(d) That certain of their products (which have been used) are new and unused;

(e) That certain of their products were guaranteed in every respect for life or for a specified number of years.

PAR. 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact:

(a) The offers to sell new and used sewing machines and vacuum cleaners for the low prices set forth in subparagraph (a) of Paragraph Four above were not genuine or bona fide offers but were made for the purpose of obtaining leads to persons interested in purchasing said products. After obtaining such leads, respondents, or their salesmen, called upon such persons at their homes, or waited upon them at respondents' place of business. At such times and places, respondents and their salesmen would disparage the advertised product and would instead attempt to sell and did sell different and more expensive sewing machines or vacuum cleaners;

(b) Respondents did not conduct a bona fide contest. Such contest was a scheme to obtain leads. Almost everyone entering the contest won a gift certificate entitling them to a discount on the purchase of a sewing machine or vacuum cleaner. These certificates were valueless as the holders of such were charged the usual and regular price by the respondents for any sewing machine or vacuum cleaner they may have purchased. In fact, in many instances the salesman calling would notify such persons that they had "won" a sewing machine or vacuum cleaner in order to gain entry but would subsequently notify them that they had merely won a discount off the purchase price of a "Cinderella" or another inexpensive machine, or an Atlas machine.

(c) The prices set forth in subparagraph (c) of Paragraph Four above were fictitious and in excess of the usual and regular retail prices of said products;

(d) Certain of the products represented as being new were in fact used machines having the appearance of being new and when represented to be new, or in the absence of a disclosure that they are used, are readily accepted by the public as being new and unused. This is particularly true, when, as frequently occurs, the prices of the used machines are the same, or approximately the same, as new machines of the same kind. There is a preference on the part of the

public for new machines over used machines, particularly when the price is the same, or approximately the same.

(e) Respondents' guarantee is not unconditional. It is limited in certain respects and these limitations are not disclosed in the advertisement or to the purchaser.

PAR. 6. In the conduct of their business, at all times mentioned herein, the respondents have been in substantial competition in commerce with corporations, firms and individuals engaged in the sale of sewing machines and vacuum cleaners of the same general kind and naure as that sold by respondents.

PAR. 7. 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' products 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. 8. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of the 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. Michael J. Vitale for the Commission.

Arnall, Golden & Gregory, by *Mr. Ellis Arnall*, of Atlanta, Ga., and *Dawson, Griffin, Pickens & Riddell*, by *Mr. Donald Dawson*, of Washington, D.C., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on December 21, 1959, issued its complaint herein, charging the above-named respondents with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On September 8, 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 counsel supporting the complaint, as well as counsel for respondents, under date of September 2, 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 Atlas Sewing Centers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7630 Biscayne Boulevard, Miami, Florida.

Respondent Herbert Kern is an officer of the corporate respondent and is loacted at 320 S. Hibiscus Drive, Miami Beach, Florida. Respondent Theodore O. Kaplen is an officer of the corporate respondent and is located at 3308 McGregor Drive, Houston, Texas, and not as set forth in the complaint. Respondent Charlotte L. Blackburn is an officer of said corporation and is located at 2506 Dorrington Street, Houston, Texas, and not as set forth in the complaint. Respondent Leo Kern is Chairman of the Board of Directors of said corporation and is located at 3912 Roseneath Drive, Houston, Texas.

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

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

4. Respondents waive:

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

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

c. All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

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

7. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents.

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

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," said agreement is hereby approved and accepted and is ordered filed if and when said agreement shall have become a part of the Commission's decision. The hearing examiner finds from the complaint and the said agreement that the Commission has jurisdiction of the subject matter of this proceeding and of the persons of each of the respondents herein; that the complaint states legal causes for complaint under the Federal Trade Commission Act against each of the respondents, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order, therefore, should be and hereby is entered as follows:

It is ordered, That respondent Atlas Sewing Centers, Inc., a corporation, and its officers, and respondents Herbert Kern, Theodore O. Kaplen and Charlotte L. Blackburn, individually and as officers of said corporation, and Leo Kern, individually and as Chairman of the Board of Directors 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 sewing machines and vacuum cleaners, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That said merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered;

2. That awards or prizes are of a certain value or worth, unless in using such awards or prizes the recipients thereof are benefited by, or save the amount of, the stated value or worth of such prizes or awards;

3. That any price is respondents' usual and regular retail price of said merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail in their normal course of business;

4. That sewing machines and vacuum cleaners which are trade-ins or have been repossessed are new, or otherwise failing to clearly reveal that sewing machines and vacuum cleaners which are trade-ins

or have been repossessed are trade-ins or repossessed, as the case may be;

5. That said merchandise sold or offered for sale is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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 27th day of October 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

FAME RECORDS, INC., ET AL.

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

Docket 7764. Complaint, Jan. 27, 1960—Decision, Oct. 27, 1960

Consent order requiring a manufacturer of phonograph records in New York City to cease giving concealed payola to disc jockeys and other personnel of television and radio stations to induce frequent playing of its records in order to increase sales.

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 Fame Records, Inc., a corporation, and Lee A. C. Gallo, Jr., 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. Fame Records, 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 782 Eighth Avenue, New York, N.Y.

Respondent Lee A. C. Gallo, Jr. is president of the corporate respondent, and formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices herein set out. The address of the individual respondent is the same as that of said corporate respondent.

PAR. 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 and jukebox operators 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 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 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, 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, negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines.

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 said disk jockeys with the payment of money or other consideration to them.

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 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* for the Commission.

Respondent, for itself.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the manufacture, distribution and sale of phonograph records to independent distributors for resale to retail outlets and jukebox operators in various states of the United States, with violation of the Federal Trade Commission Act, in that respondents, 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.

After the issuance of the complaint, respondent Fame Records, Inc., and counsel supporting the complaint 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 transmitted to the Hearing Examiner for consideration.

The agreement states that respondent Fame Records, 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 782 Eighth Avenue, New York, N.Y., and recommends that the complaint herein, which also names respondent Lee A. C. Gallo, Jr., in his individual capacity and as an officer of said corporation, be dismissed as to him, due to his recent death as evidenced by copy of death certificate attached to the agreement and made a part thereof.

The agreement provides, among other things, that respondent Fame Records, Inc. admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the

law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

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

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That respondent Fame Records, Inc., a corporation, and its officers, and respondent's 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 broadcasting of, any such records in which respondent has 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 respondent has 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.

It is further ordered, That the complaint be, and hereby is, dismissed as to Lee A. C. Gallo, Jr., individually, and as an officer of said corporate respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 27th day of October, 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

CUTTER LABORATORIES

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

Docket 7840. Complaint, Mar. 21, 1960—Decision, Oct. 27, 1960

Consent order requiring manufacturers of human and veterinary biologicals and pharmaceuticals in Berkeley, Calif., to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act through classifying its customers into functional categories with results, as typical, that a low volume purchaser paid a higher net price than his high volume purchasing competitors in the same group, and all purchasers in one group received a 15% price advantage over competitors in another where both bought less than $25 worth.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating Section 2(a) of the amended Clayton Act (U.S.C. Title 15, Section 13), hereby issues its complaint as follows:

PARAGRAPH 1. Respondent 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 4th and Parker Streets, Berkeley, California.

PAR. 2. Respondent is engaged in the manufacture, distribution and sale of human biologicals and pharmaceuticals, hospital solutions and specialty products, veterinary biologicals and pharmaceuticals, specialty veterinary products, and human blood products.

Respondent's total sales for the year 1958 were approximately $18,745,000.

PAR. 3. These products are sold by respondent for use, consumption, or resale within the United States and respondent causes them

to be shipped and transported from the state of location of its principal place of business to purchasers located in states other than the state in which the shipment or transportation originated.

PAR. 4. Respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products described among and between the states of the United States.

Respondent maintains and operates manufacturing plants at Berkeley, California, and Chattanooga, Tennessee, among others. From these plants it ships and sells throughout the United States to various purchasers located in the several states of the United States, including Washington, Oregon, Texas, Colorado, Illinois and New York.

PAR. 5. In the course and conduct of its business in commerce, respondent is discriminating in price between different purchasers of its products of like grade and quality by selling to some purchasers at higher and less favorable prices than it sells to other purchasers competitively engaged in the resale of its products with the non-favored purchasers or their purchasers.

For example, respondent's products are divided, generally, into two large groups: (1) human products only, and (2) veterinary products, including human products purchased by veterinary products customers. Within these two groups, respondent categories its purchasers according to function: i.e., Doctor (#14), pharmacy (#10), "service retailer" (#13), hospital clinic (#41), and others.

Since about June 1957, in the "human products" category, all #10 buyers are subject to a cumulative discount plan off the face of each invoice. Invoices totaling under $25.00 receive no discount. Invoices totaling from $25.00 to $49.90 receive 7½ percent discount. Invoices of $50.00 or more receive 15 percent discount. Thus, a low volume purchaser in the #10 group is subject to a higher net price than the competing high volume purchaser of the #10 group, who obtains the 15 percent discount on the basis of quantity purchases.

Further, all group #13 buyers, who are competitively engaged with the group #10 buyers in the distribution and resale of respondent's products, designated "service retailers" by the respondent, receive a straight 15 percent discount off the face of each invoice irrespective of the total volume, subject to the exception of a few products listed on respondent's price schedules. Thus, a group #13 buyer would receive a 15 percent discount off the face of an invoice totaling less than $25.00 whereas a competing group #10 buyer purchasing the same volume would receive no discount.

Basically, the same categorization applies to the veterinary product line, which operates to the advantage of a high volume purchaser and to the disadvantage of the competing low volume purchaser.

PAR. 6. In the course and conduct of its business in commerce, respondent is competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution and sale of its products. Some of respondent's purchasers are competitively engaged with each other in the resale of respondent's products within the various trading areas in which they are engaged in business.

PAR. 7. The effect of respondent's discriminations in price, as alleged, may be substantially to lessen, injure, destroy or prevent such competition, as alleged, or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are engaged.

PAR. 8. The foregoing acts and practices of the respondent, as alleged, violate Section 2(a) of the amended Clayton Act (U.S.C. Title 15, Section 13).

Mr. Franklin A. Snyder supporting the complaint.

Morrison, Foerster, Holloway, Shuman & Clark by *Mr. Girvan Peck* of San Francisco, Calif., for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on March 21, 1960 charging that respondent had violated Section 2(a) of the amended Clayton Act by unlawfully discriminating in price among its customers in connection with the sale of its products, including human and animal biologicals and pharmaceuticals.

On August 24, 1960 there was submitted to the undersigned hearing examiner an agreement between respondent, its counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the terms of the 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 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. Cutter Laboratories was 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 Fourth and Parker Streets in the City of Berkeley, California.

2. Respondent Cutter Laboratories, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Fourth and Parker Streets, Berkeley, California.

3. Cutter Laboratories, a California corporation, was merged into and with Robert K. Cutter Company, a Delaware corporation, on May 10, 1960, and the name of the latter corporation was changed by the Agreement of Merger to Cutter Laboratories, Inc., a Delaware corporation.

4. Cutter Laboratories, Inc., is the legal successor to Cutter Laboratories and as such it has assumed all of the obligations and duties of Cutter Laboratories, including compliance with the Order to Cease and Desist contained herein.

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

ORDER

It is ordered, That respondent Cutter Laboratories, Inc., a corporation (the legal successor to Cutter Laboratories which was named as respondent in the original complaint), and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of its products, including human and animal biologicals and pharmaceuticals, in commerce, as "commerce" is defined in the amended 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 price charged to any other purchaser who in fact competes in the resale and distribution of the respondent's products with the purchaser paying the higher price.

It is further ordered, That the allegation of a substantial lessening of competition or tendency toward monopoly in the line of commerce in which the respondent is engaged be dismissed.

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 27th day of October, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Cutter Laboratories, Inc., a corporation (the legal successor to Cutter Laboratories which was named as respondent in the original complaint) 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

TUBE MFG. CORP. ET AL.

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

Docket 7917. Complaint, June 3, 1960—Decision, Oct. 27, 1960

Consent order requiring a Philadelphia manufacturer of television picture tubes to cease selling the tubes with no notice thereon or on containers or invoices to show that tubes were rebuilt and contained used parts when such was the case.

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 Tube Mfg. Corp., a corporation, and Charles A. Rose, Alexander A. Parents and Sebastian Batorillo, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Tube Mfg Corp., 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 29th and Hunting Park Avenue, Philadelphia,

Pennsylvania. Respondents Charles A. Rose, Alexander A. Parents and Sebastian Batorillo are officers of this corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their 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 the manufacturing, offering for sale, sale and distribution of rebuilt television picture tubes containing used parts to wholesalers 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 product, when sold, to be shipped from their place of business in the State of Pennsylvania 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 product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents do not disclose on the tubes or on the cartons in which they are packed or on invoices or in any other manner that said television picture tubes are rebuilt and contain used parts.

PAR. 5. When television tubes are rebuilt containing used parts, in the absence of a disclosure to the contrary, such tubes are understood to be and are readily accepted by the public as new tubes.

PAR. 6. By failing to disclose the facts as set out in Paragraph 4, respondents place in the hands of uninformed or unscrupulous dealers means and instrumentalities whereby they may mislead and deceive the public as to the nature of their said television picture tubes.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of television picture tubes.

PAR. 8. The failure of the respondents to disclose on their television picture tubes, on the cartons in which they are packed and on invoices, that they are rebuilt, containing used parts, has had and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that their said picture tubes are new in their entirety, and into the purchase of substantial quantities of respondents' tubes by reason of such 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. 9. 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. Michael J. Vitale for the Commission.

Mr. David A. Leabman, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

On June 3, 1960, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violating the provisions of the Federal Trade Commission Act in connection with the manufacturing, offering for sale, sale and distribution of rebuilt television picture tubes containing used parts. On July 29, 1960, the respondents and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist in accordance with section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint and agree, among other things, that the cease and desist order there set forth may be entered without further notice and shall have the same force and effect as if entered after a full hearing. The agreement includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, and that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint. The hearing examiner finds that the content of the said agreement meets all the requirements of section 3.25(b) of the Rules of Practice.

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

1. Respondent Tube Mfg. Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 29th and Hunting Park Avenue, Philadelphia, Pennsylvania.

Respondents Charles A. Rose, Alexander A. Parents and Sebastian Batorillo are officers of said corporate respondent. They formulate, direct and control the acts and practices of said corporate respondent. Their address is the same as 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 respondent Tube Mfg. Corp., a corporation, and its officers, and Charles A. Rose, Alexander A. Parents and Sebastian Batorillo, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of rebuilt television picture tubes containing used parts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to clearly disclose on the tubes, on the cartons in which they are packed, on invoices and in advertising, that said tubes are rebuilt and contain used parts.

2. Placing any means or instrumentality in the hands of others whereby they may mislead the public as to the nature and condition of their television picture tubes.

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 27th day of October, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents, Tube Mfg. Corp., a corporation, and Charles A. Rose, Alexander A. Parents and Sebastian Batorillo, 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

NEW ENGLAND LISTINGS, INC., ET AL.

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

Docket 7963. Complaint, June 21, 1960—Decision, Oct. 27, 1960

Consent order requiring Boston, Mass., sellers of real estate advertising to cease using such deceptive practices as inducing property owners to raise their asking price in order to increase fees; and claiming to have prospective buyers available, affiliations with a large number of brokers, and offices throughout the nation, and that listed properties would be advertised in newspapers in various States.

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 New England Listings, Inc., a corporation, and Rose G. Marcoux and Raymond H. Marcoux, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent New England Listings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. Its office and principal place of business is 53 State Street, Boston 9, Massachusetts. Prior to June 15, 1959, this corporate respondent traded and did business under the name Eastern States Inter-Business Exchange, Inc. at the same address.

Respondents Rose G. Marcoux and Raymond H. Marcoux are officers of corporate respondent New England Listings, Inc. and formulate, direct, and control the practices of said corporate respondent. Their office and principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the business of soliciting the listing for sale and advertising of real estate and other property. In connection with this business, respondents are and have been engaged in the operation, in commerce, of a business which offers for sale advertising in newspapers and other advertising media and other services and facilities in connection with the offering for sale, selling, buying and exchanging of business and other properties. In

connection therewith, the respondents have been and now are 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 respondents' place of business in the State of Massachusetts and persons, firms, and corporations located in various states of the United States, and thereby have 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 respondents has been and is substantial.

