(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce;

any article of wearing apparel which, under the provisions of Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

2. Manufacturing for sale, selling, or offering for sale any article of wearing apparel made of fabric, which fabric has been shipped or received in commerce, and which, under Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

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 this order.

IN THE MATTER OF

WALTHAM WATCH COMPANY ET AL.

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

Docket 7997. Complaint, June 24, 1960—Decision, June 15, 1962

Order requiring a Chicago importer of clocks from West Germany—actually a successor by a "spin-off" in reorganization of the original Waltham Watch Company of Massachusetts to certain rights to use the "Waltham" trade name—and the sole distributor of the clocks, to cease using the word "Waltham" without clear notice that their products were not manufactured by the well-known Waltham Watch Co. of Waltham, Mass. (presently in business under another name); and requiring said distributor to cease making numerous false claims in connection with its franchise distributor plan whereby it sold "Waltham" clocks, together with display cases, to operators for resale to the public, including claims of exaggerated profits and misrepresentations of refund and return policies and guarantees, as in the order below more specifically set forth.

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 Waltham Watch Company, a corporation, and Harry Aronson and Lawrence Aronson, individually and as officers of said corporation, and David Singer, an individual, trading as Time Industries, and Muriel Singer, indi-

* As amended July 10, 1961.

vidually, 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 Waltham Watch Company is a corporation organized under the laws of the State of Delaware, with its office and principal place of business located at 231 South Jefferson Street, in the city of Chicago, State of Illinois.

Respondents Harry Aronson and Lawrence Aronson are officers of said corporate respondent. They formulate, direct and control the practices of said corporation. Their address is the same as that of the corporate respondent.

Respondent David Singer is an individual trading and doing business as Time Industries, with his office and principal place of business located at 170 West 74th Street, in the city of New York, State of New York.

Respondent Muriel Singer is an individual and acts as General Manager of Time Industries with her office and principal place of business the same as that of respondent David Singer.

Respondents David Singer and Muriel Singer cooperate in the performance of the acts and practices of Time Industries, hereinafter set forth.

PAR. 2. Respondent Waltham Watch Company, prior to the spring of 1959, imported clocks from West Germany into the United States and sold said clocks to respondent David Singer: since early 1959 respondent Singer has imported the clocks bearing the Waltham name and has paid the Waltham Watch Company a royalty on all such clocks imported.

PAR. 3. Respondent David Singer, trading as Time Industries, was, and is, the sole distributor of clocks imported into the United States by Waltham Watch Company and of clocks imported directly by said David Singer, which bear the name "Waltham", under a license agreement with Waltham Watch Company, and he is now, and for some time last past has been, engaged in the sale and distribution of said clocks to distributors for resale to the public. Said clocks are sold with display cases for use by the purchasers in various locations to display the clocks for sale to the public.

In the course and conduct of its business, respondent Waltham Watch Company, for some time last past has imported said clocks from West Germany into the United States and respondent David Singer has caused said clocks, when sold, to be shipped from the State of New York to the purchasers located in various states of the United

States. Both of said respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said clocks, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have been, and are now, in direct and substantial competition, in commerce, with corporations, firms and individuals in the sale of clocks.

PAR. 5. Respondent David Singer, with the cooperation of respondent Muriel Singer, inserts advertisements of their products in newspapers and periodicals. Persons responding to said advertisements are contacted by respondents or their agents or representatives. Said respondents or their agents or representatives then display to the prospective purchasers a variety of promotional literature and make various oral representations concerning said articles of merchandise in an effort to induce the prospective purchasers to buy said articles of merchandise. Among and typical, but not all inclusive, of the statements made in said advertisements and in circulars and other printed matter distributed to prospective purchasers are the following:

FAMOUS 109-YEAR FIRM
ANNOUNCES NEW EXPANSION FRANCHISE PLAN

World Renowned
WALTHAM CLOCKS

Millions buy this great brand.

You know WALTHAM is one of the four great names in watchmaking. Your grandfather did, too. WALTHAM, a great American name, backed by old world craftmanship, for the design and styling of its clocks. WALTHAM has spent tens of millions of dollars conditioning hundreds of millions of people, over the years, to accept the WALTHAM guaranteed line of clocks.

When you become the WALTHAM Franchise Man in your town you've got a world famous name working for you, day and night, seven days a week.

WALTHAM WATCH COMPANY

invites you to participate in one of the most gigantic expansion programs ever launched . . . to share the steadily growing profits as this world renowned firm goes all out to increase distribution of its nationally advertised products.

WALTHAM CLOCKS
Product of WALTHAM WATCH COMPANY since 1850

For the first time in the history of direct selling a famous 150-year-old company with established brand products offers you this opportunity.

YOU DO NO SELLING

Our own experienced Placement Expert contacts leading jewelry, drug, variety, food, hardware, appliance and department stores in your area.

All the selling is done FOR YOU by our Placement Expert and Area Director in your territory.

. . . all you do is service the WALTHAM CLOCK DISPLAY Route which we have already established for you.

Absolutely no selling. We do all the work.

TO MEN INTERESTED IN LIFETIME SECURITY ASSURING EXTRA INCOME . . . *WITHOUT SELLING*

We contact leading jewelry, drug, variety, food, hardware, appliance and department stores in your area and place the handsome WALTHAM CLOCK in the most profitable locations.

You never have to place a display—you do absolutely NO SELLING.

There is no selling involved. Our experienced location directors train you fully, provide you with all the help and information you need to get started at once—so YOUR CASH INCOME STARTS IMMEDIATELY.

1959's soundest BE-YOUR-OWN-BOSS FRANCHISE.

This is the only certified money making proposition in this magazine or any other magazine which requires no selling. All you do is collect profits.

Earn 25%, 50% and even 100% on your money without interfering with your regular time of work. This extra profit will make you a rich man.

WE PROTECT YOUR MODEST INVESTMENT

Further, should you decide to retire, or for any reason whatsoever, decide to sell your valuable WALTHAM CLOCK DISPLAY FRANCHISE, you are fully protected by our combined REPURCHASE OF INVENTORY AND BONUS PLAN. In fact many times we get urgent requests from opportunity seekers begging us to buy franchises. Your WALTHAM CLOCK FRANCHISE gets more valuable every day.

Because of our Guaranteed Investment Plan, the distributor can earn the equivalent of his investment through our re-order plan, therefore we feel that it is at our discretion to exercise the approval or disapproval of an applicant. This can only be done through a personal interview with an applicant by an account executive of our company. If you are accepted you may be assured that you will be a member of a very successful field of merchandising with an excellent return derived from the sale of Waltham clocks.

If you wish to reserve your territory while you investigate our proposition further a deposit of $50.00 will hold it * * *

Guaranteed unconditionally.

PAR. 6. By and through the use of the statements in the aforesaid advertisements and others of similar import, not specifically set out herein, respondents David Singer, trading as Time Industries, and Muriel Singer, represent and have represented, directly or by implication, that:

1. Their business is a part of or connected with the old and well-known Waltham Watch Company, of Waltham, Massachusetts.

2. The clocks sold by them are manufactured by the old and well-known Waltham Watch Company, of Waltham, Massachusetts.

3. Their display cases will be located in leading drug stores, chain stores, markets and other profitable locations by respondents' repre-

sentatives, and that the purchasers themselves never have to locate these cases.

4. That no selling is required on the part of the purchaser.

5. The initial investment of the purchaser of their products is protected and guaranteed and purchasers will earn from 25% to 100% on their investments.

6. Respondents will sell their products only to a limited number of selected and qualified persons.

7. Respondents guarantee that their proposition is money making.

8. Their clocks are unconditionally guaranteed.

9. Respondents will reserve territory in which the purchasers of their products may operate.

10. Their representatives who will call upon prospective customers are account executives or executives of respondent Time Industries.

11. Respondents will train purchasers of their products in the operation of their businesses.

PAR. 7. Respondent David Singer, trading as Time Industries, and respondent Muriel Singer, and salesmen and representatives employed by them, in the course of their solicitation for the sale of said clocks have repeated the statements set out in paragraph 5 and have made additional oral statements to prospective purchasers of their said products, of which the following are typical:

1. That respondents' salesmen are executives, representatives or long time employees of the old and well-known Waltham Watch Company, of Waltham, Massachusetts.

2. That purchasers of respondents' products are granted exclusive territories within which to operate their businesses.

3. That merchandise unsold at the end of one year from date of purchase may be returned to respondents and full refund of the purchase price will be made.

4. That profits of $30.00, $50.00, $80.00 or $100.00 a week would be assured purchasers of respondents' products and that the average weekly profit of the purchasers of respondents' products is $85.00.

5. That respondents' employees will relocate display cases if original locations are not profitable.

6. That respondents' salemen and their wives have made large sums of money selling clocks at retail through respondents' sales plan.

7. That two to four clocks per week will be sold from each display case and that the national average is three to four clocks weekly.

8. Purchasers of respondents' products will be able to liquidate their investments within a short time through their profits, with no risk of losing their money.

PAR. 8. The aforsaid statements and representations made in the advertising matter and orally by respondents David Singer, trading as Time Industries, and Muriel Singer, and their salesmen were, and are, false, misleading and deceptive. In truth and in fact:

1. Respondents' business is not a part of or connected in any way with the old and well-known Waltham Watch Company, of Waltham, Massachusetts.

2. The Waltham clocks sold by respondents are not manufactured by the old and well-known Waltham Watch Company, of Waltham, Massachusetts.

3. The display cases are not located in leading drug stores, chain stores, markets and other profitable locations but, on the contrary, are placed in any locations which respondents' representatives can secure, and in many cases must be relocated by the purchasers if sales are to be expected.

4. Selling is required on the part of purchasers in that in relocating display cases it is necessary to sell the merchants and others to the extent that they will permit the display cases to be placed in their establishments.

5. The initial investment of purchasers is neither protected nor guaranteed and many purchasers do not earn 25% to 100% on their investments.

6. Respondents do not sell their products to a limited number of selected and qualified persons. On the contrary and as a general rule, said products will be sold to any person who will contract to purchase and has the necessary funds to pay the purchase price.

7. Respondents do not guarantee that their proposition is money making.

8. Respondents' clocks are not unconditionally guaranteed. On the contrary, the guarantee extends for only ninety days and in case repairs are necessary a service charge of $1.25 is made, neither of which said conditions are disclosed.

9. Respondents do not reserve territory in which the purchasers of their products may operate.

10. Respondents' representatives are not account executives or executives of Time Industries, but are only salesmen.

11. Respondents provide little or no training in the operation of the business to the purchasers of their products.

12. None of respondents' salesmen are executives, representatives or employees of the old and well-known Waltham Watch Company, of Waltham, Massachusetts, nor do they have any connection with said company.

13. Purchasers of respondents' products are not granted exclusive territories within which to operate their businesses.

14. The full refund of the purchase price of unsold merchandise which is returned to respondents at the end of a year from date of purchase is not made at that time or at any other time.

15. Profits of from $30.00 to $100.00 a week are seldom if ever made by purchasers of respondents' products and $85.00 is greatly in excess of the average weekly profit of the purchasers of respondents' products.

16. Respondents' employees do not relocate display cases under any circumstances.

17. Neither respondents' salesmen nor their wives engage in the sale of respondents' products at retail through respondents' plan.

18. In a great majority of cases, two to four clocks are not sold weekly from each display case and the national average of such sales is much less than three to four clocks weekly.

19. Many purchasers of respondents' products do not liquidate their investments through profits in a short time or in the period of time commensurate with the representations respecting earnings, and many persons lose substantial portions of their investments.

PAR. 9. The name "Waltham" has long been known to the public and time-keeping products bearing this name have been and are held in high esteem by the purchasing public. The name "Waltham" is clearly and distinctly printed or stamped on the dials or faces of the clocks imported by respondent Waltham Watch Company and sold to the public by purchasers from Time Industries.

The use by respondent of the name "Waltham" in connection with said clocks, unless accompanied by a clear disclosure that said clocks are made in West Germany and are not the product of Waltham Watch Company of Waltham, Massachusetts, has the tendency and capacity to lead the public into the erroneous and mistaken belief that said clocks are the product of Waltham Watch Company of Waltham, Massachusetts.

Respondent Waltham Watch Company thus places means and instrumentalities in the hands of respondents David Singer, trading as Time Industries, and Muriel Singer, whereby distributors and the public may be misled as to the origin and manufacturer of said clocks.

PAR. 10. The use by the respondents of the foregoing false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that such statements were, and are, true, and the failure of respondents to disclose that

their products are not those of the old and well-known Waltham Watch Company, all have the tendency and capacity to cause substantial number of the purchasing public to purchase substantial quantities of respondents' products. As a result thereof, trade has been, and is now being, unfairly diverted to respondents from their competitors and injury has been, and is now being, done to competition in commerce.

PAR. 11. The acts and practices, 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 methods of competition and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. John W. Brookfield, Jr., supporting the complaint.
Mr. Ben Paul Noble, of Washington, D.C., for respondents.

INITIAL DECISION * BY WALTER K. BENNETT, HEARING EXAMINER

This proceeding was brought to prevent misrepresentation in the sale of West German-made clocks in commerce. One of the alleged misrepresentations involves the use of the well-known trade name Waltham.

The complaint, issued June 24, 1960, sets forth the type of advertising and other representations made by respondents David and Muriel Singer (the former trading as Time Industries), and charges that they were false and constituted unfair methods of competition and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act. Waltham Watch Company, and its officers, are charged with placing the means of misrepresentation in the hands of the Singers.

By answer, respondents David and Muriel Singer denied that the representations were false and misleading but admitted that they were engaged in commerce and that there is competition. Respondents Waltham Watch Company, Harry Aronson, and Lawrence Aronson (officers of Waltham), in their answer, deny either directly or on information and belief, all of the material allegations of the complaint except purely formal allegations.

At a pre-hearing conference, which has been incorporated in the public record, counsel agreed to a number of pre-trial procedures. These procedures materially shortened the time for the hearings. Counsel for both parties are to be commended for the manner in which these procedures were agreed to and carried out. Among other matters, almost all of the advertising copy was admitted. Contractual

*As corrected by hearing examiner's orders of December 11, 1961 and April 20, 1962.

arrangements between Waltham and Singer and also between Singer and Time Industries' distributors and salesmen were admitted. In addition, an arrangement was made to disclose the names of witnesses to the opposite party sufficiently in advance of the hearings at which they were to be called to permit opposing counsel to prepare cross-examination. Counsel agreed not to make contact with witnesses (other than respondents) called by opposing party until after they had been discharged from subpoena. Issues of commerce were also largely disposed of during pre-trial. It was conceded that Time Industries (which will hereafter sometimes be used interchangeably with David Singer) is engaged in commerce, and it is clear that Waltham Watch Company is also so engaged. (This concern will sometimes be described as Waltham.)

The written advertising so authenticated when read as a whole generally supports the allegations of the complaint.

Ten hearings were held at the instance of the Commission in New York, New York, Washington, D.C., Mobile, Alabama, and Atlanta, Georgia, commencing January 9, 1961, and concluding March 24, 1961. After considerable interval four hearings were held on behalf of respondents in Washington, D.C., and Chicago, Illinois, commencing April 28, 1961, and concluding August 24, 1961. On September 19, 1961, a hearing was held to permit counsel for respondent to record proof described in a proffer of proof which had been ruled inadmissible. No testimony was taken at that hearing, but counsel's time to file proposed findings and conclusions was extended to October 9, 1961.

Two requests for stays of proceedings were made by respondent.

The first request was made by motion filed July 3, 1961, to stay proceedings, pending an appeal from an order of the hearing examiner refusing to consolidate this proceeding with others pending against Waltham. The order was made orally at a hearing held June 30, 1961, and later formalized by order dated July 5, 1961. The Commission denied the stay by order dated July 10, 1961, and no further action was taken to appeal from the order on the motion. The second request was made by motion filed September 28, 1961, to stay all proceedings and to take an interlocutory appeal from the hearing examiner's order refusing to grant continuance of the hearing on September 19, 1961. The Commission denied permission to file an interlocutory appeal by order issued October 12, 1961.

The complaint was dismissed as against Lawrence Aronson at the conclusion of the Commission's case, there being no evidence to link him with any of the activities charged and affirmative testimony that

he had no connection with any of them. (1056)[1] The complaint was also amended to conform to the proof which varied in certain unimportant particulars relating to the person responsible for importation of clocks. (1055) Decision was reserved on a motion to dismiss as to other respondents which was made at the conclusion of the Commission's case. (1061) It is now denied. Proposed Findings of Fact and Conclusions of Law were submitted on October 9, 1961. Argument thereon was held October 23, 1961, at respondents' request and all have been carefully considered.

To the extent deemed necessary to this decision, the Findings of Fact and Conclusions of Law incorporated herein in substance or in terms are accepted. Those not so incorporated are rejected as either immaterial or erroneous.

Upon consideration of the entire record herein, the hearing examiner makes the following Findings of Fact and Conclusions therefrom and Order.

FINDINGS OF FACT

As a frame of reference for the alleged false representations, we consider first the relationship among respondents and the character of the business transacted.

Identity and Relationship Among Defendants

Respondent Waltham Watch Company (Waltham), is a Delaware corporation having its principal place of business at 231 So. Jefferson Street, Chicago, Illinois, which was formed in July 1957, after Waltham Watch Company of Massachusetts ceased the manufacture of watches and clocks. The owners of Waltham, during the reorganization, became entitled to the Waltham name for use with watches and clocks. From 1957 to 1959, Waltham imported clocks from West Germany bearing the Waltham name; thereafter, Singer did the importing. The Aronsons are officers of that corporation. Waltham licensed (CX-33A) respondent Singer (Time Industries) to utilize the name Waltham in the sale of clocks for a royalty fee.

Respondent Time Industries is an unincorporated business located at 170 West 74th Street, New York, New York, which was formed to merchandise "Waltham" clocks. Respondents David and Muriel Singer are man and wife. David Singer is the owner of Time Industries, while Muriel acts for him and signs much of the correspondence emanating from Time Industries as "Office and Field Manager."

The Merchandising Operation

Singer undertook a relatively new method of merchandising. Instead of using professional wholesalers to make contact with the retail

[1] References are to typewritten transcript pages unless preceded by CX or RX which refer respectively to Commission's and Respondents' exhibits.

trade, Time Industries advertised in various periodicals and newspapers for persons who would become "franchised distributors." Those who answered the advertisement were visited by a salesman from Time Industries and after some discussion were asked to sign a contract and to make a down payment. Thereafter, when full payment under the contract was made by the distributor, Time Industries placed display cases containing clocks in selected retail stores and secured an agreement from the distributor that the locations were satisfactory. The stores selected executed a consignment agreement whereby the clocks remained the property of the distributor until sold by the store. The distributor, under his contract, "serviced" the "route" by collecting from the retailer the purchase price of the clocks which the retailer sold less 33⅓ percent, and by replacing the clocks sold by the retail store in display cases which were provided for the retailers. This necessitated maintaining an inventory or reordering clocks. A bonus of clocks was provided for distributors who reordered over $500 wholesale value of clocks in a year, and the clocks were guaranteed originally by Waltham but later by Time Industries.

The Representations

As charged in the complaint, Time Industries (i.e., David Singer assisted by his wife Muriel) was responsible for the issuance of false representations both by means of advertisements and through salesmen and representatives. Waltham and its officers were charged with aiding the Singers by placing in their hands the instrumentality to commit the fraud on the public, i.e., importing until 1959 the clocks with the Waltham imprint and then authorizing the Singers to import clocks with the Waltham imprint and to represent themselves as selling Waltham clocks.

Many of the false representations were made both in the advertising for which the Singers admittedly bear full responsibility and also by various salesmen for whose statements the Singers sought to avoid responsibility. The scheme to avoid responsibility was the execution of a contract making the salesmen "independent contractors." The contract provides that salesmen should not obligate Singer "by representation, promise, act or in any manner except as herein specifically authorized." However, the Singers clothed their salesmen with apparent authority by advertising—"for details of our dynamic plan a representative of our firm will contact you and explain in detail all necessary information,"—(CX–64) and the contract was not disclosed to the distributors who bought the franchises. Hence, the unilateral action within Time Industries, coupled with the acceptance

of the benefits of the salesmen's efforts, completely thwarted the Singers' attempt to avoid responsibility. Moreover, the representations by the salesmen closely meshed with the advertising material supplied by Time Industries so as to create in the minds of the victims a single consistent rosy picture of prospects for profit from the sale of a well-known product without effort, and, further to indicate that the operation was guaranteed by a well-known manufacturer. These representations were not true and some of them could not have been realized. Typical of statements made in the written advertisements are the following:

FAMOUS 109-YEAR FIRM
ANNOUNCES NEW EXPANSION FRANCHISE PLAN
World Renowned
WALTHAM CLOCKS

Millions buy this great brand (CX–6)

You know WALTHAM is one of the four great names in watchmaking. Your grandfather did, too. WALTHAM, a great American name, backed by old world craftmanship, for the design and styling of its clocks. WALTHAM has spent tens of millions of dollars *conditioning* hundreds of millions of people, over the years, to accept the WALTHAM guaranteed line of clocks. (CX–6)

When you become the WALTHAM Franchise Man in your town you've got a world famous name working for you, day and night, seven days a week. (CX–6)

WALTHAM WATCH COMPANY

invites you to participate in one of the most gigantic expansion programs ever launched . . . to share the steadily growing profits as this world renowned firm goes all out to increase distribution of its nationally advertised products in local areas throughout the country. (CX–2)

WALTHAM CLOCKS

Product of WALTHAM WATCH COMPANY since 1850 (CX–2)

For the first time in the history of direct selling a famous 150-year-old company with established national brand products offers you this opportunity. (CX–21)

YOU DO NO SELLING

Our own experienced Placement Expert contacts leading jewelry, drug, variety, food, hardware, appliance and department stores in your area. (CX–6)

All the selling is done FOR YOU by our Placement Expert and Area Director in your territory. (CX–6)

. . . all you do is service the WALTHAM CLOCK DISPLAY Route which we have already established for you. (CX–6)

Absolutely no selling. We do all the work. (CX–21)

TO MEN INTERESTED IN LIFETIME SECURITY ASSURING EXTRA INCOME . . . *WITHOUT SELLING* (CX–6)

We contact leading jewelry, drug, variety, food, hardware, appliance and department stores in your area and place THIS HANDSOME WALTHAM CLOCK DISPLAY (See illus.) in the most profitable locations. (CX12)

You never have to place a display—you do absolutely NO SELLING (CX-2)

There's no selling involved. Our experienced location directors train you fully, provide you with all the help and information you need to get started at once—so YOUR CASH INCOME STARTS IMMEDIATELY. (CX-2)

1959's soundest BE-YOUR-OWN-BOSS FRANCHISE (CX-2)

This is the only certified money making proposition in this magazine or any other magazine which requires no selling. All you do is collect profits. (CX-2)

Earn 25%, 50% and even 100% on your money without interfering with your regular line of work. This extra profit without work will make you a rich man. (CX-2)

WE PROTECT YOUR MODEST INVESTMENT (CX-6)

Further, should you decide to retire, or for any reason whatsoever, decide to sell your valuable WALTHAM CLOCK DISPLAY FRANCHISE, you are fully protected by our combined REPURCHASE OF INVENTORY AND BONUS PLAN. In fact many times we get urgent requests from opportunity seekers begging us to buy franchises. Your WALTHAM CLOCK FRANCHISE *gets more valuable everyday.* (CX-6)

Applicants who can qualify are being appointed as Local Distributors. Must be responsible, permanent resident, have use of a car, devote at least 6 hours weekly to this dynamic merchandising plan. References and a minimum investment of $1190.00 to $4780.00 cash available immediately which is protected by our Combined Bonus & Repurchase Plan. Applicants will be accepted after a local personal interview with a company executive. Write today giving name, address, phone number and background. Kindly do not apply unless you can meet all requirements. (CX-17)[2]

If you wish to reserve your territory while you investigate our proposition further a deposit of $50.00 will hold it * * * (CX-1b)

Unconditionally Guaranteed. (CX-14)

From reading of the advertisements[3] as well as from the testimony of the purchasers of the franchises, it is clear that respondents have represented directly or by implication that:

1. Their business is a part of or connected with the old and well-known Waltham Watch Company, of Waltham, Massachusetts.

2. The clocks sold by them are manufactured by the old and well-known Waltham Watch Company, of Waltham, Massachusetts.

3. Their display cases will be located in leading drug stores, chain stores, markets and other profitable locations by respondents' representatives, and that the purchasers themselves never have to locate these cases.

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[2] The third from the last quotation in Paragraph Five of the Complaint was not contained in the advertising received in evidence. A similar representation is quoted from an advertisement in the June 29, 1959 issue of *Financial World* (CX-17).

[3] Advertisements in addition to those cited by Exhibit Number contained one or more representations in a similar vein. The following Exhibits have been examined for a cross-section of the advertising program: (CX-1a, 1b, CX-2, CX-4, CX-6, CX-7, CX-8, CX-9, CX-12, CX-13, CX-14, CX-15, CX-19, CX-21, CX-22, CX-24, CX-25a, b, CX-26, CX-50, CX-57, CX-59 and CX-64).