PAR. 3. In the course and conduct of their business, respondents, through the use of post cards and other written instruments circulated in various states, and through oral statements made by their solicitors or representatives, all for the purpose of obtaining listings of property for sale and collecting substantial sums of money as fees for the listing and sale of property, have represented, directly and by implication, to persons who had property for sale, that:

1. Respondents have available prospective buyers who are interested in the purchase of the properties sought to be listed or advertised by them;

2. Respondents have sold the property of others within a short period of time and will sell the property sought to be listed within a short period of time;

3. Respondents are associated or affiliated with a large number of real estate brokers who assist in the sale of the listed properties;

4. The property is underpriced by the owner and the asking price should be increased, and respondents will sell the property at the increased price;

5. Respondents have offices throughout the nation;

6. The property sought to be listed will be advertised in newspapers published in the various New England States and in other states.

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

1. Respondent do not have, and have never had, prospective buyers interested in, or available and ready to purchase, the properties listed or advertised;

2. Respondents' services have seldom, if ever resulted in the sale of listed properties;

3. Respondents are not affiliated or associated with any large number of brokers;

4. The purpose of increasing the owner's asking price for the listed property is not to set a fair market value on it but to increase the property owner's interest in purchasing respondents' services and to increase respondents' fees in the event the property is sold;

5. Respondents have one office, located in Boston, Massachusetts;

6. Respondents have never advertised the property of others in newspapers published outside the State of Massachusetts.

PAR. 5. The use by respondents of the aforesaid false, misleading and deceptive representations, acts and practices, in connection with the conduct of their business, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the public and to induce many owners of property, by reason thereof, to enter into contracts respecting the listing and advertising of their properties and to pay substantial sums of money to respondents in connection therewith.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, 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. Berryman Davis for the Commission.

Mr. Arthur Finn, of Waltham, Mass., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

On June 21, 1960, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violating the provisions of the Federal Trade Commission Act in connection with the offering for sale, selling, buying and exchanging of business and other properties. On August 12, 1960, the respondents and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist in accordance with Section 3.25(a) of the Rules of Practice and Procedure of the Commission.

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

constitute an admission by the respondents that they have violated the law as alleged in the complaint. The hearing examiner finds that the content of the said agreement meets all the requirements of Section 3.25(b) of the Rules of Practice.

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

1. Respondent New England Listings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. Its office and principal place of business is 53 State Street, Boston 9, Massachusetts.

Respondents Rose G. Marcoux and Raymond H. Marcoux are officers of corporate respondent New England Listings, Inc. and formulate, direct, and control the practices of said corporate respondent. Their office and principal place of business 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 New England Listing, Inc., a corporation, and its officers, and Rose G. Marcoux and Raymond H. Marcoux, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale or sale of advertising in newspapers or other advertising media, or of other services or facilities in connection with the offering for sale, selling, buying or exchanging of business or any kind of property, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly, representing:

1. That respondents have available prospective purchasers who are interested in the purchase of specific property.

2. That property will be sold through the efforts of respondents.

3. That real estate brokers are associated or affiliated with respondents.

4. That property sought to be listed is under-priced or that the asking price should be increased, or that respondents can or will sell the property at the increased price.

5. That respondents have more than one office or any greater number of offices than they have, in fact.

6. That the properties listed with them will be advertised in newspapers published in the New England States or in any media not actually utilized for that purpose by respondents.

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 27th day of October, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That 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

SCHWARTZ BROTHERS, INC., ET AL.

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

Docket 8030. Complaint, June 30, 1960—Decision, Oct. 27, 1960

Consent order requiring distributors of phonograph records in Washington, D.C., to cease giving concealed payola to disc jockeys and other personnel of television and radio stations to induce frequent playing of their records in order to increase sales.

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 Schwartz Brothers, Inc., a corporation, and Harry Schwartz, James Schwartz, Bertram H. Schwartz and Stuart D. Schwartz, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Schwartz Brothers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 901 Girard Street, N.E., in the City of Washington, District of Columbia.

Respondents Harry Schwartz, James Schwartz, Bertram H. Schwartz and Stuart D. Schwartz are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their 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 the distribution, offering for sale, and sale, of phonograph records to distributors, various retail outlets, and jukebox operators.

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

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV 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 6 to 10 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 TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio

and TV stations to induce, stimulate or motivate the disk jockey 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.

PAR. 6. 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 negotiated for and disbursed "payola" to disk jockeys, radio stations, TV stations, or personnel thereof, or other personnel for the purpose of influencing the selection of records to be "exposed" on such programs broadcast or televised across state lines.

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 concert with certain record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "expose" of records by disk jockeys with the payment of money or other consideration to one or more of the aforementioned parties which select, participate in the selection, or influence the selection of records to be played on such radio or television programs.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection 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 might otherwise 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. 7. 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 or distribution of phonograph records, and to divert trade unfairly to the

respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. 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. Harold A. Kennedy and *Mr. Arthur Wolter, Jr.*, for the Commission.

Mr. Alfred M. Schwartz, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale, and sale of phonograph records to distributors, various retail outlets, and jukebox operators, with violation of the Federal Trade Commission Act, in that respondents, 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.

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

The agreement states that respondent Schwartz Brothers, Inc. is a corporation existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 901 Girard Street, N.E., Washington, D.C., and that respondents Harry Schwartz, James Schwartz, Bertram H. Schwartz and Stuart D. Schwartz are officers of the corporate respondent and formulate, direct and control the acts and practices of the corporate respondent, their address being the same as that of the corporate respondent.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the

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

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

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That respondents Schwartz Brothers, Inc., a corporation, and its officers, and Harry Schwartz, James Schwartz, Bertram H. Schwartz and Stuart D. Schwartz, 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, 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 did, on the 27th day of October, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Schwartz Brothers, Inc., a corporation, and Harry Schwartz, James Schwartz, Bertram H. Schwartz and Stuart D. Schwartz, 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

CLUNY JUNIORS, INC., ET AL.

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

Docket 8041. Complaint, July 13, 1960—Decision, Oct. 27, 1960

Consent order requiring manufacturers in New York City to cease violating the Wool Products Labeling Act by failing to comply with labeling requirements in the sale of ladies' wool dresses and suits.

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 Cluny Juniors, Inc., a corporation, and David Cohen and Leo Drimmer, individually and as officers of said corporation, hereinafter referred to as respondents, have 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. Respondent Cluny Juniors, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and place of business located at 1400 Broadway, New York, New York.

Individual respondent David Cohen is president and individual respondent Leo Drimmer is vice president of the said corporate respondent. These individuals control, formulate and direct the acts, practices and policies of the respondent corporation. Their office and principal place of business is the same as that of the said corporate respondent.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since July 1958, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents 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 as prescribed by the Rules and Regulations promulgated under said Act.

PAR. 4. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that respondents failed to attach a stamp, tag or label or other means of identification containing the information required under Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder to each unit of multiple piece garments sold in combination, in violation of Rule 12 of the aforesaid Rules and Regulations.

PAR. 5. The respondents in the course and conduct of their business as aforesaid, were and are, in substantial competition in commerce with corporations, firms and individuals likewise engaged in the manufacture and sale of wool products, including ladies' dresses and suits.

PAR. 6. The acts and practices of the respondents as set forth above 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.

Frederick McManus, Esq., for the Commission.

Respondents, for themselves.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on July 13, 1960, charging them with having violated the Wool Products Labeling Act, the rules and regulations issued thereunder, and the Federal Trade Commission Act, by misbranding their wool products. Respondents entered into an agreement, dated August 31, 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 appropriate officials 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.

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

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the 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 Cluny Juniors, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York

with its office and place of business located at 1400 Broadway, in the City of New York, State of New York.

Individual respondent David Cohen is president and individual respondent Leo Drimmer is vice president of the said corporate respondent. These individuals control, formulate and direct the acts, practices and policies of the respondent corporation. Their office and principal place of business is the same as that of the said 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 Wool Products Labeling Act and the Federal Trade Commission Act, and this proceeding is in the interest of the public.

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

1. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939;

2. Failing to attach a stamp, tag, or label or other means of identification containing the information required under Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder to each unit of multiple piece garments sold in combination as is required by Rule 12 of the Rules and Regulations.

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 27th day of October 1960, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF

ALHAMBRA MOTOR PARTS ET AL.

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

Docket 6889. Complaint, Sept. 17, 1957—Decision, Oct. 28, 1960

Order requiring a trade association in Los Angeles, Calif., and its 59 jobber members to cease knowingly inducing and receiving discriminatory prices from manufacturers and suppliers of automotive parts and accessories in violation of Sec. 2(f) of the Clayton Act, by using their association as a device to obtain volume discounts on the aggregate purchases of all members.

Mr. Eldon P. Schrup and *Mr. Herbert I. Rothbart* for the Commission.

Mr. H. J. Gross and *Mr. Harris K. Lyle*, of Van Nuys, Calif., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is now before the undersigned hearing examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings of fact and conclusions submitted by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties, and all findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner, having considered the record herein and being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom and order:

1. Respondent, Southern California Jobbers, Inc., is a membership 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 234 West 24th Street, Los Angeles, California. At the time of the issuance of the complaint in this proceeding, the members of said respondent, Southern California Jobbers, Inc., were as follows:

(1) Respondents C. E. Long, Glen L. Long and J. T. Prochaska, Jr., co-partners trading as Alhambra Motor Parts, located at 1118 West Main Street, Alhambra, California.

(2) Respondent Edward Gaughn, an individual trading as Allied Motor Parts, located at 1351 American Avenue, Long Beach, California.

(3) Respondents Laura Kleopfer, Gloria Kleopfer and Gwenlyn D. Ockey, co-partners trading as Automotive Parts Co., located at 1130 South Pacific Avenue, San Pedro, California.

(4) Respondents E. P. Feschrach, F. G. Orm and E. R. Eckert, co-partners trading as Automotive Supply, located at 2 West Main Street, Ventura, California.

(5) Respondent B.B.&H. Motor Parts, Inc., a California corporation, located at 124 West Chestnut Street, Anaheim, California. The following individual respondents were officers of said corporate respondent:

Randall W. Brownell, President,
Arthur D. Brownell, Vice President,
Wilma M. Brownell, Secretary and Treasurer.

(6) Respondent Percy T. Lyon an individual, trading as Barlow Motor Supply Co., located at 6421 Selma Avenue, Hollywood, California.

(7) Respondent Beacon Auto Parts, Inc., a California corporation, located at 476 North Newport Boulevard, New Port Beach, California. The following individual respondents were officers of said corporate respondent:

E. Floyd Hubbard, President.
Elwin A. Hubbard, Vice President,
Juanita Firth, Secretary and Treasurer.

(8) Respondent Beedee Auto Parts, Inc., a California corporation located at 130 West Union Street, Pasadena, California. The following individual respondents were officers of said corporate respondent:

A. C. Peschke, President,
J. Peschke, Vice President,
E. E. McCreary, Secretary and Treasurer.

(9) Respondent Jack Bidinger, an individual trading as Jack Bidinger Auto Parts, located at 1810 Sunview Drive, Glendale, California.

(10) Respondents Frank G. Boggs and Rollin McBurney, co-partners trading as Boggs & McBurney Auto Parts, located at 11650 Santa Monica Boulevard, Los Angeles, California.

(11) Respondent Burbank Auto Parts, Inc., a California corporation located at 108 East Palm Avenue, Burbank, California. The following individual respondents were officers of said corporate respondent:

Jack W. Morse, President,
Earl W. Morse, Vice President,
Jewell T. Morse, Secretary and Treasurer.

(12) Respondent Art Cole, an individual trading as Art Cole Auto Parts, located at 2554 Randolph Street, Huntington Park, California.

(13) Respondent E. L. Covey, an individual trading as Covey Auto Parts, located at 1150 East Compton Avenue, Compton, California.

(14) Respondent Curtis & Christensen, Inc., a California corporation, located at 501 East Anaheim Street, Long Beach, California. The following individual respondents were officers of said corporate respondent:

F. J. Curtis, President,
Mable B. Curtis, Vice President,
H. C. Kelly, Secretary and Treasurer.

(15) Respondent Wolford Drye, an individual trading as Drye Automotive Parts, located at 140 South Eighth Street, El Centro, California.

(16) Respondents Donald M. Blackmore, Arrell S. McPartland, Otis Ludwick and Margaret A. Ludwick, co-partners trading as Dale's Auto Parts, located at 1312 18th Street, Bakersfield, California.

(17) Respondents Henry A. Mannington and Ethel C. Mannington, co-partners trading as Dyer Bros., located at 2033 North Broadway, Los Angeles, California.

(18) Respondent Eckdahl Auto Parts Co., a California corporation, located at 220 North Market Street, Inglewood, California. The following individual respondents were officers of said corporate respondent.

Burdette T. Eckdahl, President and Treasurer,
A. D. Shaw, Vice President,
F. A. Guffin, Secretary.

(19) Respondent El Monte Auto Parts, Inc., a California corporation, located at 313 South Tyler Avenue, Elmonte, California. The following individual respondents were officers of said corporate respondent:

Ruela B. Sutton, President,
Earl Crawford, Vice President,
James Whitelock, Secretary and Treasurer.

(20) Respondent C. E. Encell Auto Parts Service, Inc., a California corporation, located at 733 South Central Avenue, Los Angeles, California. The following individual respondents were officers of said corporate respondent:

Mary R. Encell, President,
Pearl C. Zittle, Vice President and Treasurer,
Theodore B. Whitmore, Secretary.

(21) Respondent Flammer Auto Parts, Inc., a California corporation, located at 8978 Washington Boulevard, Culver City, California. The following individual respondents were officers of said corporate respondent:

Edwin T. Flammer, President and Treasurer,

Edna M. Flammer, Vice President,

William R. Gallagher, Secretary.

(22) Respondent Fraiser Wright Co., a California corporation, located at 2331 South Hill Street, Los Angeles, California. The following individual respondents were officers of said corporate respondent:

Roy Wright, President,

Emma F. Wright, Vice President,

Cecil D. Penn, Secretary and Treasurer.

(23) Respondent Fullerton Motor Parts, Inc., a California corporation, located at 140 West Commonwealth Street, Fullerton, California. The following individual respondents were officers of said corporate respondent:

Joe W. Johnson, President,

Velda L. Johnson, Secretary and Treasurer.

(24) Respondents J. Leonard Gibson and Curtis C. Gibson, copartners trading as Gibson Motor Parts, located at 401 South Market Street, Inglewood, California.

(25) Respondent Graves Automotive Supply, a California corporation located at 211 East B. Street, Ontario, California. The following individual respondents were officers of said corporate respondent:

Lemuel A. Graves, President,

William T. Dingle, Secretary and Treasurer.

(26) Respondent Carl D. Haase, an individual trading as Haase Auto Parts Company, located at 2765 Randolph Street, Huntington Park, California.

(27) Respondent John J. Hartman, an individual trading as Hartman Auto Parts, located at 5900 South Main Street, Los Angeles, California.

(28) Respondent K. A. McFarland, an individual trading as Hibbard & Rodgers, located at 145 West Union Street, Pasadena, California.

(29) Respondent Hillcrest Auto Supply Co., a California corporation, located at 1236 University Avenue, San Diego, California. The following individual respondents were officers of said corporate respondent:

William H. Sharpe, President,

Lorraine E. Sharpe, Vice President,

Mable M. Brown, Secretary and Treasurer.

(30) Respondent Dora L. Huffaker, an individual trading as Huffaker's Auto Parts, located at 5406 Saukershim Boulevard, North Hollywood, California.

(31) Respondent Clarence R. Ryan, an individual trading as Long Beach Auto Parts Co., located at 1077 American Avenue, Long Beach, California.

(32) Respondent John F. Dixon, Inc., a California corporation, located at 1825 East First Street, Los Angeles, California. The following individual respondents were officers of said corporate respondent:

John F. Dixon, President,
Brian S. A. Heenan, Vice President,
Helen Dixon, Secretary,
Otha Luster, Treasurer.