4. That no selling is required on the part of the purchaser.

5. The initial investment of the purchaser of their products is protected and guaranteed and purchasers will earn from 25% to 100% on their investments.

6. Respondents will sell their products only to a limited number of selected and qualified persons.

7. Respondents guarantee that their proposition is money making.

8. Their clocks are unconditionally guaranteed.

9. Respondents will reserve territory in which the purchasers of their products may operate.

10. Their representatives who call upon prospective customers are executives of respondent Time Industries.

11. Respondents will train purchasers of their products in the operation of their businesses.

So far as representations made by the salesmen are concerned, counsel supporting the complaint offered the testimony of a substantial number of persons who purchased or were approached to purchase franchises. These witnesses were an excellent cross-section geographically, covering the East Coast and the Gulf. They were also diverse in education, age, sex and previous experience. Their testimony disclosed in general the following pattern of activity. They were attracted by the advertising generally, by the name "Waltham", had made contact with Time Industries, and received a call or calls from a man who introduced himself as a Waltham representative, presenting a card (provided by Singer) certifying himself as associated with the clock division of Waltham, and, with Time Industries, an exclusive distributor.[4] This salesman then repeated some or all of the repre-

[4] CX-51 for example is a card set up as follows:

Manufacturers Since 1850	PHONE Endicott 2 6981 6997 6998
WALTHAM WATCH CO. CLOCK DIVISION	
	Exclusive Distributors Time Industries 170 West 74th Street New York 23, N.Y.
Richard R. Weith	

There were several variations in the placement of the name on these salesmen's cards but the mention of "Waltham" was characteristic. Singer testified he had supplied cards but the Weith card was not one he identified. That card was, however, received without objection.

sentations contained in the advertising and, in addition, made it appear that he was selecting persons for franchises on behalf of the Waltham Watch Company of Massachusetts, that profits would be assured, that merchandise could be returned at the end of the year for a full refund, that Time Industries would relocate display cases if the original locations were not profitable, that a number of clocks would be sold from each display case each week, and the purchasers would be able to liquidate their investment within a short time and could not possibly lose any money. Some of the witnesses testified to specific profits which were minimums to be expected and also testified that the salesmen had said that they themselves and their wives had made large sums of money selling clocks through the plan proposed. In aid of these representations the Singers supplied their salesmen with colored photographs of the clocks to be sold and the display cases in which they were to be exhibited. These photographs showed the name "Waltham Clocks" at the top of the case, and, at the bottom, "Product of Waltham Watch Company Since 1850". However, the stamp, West Germany, the country of origin, was not reproduced so that it was readable with the naked eye, if it was visible at all. (CX–60) They also supplied order forms, calculations of profits and other sales aids. In some cases, the salesmen apparently concealed the country of origin; in other cases, they exhibited clocks which were stamped with the country of origin. According to the testimony, however, substantially all of them created an impression on the witnesses who testified that they were buying clocks made by the well-known Waltham Watch Company.

While some of the representations were not made in precisely the language in which the complaint is couched, the general purport of the representations was clearly established by the witnesses who heard the salesmen's sales talk, and each of the representations alleged was made to at least one and most to more than one of the witnesses.

The Falsity of the Representations

Taken as a whole, the representations in the advertising and those made by the salesmen which Singers supplied, were palpably false, misleading and deceptive. The scheme was clearly one to shift to the so-called franchised dealers the risk of loss if the retail stores in the locations where the clocks were displayed did not sell the clocks. This was done by collecting the cost of the clocks, the price of the display cases and the forms from the "franchised distributor" immediately; and then, letting him worry about whether or not the retailers would ever sell any clocks and thus, in part, reimburse him for his

original outlay. The Waltham name was invoked both as a guarantee of the good faith of the proposition and also as a guarantee of the quality of the goods to be sold. The profits promised and the sales predicted varied so greatly from actual known performance that the statements went far beyond permissible puffing and became actively fraudulent. Refunds, return policies, and guarantees were also not as represented. Proof was not offered as to the falsity of the representations concerning the earnings of the salesmen and their wives, but the inference is clear both from the character of the operation and the results obtained by the wide variety of the witnesses that the claims for profits made were preposterous. Respondents made no effort to establish the contrary. They called none of the salesmen whose statements were quoted by the Commission's witnesses and made no satistical showing of the earnings of the franchised dealers. They also offered no satisfactory explanation as to why they had not done so, although the burden of going forward was placed upon them by the establishment of a prima facie case by counsel supporting the complaint.

In ensuing paragraphs we set forth specific findings on the true facts established, followed by some details from the supporting evidence.

(1) Respondents' business is not a part of or connected in any way with the old and well-known Waltham Watch Company of Waltham, Massachusetts. It has a contract executed by a corporation which succeeded to some of the business.

Time Industries secured a license from Waltham Watch Company of Delaware to utilize the name Waltham in connection with the civilian clock business. Waltham Watch Company of Delaware was formed in 1957 to take over the name and good will of the civilian watch and clock business of Waltham Watch Company of Massachusetts, after the latter company had ceased the manufacture of clocks. The stockholders of the Massachusetts company received one share of stock of the Delaware company for each five shares of stock held in the Massachusetts company, and the latter company changed its name to Waltham Precision Instrument Company, Inc., and confined its activities to the manufacture of precision instruments largely for munitions. A description of the metamorphosis is found in a prospectus issued by Waltham which has been marked Commission Exhibit 72. This shows that as of the date of the filing in 1961, the Aronsons who had never been connected with Waltham of Massachusetts, except as purchasers or licensees, were the "parent" of respondent Waltham owning over sixty percent of its common stock. Thus, Time Industries is clearly not a part of the old and well-known Waltham Watch

Company of Massachusetts. It is, however, licensed to use the name Waltham in the clock business by the Delaware company which succeeded, as indicated above, to certain rights of the Massachusetts concern. Hence, it is connected in a very tenuous way. Time Industries, however, is neither a part of Waltham Watch Company nor are its salesmen representatives of that company, as for example their cards and the advertisements would indicate.

(2) The Waltham clocks sold by respondents are not manufactured by the old and well-known Waltham Watch Company of Waltham, Massachusetts.

Admittedly, neither Waltham of Massachusetts nor Waltham of Delaware manufactured the clocks sold by Time Industries. Both Mr. Singer and Mr. Aronson testified that the clocks are manufactured in West Germany and that the clocks are stamped "Made in West Germany." At one time, prior to February 1959, when a group of persons known as the "Axler Group" had control of the management of Waltham of Delaware, clocks were imported by that corporation and sold to Time Industries. When the Aronson group, however, took control, the arrangement was changed and Time Industries imported the clocks which it purchased directly from Blessing Werke and others in West Germany. At that point, Waltham exercises no control over the manufacture of the clocks. Originally, the Axler group guaranteed the performance of the clocks and maintained repair facilities. However, when the Aronson group took control of Waltham, this activity ceased and Time Industries repaired the clocks and issued guarantees. Accordingly, the representation that Waltham of Massachusetts is the manufacturer of the clocks, is palpably false. Yet, the reading of the advertisements as a whole and the reaction of many of the witnesses who bought a franchise to sell the clocks clearly demonstrates that Waltham of Massachusetts was the company which any reasonable person would believe was referred to in the representations. There was some evidence of a consumer preference for goods not made in West Germany in some areas in New York State. This was confirmed by a "survey" used by Time Industries which showed sixty-five percent of the persons interviewed preferred domestic to imported clocks. (CX–61c) There was also some indication that there was some preference against foreign-made goods in Altanta, Georgia. It is clear, however, that viewed as a whole, the advertising materials supplied to the salesmen was misleading, in its omission of the fact that the clocks were of foreign origin, particularly in the light of the emphasis placed upon the ancient respectability of the Waltham name.

(3) The display cases are not located in leading drug stores, chain stores, markets and other profitable locations but, on the contrary, are placed in any locations which respondents' representatives can secure, and in many cases must be relocated by the purchasers if sales are to be expected.

The representations in the advertising clearly imply that profitable locations will be selected in leading drug stores, chain stores, markets and other profitable locations. Salesmen's representations went even further in describing the location man as "an expert" and, in some instances, assured the prospective distributor that surveys would be undertaken before locations were picked. Actual placement, however, was distinctly a hit-or-miss affair. Some of the locators were quite unfamiliar with the territory. This was particularly apparent in the Atlanta, Georgia, area. These locators often rushed the clocks into any store where they could find a storekeeper who was willing to house them. They normally appeared to be in a hurry and had neither the time nor the inclination to select good locations. Time Industries cared little because it had already received more than the full wholesale price before any clocks were placed on location, so that even if it had to redeem the clocks after a year had elapsed it would only do so at the wholesale price then prevailing. This redemption price was sometimes so much less than what the distributor had paid that one distributor testified he did not even bother to return the clocks but distributed them as Christmas presents to relatives. Several of the witnesses testified that the clocks had been rejected by storekeepers when they went around to service the route. When an effort was made to have the clocks relocated, in one instance, at least, Mrs. Singer told the dealer that he would have to relocate the clocks himself. This was a far cry from locating the clocks in profitable locations.

(4) Selling is required on the part of purchasers in that in relocating display cases, it is necessary to sell the merchants and others to the extent that they will permit the display cases to be placed in their establishments.

The testimony of many of the purchasers of franchises, which is particularly persuasive because of their disparate education and background, shows that they were relying on the representation that all selling would be done by the expert locators from Time Industries and that no selling on the part of the distributor would be required. The distributor witnesses detailed their experiences which demonstrated that these representations were completely false. In most cases, where the witnesses testified, the locators did such a poor job of placement of the display cases and clocks that the distributor was forced to

relocate. They detailed, at some length, their efforts to sell to other storekeepers the desirability of maintaining the display cases in their stores. Some failed utterly and completely withdrew their display cases because of the sales resistence met.

(5) The initial investment of purchasers is neither protected nor guaranteed and many purchasers do not earn 25% to 100% on their investments.

The advertising of Time Industries clearly made two points: (a) that earnings of 25% to 100% could be made without interfering with the distributor's regular work, and (b) that the repurchase of inventory and bonus plan protected the investment in the event the distributor wished to retire.

In fact, claims for earnings were greatly exaggerated. The distributor's mark-up amounted to much less than he was led to believe, and, rather than making money, many of the victims lost not only their time but a large share of the money which they had invested. There was a bonus plan which was applicable in cases where distributors reordered $500 worth at wholesale of merchandise, and, so far as the evidence shows, this was carried out. This bonus plan, however, had nothing to do with the protection of the original investment.

The repurchase plan also was a source of disillusionment. The prospective distributors, when they paid in their investment of over $1,000, were convinced by the sales talk and by the advertising that this would all be returned if they decided at the end of a year to return the merchandise. The contracts signed, however, made it very clear that they could only secure the wholesale price on the original clocks which were charged to them. They could not secure the price paid nor could they return the clocks which were subsequently ordered. The display cases which were supplied for the clocks could not be returned, and some of the salesmen admitted this. If the clocks did not sell in the stores in which Times Industries located them, the distributor could not expect to receive nearly the amount that he originally invested.

(6) Respondents do not sell their products to a limited number of selected and qualified persons. On the contrary, and as a general rule, said products will be sold to any person who will contract to purchase and has the necessary funds to pay the purchase price.

Time Industries' advertising, among other things, uses the term "franchises," provides for a payment of $50 to "reserve a territory" and also indicates that it may disapprove applicants. These circumstances clearly implied that each franchise holder would be given an exclusive territory. In connection with the fiction that only a limited

number of persons would be selected, one of the salesmen even purported to use a tape recorder in interviewing a prospective franchise purchaser which he told the witness he would send back to New York to secure the approval of Time Industries to the selection of the particular franchised distributor. As a matter of fact, as David Singer testified, the salesman himself had authority to select the qualified persons and very few were ever turned down if they had the requisite money. Moreover, the number of distributors overlapping in New Haven, Connecticut, Augusta, Georgia, Alexandria, Virginia and Mobile, Alabama, and the super-saturation of locations create a very strong inference that there was no real selection at all. This inference is strengthened by the wide variety of persons who were granted franchises and by the fact that the salesmen or company executives, as they were euphoniously described in advertisement, were compensated on a straight commission basis. If there were to be any real selection, the method of compensation would seem to be entirely inappropriate. Hence, we conclude that franchises were sold indiscriminately to anyone who was willing to pay the purchase price and that the salesmen's glib remarks to the contrary were merely additional instances of misrepresentation.

(7) Respondents do not guarantee that their proposition is money making.

The advertising, read as a whole, creates the inference that Time Industries represents that the franchises will make money. The words, among others, "the only certified money making proposition", "protected investment" and "unconditionally guaranteed" would make the unwary believe that Time Industries assures or guarantees a profit; so also the words, "assuring extra income" and "your cash income starts immediately." In truth, there was no such guarantee. Substantially, all of the many witnesses called by the Commission testified that—far from making money—they lost money. They obtained no recourse except the very limited repayment of the wholesale price on return of the merchandise which came with the original order. Moreover, the franchise arrangement was such that the distributor did not even start making money until they reordered and sold substantial amounts of new merchandise. The sale of the initial stock did not even offset the cost of the franchise.

(8) Respondents' clocks are not unconditionally guaranteed. On the contrary, the guarantee extends for only ninety days and in case repairs are necessary a service charge of $1.25 is made, neither of which conditions are disclosed.

Anyone reading the words, "Waltham guaranteed line of clocks" and the representation, "unconditionally guaranteed," might properly conclude that Waltham of Massachusetts offered an unconditional guarantee. Waltham of Massachusetts is presumably meant because of the reference to that famous 109-year-old firm. The fact, however, is that there was only a limited guarantee, and this guarantee was never made by Waltham of Massachusetts at all. For a time, until the Aronsons bought out the Axler interest of Waltham of Delaware, that firm offered a limited guarantee extending for ninety days and requiring a service charge. Thereafter, the guarantee was made by Time Industries, a sole proprietor with a reputation and resources scarcely comparable to Waltham Watch Company as one would have expected from the advertising.

As so limited, however, the guarantee was honored, and, moreover, a number of distributor witnesses testified that they were permitted to return defective clocks to Time Industries and secured replacements. Despite this fact, the guarantee given did not measure up to that advertised and was accordingly false and misleading.

(9) Respondents do not reserve territory in which the purchasers of their products may operate.

The use of the term "franchise" to many of the victims of this scheme meant granting exclusive territory. This was confirmed by the statement contained in the advertising, "If you wish to reserve your territory while you investigate our proposition further, a deposit of $50 will hold it." When the distributor came to signing the contract, however, the printed form was explicit that the agreement was nonexclusive, although it had a misleading blank space to fill in territory which some distributors took for a grant of an exclusive territory. Despite this provision, which few of the distributors noticed—when it was noticed, the salesman assured the distributor that this term was merely to protect the company in the event the distributor became sick or failed to do a proper job.

In fact, the locators for Time Industries paid no attention whatever to the territories of the distributors and sometimes located displays in stores immediately adjacent to the stores where other displays had been located. This was particularly true of locations in Atlanta, Georgia, Mobile, Alabama, Alexandria, Virginia, and in New Haven, Connecticut.

(10) Respondents' representatives are not account executives or executives of Time Industries, but are only salesmen.

As part of the sales buildup, Time Industries' advertising implied that the selection of franchise distributors would be by company executives. David Singer admitted that they were merely salesmen

and that they were compensated by a straight commission, so that they did not even have a continuing interest in the success of a franchised dealer but were paid for the original placement and for nothing else. The use of the term "executive" in the circumstances was clearly misleading and additional bait to lure the unwary prospective distributor.

(11) Respondents provide little or no training in the operation of the business to the purchasers of their products.

In advertising, "Our experienced location directors train you fully.," Time Industries suggested some kind of a training course. In practice, the location director gave no training whatever. Often, he insisted upon approaching the storekeepers who were to exhibit the clock displays on their counters out of the presence of the prospective distributor. He then asked the distributor to sign a statement that the locations were satisfactory, although in many cases the distributor had never even seen them.

In several of the cases where the location man permitted the distributor to accompany him, the prospective distributor showed the location man good locations. The latter provided no training of any kind.

The representations made in the advertising were frequently repeated by the salesman who approached the prospective distributor. In addition, there were representations made orally which did not appear in the advertising. We deal with these in ensuing paragraphs.

(12) None of the respondents' salesmen are executives, representatives or employees of the old and well-known Waltham Watch Company of Waltham, Massachusetts, nor do they have any connection with said company.

Witnesses who had been franchised dealers of Time Industries described in some detail how the salesmen approached them. Some of them used the cards [5] which set forth prominently Waltham Watch Company. The salesmen, in glib fashion, suggested to the distributors that they could not go wrong dealing with an old established firm like Waltham, and a few specifically claimed connection with the Waltham Watch Company. In fact, none of the salesmen were ever employed by the Massachusetts company. Singer, in his testimony, admitted that only one of the salesmen had ever been a former employee of any Waltham company. This one had worked for the spun off Delaware company which was sixty percent owned by the Aronsons and not for the well-known Waltham company of Massachusetts.

[5] See Footnote 4 supra for a form of card, p. 1705.

(13) Purchasers of respondents' products are not granted exclusive territories within which to operate their businesses.

We have already dealt with the written advertisement phase of this same type of representation. The salesmen varied somewhat in their approach. Some made promises of exclusive territories expressly. Others, when faced with the contract provisions of the franchise, explained that the provision was merely for the protection of the company in the event the distributor got sick or failed to do his job. There were a few cases where the territory was expressly set forth in the contract and adhered to, and there were also a few cases where the exclusivity was disavowed. The printed contract, although it had a space for description of a territory which appeared to reserve an area, made it clear in another paragraph that the respondents' sales talk was completely false, and, in practice, as we have heretofore pointed out, exclusive territory was not granted. Perhaps one of the reasons why the scheme was not profitable to the distributors was that so many stores in the same area were given clocks to sell that the storekeepers became disinterested in attempting to sell them.

(14) The full refund of the purchase price of unsold merchandise which is returned to respondents at the end of a year from date of purchase is not made at that time or at any other time.

The representations orally made by the salesmen who visited the witnesses sometimes expressly stated that all merchandise could be returned and that the witness would not lose a penny. Other salesmen made it clear that the display cases could not be returned. Most victims, however, were left in a state of confusion as to just what refund would be made. The contract in terms provided that only those portions of the original inventory which were held after the first year could be returned. Moreover, the full purchase price was not returned but only the wholesale price of the merchandise. Despite Singer's denial that the wholesale price had ever been changed, several of the witnesses indicated that there had been a reduction so that they did not receive nearly as much for the clocks which they returned as they had paid for them at the time of their original purchase. Even assuming that Singer is correct, the amount paid on the purchase of the franchise far exceeded the wholesale cost of the clocks so that the mere return of the clocks, in no instance, would provide for payment in full of the amount paid at the time of the purchase of the franchise.

(15) Profits of from $30.00 to $100.00 a week are seldom, if ever, made by purchasers of respondents' products and $85.00 is greatly in

excess of the average weekly profit of the purchasers of respondents' products.

Salesmen appeared to vary their estimate of what the prospective distributor would receive depending on the relative credulity as well as the prosperity of the victim. The promised profits varied and there were, in some instances, representations of average profits. We infer, because of the ample cross-section of franchise dealers whose testimony was heard, that $85.00 a week for an average is grossly exaggerated. Most of the witnesses lost money over the period of the operation. Despite this clear inference, respondents made no effort to demonstrate statistically what the distributors were actually earning. We, therefore, conclude that the talk of prospective profits (which were non-existent in most cases) went far beyond mere sales talk and constituted misleading misrepresentations.

(16) Respondents' employees do not relocate display cases under normal circumstances.

A number of witnesses described, in some detail, the assurances of the salesmen that they maintained a continued interest in the success of the distributors and that they would return, re-examine the locations and relocate them if they were not profitable. This was not done. When the distributors complained to Mrs. Singer, she informed them, with few exceptions, that in their application they had expressed the willingness to relocate the clocks if it became necessary and, therefore, the Time Industries had no obligation to do so.

(17) There is no proof as to whether respondents' salesmen or their wives engaged in the sale of respondents' products at retail through respondents' plan.

A few of the witnesses indicated the salesman had told them that he or his wife or family had engaged in making sales through the respondents' plan. However, none of the salesmen were called by either side and there was no proof establishing that this representation was true or false.

(18) In a great majority of cases described by the cross-section represented by the witnesses, two to four clocks were not sold weekly from each display case, and the national average of such sales accordingly would appear to be much less than three to four clocks weekly.

A number of witnesses testified that the salesmen who called on them described the number of clocks which would be sold from each display case. This number varied much as the representations concerning the prospective profits varied, depending on the relative credulity of the witness. There were also varied statements made about the national average. On the basis of all of the representations described by witnesses, the estimate was so far out of line with per-

formance that it went beyond mere sales talk and became active misrepresentation. No statistical proof was offered as to the national average from the books of the respondent either by the Commission or by the respondent. However, the evidence of the cross-section of witnesses offered by the Commission creates an inference that the national average was much less than that represented. No effort was made by respondent to establish otherwise.

(19) Many purchasers of respondents' products do not liquidate their investments through profits in a short time or in the period of time commensurate with the representations respecting earnings, and many persons lose substantial portions of their investments.

The precise representations concerning liquidating the investment varied among salesmen according to the witnesses who described these representations. The salesmen created the impression that there was no risk of loss, and some expressly stated that the investment would be liquidated within very short periods of time. In practice, the witnesses who testified found this rosy prospect was completely deluding. Moreover, the investment could not have been liquidated rapidly because the distributors made no net profit at all until after all of the original clocks were sold and sales of reordered merchandise were made. As already demonstrated, there was a substantial risk of loss because the repurchase plan never adequately reimbursed the distributor. A great majority of the witnesses lost money.

It is thus very clear from an analysis of each of the representations that there was a studied plan to misrepresent the character and profitability of the so-called franchise arrangement. David Singer, as proprietor of Time Industries, and his wife were clearly responsible for these representations which were false. Proof of their individual participation is discussed, as is that of the other individual respondents, following findings with respect to Waltham.

Waltham Watch Company's Responsibility

The allegations concerning the activity of respondent Waltham Watch Company are found in Paragraphs two, three, and nine of the complaint. Very briefly, it is charged that respondent Waltham imported clocks from West Germany into the United States and sold them to Time Industries for distribution throughout the United States during part of the time and that thereafter Time Industries imported the clocks. It is also charged that respondent Waltham places means and instrumentalities in the hands of Time Industries to mislead the public as to the origin and manufacture of the clocks. During the Commission's case, there was a slight variation between the allega-

tions and the proof concerning importation which was cured by an amendment to the complaint. Waltham's part, both before and after the change in method of importation, had substantially the same defect. It issued a license to Time Industries to utilize the name Waltham. It contracted for a substantial royalty for the use of this name and took no steps whatever to prevent confusion on the part of the public as to the origin and manufacture of the clocks.

The name "Waltham" has been associated in the minds of the public with the Waltham Watch Company of Massachusetts, one of the former leaders in the American Watch industry.[6] Waltham was charged with knowledge of the history and reputation of the Massachusetts company. It also knew both at the time that it purchased them and at the time it licensed Time Industries to purchase them, that the clocks to be sold by Time Industries were manufactured in West Germany (CX–33 a, b), and had the "Waltham" name affixed to the dials. In its agreement with Time Industries and Singer, Waltham reserved a right to approve the advertising (id). It took no effective steps to do so until after the complaint was issued in this case. The purchasers of franchises from Time Industries were confused by the representations in the Time Industries' advertisements. From these advertisements, they properly considered that the firm whose clocks they were asked to sell was the old established Waltham Watch Company of Massachusetts which had for so many years an outstanding reputation in American watchmaking. Respondent Waltham made it possible for Time Industries to create this misleading impression under claim of right by the issuance of its license. Advertisements and complaints brought these misrepresentations to Waltham's attention earlier than December 1959 (RX–43, 1126 and 1133). It cannot benefit from the proceeds of Time Industries' representation by reserving a royalty fee and, at the same time, disclaim responsibility when it failed to exercise any effective means of preventing the misrepresentations charged. Although no figures were offered as to the exact amount that Waltham obtained as a result of its license to Time Industries, the contract provided for a minimum royalty of $50,000 annually and $0.50 for each clock (CX–33c).[7] Mr. Aronson recalled that payments had been approximately $50,000.

[6] As Time Industries pointed out in its Summary and Conclusions (CX–61c), "Waltham is in the singularly advantageous position of being able to appeal to both preferences—domestic and imported. Waltham—'The first name in American Watches'—has every implication of American manufacture. To it can be added the advantages that accrue to imported merchandise."

[7] Royalties shown in CX–72 include royalties on sales of watches in foreign countries as well as clocks by Time Industries. All royalties for the six months ending December 31, 1960, amounted to $27,859.