(33) Respondents L. C. Haskins, R. B. Sharpe and Williard Wedeking, co-partners trading as Masters Automotive Supply, located at 208 South Hill Street, Oceanside, California.

(34) Respondents Bert C. Russey and James E. Bussey, co-partners trading as Bussey Auto Parts, located at 901 Santa Monica Boulevard, Santa Monica, California.

(35) Respondent Charles M. Darling, an individual trading as Mission Auto Supply, located at 2010 North Broadway, Santa Maria, California.

(36) Respondents D. T. Johnston and Charles G. Russell, co-partners trading as Motor Parts Depot, located at 4225 West Pico Street, Los Angeles, California.

(37) Respondents A. C. Brown and Mable S. Brown, co-partners trading as Motor Parts & Equipment Co., located at 3855 Eighth Street, Riverside, California.

(38) Respondents Henry C. Neufeld, Elmer M. Anderson and Dona Jane Senn, co-partners trading as Neufeld's Auto Parts, located at 100 Central Avenue, Shafter, California.

(39) Respondents John C. Weatherway and Lester L. Congdon, co-partners trading as North Long Beach Motor Supply Company, located at 5375 Atlantic Street, Long Beach, California.

(40) Respondent Loren K. Patty, an individual trading as Owl Auto Supply, located at 3583 Market Street, Riverside, California.

(41) Respondent P. & W. Parts Store, Inc., a California corporation, located at 515 West Main Street, Alhambra, California. The following individual respondents were officers of said corporate respondent:

William H. Woodcock, President,
Lee R. Anthony, Vice President and Treasurer,

John F. Arthur, Secretary.

(42) Respondents Loy G. Cabe and Roy L. Cabe, co-partners trading as Parts Service Company, located at 1058 American Avenue, Long Beach, California.

(43) Respondent Pomona Motor Parts, a California corporation, located at 363 West Third Street, Pomona, California. The following individual respondents were officers of said corporate respondent:

J. K. Wilkinson, President,

Helen Bates, Secretary.

(44) Respondents Stewart J. Bryant, Elizabeth H. Bryant and F. Ray Bryant, co-partners trading as Paso Robles Auto Parts, located at 944 Spring Street, Paso Robles, California.

(45) Respondents Howard L. Phoenix and Ross L. Mossman, co-partners trading as Phoenix Motor Parts, located at 110 West State Street, Redlands, California.

(46) Respondent Santa Ana Motor Parts & Machine Works, Inc., a California corporation, located at 413 West Fifth Street, Santa Ana, California. The following individual respondents were officers of said corporate respondent:

C. Ed Thomas, President,

Evelyn J. Thomas, Vice President,

Frank N. Sellers, Secretary and Treasurer.

(47) Respondent Edward L. Kenworthy, an individual trading as Santa Barbara Motor Parts, located at 211 West Carillo Street, Santa Barbara, California.

(48) Respondent San Bernardino Motor Parts, a California corporation, located at 196 F. Street, San Bernardino, California. The following individual respondents were officers of said corporate respondent:

Peter B. Long, President,

George E. Osborn, Vice President,

John H. Buchenau, Secretary and Treasurer.

(49) Respondents James W. H. Sparks, Floyd A. Sparks, Carlos A. Sparks and Willie D. Sparks, co-partners trading as Sparks Auto Parts Service, located at 7528 East Garvey Street, South San Gabriel, California.

(50) Respondent Sturtevant Auto Parts, Inc., a California corporation, located at 6162 Van Nuys Boulevard, Van Nuys, California. The following individual respondents were officers of said corporate respondent:

Sabin B. Sturtevant, President,

G. E. Lee, Vice President,

S. P. Sturtevant, Secretary.

(51) Respondents Robert Dopyera, James R. Barber and Victor Lesovsky, co-partners trading as Tasco Auto Parts, located at 306 Center Street, Taft, California.

(52) Respondent Mac Johnson, an individual trading as Torrance Auto Parts, located at 1912 Carson Street, Torrance, California.

(53) Respondent Triangle Motor Parts, a California corporation, located at 2622 North Figueroa Street, Los Angeles, California. The following individual respondents were officers of said corporate respondent:

Robert Heffner, President,
Roy Baugh, Vice President,
Milton A. Souders, Secretary and Treasurer.

(54) Respondent Valley Auto Supply of San Bernardino, Inc., a California corporation, located at 441 Fifth Street, San Bernardino, California. The following individual respondents were officers of said corporate respondent:

John Wilson, President,
Paul Clammer, Vice President,
Arthur Lindholm, Secretary and Treasurer.

(55) Respondent Glenn Wellington, an individual trading as Glenn Wellington Auto Parts, located at 6422 Selma Street, Hollywood, California.

(56) Respondent Wilke Machine & Auto Parts, a California corporation, located at 699 E. Street, Bramley, California. The following individual respondents were officers of said corporate respondent:

H. P. Wilke, President,
N. Alta Wilke, Vice President,
Muriel Merritt, Secretary and Treasurer.

(57) Respondent Dunn Supply Co., Inc., a California corporation, located at 100 Market Street, San Diego, California. The following individual respondents were officers of said corporate respondent:

J. Elmo Dunn, President,
Nancy Jane Dunn, Vice President,
Dewey A. Dunn, Secretary and Treasurer.

(58) Respondents Jack A. Monteverde and Ruth B. Monteverde, co-partners trading as Monte's Auto Parts, located at 1230 San Fernando Road, San Fernando, California.

(59) Respondent Ben McConnell, an individual trading as McConnell Motor Parts, located at 203 South Pacific Avenue, San Pedro, California.

2. The individual respondents above named, both individually and as the officers of the several corporate respondent jobber members,

have actively participated in the acts and practices hereinafter found which were knowingly designed and intended to induce the granting of discriminatory and illegal prices, discounts, allowances, rebates, terms and conditions of sale to the respondent jobber members. Such participation included serving as officers and directors of respondent Southern California Jobbers, Inc., and as members of various committees of said group organization.

3. Respondent James L. Polhamus is an individual who has been General Manager and Executive Secretary of respondent Southern California Jobbers, Inc., since 1955. He was employed by the respondent jobber members to supervise the activities of respondent Southern California Jobbers, Inc., and to assist in the negotiation and in the carrying out of various agreements entered into with manufacturers and suppliers of automotive parts, accessories and supplies.

4. The respondent jobber members of respondent Southern California Jobbers, Inc., are independent jobbers engaged in the purchase and resale of automotive parts, accessories and supplies, in interstate commerce, and have been and are now engaged in active and substantial competition with other corporations, partnerships, firms and individuals also engaged in the purchase and resale of such automotive products of like grade and quality, in interstate commerce, which have been purchased from the same or competitive sellers.

5. Respondent jobbers organized, and have maintained, controlled and operated respondent Southern California Jobbers, Inc., for the purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and sellers of automotive parts, accessories and supplies. It is a membership corporation, serving only respondent jobber members, with stock ownership limited to one share for each jobbers member. Participation of respondent jobber members in the net income of respondent Southern California Jobbers, Inc., is based on a percentage of their individual purchases through the group organization. Each respondent jobber member was required by the By-Laws of Southern California Jobbers, Inc., to keep on deposit a sum of money in a Merchandise Guarantee Fund, which served as a revolving fund for use by respondent jobber members in purchasing automotive parts, accessories and supplies through the group organization. In 1956 this fund amounted to $78,000.00, or a deposit of $1,300.00 for each of the 60 members.

6. It was the regular procedure for the respondent jobbers, acting through respondent Southern California Jobbers, Inc., to either notify or allow competing manufacturers of various lines of auto-

motive products to submit prices and appear before the members of the group, or a committee named for that purpose, who would consider the offers and vote to accept one of the lines to the exclusion of the lines of the seller's competitors. This, however, was not a rigid requirement in that the individual members could continue to handle competitive lines which they were already selling or for which they had a preference. In actual practice, most of the members of the group organization sold and distributed the particular manufacturer's line accepted by the group.

7. When a seller's line was accepted, notice was sent to all jobber members giving full information as to the contract terms agreed upon. These notices were incorporated in a so-called "deal book" which was supplied to the jobber members at the first of the year, and additional pages were supplied as contracts wer entered into with suppliers. These lines purchased from the suppliers were, for convenience, divided into the warehouse line and brokerage line. The term "brokerage" was used to distinguish from the warehouse line as there is nothing which remotely resembles brokerage in these transactions, nor is there any contention that brokerage, as such, was paid.

8. The warehouse line referred to those lines, stocks of which were carried in the warehouse of the Southern California Jobbers, Inc. When a jobber member wished to purchase products from the warehouse line, order was sent to respondent, Southern California Jobbers, Inc., who either procured the merchandise from the supplier or filled the order out of stock. When delivery had been made, respondent Southern California Jobbers, Inc., billed the jobber member receiving the merchandise. In the case of the so-called brokerage lines, the jobber member ordered direct from the supplier who delivered the merchandise to the jobber member but billed respondent Southern California Jobbers, Inc. Each jobber member settled monthly with respondent Southern California Jobbers, Inc., for his own individual purchases. The group office in turn made monthly settlements with the suppliers for the aggregate purchases of all jobber members, and annually or periodically distributed to respondent jobber members all discounts and rebates received, less operating expenses, in proportion to the amount of each jobber's individual purchases.

9. As of January 1, 1958, as evidenced by the "deal book" delivered to respondent jobber members (CX 7), there was a total of 69 suppliers, 40 of which were listed as warehouse lines, 28 as brokerage lines, and one part warehouse and part brokerage. A comparative study made of the purchases from suppliers who had contracts or agreements with Southern California Jobbers, Inc., is as follows:

	1955	1956	1957	1958
Total purchases	1,892,320	2,270,864	2,761,795	3,129,446
Warehouse purchases	297,800	390,458	954,504	1,762,346
Brokerage purchases	1,594,520	1,880,405	1,807,291	1,367,099
Gross revenue	229,887	317,021	400,011	482,722
Net rebates	207,055	271,510	343,119	384,982

10. A more detailed description of the brokerage accounts for the years 1957 and 1958, based upon net purchases which do not include impounds or items rebatable to the jobber members, are as follows:

BROKERAGE

Product name	Discounts or rebates allowed	No. members buying	Gross purchases less rebate	
			1958	1957
Standard Motor Products	20%	50	256,015	230,841
Partex	15/20	46	204,172	190,658
Cali Blok	7% on material	28	162,923	118,653
Thermoid	17½%	32	73,426	99,168
Auto Products	5/20	28	82,925	104,143
Carburetor Co.	14.25 on material	52	57,319	53,708
Airtex (Rebuilt)	18%	36	49,948	85,642
Hobbs Gould	20%	18	48,282	45,808
Hygrade	10%	45	43,745	24,451
Arrow Safety	15%	35	26,924	31,813
Total 1st 10 lines			1,005,679	984,885
Foote Axle	5%	36	26,256	27,826
Accurate	15%	8	24,347	25,431
Car Control	10/15/20	44	15,080	11,576
White Machine	10%	17	14,788	12,113
American Ball	20%	17	12,102	11,590
S. M. Arnold	10%	13	9,815	8,421
Perfect Equipment	7%	8	7,787	7,495
Cambria Spring	10%	15	7,143	6,081
Diamond U	20%	22	8,664	7,849
H. B. Egan	10%	13	8,496	6,511
Total 2d 10 lines			134,478	124,893
Dutch Brand	20%	15	8,057	9,232
CAC	20%	8	5,005	3,684
Miracle Power	20%	8	4,365	4,097
Jambor	10%	10	4,012	4,950
Ace Drill	10%	9	3,281	3,166
Bay State	20%	11	2,211	2,020
Fox	0	3	920	2,224
Martin Wells	20%	1	743	1,093
Total 3d 8 lines			28,594	30,466
Grand total all lines			1,168,751	1,140,244

11. The volume rebate granted by certain suppliers to respondent jobber members was a retroactive volume rebate based upon the aggregate purchases of all the jobber members. Typical of such practices is the agreement with Standard Motor Products, Inc., which generally maintains a sliding scale of volume rebates on net amount purchased per year as follows:

Under	*Percent*
$1,800	3
2,800	5
4,200	10
7,200	12
9,000	13
12,000	15
25,000	16
50,000	17
75,000	18
100,000	20

In the case of Southern California Jobbers, Inc., these rebates were not based on the total purchases of the individual respondent jobber member, but instead were based upon the total purchases of all the members of the group organization.

12. When respondent Southern California Jobbers, Inc., made payment to Standard Motor Products, Inc., for purchases made during the month by the respondent jobber members, it was permitted to deduct the maximum rebate of 20 percent on paying the invoices. While the aggregate purchases of the jobber members reached the maximum volume of $100,000 required for the 20 percent discount, no individual jobber member purchased near this amount. In fact, in 1956 the purchases of only 4 jobber members reached the 15 percent brcaket, and 21 earned no discount; and in 1957 the purchases of only 9 reached the 15 percent bracket and 21 earned no discount, and yet in both years all received the maximum 20 percent volume rebate. In the same trading area there were competitors of respondent jobbers purchasing merchandise of like grade and quality from Standard Motor Products, Inc., who received no discount, or a lower discount, based upon the actual amount of their purchases as provided by Standard's volume discount schedule.

13. The warehouse distributor's discount was a discount paid to jobbers on automotive products resold to other jobbers and who maintained at least a minimum stock of the suppliers' automotive products in their warehouses. The warehouse distributor usually purchased at jobber's list price and sold both dealers and other jobbers. Sales made to other jobbers were generally made at jobber's list price and the distributor relied upon the warehouse distributor discount for his compensation. In granting this discount to the respondent jobbers, the supplier treated the respondent Southern California Jobbers, Inc., as a purchaser and reseller to respondent jobber members, and granted the discount or rebate on all products purchased by the respondent jobber members through the Southern California Jobbers, Inc. This warehouse distributor's rebate on the aggregate purchases of the respondent jobbers was

paid over to respondent Southern California Jobbers, Inc., who, in turn, distributed the net after deduction of operating expenses to the jobber members in proportion to their individual purchases. In the same trading area there were competitors of respondent jobbers, purchasing products of like grade and quality from the same, or other, suppliers, and who received no discount as warehouse distributors.

14. The automotive parts industry is a highly competitive business, involving small margins of profit. The net margin of profit of a number of respondent jobber witnesses, who testified, was from 1 percent to 4 percent after taxes. The importance of the discriminatory prices allowed by the various suppliers is pointed up by the importance given by respondent jobbers to the 2 percent cash discount as increasing their margin of profit and reducing the cost of acquisition of their merchandise. Through the lower cost of merchandise resulting from such discriminatory prices, the respondent jobbers obtained a competitive advantage over their competitors, selling the same or comparable merchandise in the same trade area, who receive discounts or rebates based upon their individual purchases.

CONCLUSIONS

1. Respondent Southern California Jobbers, Inc., was organized, maintained and controlled by the respondent jobbers to function principally as a group-buying organization for the purpose of inducing the granting or allowance of lower or more favorable prices by manufacturers and sellers of automotive parts, accessories and supplies. The respondent jobber members are, in fact, the purchasers, and the group organization serves only as a medium or instrumentality in inducing and receiving discriminatory prices. The operation of a warehouse in the manner and form hereinbefore found did not change the situation other than to assist the respondent jobber members in obtaining warehouse distributor discounts and rebates to which they were not entitled and which were not received by non-members.

2. The various courts of appeals in seven cases have sustained the findings of the Federal Trade Commission that the granting of volume rebates by suppliers to group-buying organizations based upon aggregate purchases of all members under the circumstances as herein found, constitute a price discrimination in violation of Section 2(a) of the Clayton Act as follows:

Standard Motor Products v. Federal Trade Commission, 265 F. 2d 674 (2 Cir. 1959), cert. denied, 361 U.S. 826;

P. Sorensen Mfg. Co. v. Federal Trade Commission, 246 F. 2d 687 (D.C. Cir. 1957);

P. & D. Mfg. Co. v. Federal Trade Commission, 245 F. 2d 281 (7 Cir. 1957), cert. denied, 355 U.S. 884;

C. E. Niehoff & Co. v. Federal Trade Commission, 241 F. 2d 37 (7 Cir. 1957), modf'd, 355 U.S. 411 (1958) rehearing denied, 355 U.S. 968;

E. Edelmann & Co. v. Federal Trade Commission, 239 F. 2d 152 (7 Cir. 1956), cert. denied, 355 U.S. 941;

Whitaker Cable Corp. v. Federal Trade Commission, 239 F. 2d 253 (7 Cir. 1956), cert. denied, 353 U.S. 938, rehearing denied, 356 U.S. 905;

Moog Industries v. Federal Trade Commission, 238 F. 2d 43 (8 Cir. 1956), aff'd, 355 U.S. 411 (1958), rehearing denied, 356 U.S. 905.

In addition, the circuit court of appeals sustained a finding by the Federal Trade Commission that a warehouse distributor's discount identical with that granted by the same supplier to respondent Southern California Jobbers, Inc., was in violation of Section 2(a) of the Clayton Act, *E. Edelmann & Co.* v. *F.T.C.*, *supra.*

3. The allowance of a warehouse distributor's discount to Southern California Jobbers, Inc., as herein found, cannot be defined as a functional discount, since Southern California Jobbers, Inc., is not an independent jobber or warehouse distributor but instead is owned by the jobber members, deals only with jobber members, and distributes all allowances and rebates received from suppliers, after deduction of all operating expenses, to the jobber members in proportion to their individual purchases. The respondent Southern California Jobbers, Inc., is nothing more than a device for obtaining, collecting and remitting to respondent jobber members, warehouse discounts received from manufacturers and suppliers on purchases made by respondent jobber members, and the functional classification as warehouse distributor is basically artificial.

4. The method of operation of the respondent Southern California Jobbers, Inc., including the adoption of the line of one seller to the exclusion of its competitors and the holding out to sellers the prospects of increasing their volume and obtaining new customers from among the members, served as an inducement to manufacturers and sellers of automotive products to grant to respondent jobbers a lower price than would have otherwise been obtained. This method of inducement, as well as the practice of the respondent jobber members of holding out or representing to manufacturers and suppliers that respondent Southern California Jobbers, Inc., is a warehouse distributor and by this means receiving a warehouse distributor's discount or allowance when respondents knew full well that there

was no resale by Southern California Jobbers, Inc., to them or by respondent jobbers to other jobbers, constituted a violation of Section 2(f) of the Clayton Act.

5. There is evidence in this record tending to show that differentials of small amounts were important in the trade and the existence of Southern California Jobbers, Inc., as a buying group bears this out. In 1958 there were 69 suppliers who had contracts with respondent Southern California Jobbers, Inc., granting to respondent jobber members a volume rebate based upon aggregate purchases or a warehouse distributor's discount or rebate. Consequently, the discriminatory price granted by one supplier, while substantial in itself, when considered in conjunction with rebates granted by the other 68 suppliers gives a more complete picture of the monetary advantage accruing to the respondent jobber members. The respondent jobber members were fully aware and appreciative of the monetary advantage accruing to them by the price discriminations obtained by purchasing thru the group organizations. In his report to the respondent jobber members at the annual stockholders meeting of Southern California Jobbers, Inc., held February 22, 1959, the president, after reviewing tabulation of earnings from discounts and rebates for the years 1937 to 1948 stated:

> I am sure that these figures far exceed the wildest dreams of the founders of this Corporation, and close study should be made of them by each of us. A quick glance will show that for every one hundred dollars worth of merchandise purchased through S.C.J. nearly $13.00 additional net profit was realized by the stockholders. This means, generally speaking, that our *net profit* is *doubled* on lines purchased through S.C.J. This should convince all of us that wherever possible *we should support our own lines.*
>
> Roy tells me that some members who have been members of S.C.J. since its inception have realized from $25,000.00 to $55,000.00 additional profit. While most of us have contributed some time and effort, I do not know of any field where such effort could be so handsomely rewarded.

6. The respondent jobber members knew that the rebates allowed were based not on the quantities or other factors involved in a particular sale, and not upon quantities sold by them to other jobbers, but rather upon the combined dollar amount of all sales to the respondent jobber members through the group organization and bear relationship to factors other than the actual costs of production and delivery. The respondent jobbers were successful operators in a highly competitive market and knew the facts of life so far as the automotive parts market was concerned and knew that no cost justification could be maintained by the sellers since no difference in the cost of manufacture, sale or delivery was involved. Furthermore, the respondent jobber members were placed upon notice as to the illegality of price discriminations received through the medium

of group-buying organizations similar to Southern California Jobbers, Inc., by the initial decisions of the hearing examiners, and the decisions of the Federal Trade Commission and the circuit courts of appeals. (See cases cited in paragraph 2 above.)

7. In a recent decision of the Circuit Court of Appeals for the Second Circuit, dated May 5, 1960, in the matter of American Motor Specialties Co., Inc., the Court held that the use of a group-buying organization organized to obtain lower prices from manufacturers and suppliers in the form of volume discounts or rebates based upon the aggregate purchases of all of its members was a violation of Section 2(f) of the Clayton Act. This decision is fully dispositive of all the issues in the present proceeding:

> * * * Thus, from the mere fact that an organization of buyers was able to persuade a manufacturer to treat the orders of the various individual member firms as coming from a single source, the amount of rebate for each member firm's dollar of order was increased, thereby placing each member firm at an advantage over its unorganized competitors. * * * The rebates were paid to the group, and a portion thereof was periodically distributed to each member. The amounts so distributed were apportioned according to the percent which each individual firm's purchases bore to the group's total purchases from the manufacturer. * * * The Commission concedes that member firms were not required to purchase from the manufacturers whose prices had been group-approved, but it clearly was in the interest of a member to do so, and just as clearly it was in the interest of members to exert moral pressure upon fellow-members to so purchase.
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> * * * * * * *
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> Petitioners of course knew that they, as individual firms, were receiving goods in the same quantities and were served by sellers in the same manner as their competitors, and hence organized themselves into a buying group in order to obtain lower prices than their unorganized competitors. Hence, by the very fact of having combined into a group and having obtained thereby a favorable price differential, they each, under *Automatic Canteen*, were charged with notice that this price differential they each enjoyed could not be justified. And this knowledge of each of the seventeen individual firms is imputable to the organization of which they were all members. Thus, irrespective of whether the buying groups' efforts to bargain with the various manufacturers constituted an improper *inducement* under Section 2(f), we hold that the Commission introduced sufficient evidence to fulfill the requirements of *Automatic Canteen* when it showed that petitioners knowingly received preferential price treatment of such a nature as to violate Section 2.

8. The acts and practices of the respondent jobbers in knowingly inducing and knowingly recovering discriminations in price through the use of the group-buying organization, Southern California Jobbers, Inc., prohibited by Section 2(a) of the Clayton Act, as herein found, are in violation of Section 2(f) of said Act.

ORDER

It is ordered, That respondents C. E. Long, Glenn L. Long and J. T. Prochaska, Jr., co-partners doing business as Alhambra Motor Parts, Edward Gaughn, an individual, doing business as Allied Motor Parts, Laura Kleopfer, Gloria Kleopfer and Gwenlyn D. Ockey, co-partners doing business as Automotive Parts Co., E. P. Feschrach, F. G. Orm and E. R. Eckert, co-partners doing business as Automotive Supply, B.B. & H. Motor Parts, Inc., a corporation, and its officers, Percy T. Lyon, an individual doing business as Barlow Motor Supply Co., Beacon Auto Parts, Inc., a corporation, and its officers, Beedee Auto Parts, Inc., a corporation, and its officers, Jack Bidinger, an individual doing business as Jack Bidinger Auto Parts, Frank G. Boggs and Rollin McBurney, co-partners doing business as Boggs & McBurney Auto Parts, Burbank Auto Parts, Inc., a corporation, and its officers, Art Cole, an individual, doing business as Art Cole Auto Parts, E. L. Covey, an individual doing business as Covey Auto Parts, Curtis & Christensen, Inc., a corporation, and its officers, Wolford Drye, an individual doing business as Drye Automotive Parts, Donald M. Blackmore, Arrell S. McPartland, Otis Ludwick and Margaret A. Ludwick, co-partners doing business as Dale's Auto Parts, Henry A. Mannington and Ethel C. Mannington, co-partners doing business as Dyer Bros., Eckdahl Auto Parts Co., a corporation, and its officers, El Monte Auto Parts, Inc., a corporation, and its officers, C. E. Encell Auto Parts Service, Inc., a corporation, and its officers, Flammer Auto Parts, Inc., a corporation, and its officers, Frazier Wright Co., a corporation, and its officers, Fullerton Motor Parts, Inc., a corporation, and its officers, Curtis C. Gibson and J. Leonard Gibson, co-partners doing business as Gibson Motor Parts, Graves Automotive Supply, a corporation, and its officers, Carl D. Haase, an individual, doing business as Haase Auto Parts Company, John J. Hartman, an individual, doing business as Hartman Auto Parts, K. A. McFarland, an individual, doing business as Hibbard & Rodgers, Hillcrest Auto Supply Co., a corporation, and its officers, Dora L. Huffaker, an individual, doing business as Huffaker's Auto Parts, Clarence R. Ryan, an individual, doing business as Long Beach Auto Parts Co., John F. Dixon, Inc., a corporation, and its officers, L. C. Haskins, R. B. Sharpe and Willard Wedeking, co-partners doing business as Masters Automotive Supply, Bert C. Bussey and James E. Bussey, co-partners doing business as Bussey Auto Parts, Charles M. Darling, an individual, doing business as Mission Auto Supply, D. T. Johnston and Charles G. Russell, co-partners doing business as Motor Parts Depot, A. C. Brown and

Mable S. Brown, co-partners doing business as Motor Parts & Equipment Co., Henry C. Neufeld, Elmer M. Anderson and Dona Jane Senn, co-partners doing business as Neufeld's Auto Parts, John C. Weatherway and Lester L. Congdon, co-partners doing business as North Long Beach Motor Supply Company, Loren K. Patty, an individual, doing business as Owl Auto Supply, P. & W. Parts Sotre, Inc., a corporation, and its officers, Loy G. Cabe and Roy L. Cabe, co-partners doing business as Parts Service Company, Pomona Motor Parts, a corporation, and its officers, Stewart J. Bryant, Elizabeth H. Bryant and F. Ray Bryant, co-partners doing business as Paso Robles Auto Parts, Howard L. Phoenix and Ross L. Mossman, co-partners doing business as Phoenix Motor Parts, Santa Ana Motor Parts & Machine Works, Inc., a corporation, and its officers, Edward L. Kenworthy, an individual, doing business as Santa Barbara Motor Parts, San Bernardino Motor Parts, a corporation, and its officers, James W. H. Sparks, Floyd A. Sparks, Carlos A. Sparks and Willie D. Sparks, co-partners doing business as Sparks Auto Parts Service, Sturtevant Auto Parts, Inc., a corporation, and its officers, Robert Dopyera, James R. Barber and Victor Lesovsky, co-partners doing business as Tasco Auto Parts, Mac Johnson, an individual, doing business as Torrance Auto Parts, Triangle Motor Parts, a corporation, and its officers, Valley Auto Supply of San Bernardino, Inc., a corporation, and its officers, Glenn Wellington, an individual, doing business as Glenn Wellington Auto Parts, Wilke Machine & Auto Parts, a corporation, and its officers, Dunn Supply Co., Inc., a corporation, and its officers, Jack A. Monteverde and Ruth B. Monteverde, co-partners doing business as Monte's Auto Parts, Ben McConnell, an individual, doing business as McConnell Motor Parts, and their respective agents, representatives and employees; and the individual respondents Randall W. Brownell, Arthur D. Brownell, Wilma M. Brownell, E. Floyd Hubbard, Elwin A. Hubbard, Juanita Firth, A. C. Peschke, J. Peschke, E. E. McCreary, Jack W. Morse, Earl W. Morse, Jewell T. Morse, F. J. Curtis, Mable B. Curtis, H. C. Kelly, Burdette T. Eckdahl, F. O. Guffin, A. D. Shaw, Ruela B. Sutton, Earl Crawford, James Whitelock, Mary R. Encell, Pearl C. Zittle, Theodore B. Whitmore, Edwin T. Flammer, Edna M. Flammer, William R. Gallagher, Roy Wright, Emma F. Wright, Cecil D. Penn, Joe W. Johnson, Velda L. Johnson, Lemuel A. Graves, William T. Dingle, William H. Sharpe, Lorraine E. Sharpe, Mable M. Brown, John F. Dixon, Brian S. A. Heenan, Helen Dixon, Otha Luster, William H. Woodcock, Lee R. Anthony, John F. Arthur, J. K. Wilkinson, Helen Bates, C. Ed Thomas, Evelyn J. Thomas, Frank N. Sellers, Peter B. Long, George E. Osborn, John H. Buchenau, Sabin B. Sturtevant, G. E. Lee, S. P.

Sturtevant, Robert Heffner, Roy Baugh, Milton A. Souders, John Wilson, Paul Clammer, Arthur Lindholm, H. P. Wilke, N. Alta Wilke, Muriel Merritt, J. Elmo Dunn, Nancy Jane Dunn, and Dewey A. Dunn, and their respective agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

(2) Maintaining, managing, controlling or operating respondent Southern California Jobbers, Inc., or any other organization of like character, as a means or instrumentality to knowingly induce, or knowingly receive or accept, any discrimination in the price of automotive parts, accessories or supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

It is further ordered, That respondent Southern California Jobbers, Inc., a corporation, and its respective members, officers, agents, representatives and employees; and the individual respondent James M. Polhamus, and his representatives, agents, and employees, in connection with the offering to purchase, or purchase, of any automotive parts, accessories or supplies or other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers where the seller is competing with any other seller for respondents' business or where respondents are competing with other customers of the seller.

For the purpose of determining the "net price" under the terms of this order, there should be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs of counsel for respondents and counsel in support of the complaint, 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 respondents' appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision, filed June 22, 1960, 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

VENUS FOODS

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

Docket 7212. Complaint, Aug. 21, 1958—Decision, Oct. 28, 1960

Order requiring a manufacturer of food products in Los Angeles, Calif., with sales of bakery items in 1957 in excess of $2,400,000, to cease violating Sec. 2(c) of the Clayton Act by granting a discount of 5% in addition to its prevailing wholesale price to new customers in the New York-New England area purchasing its fruit bars for their own accounts for resale.

Mr. Cecil G. Miles and *Mr. Franklin A. Snyder* for the Commission.

Gibson, Dunn & Crutcher, of Los Angeles, Calif., by *Mr. John J. Hanson* and *Mr. Julian O. von Kalinowski*, for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint charging the respondent with making payments of commissions, brokerage, or allowances, or

discounts in lieu thereof, to certain buyers who purchase for their own account for resale in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions, together with briefs presented by counsel.

The hearing examiner has given consideration to the proposed findings as to the facts and conclusions submitted by both parties, and briefs in support thereof, and all findings of facts and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner, having considered the record herein and being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order.

FINDINGS AS TO THE FACTS

1. Respondent Venus Foods, Inc., a California corporation, located at 3317 East 50th Street, Los Angeles, California, is engaged in the sale and distribution in interstate commerce of food products and bakery items.

2. Among the bakery items sold by respondent are various fruit bars, which are the only items involved in this proceeding. Respondent generally sold its fruit bars to distributors, either directly or through brokers, at list price, less 24 percent, delivered, subject to 1 percent cash discount, 10 days. When sold through brokers, the brokerage fee was generally 5 percent of distributor net price. Respondent's prices were generally the same throughout the United States. In some localities respondent did sell its fruit bars at special prices. The extent to which these special or off-scale prices may have differed from respondent's prices generally are not material to the issues in this proceeding.

3. For the purpose of obtaining wider distribution for its fruit bars, the respondent on March 22, 1956, appointed Henry M. Samplin Associates, Inc., its exclusive broker for the New York and New England area, with a commission of 5 percent on net sales. On May 26, 1956, the respondent cancelled this arrangement with said Samplin, and at approximately the same time the respondent entered into negotiations with Frito New York, Inc., New England Frito Corporation, and Frito Tri-State Corporation, which negotiations were formalized in a written contract dated July 1, 1956, between respondent and Frito New York, Inc., granting to them the sole and exclusive right to sell respondent's Venus brand fruit bars in the

New England States and portions of the States of New York and New Jersey, as specified. By the terms of said contract, respondent agreed to sell Frito its fruit bars at list price, less a distributor discount of 24 percent, less cash discount of 1 percent, and a further discount of 5 percent for "warehousing, handling and freight out". The term "freight out" refers to the delivery costs in transferring merchandise from Frito warehouse to Frito distributor.