The Responsibility of Individual Respondents

Harry Aronson is the principal stockholder and chief executive officer of respondent Waltham Watch Company. He and his family owned over sixty percent of the stock of the company. He has had long experience in the watch business and is generally familiar with the clock and watch industry. He executed the current license agreement with Time Industries which granted that company a claim of right to misrepresent the origin and manufacture of the clocks which Time Industries sold. While Aronson testified that he made no check on the advertising material of Time Industries until after the complaint was filed, some of the advertisements came to the attention of Waltham Watch Company. Goldstein testified he brought an advertisement like CX–6 to Aronson's attention in October or November 1959 (1134). Moreover, Waltham had expressly reserved the right to approve in advance any advertising which Time Industries might issue. Knowing the industry, the origin of the clocks and the reputation of Waltham Watch Company of Massachusetts, his failure to check Time Industries' operations to insure that the public was not misled, created an instrument of deception. Moreover, he stood by, in the face of complaints by franchised distributors, and reports by his own advertising department without taking any effective steps to prevent the continuance of Time Industries' misleading practices.

Lawrence Aronson

Lawrence Aronson is Vice President of respondent Waltham Watch Company and is the son of Harry Aronson, as well as being a stockholder. The only testimony in the record concerning him, in addition to that identifying him, is his father's which completely exonerated him of any responsibility for the arrangements between Waltham and Time Industries, or for the checking of the advertising of the latter concern.

David Singer

David Singer is the sole proprietor of Time Industries. He checked and approved the advertising received in evidence and personally received complaints from some of the disgruntled distributors. He had full knowledge of the operation of the sales scheme, and while he may not have known in detail all of the representations made by the salesmen he hired, he failed utterly, even when representations were drawn to his attention to take effective steps to prevent the public from being misled. He supplied the cards (described in footnote 4 *supra*) with the Waltham name and the Waltham display cases. He hired salesmen under an arrangement whereby they secured a commission for selling the franchises, clothed them with no responsibility other than

collecting the money. This was done in the face of his advertising which implied to the prospective franchise distributors that the plan involved a careful selection. He knew there would be no selection, there would be no reservation of territory, and that the salesmen would tend to appoint anyone who had the money and the means of servicing their route.

Singer was experienced in the watch industry and clearly knew Waltham's reputation and the danger of confusion in the method of advertising which was adopted. This advertising, the cards he provided for his salesmen, and the setup of the display cases, all emphasized Waltham, when, in fact, what the distributor was getting was a relatively inexpensive West German clock.

Muriel Singer

Muriel Singer is David Singer's wife. Both David Singer and his wife testified that he was the controlling force behind Time Industries and made all the decisions. They also attempted to create the impression that Mrs. Singer was merely helping out her husband much as an employee would do. However, the attempt by Mr. Singer to assume all the responsibility and to exonerate Mrs. Singer does not stand up against the other evidence. Moreover, Mrs. Singer's alertness and demeanor on the witness stand, as well as her correspondence, indicate that her role was much more significant. She admitted discussing the affairs of Time Industries with her husband, was present during many of the conferences held by her husband and wrote most of the letters received in evidence under the title Office and Field Manager. These mark her a responsible factor in the enterprise. The testimony of the witnesses confirms this impression. Milton Hettleman testified that he had dealt with both Mr. and Mrs. Singer but spoke to her most of the time. Marinoff stated that he had been referred to Mrs. Singer by Mr. Singer and had discussed with her his complaint that the clocks were not made in Switzerland as had been represented to him. Jui stated that he had drawn Mrs. Singer's attention to the representation that he was dealing with Waltham. Mosher dealt with Mrs. Singer, and she returned his deposit when he claimed that there were false representations made. Rodrigues stated that he had told Mrs. Singer about the representations salesman Parker had made, so she was fully aware of the character of the sales effort. Mrs. Singer's activities and responsibility, as demonstrated by the witnesses and by her activity, indicate that she was assisting her husband as a principal, with knowledge that he was engaging in a scheme to mislead the purchasers of franchises. It was stipulated that an FTC investigator was referred to Mrs. Singer when Mr. Singer was in Europe.

Effect on Competition

While no competitors of respondent Waltham were called to testify concerning the effect of the misrepresentations on their business, it is clear from the testimony and from the exhibits that there are a number of manufacturers of spring-actuated as well as electrically-powered clocks selling in the same markets in which respondents seek to sell their products. It is also clear from the testimony of the distributor's witnesses that the name "Waltham" caused them to make initial contact with Time Industries because of their knowledge of the reputation of the Waltham Watch Company of Massachusetts. The advertising to the ultimate consumer as well as that directed to the franchise distributors was such that it was calculated to deceive prospective purchases of distributorships, as well as of clocks, into the mistaken belief that they were purchasing the products of the Waltham Watch Company of Massachusetts, and thus to cause them to refrain from purchasing the products of respondents' competitors. Moreover, proof of actual diversion or deception is unnecessary under the Wheeler-Lea Amendment of 1938 [8] to the Federal Trade Commission Act. The misleading character of the acts and practices without more are prohibited. *Progress Tailoring Co.* v. *F.T.C.* (7th Cir. 1946) 153 F. 2d 103.

Approval of Certain Findings of Fact Proposed by Respondents

Where the hearing examiner is in agreement or in substantial agreement with the whole or some part of the findings proposed by respondent, they are adopted with amendments, necessary to make them conform to the facts established, and comments as follows:

1. There is no evidence of deception of the ultimate consumer whatsoever as none were called to testify. However, as heretofore pointed out, the representations, on the clocks and on the display cases, had a tendency to deceive the public as to the manufacturer and origin of the clocks.

2. Every franchised distributor of Time Industries signed a contract which was, according to the evidence, with few exceptions, fully performed by Time Industries. Several witnesses, however, testified that they were not permitted to examine the contract carefully and were rushed into signing it.

3. There was no written evidence that Time Industries failed to perform according to its written guarantee when called upon to do so. The guarantee, however, was conditional and not unconditional as represented.

[8] 15 U.S.C.A. 45, 52 Stat. 111.

4. All "Waltham" clocks sold by respondent Singer were imported from West Germany and marked in small letters, "West Germany" on the face, in addition to bearing the name "Waltham" in larger letters. The clocks made physical exhibits bear the word "Germany" stamped on the back as well as "West Germany" on the face. The boxes, however, give the impression that the watches are American made.

5. Some of the imported clocks were assembled or cased by Time Industries after import. For a time, Time Industries maintained a crew of several technicians for testing and repairing clocks, in addition to a small group to assemble clocks.

6. Salesmen of Time Industries signed an agreement designating them independent contractors. They were paid a commission on "sales" and were supplied cards and advertising material by Singer. In the advertising directed to prospective distributors, Time Industries clothed these salesmen with apparent authority.

7. Time Industries' form contract with distributors expressly stated that the franchise was non-exclusive. However, there was a blank spaced filled in with an area description in some of the form contracts which to the unwary would appear to grant an exclusive territory.

8. Many franchise distributors were attracted by the trade name "Waltham" which Time Industries had, by agreement with Waltham Watch Company, secured a claim to an exclusive right to use on clocks. Many of the franchised distributors testified that they became aware that the clocks were not made by Waltham Watch Company of Massachusetts, after making an initial contact with Time Industries and after they were shown clocks with the designation "West Germany" on them by the salesmen. Some were dissappointed when the trade name "Waltham" did not sell their product as they had expected it to do.

9. David Singer, trading as Time Industries, determined its policies as to buying, marketing and advertising and did not consult with Waltham, even though he had agreed to submit his advertising, when the demand was made for him to do so under the terms of his "license" agreement to use the name "Waltham."

10. Respondent Waltham Watch Company succeeded by a "spin-off" in corporate reorganization of Waltham Watch Company of Massachusetts to certain rights to utilize the name Waltham in certain types of activity. The latter company had, however, ceased manufacture and sale of clocks at the time. Respondent Waltham made a contract with David Singer which purported to give him the exclusive right to use that name in connection with the sale of clocks under con-

ditions set forth in the contract. Neither such corporate reorganization nor the contract gave either respondent Waltham Watch Company or respondent David Singer, trading as Time Industries, the right to misrepresent the manufacturer, its age, reputation or the country of origin of clocks sold by either of them.

11. Shortly before and following the issuance of the complaint in this matter, respondent Waltham attempted to require David Singer to submit his advertising for editing by Waltham. After Singer ignored the request and became in arrears on royalty payments, respondent Waltham cancelled the license purporting to authorize the use of the name "Waltham" on clocks. This cancellation does not, however, render this matter moot as Waltham still claims the right to utilize and to license others to utilize the name "Waltham" without the safeguards to insure against deception of the public.

12. A number of witnesses testified that they sought franchises from Time Industries because they thought the clocks were made by the well-known Waltham Watch Company of Massachusetts. Inherent, though not expressed, was the fact that they thought the clocks were made in Massachusetts.

CONCLUSIONS OF LAW

The Federal Trade Commission has jurisdiction of the persons of respondents and of the subject matter of this proceeding. Respondents are engaged in interstate commerce, and the practices charged took place in commerce as that term is defined in the Federal Trade Commission Act. There is substantial competition between respondents and other manufacturers and distributors of clocks. This proceeding is in the public interest and the findings of fact are made on the basis of substantial and reliable evidence.

Time Industries and David Singer secured a claim of right to use the name "Waltham" in connection with clocks by virtue of a license from Waltham Watch Company of Delaware. The licensing of Time Industries and David Singer to use the name "Waltham" does not, however, constitute a defense to a charge against Time Industries and David Singer of unfair or deceptive acts or practices.

The name "Waltham" has long been known to the public, and time-keeping products bearing that name have been associated with the Waltham Watch Company of Waltham, Massachusetts, connoting the first name in American watches. It has thus attained a secondary meaning. The name "Waltham" is clearly and distinctly printed or stamped on the dials or faces of the clocks imported by respondent Singer and was similarly imprinted on the clocks imported by Wal-

tham Watch Company. Said clocks were sold to the public by purchasers from Time Industries, and the display cases provided by Time Industries feature the name "Waltham" in addition to the phrase, "Product of Waltham Watch Co. since 1850." This use by respondents of the name "Waltham" in connection with said clocks, unless accompanied by a clear disclosure that said clocks are made in West Germany and are not the product of Waltham Watch Company of Waltham, Massachusetts, has a tendency and capacity to lead the public into the erroneous and mistaken belief that said clocks are the product of Waltham Watch Company of Waltham, Massachusetts.

The use by the respondents of the false, misleading and deceptive statements and representations described in the findings of fact has had and now has the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that the statements are true, and has the tendency and capacity to cause a large proportion of the purchasing public to purchase substantive quantities of the products sold by respondent, Time Industries, Inc., on which respondent Waltham has reserved a royalty. As a result of this tendency, trade tends to be unfairly diverted to respondents from their competitors and thus injury has been and is now being done to competition in commerce.

Since the name "Waltham" as used in the advertising of Time Industries is placed in the context which is calculated to deceive readers as to the management, operation and experience of the manufacturer, (See *A.P.W. Paper Co., Inc.* v. *F.T.C.*, 149 F. 2d 424 (2d Cir. 1945)), such use of the name "Waltham" by Time Industries is an unfair and deceptive act and practice within the meaning of Section 5 of the Federal Trade Commission Act.

The use of the name "Waltham" by Time Industries in advertising matter designed to sell clocks imported from West Germany has the tendency, where no mention is made of the foreign origin of such clocks, to mislead the public into the belief that the clocks are the product of Waltham Watch Company of Massachusetts, a well-known former domestic manufacturer of watches and clocks. Such use is accordingly an unfair and deceptive act and practice within the meaning of Section 5 of the Federal Trade Commission Act. (See *C. Howard Hunt Pen Co.* v. *F.T.C.*, 197 F. 2d 273 (3rd Cir. 1952) and *Edward P. Paul & Co.* v. *F.T.C.*, 169 F. 2d 294 (D.C. Cir. 1948).

Time Industries and its propietor, David Singer, are responsible for the representations made in advertisements authorized by them and also for representations made by salesmen employed by them, despite efforts to relieve themselves from responsibility by attempting

to make the salesmen independent contractors. *F.T.C.* v. *Standard Education Society et al.*, 302 U.S. 112 (1937) *cf. Globe Readers Service, Inc.* v. *F.T.C.* (Federal Trade Commission Docket 7490), 7th Cir., June 3, 1961. Such salesmen were clothed with apparent authority to represent Time Industries and David Singer. Their representations, in the main, corresponded with the representations contained in the advertising authorized by Singer.