4. It is the contention of the respondent that the additional 5 percent paid to Frito does not constitute a payment of commission or brokerage for the reason that this payment was made for warehousing, handling and cost of freight from Frito warehouse to Frito distributor, and constitutes a functional discount to Frito for acting as a regional distributor, and does not involve any discrimination in price.

5. The transaction between respondent and Frito was a purchase and sale agreement subject to certain discounts or allowances off list price. The merchandise was purchased by Frito for its own account, and upon delivery became the sole property of Frito. The payment by respondent to Frito for warehousing, handling and delivery to its own customers was a payment to Frito for doing its own work, and is a mere gratuity, and does not constitute compensation for any service rendered to respondent.

CONCLUSIONS

1. The facts in this proceeding do not support respondent's contention that the additional 5 percent was allowed as a functional discount. The respondent has never set up a regional distribution organization as part of its distribution system, and did not do so with Frito. At or about the time that negotiations with Frito were started, respondent was dealing with a broker in the territory involved, and respondent cancelled its brokerage contract with him and entered into a sales agreement with Frito. In the course of the negotiations, Frito demanded an additional discount from respondent's wholesale price, which was granted by the respondent and described in the contract as "a further discount of 5 percent for warehousing, handling and freight out". This was not the establishment of a regional distributor, but simply an agreement to pay for services rendered by Frito to itself as purchaser, owner and subsequent seller of the goods purchased.

2. Frito performed no services for the respondent such as might bring this case within the exception of Section 2(c) by reason of services rendered. The law is well settled that services rendered by a purchaser, after delivery of merchandise and passage of title, are

services rendered to itself as purchaser, owner and subsequent seller of the goods purchased and not to the seller from whom purchase was made. All of the services upon which respondent relies are services rendered by Frito in connection with its own purchase, ownership and resale of the merchandise, and such services are rendered by Frito not to respondent, but to itself. *Southgate Brokerage Co., Inc.*, vs. *Federal Trade Commission*, C.C.A. 4, 150 F. 2d 607.

3. The law is well settled that price discrimination which is covered by Section 2(a) of the Clayton Act is not necessary to a violation of Section 2(c), which specifically forbids the payment of brokerage by the seller to the buyer or the buyer's agent. *Southgate Brokerage Co., Inc.*, vs. *Federal Trade Commission*, *supra; Oliver Bros.* vs. *Federal Trade Commission*, C.C.A. 4, 102 F. 2d 763.

4. Respondent cannot claim termination of practice because of cancellation of Frito's contract in October 1958, since it immediately returned to the use of a broker in the New York-New England area, paying him the regular brokerage of 5 percent on sales at the prevailing wholesale price, and a lesser percentage where a larger discount was granted to the customer. The Frito transaction was offered in evidence as an example of the practices of respondent, and did not purport to be all-inclusive of the acts and practices alleged to be in violation of Section 2(c) of the Clayton Act. Furthermore, the alleged termination was subsequent to the issuance of the complaint and after evidence in support of the complaint had been substantially completed, and respondent still maintains that the practices charged are not in violation of the Clayton Act.

5. It is further concluded that the acts and practices of respondent, as herein found, constitute the making of payments of commissions, brokerage or allowances, or discounts in lieu thereof, to certain buyers who purchase for their own account for resale in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That Venus Foods, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of bakery products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Paying, granting or allowing, directly or indirectly, to any buyer or to anyone acting for, or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance, or

discount in lieu thereof, upon or in connection with any sale of bakery products to such buyer for his own account.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The complaint in this matter charges respondent, Venus Foods (erroneously referred to in the complaint and in the initial decision as Venus Foods, Inc.), with violating Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner held in his initial decision that the charge was sustained by the evidence and ordered respondent to cease and desist from the practice. Respondent has appealed from this decision.

In substance, it is the respondent's contention that a 5% discount which it granted in connection with its sale of fruit bars to three organizations, Frito New York, Inc., New England Fritos Corporation and Frito Tri-State Corporation, did not constitute the payment of brokerage or a commission or a discount in lieu thereof.

Respondent is located in Los Angeles, California, and prior to 1956 sold its fruit bars throughout most of the country with the exception of a territory generally defined as the New York-New England area. It desired to gain distribution in that area, and on March 22, 1956, appointed Henry M. Samplin Associates, Inc., New York City, its exclusive broker for the area. As Venus' broker, Samplin received a commission of 5% of the purchasers' net price. Sales of respondent's fruit bars were made by Samplin to distributors at a delivered price of $4.70 per case, less 24%, less 1% cash discount, if paid within 10 days. Respondent's sales manager, Mr. Thorpe, made a trip to New York City and terminated the arrangement with Samplin on May 26, 1956. While in New York and at about the same time Samplin's services were discontinued, Thorpe entered into negotiations with Frito New York, Inc., for distribution of Venus fruit bars. At the first meeting between these two, Thorpe offered to sell the fruit bars to Frito New York at the same price as sales had been made to distributors through Samplin. Frito New York stated that it would need a larger discount to cover the cost of getting the merchandise to its distributors. Thorpe then contacted his office in Los Angeles and discussed the Frito deal with the president of respondent corporation. The next day, at a meeting with representatives from Frito New York, which was also attended by a representative of New England Fritos Corporation, a deal was arrived at whereby respondent would sell to the Frito companies at a price of $4.70, less 24%, less 5%, less 1% cash, 10 days. Although Frito Tri-State Corporation was not represented

at this meeting, it is clear from the record that it also purchased from respondent on the same basis. The agreement was confirmed in a letter from Frito New York to respondent, dated July 1, 1956, which specified the territory to be covered (substantially the same area formerly serviced by Samplin) and which provided in part as follows:

> DISTRIBUTORSHIP: We are hereby granted the sole and exclusive right to sell the products within the territory. During the term of this agreement, you will not grant to any other person, firm or corporation the right or privilege of selling the products at wholesale within the territory.
>
> OUR COST: You will sell us the products at your prevailing wholesale price, less a distributor discount of 24%, a further discount of 1% for prompt payment and a further discount of 5% for warehousing, handling and freight out.

The hearing examiner found that respondent sold its fruit bars at generally the same price throughout the United States and that when the products were sold through brokers, the brokerage fee was generally 5% of the distributor net price. Respondent does not seriously dispute these findings, but contends that the hearing examiner was in error in finding that it generally sold its fruit bars to distributors at list price, less 24% delivered and that, in some localities, it sold the products at special or off-scale prices. Respondent argues that its method of quoting prices to distributors varies in different marketing areas and that the prices in the various areas are the regular prices established for those areas. In support of this argument, respondent introduced evidence showing that its method of quoting prices varied from an f.o.b. Los Angeles price to different delivered prices in different areas, the difference in delivered prices resulting from freight differentials. However, this evidence is weakened considerably by a statement in a letter from respondent to its broker, Samplin, dated April 30, 1956, wherein respondent stated that "Our terms will be the same as all over the United States, less 24% and 1% delivered, * * *." In addition, the marketing areas used by respondent to show its different pricing methods are generally in the western part of the country (California, Nevada, Washington, Arizona and Texas). There are in the record invoices of sales through brokers to distributors in Wisconsin, Ohio and Michigan which reflect the price of $4.70, less 24%. Respondent's price list for its distributors in the southeastern section of the United States quotes this same price. Moreover, this was the price at which sales were made to distributors in the New York-New England area through Samplin. We think the record clearly shows, at the very least, that respondent had established a price of $4.70, less 24% for its fruit bars, whether sold

through brokers or not, in the eastern portion of the country, the area with which this proceeding is concerned. That respondent may have had a different method of pricing in the western section is immaterial.

The record contains no direct evidence that the 5% discount to the Frito companies constituted a brokerage payment or commission or was a discount in lieu thereof. Accordingly, any finding that such was the case rests on inferences to be drawn from the evidence. In our view, there are sufficient facts of record to support such a finding. In summary, these facts show that the 5% granted to the Frito companies was exactly the same as respondent allowed its broker for sales in the same area; the price, less the 5% discount, was the same at which respondent formerly sold its fruit bars to distributors in the same area through its broker and was currently selling other distributors in surrounding areas through brokers; the 5% discount was granted Frito within a few days after cancellation of respondent's brokerage arrangement for the same area; and, in the terms of the agreement between Frito and respondent, the price at which respondent agreed to sell to Frito is designated as a "wholesale price," with respondent also agreeing not to grant any other company the right of selling the fruit bars at "wholesale" within the territory. Thus, the facts in this case go far beyond those present in the *Robinson* case [1] cited by respondent, in which the facts showed that the seller after eliminating a broker, sold directly to all purchasers, and in which plaintiff pleaded only his unsupported conclusion that a reduction in price granted to a buyer from a manufacturer constituted a discount in lieu of brokerage.

Respondent's principal argument on this appeal is that the evidence shows that the additional 5% granted to the Frito companies was a functional discount, thus rebutting any other inferences that may be drawn from the surrounding circumstances. It is respondent's contention that the Frito companies operated as regional distributors, warehousing the products and selling and transporting them to distributors who in turn sold to retailers, whereas respondent's usual distribution chain consisted of sales to distributors who sold direct to retailers. In support of this argument, respondent points out that New England was a new territory and claims that its attempt to gain distribution through a broker in that area was unsuccessful. Respondent's general manager testified that after termination of the brokerage arrangement, he made a survey of the market to find the best means of distribution, in the

[1] *Robinson* v. *Stanley Home Products, Inc.*, 272 F. 2d 601 (1st Cir. 1959).

course of which he contacted other distributors who advised him that they could not handle the products for a discount of less than 35%; and that in the negotiations with the Frito companies, their method of distribution was explained. In addition, respondent points to the terms of its agreement with Frito which provides that the 5% discount is for "warehousing, handling and freight out." (Freight out refers to Frito's cost of delivering the goods from its warehouse to distributors.)

It is our opinion that the record does not support respondent's contention. Although respondent's general manager, Thorpe, testified at the second hearing in this matter in November 1959 that the Frito companies informed him that they sold to independent distributors, the following testimony by respondent's president at the first hearing in October 1958 indicates that the Frito companies also sold directly to retailers:

Q. Mr. Nussbaum, to what type customers do the Frito Company sell?

A. *A great portion* of their business is to independent distributors to whom they have contracts.

Q. What control do you have over the prices at which they sell?

A. At which they sell to *stores* and independent distributors?

Q. Yes, sir.

A. Only the control of how much you can price the mercchandise for. There is a limit that you can sell a 49-cent item. (Emphasis supplied.)

This is further borne out by the testimony of Thorpe in the second hearing when, in relating his discussion with the Frito officials leading up to the agreement, he stated:

* * * we discussed the problems that their men possibly might run into in trying to integrate a foreign item. When I say foreign, foreign to their type of items on the trucks, and the sales problems that they would have with the individual groceries, and that type of thing.

Another fact which militates against respondent's argument that the 5% discount was not in lieu of brokerage is the provision in the contract resulting from the negotiations with the Frito companies that "You (Venus Foods) will also hold us (Frito) harmless with regard to any claims which may be made against us by any broker or former broker of yours in this territory."

Evidence which respondent attempted to introduce concerning its methods of distribution in the area after termination of the Frito contract was properly held to be immaterial by the hearing examiner. The question of whether or not a discount to a buyer constituted a brokerage payment or discount in lieu thereof depends upon the facts surrounding that particular transaction and cannot be related to sales methods subsequently employed by the seller.

Moreover, the evidence shows that respondent did not attempt to classify the Frito companies functionally, but in fact considered them to be the same type of distributor as those to whom it usually sold. As previously stated, the price quoted by Thorpe to Frito at their first meeting was the same as that to which respondent sold its regular distributors in the eastern part of the country. Also, Thorpe made no mention in his testimony concerning his telephone discussion with respondent's president about the proposed Frito deal, that they planned to establish a regional distributor. In the written agreement between the parties, Frito is obviously classified as a wholesaler. In addition, the circumstance that the Frito companies did not account to respondent as to the names of the customers to whom they sold the merchandise and that respondent did not have a policy requiring them to furnish this information, stipulated to by respondent, tends to negate any argument that this was the action of seller establishing a regional distributor.

Respondent sells to approximately 300 distributors. It attempted to show that the 5% granted to the Frito companies was a functional discount by showing that it had previously granted discounts in that amount to two of its customers to enable them to function as regional distributors. One such transaction involved an individual named Shelby who was respondent's exclusive distributor in southern Texas. Respondent introduced evidence showing that Shelby purchased its fruit bars f.c.b. Los Angeles at a price of $3.25 per case, less 5%, less 1%. Thorpe testified that Shelby has a main plant, a branch in Beaumont, Texas, a sub-distributor in the Waco area, and a sub-distributor that handles part of Louisiana. He further stated that the 5% discount was granted to Shelby to put him in a competitive position in the market plus getting the merchandise distributed to outlying areas, and that respondent never employed a broker in the area covered by Shelby.

In order to establish that the 5% received by Shelby was a functional discount, we think the most significant evidence respondent could have adduced would have been that Shelby sold exclusively to distributors and did not sell directly to retailers from its own branch or plant. In the absence of such a showing, this record will not support a conclusion that Shelby actually functioned as a regional distributor or that the 5% was given to him solely for that purpose.

The other transaction referred to by respondent involved its Milwaukee, Wisconsin, distributor, Milwaukee Biscuit Company. The evidence shows that respondent sold to this distributor at a delivered price of $4.70 per case, less 24%, less 1%. Regarding this

transaction, Thorpe testified that in 1957 respondent received an inquiry from a distributor in Green Bay, Wisconsin. Respondent had a problem getting merchandise to this distributor because of the small area and small quantity ordered. Thorpe entered into an arrangement with Milwaukee Biscuit Co. whereby that company would ship Venus fruit bars to the Green Bay distributor out of its own stock. Thorpe agreed to pay Milwaukee Biscuit Co. 5% or allow it to charge respondent back 5% for the cost of handling and shipping the merchandise to Green Bay. This arrangement was terminated in 1958.

It is not clear from the record whether the Green Bay distributor placed its order with and made payment to Milwaukee Biscuit Co. or to respondent. However, regardless of whether the Green Bay distributor was a customer of respondent or of Milwaukee Biscuit Co., we do not think this single exception to respondent's usual pricing system in that area is indication of any policy on the part of respondent to classify its distributors functionally.

Giving full weight to respondent's testimony concerning its dealings with Shelby and Milwaukee Biscuit Co., it is our opinion that two isolated instances of the granting of a discount, in the amount usually accorded brokers, to distributors who sell to other distributors, would not serve to rebut the inference arising from the facts present in this case.

As respondent has failed to show that the 5% granted to the Frito companies was a functional discount, the *Whitney* case [2] which it cites, is obviously not in point. The court there pointed out that the record before it showed that interpacker (functional) discounts were customary in the transaction under consideration, that the particular discount in question was intended as such, and assumed this to be the case in making its decision.

On the basis of the foregoing facts, we conclude that the respondent in its sale of fruit bars to the Frito companies for their own account, granted those companies a discount in lieu of brokerage. It is well settled that Section 2(c) of the Clayton Act contains an absolute prohibition of payments or allowances of brokerage or sums in lieu of brokerage from sellers to buyers. *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939), *cert. denied* 308 U.S. 625 (1940); *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F.2d 687 (2d Cir. 1938), *cert. denied* 305 U.S. 634 (1938). Furthermore, it is our view that the facts fully support the hearing examiner's conclusion that the discount was for services rendered by Frito to itself as purchaser,

[2] In re *Whitney & Company*, 273 F. 2d 211 (9th Cir. 1959).

owner and subsequent seller of the goods purchased and that such services do not bring this case within the exception of Section 2(c) by reason of services rendered. *Great Atlantic & Pacific Tea Co., supra; Southgate Brokerage Co., Inc.* v. *Federal Trade Commission*, 150 F.2d 607 (4th Cir. 1945). Likewise, we agree with the hearing examiner that price discrimination which is covered by Section 2(a) of the Clayton Act is not necessary to a violation of Section 2(c). *Southgate Brokerage Co., Inc.* v. *Federal Trade Commission, supra.*

The appeal of respondent is denied. To the extent the findings of the hearing examiner are deficient, the initial decision is modified to include the factual findings together with the reasons and basis therefor embodied in this opinion. Also, the initial decision is modified by substituting the name Venus Foods for the name Venus Foods, Inc., wherever the latter name appears in the findings, conclusions and order of the hearing examiner. As so modified, the initial decision is adopted as the decision of the Commission.