The false representations made in the advertisements were capable of procuring and did, in some instances, procure the victims to make initial contact with Time Industries. It was thus immaterial that later statements were made to the contrary and that the formal documents, later signed, demonstrated that some of the representations in the advertising were untrue. When the initial contact is procured by misrepresentation, subsequent events or representations do not expunge the original wrong. *Matter of Exposition Press, Inc.*, Docket 7489, December 20, 1960; *Carter Products, Inc.* v. *F.T.C.*, 186 F. 2d 821 (7th Cir. 1951), and *F.T.C.* v. *Standard Education Society, et al.*, 302 U.S. 112 (1937).

The representations, containing prospective profits, sales, etc., went beyond mere puffing and constituted misrepresentations, and thus unfair acts and practices within the meaning of Section 5 of the Federal Trade Commission Act. *Washington Mushroom Industries, Inc., et al.*, 53 F.T.C. 369, (October 24, 1956); *William J. Miskel, et al., doing business as Tanners Shoe Company*, 53 F.T.C. 1137, (June 13, 1957); *In the Matter of Allan Goodman Trading as Weavers Guild*, 52 F.T.C. 982, (March 14, 1956); *Tractor Training Service, et al.*, 50 F.T.C. 762 (March 3, 1954), *cf. Illinois Continental Machine Corp., et al.*, 54 F.T.C. 610, November 15, 1957, where the proof failed to establish that the representations were false.

Whether or not there was a preference for or against foreign-made goods is immaterial. The customer is entitled not to be deceived by the advertising as to the origin of the product advertised. *In the Matter of Manco Watch Strap Co., Inc.*, July 17, 1961, Docket 7785. Respondents' contention that, because Waltham of Massachusetts had imported Swiss watches before the reorganization, it transmitted to respondent Waltham the right to import "Waltham" clocks, simply does not follow. Waltham of Massachusetts had long prior to that time ceased the manufacture and sale of clocks. It did not import them. Moreover, if Waltham of Massachusetts had embarked in a program of misrepresentation, such as that here disclosed, the fact that it was the original owner of a well-recognized name would not permit it to utilize that name in a manner calculated to deceive the

public. *Edward P. Paul & Co., Inc.* v. *F.T.C.*, 169 F. 2d 294 (D.C. Cir. 1948). The further contention that other watch companies palm off imported watches as domestic products is likewise immaterial. The Supreme Court has recently reiterated the sound principle that two wrongs do not make a right and that a respondent cannot justify his unlawful activity by claiming that he is only meeting competitors who are engaged in an unlawful plan. *F.T.C.* v. *Staley Mfg. Co., et al.*, 324 U.S. 746 (1945).

The representations concerning the location of display cases, the lack of selling required, the protection of purchasers investment, the selection of franchise distributors, the guarantee that the franchise will make money, the guarantee of the product in the hands of ultimate consumers, the exclusivity of territory, the executive character of the salesmen, the training to be provided, the employment of salesmen by Waltham, refunds of purchase price, and services available for relocation, were false and constitute unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. (See *Holland Furnace Company* v. *F.T.C.*, (Federal Trade Commission Docket 6203), Opinion Judge Duffy, October 11, 1961, 7th Cir.)

Whatever right respondent Waltham secured to use the name "Waltham" in connection with the business of manufacturing and selling watches by virtue of the reorganization of Waltham Watch Company of Massachusetts, it is doubtful that the right to use the name "Waltham" on clocks was validly transmitted to the Delaware company because Waltham of Massachusetts had some time before ceased to manufacture clocks. It had no inventory of clocks and no going business in clocks to transfer. See *Mulhens & Kropff, Inc.* v. *Ferd Muelhens, Inc.*, 22 F. 2d 191 (S.D. New York 1927). See also *Gehl* v. *Hebe Co.*, 276 Fed. 271 (CCA, 7th Cir. 1921.). It is, however, unnecessary to a decision in this proceeding to determine whether or not either the transfer to respondent Waltham or the subsequent license to respondent Singer, trading as Time Industries, was valid. Respondent Waltham Watch Company is not at liberty to use the name "Waltham" in a fashion that would mislead the public.

Respondent Waltham, by its grant of authority to David Singer and Time Industries to utilize this well-recognized "Waltham" name on products of which it neither supervised the production, the advertising, nor the distribution, placed in the hands of Singer and Time Industries a means to deceive prospective purchasers of franchises from Time Industries.

Respondent Waltham, by reason of the wide advertising by Time Industries and the complaints received by it, was required to inquire into the use by Time Industries of the Waltham name, since it had notice that Time Industries was importing clocks from West Germany, and since it had reserved authority to approve advertising prior to its release. It could not continue to receive the substantial benefits of its contract with Time Industries and David Singer, and disassociate itself from responsibility for overseeing the advertising of Time Industries in the use of the Waltham name.

The placing in the hands of Time Industries and Singer the right to use the Waltham name on imported merchandise under circumstances in which the public might be misled, constituted an instrumentality to deceive and was an unfair act and practice within the meaning of Section 5 of the Federal Trade Commission Act.

Similarly, by placing in the hands of its distributors and locating in retail stores the display racks on which the name "Waltham" and the phrase, "Product of the Waltham Watch Co. since 1850" appeared, Time Industries and David Singer placed in the hands of the distributors and the retail merchants a means to deceive prospective retail purchasers of the clocks as to the manufacturer, its age and reputation, and as to the country of origin of the clocks, under circumstances in which the public might be misled. This also constituted an instrumentality to deceive and was an unfair act and practice within the meaning of Section 5 of the Federal Trade Commission Act. *Winstead Hosiery* v. *F.T.C.*, 258 U.S. 483 (1922); *Globe Cardboard Novelty Co., Inc.* v. *F.T.C.*, 192 F. 2d 444 (3rd Cir. 1951), and *Chicago Board Company* v. *F.T.C.*, 253 F. 2d 78 (cert. denied), 358 U.S. 821 (7th Cir. 1958).

Respondent David Singer is the sole proprietor of the unincorporated business known as Time Industries, and is responsible for the unfair and misleading acts and practices perpetrated under its name. Respondent David Singer, individually had knowledge of the unfair acts and practices, or some of them, perpetrated under the name, Time Industries, and personally ordered or approved such acts and practices.

Respondent Muriel Singer, individually had knowledge of the unfair acts and practices, or some of them, perpetrated under the name, Time Industries, and with such knowledge personally assisted in furthering such activities as a principal in the unlawful enterprise.

Respondent Harry Aronson is an official and a substantial stockholder of respondent Waltham Watch Company. He executed on behalf of said company the agreement, placing in the hands of David Singer and Time Industries, the means of deceiving the public, and,

although chargeable with knowledge of the unfair acts and practices of Singer and Time Industries, took no effective action to stop them.

Respondent Lawrence Aronson, despite the fact that he is an officer and stockholder of Waltham Watch Company, was not shown to have authorized, undertaken or approved any acts leading to the unfair and deceptive practices charged, and this proceeding accordingly should be dismissed as to him in his individual capacity.

Respondents, David Singer, Muriel Singer, and Harry Aronson, have committed unfair and deceptive acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act, and, accordingly, an order should be issued requiring each of them individually to cease and desist from such practices, in addition to the order to be issued against the unincorporated business of Time Industries and the corporate respondent, Waltham Watch Company of Delaware.

It is appropriate, in the circumstances of this case, that the order require an express statement that the products are not manufactured by Waltham Watch Company of Massachusetts be made in connection with the use of the name "Waltham" to prevent deception of the public. *Theodore Kagen Corp.* v. *F.T.C.*, Federal Trade Commission Docket 6893, (C.A.D.C. 1960); *Keele Hair & Scalp Specialists, Inc., et al.* v. *F.T.C.*, 275 F. 2d 18 (5th Cir. 1960); *Ward Laboratories, Inc.* v. *F.T.C.*, 276 F. 2d 952 (2nd Cir. 1960), and *Bantam Books, Inc.* v. *F.T.C* 275 F. 2d 680 (2nd Cir. 1960).

ORDER

It is ordered, That Time Industries, an unincorporated business, David Singer, individually and trading as Time Industries, or under any other trade name or names, and Muriel Singer, individually and as Office and Field Manager of Time Industries, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of clocks or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I. Offering for sale or selling any product which is in whole or substantial part of foreign origin, without clearly and conspicuously disclosing on such product the country of origin of the product, and on the advertising used in connection therewith, and if said product is enclosed in a package or container, on the package or container of the product, in such manner that the name of the country of origin will not be hidden, obscured or obliterated.

II. Using the word "Waltham" as part of the name of any product unless the public is clearly warned by a statement, in immediate connection therewith, that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts, and, unless, in addition, the product is manufactured under the direction of respondent, Waltham Watch Company, and the right to use such name is licensed and the use supervised by said respondent, Waltham Watch Company.

III. Representing, directly or by implication, when such is not the fact that:

1. Any product is manufactured by Waltham Watch Company of Waltham, Massachusetts, or in any other way misrepresenting the age, reputation or location of the manufacturer.

2. The business of said respondents is connected in any way with the Waltham Watch Company of Waltham, Massachusetts.

3. Display cases for the sale of clocks will be located in leading drug stores, chain stores, markets and other profitable locations.

4. Selling is not required of persons who purchase franchises.

5. The initial investment of persons who purchase franchises is protected or guaranteed.

6. Any percentage will be earned on an investment in a franchise.

7. The products are sold only to a limited number of selected and qualified franchise distributors.

8. Any sales proposition is guaranteed to be money making.

9. Any product is unconditionally guaranteed, or guaranteed to any extent unless the terms and conditions of the guarantee are clearly and unmistakably disclosed.

10. Any territory is reserved exclusively for any franchised distributor, or he is granted any exclusive territory within which to operate his business.

11. Any salesman is an executive of Time Industries, or a representative or executive of Waltham Watch Company of Waltham, Massachusetts, or connected with the latter firm.

12. The full refund of the purchase price of unsold merchandise will be made.

13. Any designated profit will be earned.

14. Employees of said respondents will relocate display cases.

15. Any number of clocks will be sold from each display case during any interval or that the national average of such sales is any particular figure.

16. Any number of franchise dealers liquidate their investments through profits during any period of time.

IV. Placing in the hands of others means and instrumentalities whereby they may mislead the public as to the manufacturer or the place of origin of clocks or any other product.

It is further ordered, That Waltham Watch Company, a corporation, and its officers, and Harry Aronson, individually and as an officer of said corporation, and Lawrence Aronson as an officer of said corporation, and said respondents' officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the use of the name "Waltham," in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I. Using or authorizing any person to use the name "Waltham" in connection with the sale of clocks or any other product unless it supervises said use and insures that the name is so utilized that:

1. The public is clearly warned by a statement immediately in connection therewith, that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts, and,

2. If the product is of foreign origin, the country of origin of the product is clearly and conspicuously disclosed on the product, on the advertising used in offering it for sale, and on any package or container in which the product is enclosed, in such manner that the name of the country of origin will not be hidden, obscured or obliterated.

II. Placing any means or instrumentality in the hands of others whereby they may mislead the public, as to the manufacturer of any product which they sell, the manufacturer's age, experience and reputation or the country of origin of the product.

It is further ordered, That the complaint is dismissed as against respondent, Lawrence Aronson, individually, but not as an officer of respondent, Waltham Watch Company.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon the exceptions to the initial decision filed by respondents, Waltham Watch Company, Harry Aronson and Lawrence Aronson, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission 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' exceptions to the initial decision be, and they hereby are, denied.

It is further ordered, That the hearing examiner's initial decision, filed November 14, 1961, as corrected by his orders filed December 11, 1961, and April 20, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, Waltham Watch Company, a corporation, Lawrence Aronson, as an officer of the said corporation, Harry Aronson, individually and as an officer of the said corporation, and David Singer and Muriel Singer, individually, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

THE JOHN GERBER COMPANY

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

Docket C-148. Complaint, June 18, 1962—Decision, June 18, 1962

Consent order requiring a furrier in Memphis, Tenn., to cease violating the Fur Products Labeling Act by failing to show on invoices of fur products the true animal name of the fur and the country of origin of imported fur, by advertising falsely in newspapers that prices were reduced due to a special purchase when the fur products concerned were the property of an independent third party operating temporarily and conducting a sales promotion on the premises under respondent's name; and by failing to keep adequate records disclosing the facts upon which price and value claims in advertising were based.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that The John Gerber Company, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur 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 The John Gerber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 25 North Main Street, Memphis, Tenn.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed:

1. To show the true animal name of the fur contained in the fur products.

2. To show the country of origin of the imported fur used in the fur product.

PAR. 4. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondent caused the dissemination in commerce as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 5. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondent, which appeared in issues of The Commercial Appeal, a newspaper published in the city of Memphis, State of Tennessee, and having a wide circulation in said State and various other States of the United States.