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, for the reasons stated in the accompanying opinion, having denied the aforementioned appeal, and having modified the initial decision to the extent necessary to conform to the views expressed in the said opinion:

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

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

IN THE MATTER OF

EXQUISITE FORM BRASSIERE, INC.

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

*Docket 6966. Complaint, Nov. 29, 1957 *—Decision, Oct. 31, 1960*

Order requiring an industry leader in the manufacture and sale of brassieres, with annual sales in excess of $10 million, to cease discriminating in price between competing customers in violation of Secs. 2(d) and 2(e) of the Clayton Act by paying advertising allowances and furnishing "stylists" to certain large retailer customers while not making either available on proportionally equal terms to competing smaller customers.

Peter J. Dias, Esq., and *Robert G. Cutler, Esq.*, for the Commission.

James W. Cassedy, Esq.; Robert B. Dawkins, Esq., and *Peyton Ford, Esq.*, of Washington, D.C., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On November 29, 1957, the Federal Trade Commission issued its complaint against Exquisite Form Brassiere, Inc., a corporation (hereinafter called respondent), alleging that respondent had violated Section 2(d) of the Clayton Act (hereinafter called the Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act. Copies of said complaint together with a notice of hearing were duly served on respondent.

Respondent appeared by counsel and filed an answer admitting the corporate, commerce, and most of the factual allegations of the complaint but denying any violation of the Act. Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from June 9, 1958, to December 29, 1958.

At the conclusion of the case-in-chief, counsel supporting the complaint moved the undersigned to certify to the Commission their motion to amend the complaint to also allege a violation of Section 2(e) of the Act, in view of the proof received. Counsel for both parties and the undersigned being of the opinion that such an amendment was not "reasonably within the scope" of the original complaint, as required by Section 3.9 of the Commission's Rules

* Amended and Supplemental Complaint, Aug. 1, 1958.

of Practice, said motion was certified to the Commission. On August 1, 1958, the Commission granted the motion and issued its amended and supplemental complaint, alleging violations of Sections 2 (d) and (e). The Commission's order further provided that the evidence theretofore introduced should have the same force and effect as though received under the complaint as amended, and that respondent be accorded such procedural rights as the undersigned deemed appropriate and necessary.

Respondent was accorded the right to, and did, recall witnesses for further cross-examination in the light of the amended complaint, and thereafter presented its defense, none of which had been proffered prior to the amendment of the complaint. Every procedural right which respondent could have been afforded had the complaint originally alleged violations of Sections 2 (d) and (e) was accorded.

The amended and supplemental complaint alleges, in substance, that respondent paid for services furnished by some customers and that such payments were not available on proportionally equal terms to competing customers, in violation of Section 2(d); and that respondent furnished services to some purchasers upon terms not accorded to competing purchasers on proportionally equal terms in violation of Section 2(e).

Both parties were represented by counsel, participated in the hearings, and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Because of the untimely demise of both Messrs. Cassedy and Dawkins, several extensions of time for the filing of proposed findings were granted, finally terminating September 15, 1959, at which time both parties filed their proposed findings of fact and waived oral argument thereon. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. *The Business of Respondent*

The complaint alleged, respondent admitted, and it is found that respondent is a New York corporation with its principal

[1] 5 U.S.C. § 1007(b).

office and place of business located at 159 Madison Avenue, New York City, New York.

II. *Interstate Commerce*

The complaint alleged, respondent admitted, and it is found that it is now, and for many years past has been, engaged in the manufacture, sale and distribution of brassieres. In the course and conduct of its business respondent is now, and has been, engaged in commerce, as "commerce" is defined in the Act, having shipped its products or caused them to be transported from its principal place of business in the State of New York to customers located in othe rstates of the United States and the District of Columbia. Volume and dollar-wise, respondent is a leader in the industry, with sales in excess of $10,000,000 annually. Respondent sells its products to various customers and purchasers, such as department stores, women's specialty stores, and dress shops, with places of business located in various cities throughout the United States, who were and are engaged in the resale of respondent's products at retail to the purchasing public.

III. *The Unlawful Practices*

A. Paying for services furnished by customers. (Section 2(d))

Section 2(d) makes it illegal for any person engaged in commerce to

> * * * pay * * * to a customer * * * for any services * * * furnished by or through such customer in connection with the * * * sale * * * of any products * * * manufactured * * * by such person, unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products. * * *

The facts with respect to this issue are substantially undisputed and for the most part admitted. Since 1954 respondent has had in effect a cooperative advertising plan, with various changes from time to time as hereinafter set forth, under which it pays, by means of credit memoranda applicable to current or future invoices, a portion of the cost of newspaper advertising placed by its larger customers and featuring respondent's products. From August 30, 1954, to January 25, 1956, if a customer would place such an advertisement of at least 400 lines in a recognized newspaper, respondent would pay 60 percent of the cost. If within six months the customer placed at least five such advertisements, respondent would pay 70 percent of the cost of all of them. If at least eight advertisements were placed within six months, respondent would pay 80

percent of the cost of all of them. No payments were made for any smaller advertisements or in any other media.

From January 26, 1956, to July 1, 1957, the lineage requirement was changed to 200 lines and respondent would pay 50 percent of the cost of each advertisement; for successive advertisements within a three-months' period, 60 percent for two, 70 percent for three, and 80 percent for four. From July 1, 1957, to the date of the hearings, respondent's plan was changed so that it would pay 50 percent on all such advertisements regardless of the number placed, with the same 200-line and media requirements.

The record establishes that this plan was designed for, and offered only to, the larger accounts. The specific terms of the cooperative advertising plan, particularly the requisite size of the advertisement, made it inapplicable to smaller accounts which never did enough business in respondent's products to justify or even pay for advertising expenditures in such amounts. In fixing the terms of its advertising program, respondent of course knew that its smaller accounts could not afford an advertisement of the requisite size devoted to one product when the account's share of the cost would in all probability exceed its total gross profit on the sale of such product.

In the terms of the statute, the payments must be available upon proportionally equal terms to all competing customers. It follows that if they are not available or offered to all such, no matter how equal the terms otherwise may be, the statute is violated. Both requisites are necessary—availability to all and proportionally equal terms to all. It is settled law, and indeed respondent's counsel concedes, that the term "available" as used in § 2(d) means that the payment must be offered, and the terms made known, to all competing customers.[2] That which is not made known or that which is not offered cannot be considered as available. The choice must be that of the customer, not the seller. Any other interpretation would make evasion of the statute simplicity itself.

The record here establishes that the respective plans were not offered and were not made known to many of respondent's customers competing with those to whom such payments were made. Counsel supporting the complaint called a number of respondent's customers located in Paterson, Plainfield, and Trenton, New Jersey, who testified that they were never offered cooperative advertising allowances by respondent and had never received any. Some of these customers testified that they had been informed of the existence of a

[2] *Kay Windsor Frocks, Inc.*, 51 FTC 89 (1954); *Henry Rosenfeld, Inc.*, 52 FTC 1535 (1956); *Chestnut Farms-Chevy Chase Dairy*, 53 FTC 1050, Docket No. 6465 (1957).

plan at its inception, but had never been advised of its terms and specifically the changes occurring in 1956 and 1957. The record further establishes that respondent did pay such advertising allowances to various customers in each of the three cities who were in direct competition in the resale of respondent's products with the customers who were not offered the plan. Both the testimony of the customers who were not offered the plan and their geographic proximity to the location of the stores which were paid advertising allowances establish that they were in fact in direct competition with each other in the resale of respondent's products.[3]

As the Commission said in the *Rosenfeld* case, *supra*:

* * * Under the Act, an allowance cannot be deemed "available to a reseller, * * * when a seller fails to inform or otherwise offer promotional allowances to a customer * * *,

and also in the *Chestnut Farms Dairy* case, *supra*,

* * * Whether or not a customer participates therein is a decision for the customer. The customer obviously must know the specific terms of a plan before he can determine whether he is interested in participating. * * *

Respondent's cooperative advertising plan in fact was not designed or intended for the use of its smaller customers. As found above, many of them were never offered the plan, and, while many of them knew in general that cooperative advertising existed in the industry, they were never told of respondent's terms, which changed three times from 1954 to 1957. Respondent argues that its second plan, the one adopted in 1956, was given some publicity in trade journals and hence was known to its customers. Aside from the question of who did or did not read such articles, such general publicity cannot be equated with an offer and actual knowledge of the terms, so as to be "available" within the meaning of the statute.

Respondent also contends that it offered the plan to all of its customers orally through its salesmen, but the undisputed testimony of many customers was that they were never offered the plan, and of other customers, that while they were informed of the original plan, they were never advised of the terms of the second or third plans. Respondent called no salesmen to refute this testimony and hence it stands undisputed. While it is apparent that many of respondent's smaller customers economically could not have made use of the cooperative advertising because of the required size of the advertisement, it also seems obvious that at least some of them might have been able to make use of it when the requisite size was

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[3] *Elizabeth Arden* v. *F.T.C.*, 156 F. 2d 132 (C.A. 2, 1946); *F.T.C.* v. *Simplicity Pattern*, 360 U.S. 55 (1959; and *Liggett & Myers Tobacco Co., Inc.*, 56 FTC 221, Docket No. 6642 (1959).

reduced from 400 to 200 lines in 1956. Yet it is undisputed that they were never informed of this change.

While the Commission in the *Lever Brothers* and the so-called *Soap* cases,[4] held that every feature of a plan need not be useful to all in order for it to be upon proportionally equal terms, this holding was limited to situations where reasonably equal alternatives are available. As the Court of Appeals pointed out in the recent *State Grocers* case,[5] a plan (of exactly the same type as herein) whose terms by their nature cannot be used by all competing customers is not "available," and is tantamount to no offer at all. In the *Soap* cases, alternative advertising allowances were made known and available to all. The teaching there is that all parts of an offer do not have to be usable by all, but only when and if a reasonable alternative of proportionally equal terms is available. Unless such special circumstances exist, the more recent holding in the *State Grocers* case, *supra*, must prevail—namely, that a plan which is not usable by all, with no alternatives of proportional equality, is not available to all within the meaning of the statute.

In an attempt to establish a reasonable alternative, respondent argued that its premium plan, and/or the furnishing of counter display material and store dispensers for its products, were available alternatives upon proportionally equal terms. The argument is without merit. With regard to its premium plan, hereinafter described, in the first place, and most importantly, the record establishes that it was not in effect during most of the time encompassed by the cooperative advertising allowances. The premium plan was discontinued in January 1955, renewed in June of 1955, and then discontinued permanently in January 1956. Throughout nearly half of 1955, substantially all of 1956, and ever since it has not been in existence. That which does not exist cannot be an alternative. Secondly, even when it existed it was not proportionally equal—it did not constitute a form of advertising allowance such as the various alternatives in the *soap* case did. Thirdly, it was not an alternative since it was neither offered nor made available to all. It was neither offered, nor made available, to those accounts receiving advertising allowances.

The premium plan consisted of a system of points awarded to customers, one for each $10 worth of goods purchased from respondent. It required the accumulation of 30 points, or a minimum of $300 in purchases, before any premium or prize was earned. Conversely, no minimum purchases were necessary under the co-

[4] *Lever Brothers Co.*, 50 FTC 494 (1953); and companion cases.

[5] *State Wholesale Grocers* v. *A & P Company*, 258 F. 2d 831 (C.A. 7, 1958).

operative advertising plan. Additionally, no one could seriously argue that an ice bucket, a pressure cooker, an iron, a percolator, a carving set or a bridge set were reasonable alternatives of proportional equality with hundreds of dollars worth of promotional advertising. In short, the premiums were neither available nor proportionally equal within the meaning of the statute.

In addition to establishing that advertising allowances were not made available to all competing customers, the record also establishes that even among those to whom they were made available the plan was not adhered to and they were not upon proportionally equal terms. A number of instances were established where respondent deviated from its stated percentages in Paterson, Plainfield and Trenton. Some customers were paid 80 percent of the costs of ads when they were only entitled to 50 percent under the terms of the plan; some were paid percentages not even set forth in the plan, such as 75 and 77 percent; and some were paid only 50 percent when they were entitled to a larger amount because of placing the requisite number of ads during the specified periods of time. In each instance these variations occurred among customers competing in the resale of respondent's products. The record also establishes that in one instance respondent granted "push" or "prize" money to one customer's sales personnel in the amount of 11 cents per brassiere sold during a specified period of time, without according such allowance to any of respondent's competing customers.

Respondent's contention that its furnishing of display material and store dispensers constitutes a proportionally equal alternative is entitled to even less consideration. Inasmuch as such materials were offered and furnished to all customers who desired them regardless of participation in the cooperative advertising or the premium plan, they were in no sense alternatives but were general promotional services available to all. Even if such facilities had been offered as alternatives, which they were not, quantitatively they could not be considered proportionally equal. In addition, it would appear to be an attempt to make Section 2(e) "services" a substitute or alternative for Section 2(d) "payments"; Section 2(d) encompasses paying for services furnished by a customer, whereas § 2(e) encompasses services furnished by the seller to the customer, which would include the furnishing of store dispensers and display material. Section 2(d) expressly provides that such payments for services furnished by a customer are illegal unless *such payment* is available on proportionally equal terms to all other customers competing. This means what it says: an alternative must be the

payment for services furnished and not the furnishing of services by the seller to the customer. Such payment, not something else, must be available on proportionally equal terms.

In addition to the foregoing defenses, respondent also argued that its cooperative advertising allowances were made in good faith to meet competition. It is now well settled that the good faith meeting of competition defense set forth in Section 2(b) is not applicable to Section 2(d).[6]

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent has paid and contracted to pay for advertising services furnished by or through some of its customers in connection with the sale or offering for sale of its products by such customers, without making such payments available on proportionally equal terms to all other customers competing in the distribution of its products, in violation of Section 2(d) of the Act.

B. Furnishing services to purchasers. (Section 2(e))

Section 2(e) makes it illegal to

> * * * discriminate in favor of one purchaser against another * * * of a commodity bought for resale * * * by * * * furnishing * * * any services * * * connected with the * * * sale * * * of such commodity * * * upon terms not accorded to all purchasers on proportionally equal terms.

The terminology of the Section and the decisions of the Commission and the courts make it clear that the term "accorded" used in Section 2(e) has substantially the same meaning as the term "available" used in Section 2(d). For the same reasons as expressed hereinabove, the services supplied by respondent must be offered and made known to all purchasers, or they cannot be considered as having been accorded to all as required by the statute. Although Section 2(e) does not contain the limitation found in 2(d), that the purchasers or customers to whom the services must be accorded be competing in the resale of the products, the decisions of the Commission and the courts uniformly have so construed it.

As with respect to the 2(d) count, the facts are substantially undisputed. During the same period of time in the course and conduct of its business, respondent has furnished to some of its purchasers the services of special personnel known as "stylists." These "stylists," perhaps more commonly known as "demonstrators," are employed and paid by respondent and furnished to some of its customers at their stores to assist in the demonstration and sale of

[6] *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *A & P Tea Co. v. F.T.C.*, 106 F. 2d 667 (C.A. 3, 1934); and *Henry Rosenfeld, Inc.*, 52 FTC 1535 (1956).

respondent's products and the education of its customers' sales personnel. As in the case of cooperative advertising, the record establishes that respondent furnished stylists only to its larger accounts. They were not offered or made available to many of respondent's smaller accounts in direct competition with such favored accounts in the resale of respondent's products.