PAR. 6. In advertising fur products for sale as aforesaid, respondent falsely and deceptively advertised said fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the said Rules and Regulations, by representing, directly or by implication, through such statements as:

If it were not for tremendous and unusual price concessions to Gerber's from one of the greatest fur houses in the United States, a sale like this simply couldn't happen! Gerber's passes the savings on to YOU who seek the superlative in fur.

that respondent, a retailer, obtained price concessions from a supplier of certain fur products and as a result of the special purchase was able to offer the said fur products for sale to the purchasing public at prices reduced from regular or usual prices.

The representation that prices were reduced from regular or usual prices due to a special purchase was false, misleading and deceptive in that respondent did not make a special purchase of the fur products offered for sale and in fact neither owned nor purchased the said fur products.

The said fur products were the exclusive property of an independent third party operating temporarily and conducting a sales promotion on the premises and under the name of respondent.

PAR. 7. Respondent in advertising fur products for sale as aforesaid, made claims and representations respecting prices and values of fur products. Said representations were of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent The John Gerber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 25 North Main Street, Memphis, Tenn.

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

ORDER

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

1. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

A. Represents directly or by implication that prices of fur products are reduced from regular or usual prices due to special purchases, when such is not the fact.

B. Misrepresents in any manner the savings available to purchasers of respondent's fur products.

3. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

DONENFELD'S INC., ET AL.

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

Docket C-149. Complaint, June 19, 1962—Decision, June 19, 1962

Consent order requiring furriers in Dayton, Ohio, to cease violating the Fur Products Labeling Act by failing to disclose on labels and invoices and in advertising, the names of animals producing certain furs; failing to disclose on labels when fur products were composed of cheap or waste fur and to identify the manufacturer, etc.; failing to show on invoices and in advertising when furs were artificially colored or composed of flanks, and to use the terms "Persian Lamb" and "Dyed Mouton" as required; failing to show on invoices the country of origin of imported furs, and invoicing bleached and dyed fur as natural; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Donenfeld's, Inc., a corporation, and Ralph Donenfeld and Stanley R. Donenfeld, 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 Fur 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 Donenfeld's, Inc., is a corporation organized, existing and doing business by virtue of and under the laws of the State of Ohio with its office and principal place of business located at 35 North Main Street, Dayton, Ohio.

Respondents Ralph Donenfeld and Stanley R. Donenfeld are Vice President and Secretary-Treasurer, respectively, of the said corporate respondent and 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. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect of the name of the country of origin of imported furs used in the fur product, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show that the fur product was composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such was the fact.

3. To show the name, or other identification issued and registered by the Commission of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, or transported or distributed it in commerce.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) Labels affixed to fur products failed to show that the fur products were composed in whole or substantial part of flanks, when

such was the fact, in violation of Rule 20 of said Rules and Regulations.

(c) Labels affixed to fur products did not comply with the minimum size requirements of one and three-quarter inches by two and three-quarter inches, in violation of Rule 27 of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with non-required information, in violation of Rule 29(a) of said Rules and Regulations.

(e) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(f) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(g) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not separately set forth on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

(h) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products but not limited thereto, were invoices pertaining to such fur products which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To show the country of origin of the imported furs used in the fur product.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced, in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated there-

under was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth in the manner required, in violation of Rule 8 of said Rules and Regulations.

(c) The term "Dyed Mouton Lamb" was not set forth in the manner required, in violation of Rule 9 of said Rules and Regulations.

(d) Invoices failed to show that fur products were composed in whole or substantial part of flanks, when such was the fact, in violation of Rule 20 of said Rules and Regulations.

(e) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on invoices with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

(f) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural when in fact such fur was bleached, dyed or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 9. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act in that said fur products were not advertised in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder.

Said advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the Journal Herald and the Dayton Daily News, newspapers published in the city of Dayton, State of Ohio, and having a wide circulation in said State and various other States of the United States.

Among such false and deceptive advertisements of fur products, but not limited thereto, were advertisements referred to herein, which failed:

1. To disclose the name or names of the animal or animals that produced the fur contained in the fur product as set forth in the Fur Products Name Guide.

2. To disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact.

PAR. 10. In advertising fur products as aforesaid, respondents failed to set forth the term "Persian Lamb" in the manner required, in violation of Rule 8 of the Rules and Regulations promulgated under the Fur Products Labeling Act.

PAR. 11. In advertising fur products as aforesaid, respondents failed to set forth the term "Dyed Mouton Lamb" in the manner required, in violation of Rule 9 of said Rules and Regulations.

PAR. 12. In advertising fur products for sale as aforesaid, respondents failed to disclose that fur products were composed in whole or in substantial part of flanks, when such was the fact, in violation of Rule 20(a) of said Rules and Regulations.

PAR. 13. In advertising fur products as aforesaid, respondents failed to set forth all the parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of said Rules and Regulations.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Donenfeld's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 35 North Main Street, Dayton, Ohio.

Respondents Ralph Donenfeld and Stanley R. Donenfeld are Vice-President and Secretary-Treasurer, respectively, of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Donenfeld's, Inc., a corporation, and its officers, and Ralph Donenfeld and Stanley R. Donenfeld, 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 into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. Failing to affix labels to fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Falsely or deceptively labeling or otherwise falsely or deceptively identifying any such product as to the country of origin of imported furs used in the fur product.

C. Setting forth on labels affixed to fur products:

(1) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

(2) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder, mingled with non-required information.

(3) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

D. Failing to show that fur products are composed in whole or substantial part of flanks, when such is the fact.

E. Affixing to fur products labels that do not comply with the minimum size requirements of one and three-quarter inches by two and three-quarter inches.

F. Failing to set forth the information required by Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in the required sequence in accordance with Rule 30 of the aforesaid Rules and Regulations.

G. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal furs the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

H. Failing to set forth on labels the item number or mark assigned to a fur product.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

C. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

D. Failing to set forth the term "Dyed Mouton Lamb" in the manner required where an election is made to use that term instead of the term "Dyed Lamb".

E. Failing to show that fur products are composed in whole or substantial part of flanks, when such is the fact.

F. Failing to set forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to each section of fur products composed of one or more sections containing different animal furs.

G. Failing to set forth the item number or mark assigned to a fur product.

H. Representing directly or by implication that the fur contained in fur products is natural, when such is not the fact.

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

A. Fails to disclose in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

B. Fails to disclose that the fur product is composed in whole or in substantial part of flanks, when such is the fact.

C. Fails to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

D. Fails to set forth the term "Dyed Mouton Lamb" in the manner required where an election is made to use that term instead of the term "Dyed Lamb".

E. Fails to set forth all parts of information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

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 this order.

IN THE MATTER OF

H.S.D. PUBLICATIONS, INC.

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

Docket C-150. Complaint, June 19, 1962—Decision, June 19, 1962

Consent order requiring the publisher of "Alfred Hitchcock's Mystery Magazine" in Riviera Beach, Fla., to cease paying promotional allowances to some customers but not to their competitors, in violation of Sec. 2(d) of the Clayton Act—such as a payment of $9,661 to Union News Co., New York City—and basing such allowances on individual negotiations resulting in proportionally unequal terms to even the favored customers.

COMPLAINT

The Federal Trade Commission having reason to believe that the party respondent named in the caption hereof and hereinafter more

particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent H.S.D. Publications, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 2441 Beach Court, Riviera Beach, Fla. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Alfred Hitchcock's Mystery Magazine". Respondent's sales of publications during the calendar year 1960 exceeded two hundred fifty thousand dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Kable News Company, hereinafter referred to as Kable News.

Kable News has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. Kable News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Kable News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Kable News also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, Kable News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Alfred Hitchcock's Mystery Magazine" is among the most popular and widely circulated mystery magazines in the United States and is distributed throughout various States by Kable News through local distributors to retail outlets.

PAR. 3. Respondent, through its conduit or intermediary, Kable News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has 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, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondent's publication were:

Customer	Approximate amount received	
	1960	1961 (Jan.–June)
Fred Harvey, Chicago, Ill	$204.80	$81.48
Interstate Co., Los Angeles, Calif	96.60	123.55
Greyhound Post Houses, Forest Park, Ill	107.52	52.76
Union News Co., New York City	9,661.00	(Jan. 1, 1960–June 30, 1961).

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PAR. 6. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent H.S.D. Publications, 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 2441 Beach Court, in the city of Riviera Beach, State of Florida.

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

ORDER

It is ordered, That respondent H.S.D. Publications, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines.

The word "customer" as used above shall be deemed to mean anyone who purchases from H.S.D. Publications, Inc., acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

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

IN THE MATTER OF

NATIONAL POLICE GAZETTE CORPORATION

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

Docket C-151. Complaint, June 22, 1962—Decision, June 22, 1962

Consent order requiring the New York City publisher of "National Police Gazette" to cease paying promotional allowances to some customers but not to their competitors, in violation of Sec. 2(d) of the Clayton Act—such as a payment of $2,078.20 to Union News Co., New York City—and basing such allowances on individual negotiations resulting in proportionally unequal terms to even the favored customers.

COMPLAINT

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

PARAGRAPH 1. Respondent National Police Gazette Corporation is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 250 West 57th Street, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "National Police Gazette". Respondent's sales of publications during the calendar year 1960 exceeded sixty thousand dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Publishers Distributing Corporation, hereinafter referred to as PDC.

PDC has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. PDC, as national distributor of publications published by respondent and other independent publishers, has performed and

is now performing various services for these publishers. Among the services performed and still being performed by PDC for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. PDC has also negotiated promotional arrangements with the retail customers of the publishers it represents on behalf of and with the knowledge and approval of said publishers, including respondent publisher.

In its capacity as national distributor for respondent in dealing with the customers of respondent, PDC served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent.

PAR. 3. Respondent, through its conduit or intermediary, PDC, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has 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, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960 which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Customers	*Approximate amount received*
Union News Co., New York City	$2,078.20
Greyhound Post Houses, Forest Park, Ill	601.60
ABC Vending Corp., Long Island City, N.Y.	219.48

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PAR. 6. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, National Police Gazette Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 250 West 57th Street, in the city of New York, State of 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 National Police Gazette Corporation, a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines.

The word "customer" as used above shall be deemed to mean anyone who purchases from National Police Gazette Corporation, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

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

IN THE MATTER OF

NOVEL MANUFACTURING CORP. ET AL.

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

Docket C-152. Complaint, June 22, 1962—Decision, June 22, 1962

Consent order requiring New York City distributors of top playhouses to cease making misrepresentations in advertising concerning safety and flameproof features of the playhouses and other products, as well as the material, construction, size, pricing, etc., as in the order below indicated.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Novel Manufacturing Corp., a corporation, and Russell Weith and Alan Weston, 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 Novel Manufacturing Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 31 Second Avenue in the city and State of New York.

Respondents Russell Weith and Alan Weston 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 advertising, offering for sale, sale and distribution of, among other things, a toy product, designated by respondents as a playhouse, to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their playhouses, respondents have made certain statements and representations with respect to the nature, characteristics, safety factors, material and composition, size, dimensions, height, use, type of construction and price of respondents' products as well as the character of the business of respondents, in advertisements in magazines of national circulation, of which the following is typical:

safety . . . flameproof and waterproof . . .
Big enough for 2–3 kids!
Huge . . . kingsize . . .
Nine feet square.
23 cubic feet in size.
Approx. 3 Ft. High . . . .
Use year round, indoors or outdoors.
Walls and Door . . . Peaked roof . . . .
sets up in a jiffy . . .
Western-Style cabin . . . .
FRONTIER CABIN . . . .
. . . realistically imprinted in authentic brown split-log design . . . .
a comparable $3.98 value now only $1.00.
This sale price is made possible by your buying directly from the factory.
We are the largest Mfrs. and Distrs. of playhouses in the U.S.
Over 250,000 satisfied customers.

PAR. 5. By and through the use of the aforesaid statements and representations, and others similar thereto but not specifically set forth herein, respondents have represented, and are now representing, directly or by implication:

1. That said products are safe for use by children of tender years.

2. That the material employed in the manufacture of the product is flameproof.

3. That the size, dimensions, usable space and height of the product are fairly and accurately represented in the text and illustrations contained in respondents' advertisements.

4. That the product is complete and ready for use.

5. That the product is inherently and independently rigid and can stand erect without the addition of, or necessity for, substantial interior structural support.