Much of the testimony concerning the furnishing of stylists came into the record prior to the amendment of the complaint, when Section 2(e) was not in issue and the issue at that point was 2(d). The testimony of respondent's officials reveals that the stylist program was never intended to be available or offered to all of its customers, but was a special program designed to promote sales in the largest stores of respondent's customers. Respondent sells nationally and has the country divided into from ten to fourteen districts. It employed only four to six stylists. They were assigned on an equal basis to each district, so that each individual district would have use of a stylist for approximately six months. Respondent's officials conceded that its district managers assigned stylists to purchasers in their territory as they saw fit, and that it would be completely impractical to furnish them to every customer who wanted them. They also conceded that it was not intended that the program would be available to all customers. Prior to the amendment of the complaint to include Section 2(e), it was frankly conceded that the stylist program was adopted as a promotional device to enhance respondent's sales.

The record establishes that respondent furnished stylists to customers in Plainfield and one customer in Trenton while not offering or furnishing such stylists to all other competing customers in those areas. While respondent's answer affirmatively alleged that it had made the services of stylists available on proportionally equal terms to all its competing customers, respondent's principal defense to the 2(e) charge appears to be that it furnished such services as a good faith meeting of competition. Actually its position in this respect is inconsistent inasmuch as if it furnished or offered the services of stylists to all of its customers, then it could not have been limiting the furnishing of such stylists to a good faith meeting of services furnished by competitors, since the record establishes and respondent concedes that such stylists were not furnished by competitors to the smaller stores and accounts among respondent's customers.

Inasmuch as the record establishes beyond dispute that such services were not offered or accorded to all competing purchasers, the only defense necessary to consider is that of the good faith meeting of competition. Counsel supporting the complaint suggest

in their brief that the good faith meeting of competition defense in Section 2(b) is not applicable to Section 2(e) as a matter of law, suggesting that the holdings of the Commission and the Court of Appeals to the contrary in the *A & P Tea Co.* and *Rosenfeld* cases[7] were *dicta*. Be that as it may, the issue has been definitively settled by the recent decision of the Supreme Court in the *Simplicity Pattern* case,[8] where the Court specifically held that the good faith meeting of competition defense set forth in Section 2(b) does apply to Section 2(e), although it does not to Sections 2(c) and 2(d). Section 2(b) provides, *inter alia*:

> * * * Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

With respect to this very point, the Supreme Court held:

> Thus a discrimination in prices may be rebutted by a showing under any of the Section 2(a) provisos, or under the Section 2(b) proviso—all of which by their terms apply to price discriminations. On the other hand, the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the Section 2(b) proviso.

There can no longer be any question but that the proviso in 2(b) is applicable to Section 2(e).

As counsel supporting the complaint points out, this necessitates applying the tests which have been applied to Section 2(b) in order to determine whether or not respondent's furnishing of stylists was in fact a good faith meeting of the furnishing of such services to a purchaser by a competitor. It is settled law that the good faith meeting of competition defense is restricted to individual competitive situations and does not apply to a plan or system.[9] In other words, in the language of the statute, the meeting of competition must be defensive in order to meet an offer made to one's customer and thus prevent the loss of such a customer, rather than be aggressive, or a system designed to meet competition generally as distinguished from individual offers to customers.

The situation here was exactly the opposite. Before the complaint was amended, respondent's testimony frankly revealed that the plan was designed as an aggressive tool to promote the sales of its products. The very method by which it was set up, limiting the stylists to an equal amount of time in each district and permitting their use by each district manager as he saw fit would prevent its

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[7] See footnote 6, *supra*.

[8] See footnote 6, *supra*.

[9] *F.T.C.* v. *Staley Mfg. Co.*, 324 U.S. 746 (1945); *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951); 355 U.S. 396 (1958); and *C. E. Niehoff & Co.*, 51 F.T.C. 1114 (1955).

being used only for the purpose of meeting specific competition. If it were designed to meet competition as it arose, stylists would have to be assigned in those areas where the need occurred, and not divided equally throughout the entire nation and used at the discretion of district managers. The odds would be astronomical against an even distribution of offers by competitors to respondent's customers at all times throughout the country. Furthermore, as was pointed out by the Supreme Court in the *Staley* and *Standard Oil* cases, *supra*, Section 2(b) does not permit the adoption of a system to meet the competition of an illegal discriminatory system engaged in by competitors. Two wrongs do not make a right. The "good faith" requirement is not met unless the discrimination is limited to individual situations in order to meet competitive offers and prevent the loss of customers. Although respondent proved that some of its competitors had supplied stylists, no attempt was made to demonstrate the terms and conditions of such programs, the products involved, or the length of time such services were furnished. Lacking this information, respondent's furnishing of stylists hardly could be said to have been made in good faith to meet the services furnished by competitors.

Additionally, the proviso is designed to prevent the loss of customers by permitting such discrimination in limited situations. The record here establishes that the furnishing of stylists was not a prerequisite to preventing the loss of any customers, since they all testified that the failure or refusal of a manufacturer to furnish stylists would not result in their discontinuance of business with that manufacturer. After the complaint was amended to include Section 2(e), the same witness for respondent then testified that the furnishing of stylists was limited to the meeting of competition, although he had previously testified to the contrary, namely, that stylists were used at the discretion of the district managers for whatever promotional benefit possible. In the light of well-established principles of evidence, his testimony prior to the existence of a self-serving motivation militating against a full and frank disclosure of all the facts is entitled to more weight than that after the amendment. This principle is similar to the familiar one applied by the courts in connection with numerous exceptions to the hearsay rule, such as past recollection recorded, admissions, statements against interest, res gestae, declarations of state of mind, etc.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent has discriminated in favor of some purchasers against other purchasers by furnishing the services of stylists upon terms not accorded to all competing purchasers on

proportionally equal terms, in violation of Section 2(e) of the Act. It is further concluded and found that such discrimination in the furnishing of services was not made in good faith to meet services furnished by a competitor.

C. Respondent's contentions applicable to both counts

Respondent's answer (although not its present counsel) advanced the threadbare contention that Sections 2 (d) and (e) are unconstitutional. In addition to the well-settled rule that administrative agencies have no power to pass upon the constitutionality of laws enacted by Congress, the numerous decisions of the Courts of Appeal and the Supreme Court enforcing Commission orders issued under Sections 2 (d) and (e) demonstrate the contrary.[10]

Respondent also argues that under Sections 2 (d) and (e) it is essential to both plead and prove that the practices may have had a substantially injurious effect upon competition, as is necessary in connection with alleged violations of Section 2(a), price discrimination. The contrary is so well settled as to not warrant extended discussion, and the Commission and the courts have so held frequently.[11] In the recent *Simplicity Pattern* decision, the Supreme Court specifically passed upon this very contention, and stated:

> In terms, the proscriptions of these three subsections [(c), (d), and (e)] are absolute. Unlike Section 2(a), none of them requires, as proof a a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondents as above found violate Sections 2 (d) and (e) of the Act.

ORDER

It is ordered, That respondent Exquisite Form Brassiere, Inc., a corporation, its officers, directors, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of brassieres in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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[10] *Elizabeth Arden* v. *F.T.C., supra; F.T.C.* v. *Simplicity Pattern, supra; Great A & P* v. *F.T.C., supra,* and *State Wholesale Grocers* v. *A & P Co., supra.*

[11] *Henry Broch & Company,* 54 FTC 673, Docket No. 6484 (1957); *Elizabeth Arden* v. *F.T.C., supra;* and *F.T.C.* v. *Simplicity Pattern Co., supra.*

1. Paying, or contracting to pay to or for the benefit of any customer, an advertising allowance, push money or anything of value as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of respondent's products, unless such payment or consideration is offered and otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products;

2. Discriminating, directly or indirectly, among competing purchasers of its products, by contracting to furnish, furnishing, or contributing to the furnishing of the services of stylists or any other services or facilities connected with the processing, handling, sale or offering for sale of respondent's products, to any purchaser from respondent of such products bought for resale, unless such services or facilities are offered and otherwise made available on proportionally equal terms to all purchasers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By SECREST, *Commissioner*:

The complaint herein charges the respondent with violating subsections (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondent to cease and desist the practices found to be unlawful. Respondent has appealed from this decision.

The complaint, as originally issued, charged only a violation of Section 2(d). At the conclusion of the case in chief, the complaint was amended on the motion of counsel supporting the complaint to include allegations charging also a violation of Section 2(e) of the Act. Respondent contends that the Commission exceeded its authority under § 3.9 of its Rules of Practice by amending the complaint to include a new and separate charge. It also contends that by so amending the complaint the Commission deprived respondent of its constitutional right to a fair hearing.

The answer to the first argument is that the new allegations were not added to the complaint pursuant to § 3.9 of the Rules of Practice which relates solely to the hearing examiner's authority to amend complaints, but in an exercise of the administrative responsibility of the Commission itself to issue its complaint and to supplement a complaint previously issued whenever it has "reason to believe"

that a provision of the Clayton Act within its jurisdiction to enforce is, or has been, violated.

With respect to the second contention, respondent has failed to indicate in what manner it was deprived of a fair hearing. The record reveals that insofar as the new allegations were concerned respondent was accorded the same procedural rights and safeguards it would have received had a new complaint been issued. Its appeal on these points is, therefore, denied.

Respondent has also appealed from the hearing examiner's holding that it violated Section 2(d) by making payments to certain customers for newspaper advertising furnished by or through them in connection with the sale of its products without making such payments available on proportionally equal terms to other customers competing in the distribution of such products. The hearing examiner found in this connection that respondent's cooperative newspaper advertising plan was not offered or made known to certain customers of respondent who were competing with others to whom respondent had granted advertising allowances.

Respondent contends that the hearing examiner's findings are not supported by the evidence, and further that it had proportionalized the payments made under the cooperative advertising plan by providing alternative plans on proportionally equal terms to customers who could not use newspaper advertising. On the latter point, the examiner ruled that other plans offered by respondent, namely, its premium plan and/or the furnishing of counter display material and store dispensers for its products, were not suitable alternatives to respondent's cooperative advertising plan.

We are convinced from an examination of the record that respondent's cooperative newspaper advertising plan was not offered or made known to some customers competing with others who received payments under the plan. The record reveals that respondent's salesmen offered the plan to certain of respondent's larger customers but did not make the offer to smaller competing customers nor inform them of the existence of the plan. Respondent's contention that advertising and other publicity in trade journals with respect to the plan constituted notice to all customers of the "availability" of the plan is refuted by the testimony of several of its customers. This argument also ignores the fact that publicity with respect to the plan, given in January and February, 1956, did not occur until about sixteen months after the plan was put into effect in 1954.

The record also discloses that respondent's premium plan was not offered to customers who received payments under the cooperative

advertising plan. Since the two plans were not offered to all competing customers, they cannot be considered as alternative features or elements of a comprehensive plan. In *Lever Brothers Company*, 50 F.T.C. 494 (1953), we held that a seller may pay for promotional services of various types and that in some instances it might be his duty to do so in order to meet the test of availability. We also held that such a comprehensive plan does not have to be so tailored that every feature of it will be usable or suitable for all customers. However, the customer and not the seller should decide what is or is not usable and suitable for him and should have the opportunity to select that feature of a plan which suits him best. *Liggett & Myers Tobacco Company, Inc.*, Docket 6642 (1959); *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050 (1957).

Since respondent's customers were denied this choice, the aforementioned plans cannot be considered as alternatives but were in fact separate and distinct from one another. Respondent's other two plans, namely, the furnishing of display material and store dispensers, were not offered in lieu of the advertising allowance but were available to customers receiving such allowance. It is our conclusion, therefore, that the various plans offered by respondent were not alternatively available to all competing customers. Consequently, we do not reach the question of whether the various plans could be legitimate components of a comprehensive plan or whether the terms of one plan were or could be proportionally equal to those of another. The allegation that respondent violated Section 2(d) is sustained by the showing that the cooperative advertising allowance was granted to some customers but was not offered to other customers competing in the distribution of respondent's products. Respondent's appeal on this point is also denied.

Another point raised by respondent in this phase of its appeal concerns the hearing examiner's rejection of its argument that its cooperative advertising allowances were granted in good faith to meet competition. The hearing examiner rejected this argument citing *Federal Trade Commission* v. *Simplicity Pattern Company*, 360 U.S. 55, 1959; *The Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939) and *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956).[12]

[12] Specifically the hearing examiner held that "it is now well settled that the defense set forth in Section 2(b) is not applicable to Section 2(d)" and that "this issue has been definitely settled by the recent decision of the Supreme Court in the *Simplicity Pattern* case." *supra*. He observed that the Court in the *Simplicity Pattern* case had held the good faith meeting of competition defense available in Section 2(e) situations but that it could not be offered defensively in cases brought under Sections 2(c) and 2(d).

The "services and facilities" amendment to the good faith meeting of competition defense originally took form during the Senate debates and culminated in Senate passage of a bill containing only present Section 2(d) but not Section 2(e). (80 Cong. Rec. 8418–8419). As initially proposed the meeting of competition defense appeared at the end of the bill and was numbered 2(d) following Section 2(c)(1) which is now Section 2(d). After the "services and facilities" language was added to the bill, however, the position of the subsection was changed and renumbered 2(b) and placed in the bill immediately following Section 2(a) which, then as now, relates only to price. Senator Moore of New Jersey in introducing the "services and facilities" amendment to Section 2(b) made no clear explanation as to why he added this language [13] to the bill,[14] but both the Senate and later the House amendments referred only to a *seller* furnishing the service or facility, as distinguished from payments by the seller to his customers which is, and was, the practice encompassed by what is presently Section 2(d).

In the House the "services and facilities" amendment was initially proposed on May 27, 1936 by Representative Miller on behalf of the Committee on the Judiciary during the debates on H.R. 8442 (80 Cong. Rec. 8139–8140). Representative Miller made no explanation as to why this amendment was offered but on May 28, 1936 Representative McLaughlin offered an amendment which was identical to the one offered by Representative Miller and stated: "Mr. Chairman. This is a committee amendment agreed to unanimously by the Committee and was explained yesterday. It simply allows a *seller* to meet not only competition in price of other competitors but also competition in services and facilities furnished." (80 Cong. Rec. 8224–8225). The Conference Committee Report (No. 2951, 74th Cong., 2nd Sess., June 8, 1936) explained the 2(b) proviso as: "A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission, * * *"

In our *Rosenfeld* opinion, *supra*, we concluded that the 2(b) defense is not available in a proceeding involving an alleged viola-

[13] In pertinent part the added language provided that: "nothing herein contained shall prevent a *seller* rebutting the prima facie case thus made by showing that his * * * *furnishing of services or facilities* * * * was made in good faith to meet * * * the *services or facilities* furnished by a competitor." [Emphasis provided.]

[14] Senator Moore: "* * * The milk producers in New Jersey feel that unless this amendment is adopted all of their work for all these years will mean nothing; that they will go back again to where they were. The amendment merely provides that if they charge more to one person than to another, or are accused of discrimination, they shall have a right to prove justification. I think the amendment goes a little farther than the Borah-Van Nuys amendment or the amendment of the Senator from Oregon (Mr. McNary)." (80 Cong. Rec. 6435.)

tion of Section 2(d) because the statutory language does not so provide.[15] This holding was affirmed on May 29, 1959 *In the Matter of Admiral Corporation* (Docket 7094, CCH Trade Reg. Rep. Par. 28,083) where, in denying the respondent's interlocutory appeal, we cited *Rosenfeld* and again declared that "the defense afforded in subsection (b) of Section 2 does not extend to other proceedings involving proved charges of violation of Section 2(d)." Our July 15, 1959 opinion in the same case alluded to our prior holding and stated that we would not there "reconsider or revise that ruling in any respect * * *" (CCH Trade Reg. Rep. Par. 28,175).

In our previous treatment of this issue we pointed to the hearings, debates, and Committee Reports and observed that there was little in the legislative history to explicate the meaning of the "services and facilities" amendment to Section 2(b). On the contrary we found that the discussion of the proviso in both the House and Senate appeared to be limited to situations involving price discrimination and that this was to be expected since neither the Robinson nor Patman bills, as originally introduced, provided for the defense of good faith meeting of competition and the proponents of the defense, in offering their amendments, initially limited its application to price. The addition of the language relating the defense to "services and facilities" apparently was not considered a significant change nor, for that fact, was the defense itself so considered, as it was interpreted as providing only a procedural as distinguished from a substantive defense.

Respondent contends that subsections (d) and (e) are interchangeable, relate to similar practices and that therefore the same standards, including this defensive proviso, should apply to each. We believe, however, that "the provisions of all paragraphs of Section 2 are consistent and deal logically with their respective subjects."[16] That there are obvious differences between a seller furnishing a service or facility and his providing only the remuneration for the many distinctive promotional activities of his customers can readily be seen by reference to this Commission's

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[15] We observed that "judicial interpretation of Sections (c) and (d) had failed to integrate violations thereof with the standards applicable to the price discrimination provisions of the Act" and citing *The Great Atlantic & Pacific Tea Company* v. *Federal Trade Commission, supra,* we noted that the Court had stated that "The language of paragraph (b) related to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but are not applicable to proceedings instituted under paragraphs (c) or (d)."

[16] *The Great Atlantic & Pacific Tea Company* v. *Federal Trade Commission,* 106 F. 2d 667, 677.

decisions.[17] Each subsection has its own office and relates to specific and legally determinable and distinguishable practices. Since the specific language of Section 2(b) refers only to practices covered by Sections (a) and (e) we must therefore reject the argument that the subsection must also logically apply to Section 2(d).

In confining our interpretation of this subsection to its precise language we are following previous interpretations of this same subsection, i.e., *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 241. In that case, despite a legislative history clearly indicating that Congress felt that the defense was to be construed as strictly procedural, the Supreme Court held that the language of Section 2(b) was clear and provided a complete defense to a charge of price discrimination. The dissent in the *Standard* case referred to the obviously different Congressional intent,[18] but the majority held to a literal interpretation of the language of the statute.

"We cannot supply what Congress has studiously omitted." [19] Since subsection 2(b) refers only to a *seller's* furnishing a service or facility and since there is nothing in the history of the bill or in the language of the statute to support respondent's contentions that this provision may be applied defensively to a charge of violation of Section 2(d) we must to this extent deny respondent's appeal.

Respondent has also taken exception to the hearing examiner's ruling that it violated Section 2(d) through the payment of "push" or "prize" money, contending that the findings on this point are not supported by the record and that, in any event, the payment of push money does not come within the purview of Section 2(d).

The record discloses in this connection that respondent transmitted a check to Rosenbaum's, of Plainfield, New Jersey, by letter dated July 19, 1957, advising that "This check represents the prize monies due your Sales Personnel for the Exquisite Form P.M. Contest that was run in your store for the period of 4/15 thru 6/8/7." Since this payment was granted by respondent to or, at least, "for the benefit of" a customer for promotional services

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[17] e.g., see *P. Lorillard Co.* v. *Federal Trade Commission*, 267 F. 2d 439 (3d Cir. 1959), cert. den. 80 S. Ct. 293 (1960); *Swanee Paper Corp.*, CCH Trade Reg. Rep. Par. 28, 212 (Dkt. 6927, 1959); *Liggett & Myers Tobacco Co., Inc.*, CCH Trade Reg. Rep. Par. 28, 256 (Dkt. 6642, 1959).

[18] Justice Reed in his dissent referred to the statement by Mr. Utterback, Chairman of the House managers, before the Conference Report was agreed to by the House wherein he received permission to print an explanation of his understanding of the proviso. He explained that the proviso "does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. * * * It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given. * * *" 340 U.S. 260, 261.

[19] *Federal Trade Commission* v. *Simplicity Pattern Company*, 360 U.S. 55, 67.

furnished respondent, it clearly comes within the scope of Section 2(d). The record also reveals that this payment was not made available on proportionally equal terms to other customers of respondent in the Plainfield, New Jersey, area. This showing is sufficient to sustain the charge in the complaint that respondent violated Section 2(d) of the amended Clayton Act.

The hearing examiner also held that respondent violated Section 2(e) by furnishing the services of "stylists" to certain purchasers without making such services available to competing purchasers on proportionally equal terms. He ruled further that respondent had not justified this discrimination by showing that the services had been furnished in good faith to meet similar services provided by a competitor. Respondent has taken exception to both rulings.

The record clearly establishes that the stylist services furnished by respondent to some of its larger customers were not offered or otherwise made available to other purchasers competing with such favored customers. Respondent's contention that the services were an alternative feature of a comprehensive promotional plan which included the cooperative advertising allowance, the premium plan, and the furnishing of the display material and store dispensers is rejected since the stylist services were not offered to all competing customers. Moreover, the evidence shows that some of the favored customers received both the stylist services and the cooperative advertising allowance.

In his consideration of the respondent's defense that it was meeting competition in the furnishing of the services of the stylists, the hearing examiner applied substantially the same tests which have been applied by the Commission and the courts in cases where the meeting competition defense has been raised to justify a price discrimination under Section 2(a) of the Act. The record discloses that before the complaint was amended to include the Section 2(e) count, an employee of respondent testified that stylists were used at the discretion of respondent's district managers for whatever promotional benefits were possible. After the amendment, however, he testified that a policy committee of respondent decided where to send the stylists and that the decision was governed by information as to the stores to which a competitor had supplied a stylist. The hearing examiner held that the earlier testimony of this witness was entitled to more weight than that given after the amendment and, on the basis thereof and upon a consideration of the other evidence of record, he concluded that the stylist plan was designed and used by respondent as a general method of sales promotion and not for the purpose of meeting similar services furnished by other brassiere

manufacturers in individual competitive situations. We are convinced that the hearing examiner's appraisal and evaluation of the evidence was correct and that his holding that respondent had not furnished the services of stylists in good faith to meet competition is fully supported by the record.

One of the arguments raised by the respondent in its appeal attacks the constitutionality of subsections (d) and (e) of Section 2 of the Clayton Act. This argument has not been considered, however, since we have no authority, as an administrative agency, to rule on questions involving the constitutionality of the statutes we are charged with administering.[20] All other arguments made by respondent which have not been discussed herein are rejected.

The appeal of respondent is denied. An appropriate order will be entered.

Commissioner Tait dissented in part to the decision herein.

OPINION OF COMMISSIONER TAIT DISSENTING IN PART

I disagree with the majority's ruling that the defense set forth in the Section 2(b) proviso should not be recognized in a proceeding under Section 2(d).

The meeting competition defense was first raised in a Section 2(d) proceeding before the Commission in the matter of *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581 (1951). The Commission did not hold in that case that the defense was not available to the respondent, but ruled only that respondent had failed to show that it had granted disproportionate allowances in a good faith effort to meet competition. The meeting competition defense was also rejected for the same reason in the matter of *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956), in which case the Commission stated, however, that the defense was not applicable to a respondent in a Section 2(d) case. This statement was made after some inconclusive consideration of the legislative history of the section, and was clearly based, in the words of the Commission, on the "bare-bones" language of the statute itself.

The holding in this case is essentially a reaffirmation of the ruling made in *Rosenfeld*, although the majority endeavors to supplement and bolster that decision by further consideration of the legislative history of Section 2(b) which, in *Rosenfeld*, was found to be noninformative. It arrives at the same conclusion that was reached in Rosenfeld, however, and again the ruling is based on what the Supreme Court has referred to as "the infelicitous lan-

[20] *Engineers Public Service Co. v. Securities & Exchange Commission*, 138 F. 2d 936 (D.C. Cir. 1943).

guage of § 2(b)." *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953).

It is the majority's position that the phrases "the furnishing of services or facilities" and "the services or facilities furnished" in Section 2(b) relate only to Section 2(e) which deals with the furnishing of services or facilities by a seller and not to Section 2(d) which deals with payments by the seller to or for the benefit of the customer for services or facilities furnished by or through the customer. This attempt to give a strict, literal interpretation to the language overlooks the decisions which have held that a seller who makes payments to a customer for demonstrator services is in reality furnishing such services to the customer. *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F.2d 132 (2d Cir. 1946), and *Elizabeth Arden Sales Corporation* v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945). Both of these cases were brought under Section 2(e). The court in the latter case remarked that the situation might alternatively "have been regarded as a discriminatory payment of compensation" by the seller for services or facilities furnished by the customer and "so to constitute a violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act * * *" The court also observed that "whether the situation were construed as a discrimination under subsection (e) or as one under subsection (d) of Section 2 would not seem to be of any importance here" and that "even if subsection (e) had been invalid, we would not for that reason have reversed the judgment, because, as we have previously indicated, the situation could just as properly on the evidence have been treated as a violation of subsection (d) * * *"

These two cases raise a question to which I find no answer in the majority opinion. If the payment by a seller to a customer for services furnished by or through that customer can constitute the furnishing of a service by the seller under Section 2(e), why can not the payment by the seller for a service be considered the furnishing of a service under Section 2(b)?

The majority relies on *Federal Trade Commission* v. *Simplicity Pattern Company*, 360 U.S. 55 (1959), as authority for its position that the defense of meeting competition is not applicable to a proceeding under Section 2(d). They cite this case and quote the hearing examiner's observation that "this issue has been definitely settled by the recent decision of the Supreme Court in the Simplicity Pattern case." The following statement from that decision is quoted in the initial decision:

> Thus, a discrimination in prices may be rebutted by a showing under any of the § 2(a) provisos, or under the § 2(b) proviso—all of which by their

terms apply to price discriminations. On the other hand, the only escape Congress has provided for *discriminations in services or facilities is the permission to meet competition* as found in the § 2(b) proviso. [Emphasis supplied.]

In making this statement, the court had before it the question of whether the respondent should have been permitted under the justification provisions of Section 2(b) to rebut a Section 2(e) violation by showing an absence of competitive injury or by showing that its discrimination in services and facilities could be accounted for by cost differentials. The court held, in effect, that a Section 2(e) violation cannot be justified by a showing under any of the Section 2(a) provisos and that the only defense to such a violation is found in the Section 2(b) proviso. Since neither the meeting competition defense nor Section 2(d) was involved in this proceeding, the court's holding cannot be construed as having any bearing whatsoever on the applicability of the defense of meeting competition to a Section 2(d) case.

The briefs for the Commission filed with the Supreme Court in *Simplicity Pattern Company* also show that the applicability of the 2(b) proviso to a 2(d) proceeding was not in issue in that case. As a matter of fact, it was argued in our first brief that "The proviso to § 2(b) clearly creates a meeting competition defense to §§ 2(d) and 2(e) as well as to § 2(a)." While not departing from this position, a later brief for the Commission contained the following statement:

It is not clear whether § 2(b) and its proviso apply also to charges under § 2(d). We assumed that they did in our brief in No. 406 (e.g., p. 17)—where the question was not in issue—but the Commission, in dealing specifically with the question, has held that they do not. *In the matter of Henry Rosenfeld, Inc.*, decided June 29, 1956, 1956-57 CCH Trade Reg. Rep. Par. 26,068. That question is, of course, immaterial to any issue in this case.

In its search for some indication of Congressional intent as to the scope of the Section 2(b) proviso, the majority glosses over that part of the legislative history of the Robinson-Patman Act which is most informative on this subject. House Bill, H.R. 8442, and Senate Bill, S. 3154, as originally introduced were identical in all respects. Both contained, as Section 2(d)(1), a provision which was the prototype of the present Section 2(d). Neither bill, however, provided for the defense of good faith meeting of competition and neither contained a provision similar to the present Section 2(e). Section 2(b) of the Clayton Act, as amended, first appeared in its present form as Section 2(b) in Senate Bill, S. 3154, when the bill was passed by the Senate. Although that bill contained the provision which ultimately became Section 2(d) of the amended Clayton Act, it *did not* contain any provision similar to Section

2(e) of the amended Act, nor did it otherwise prohibit the disproportionate furnishing of services and facilities as distinguished from payments to customers who furnished such services or facilities. It thus appears that at that stage of the history, at least, the defense set forth in the proviso must have applied to payments for services and facilities furnished by a customer. Any other construction would mean that the reference to "services and facilities" contained in the proviso was meaningless.

H.R. 8442 was later amended by the House to extend the scope of the meeting competition defense by the use of language identical to that contained in Section 2(b) of the Senate Bill. There is nothing in the discussion of this amendment or elsewhere in the debates or Committee reports to indicate that the meeting competition defense should not apply to a Section 2(d) proceeding.

In the Robinson-Patman Act, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." *Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F. 2d 453, 455 (7th Cir. 1943); *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231 (1951). It is completely incongruous to say that Congress intended to protect competition by providing a seller with the right of self-defense against a competitor's lower prices or its furnishing of services or facilities and at the same time intended to eliminate competition in another area so closely related to the furnishing of services or facilities as to be almost indistinguishable from it.

As one commentator has stated, "each of these sections [2(d) and 2(e)] is directed at discriminatory treatment of customers competing in the resale of the seller's goods, not at the purchase or furnishing of merchandising services as such." [21] The evil at which both sections are aimed is the granting of discriminatory concessions by sellers to favored customers through the medium of cooperative merchandising arrangements. It may be said that both sections prohibit discriminations in services and facilities which are furnished directly by the seller or indirectly through payments made to the customer or to a third person. They differ only in that they apply to different methods by which services and facilities may be furnished and this distinction has not always been maintained. *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, *supra*, and *Elizabeth Arden Sales Corporation* v. *Gus Blass Co.*, *supra*. Consequently, there is no sound or logical reason why a showing that competition was met in good faith should justify a *prima facie* violation of one section and not the other.

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[21] Austin, "Price Discrimination and Related Problems under the Robinson-Patman Act," Second Revised Edition (1959).

To the fullest extent Sections 2(d) and 2(e) should be interpreted to reconcile their basic purposes. I see no reason why a distinction should be made between these twins of the Robinson-Patman Act.

I also disagree with the majority's failure to overrule the hearing examiner's holding that the furnishing of services or facilities to customers cannot in any case constitute a suitable alternative to payments for services or facilities to be provided by competing customers. In rejecting the respondent's argument that its furnishing of display material and store dispensers constitutes a proportionally equal alternative to an advertising allowance, the hearing examiner made the following ruling:

> * * * it would appear to be an attempt to make Section 2(e) "services" a substitute or alternative for Section 2(d) "payments"; Section 2(d) encompasses paying for services furnished by a customer, whereas § 2(e) encompasses services furnished by the seller to the customer, which would include the furnishing of store dispensers and display material. Section 2(d) expressly provides that such payments for services furnished by a customer are illegal unless *such payment* is available on proportionally equal terms to all other customers competing. This means what it says: an alternative must be the payment for services furnished and not the furnishing of services by the seller to the customer. Such payment, not something else, must be available on proportionally equal terms.

The hearing examiner's reliance on the precise wording of the statute and his attempt to distinguish the practices covered by Sections 2(d) and 2(e) was logical in the light of the *Rosenfeld* decision, *supra*. The ruling, however, is clearly in conflict with the view expressed by the Commission on this point in its "Guides"[22] for compliance with Sections 2(d) and 2(e) and certain compliance reports accepted by the Commission in litigated cases.

For the majority to take a position contrary to that of the hearing examiner would point up a lack of consistency in its construction of the statute. It would then be forced to hold that the phrase "such payment" in Section 2(d) includes the "furnishing of services or facilities" as a proper alternative, but that the phrase "the furnishing of services or facilities" in Section 2(b) does not permit "such payment" as an alternative. The majority temporarily solves its dilemma by holding that it is unnecessary to consider the question. This may be so; but the inconsistency is implicit and remains unanswered.

I would reverse the initial decision on both of these issues.

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[22] Guides for Advertising Allowances and Other Merchandising Payments and Services: Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act, Adopted May 19, 1960.

FINAL ORDER

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

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

It is further ordered, That respondent, Exquisite Form Brassiere, Inc., 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 part.

IN THE MATTER OF

E & J CORPORATION TRADING AS CITY AUTO SALES ET AL.

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

Docket 7911. Complaint, June 3, 1960—Decision, Oct. 31, 1960

Consent order requiring used car dealers in Washington, D.C., to cease misrepresenting down payments, monthly terms, and guarantees on their used cars, made by such typical statements in newspaper and radio advertising as "1.00 Down", "No Money Down As Low as $15 Per Mo.", "All Cars Guaranteed".

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 E & J Corporation, a corporation trading as City Auto Sales, and Arthur J. Bisogne, also known as Sonny Bisogne, 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 E & J Corporation, is a corporation organized and existing under and by virtue of the laws of the Dis-