6. That the type of material and manner of construction employed by respondents results in a product of such durability, sturdiness and stability as to afford safe shelter for children from the elements of the weather year round.

7. That a product of like grade and quality is usually and regularly sold at retail in the trade area or areas where the representation is made at a price of $3.98, and purchasers of respondents' product would realize a saving of the difference between the represented $3.98 price and respondents' price of $1.00.

8. That the purchaser is buying the product direct from the factory.

9. That the respondents are manufacturers of the product produced in their own factory.

10. That respondents have sold over 250,000 units of this product and that all of said sales have resulted in satisfied customers.

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

1. The product is not safe for use by children of tender years without conspicuous and adequate warning to the adult purchasing public of the dangers of fire and asphyxiation.

2. The material employed in the manufacture of the product is not flameproof.

3. The size, dimensions, usable space and height of the product are not fairly and accurately represented in the text and illustrations contained in respondents' advertisements.

4. The product is not complete and ready for use.

5. The product is not inherently and independently rigid and cannot stand erect without the addition of, or the necessity for, substan-

tial interior structural support such as a card table, which must be supplied by the purchaser.

6. The type of material and manner of construction employed by respondents does not result in a product of such durability, sturdiness and stability as to afford safe shelter for children from the elements of the weather year round.

7. A product of like grade and quality is not usually and customarily sold at retail in the trade area or areas where the representation is made at a price of $3.98, and purchasers of respondents' product would not realize a saving of the difference between the said higher and lower price amounts.

8. The purchaser is not buying the product direct from the factory.

9. The respondents are not manufacturers of the product operating their own factory.

10. Respondents do not have over 250,000 satisfied customers.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commmission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Novel Manufacturing Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 31 Second Avenue in the city of New York, State of New York.

Respondents Russell Weith and Alan Weston are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Novel Manufacturing Corp., a corporation, and its officers, and Russell Weith and Alan Weston, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of playhouse toy products, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) By use of the terms flameproof, fireproof, fire-resistant, fire-retardant, or any other terms or descriptions, that the product is non-combustible or free from the hazard of fire.

(b) That the type of material and manner of construction employed by respondents results in a product of such durability, sturdiness and stability as to afford safe shelter for children from the elements of the weather year round.

(c) By or through the use of any pictorial illustration or textual description that the product is larger or more commodious than is actually the fact.

(d) That their product is of a value comparable to any other product retailing at a higher price unless the merchandise to which their

product is compared is at least of like grade and quality in all material respects and is generally available for purchase at the comparative price in the same trade area, or areas, where the claim is made.

(e) That any saving is afforded in the purchase of respondents' product as compared to the purchase of another product unless the merchandise to which respondents' product is compared is at least of like grade and quality in all material respects and is generally available for purchase at the comparative price in the same trade area, or areas, in which the claim is made.

(f) That the purchaser is buying the product direct from the factory.

(g) That the respondents are manufacturers of the product.

(h) That respondents have any particular number of satisfied customers, unless such claim is based upon affirmative proof of customer satisfaction exclusive of the number of sales.

2. Failing to disclose clearly and conspicuously that there is danger to children of fire or asphyxiation from the use of the product.

3. Failing to disclose clearly and conspicuously that the product is not complete or ready for use.

4. Failing to disclose clearly and conspicuously that the product is not inherently or independently rigid without the addition of, or necessity for, substantial interior structural support.

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 this order.

IN THE MATTER OF

DENNIS HARTMAN DOING BUSINESS AS NATIONAL POETRY ASSOCIATION, ETC.

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

Docket C-153. Complaint, June 22, 1962—Decision, June 22, 1962

Consent order requiring an individual in West Los Angeles, Calif., engaged under various trade names in soliciting original manuscripts for publication, largely through competitions in educational institutions, and in publishing anthologies of poetry, essays, drawings, etc., to cease representing falsely by use of his trade names and his designation as secretary in his promotional materials that the organizations sponsoring the competitions

and publishing the anthologies were non-profit institutions or groups of persons associated together to promote interest in literary or artistic works, and that he was acting in the name of such a group.

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 Dennis Hartman, an individual doing business as National Poetry Association, National Essay Association, National High School Poetry Association, American Poetry Society and National Art Association, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Dennis Hartman is an individual who does business under various trade names including, among others: National Poetry Association, National Essay Association, National High School Poetry Association, American Poetry Society and National Art Association. His office and principal place of business is located at 3750 Overland Drive, West Los Angeles, Calif.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of soliciting manuscripts of original literary and artistic works for publication; and of publishing, advertising, offering for sale, selling, and distributing various publications including anthologies of poetry, essays, drawings, and other literary and artistic works. His volume of business has been and is substantial.

PAR. 3. In the course and conduct of his business, respondent now causes, and for many years last past has caused, said anthologies and other publications, when sold, to be shipped from his place of business in the State of California to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, respondent uses form letters, bulletins, brochures, and other promotional materials in soliciting manuscripts of original literary and artistic works, and in soliciting the sale of his anthologies and other publications. Said promotional materials are, in the main, sent to educational institutions for distribution to, or for the notice of educators and students. Said promotional materials invite participation by educators and

students in various competitions, the purported purposes of which are to determine the merit of, and to accord recognition to, poems, essays, drawings and other original literary and artistic works.

Those participants in said competitions whose works have been selected by respondent for publication, or the institutions with which such participants are associated, are thereafter informed that the particular publication which will contain such work may be ordered from respondent at a designated price.

PAR. 5. In the course and conduct of his business, respondent sets forth various organizational names, designations and titles in said promotional materials which describe the nature and purpose of the organization that is purportedly sponsoring a particular competition in which educators or students are invited to participate. Other promotional materials bearing the said names and titles solicit orders for anthologies and other publications containing said literary and artistic works.

Among and including, but not necessarily limited to, the organizational names and designations so used by respondent are those set forth in paragraph 1 hereof. Much of said promotional materials also bears the name of respondent, together with the designation or title of Secretary.

PAR. 6. In the course and conduct of his business, respondent has set forth certain statements in said promotional materials which purport to further describe the nature and purpose of the organizations named or designated therein.

Among and typical, but not necessarily limited to, the statements contained in said promotional materials are the following:

OUR EFFORTS ARE DEDICATED TO THE YOUTH OF OUR COUNTRY, AND TO THEIR RESPECTIVE TEACHERS AND SCHOOLS (National High School Poetry Association Bulletin).

The National Poetry Association was founded in 1937 for the purpose of giving publication recognition to the creative writing and arts efforts of high school students (National Poetry Association brochure).

PAR. 7. By and through the use of the aforesaid names, designations, titles and statements as set forth in said promotional materials sent and distributed as aforesaid, respondent has represented, directly or by implication:

(a) The group or organizations named as sponsoring said competitions and publishing the anthologies are eleemosynary or nonprofit institutions or are composed of persons who are associated together for the purpose of promoting interest in poetry, essays, drawings, or other literary or artistic works as the case may be.

(b) That he is acting in the name, or with the approval, of a group or organization so constituted.

PAR 8. Respondent's said statements and representations, and others of the same import and meaning not set forth specifically herein, are false, misleading, and deceptive. In truth and in fact:

(a) Said competitions are not sponsored by eleemosynary or non-profit institutions, nor do said names refer to organizations composed of persons who are associated together for the purposes as represented by respondent. To the contrary, the organizations so named are merely trade names under which respondent carries on his business of soliciting manuscripts of original literary and artistic works for publication, and of soliciting the sale of his said publications.

(b) Respondent is acting for himself and to his own interests in carrying on his said business.

PAR. 9. In the conduct of his business at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the solicitation of literary and artistic manuscripts for publication, and in the sale of publications of the same general kind and nature as those sold by respondent.

PAR. 10. The use by respondent 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 respondent's products by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Dennis Hartman is an individual who does business under various trade names including, among others: National Poetry Association, National Essay Association, National High School Poetry Association, American Poetry Society and National Art Association. His office and principal place of business is located at 3750 Overland Drive, West Los Angeles, Calif.

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

ORDER

It is ordered, That Dennis Hartman, an individual, doing business as National Poetry Association, National Essay Association, National High School Poetry Association, American Poetry Society, National Art Association, or under any other trade name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation of literary or artistic manuscripts for publication, or with the offering for sale, sale or distribution of published anthologies or other literary or artistic works, or of any other publications, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the names National Poetry Association, National Essay Association, National High School Poetry Association, American Poetry Society, National Art Association or any other words or names of similar import or meaning to designate, describe or refer to the respondent's business; or from otherwise representing, directly or by implication, that any business organized or operated for profit is composed of persons who are associated together for the purpose of promoting interest in poetry, essays, drawings, or other literary or artistic works;

2. Representing, directly or by implication, that any business organized or operated for profit is an eleemosynary or non-profit institution;

3. Using the title of Secretary or any other title commonly used by officers of associations or eleemosynary organizations;

4. Representing, directly or by implication, that respondent is acting in the name of or with the approval of or is sponsored by any eleemosynary organization.

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

IN THE MATTER OF

OLSON RADIO CORPORATION ET AL.

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

Docket 7702. Amended Complaint, June 30, 1960—Decisions, June 26 1962

Order requiring an Akron, Ohio, corporate distributor to cease selling rebuilt television tubes containing a used "envelope" without clearly disclosing that the tubes contained used parts; and selling imported products with markings showing the foreign origin so small, or indistinct, or so placed—even entirely lacking on containers—as not to give adequate notice of foreign manufacture to purchasers; and

Consent order requiring said corporate distributor and three officials to cease making deceptive pricing, savings, and guarantee claims for their products.

AMENDED AND SUPPLEMENTAL 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 Olson Radio Corporation, a corporation, and Irving Olson, Sidney Olson and Albert Schultz, 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 amended and supplemental complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Olson Radio Corporation is a corporation organized, existing and doing business under and by virtue of

the laws of the State of Ohio, with its principal office and place of business located at 260 South Forge Avenue, in the city of Akron, State of Ohio. The corporate title of this respondent was formerly Olson Radio Warehouse, Inc.

Respondents Irving Olson, Sidney Olson and Albert Schultz, are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the corporate respondent, including the acts, practices and policies 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 sale of various articles of merchandise to retailers for resale to the public and directly 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 products, when sold, to be shipped from their place of business in the State of Ohio to purchasers thereof located in various other states of the United States and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents, for the purpose of inducing the sale of their products, have made certain statements in their catalogs and advertising circulars mailed to prospective purchasers, of which the following are typical but not all inclusive.

Angle Wrench Set
Reg. 3.95 1.95 set

Stylus Pressure Gauge
Reg. Price 3.50 1.93

Crystal Lapel Microphone
List Price 8.95

2.95 each dealer price

Portable Mike Floor Stand
List Price 12.50 — 6.99 each

General Electric Electronic Tubes
Guaranteed for 12 months

Aluminized Picture Tubes
Factory Sealed
1 Year Guarantee

Fully guaranteed top quality picture tubes in factory sealed cartons including warranty

PAR. 5. Through the use of the aforesaid statements, and others of similar import not specifically set out herein, respondents represented, directly and by implication:

1. That the amounts listed in connection with the words "reg." and "list" were the prices at which respondents usually and customarily sold the articles of merchandise described in the advertisement in the recent course of business and that the differences between said amounts and the advertised prices represented savings from respondents' usual and customary prices.

2. That the electronic tubes described in the advertisement are guaranteed for 12 months in every respect.

3. That the television picture tubes described in the advertisement are new in their entirety.

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

1. The amounts listed in connection with the words "reg." and "list" were in excess of the prices at which respondents had sold said merchandise in the recent regular course of business and the difference between said amounts and the prices at which said articles of merchandise were offered for sale did not constitute savings to purchasers from respondents' usual and customary retail prices.

2. Respondents do not guarantee the articles of merchandise described in the advertisement in every respect. The terms, conditions and extent to which such guarantee applies, and the manner in which the guarantor will perform thereunder are not disclosed in the advertisement.

3. The television picture tubes described in the advertisement are not new but are rebuilt tubes containing used parts.

PAR. 7. All, or certain, of the television picture tubes advertised and sold by respondents are rebuilt and contain used parts. Respondents do not disclose on the tubes or on the cartons in which they are packed, on invoices or in their advertising that they are rebuilt containing used parts.

PAR. 8. When television picture 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. 9. By failing to disclose the facts set forth in Paragraph Seven, 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. 10. Among the articles of merchandise offered for sale and sold by respondents are numerous products made in several foreign countries and imported into the United States. Certain of these products

are enclosed in various types of packages or cartons. While all of the products are marked showing the country of origin, some of said markings are so small and indistinct, or so placed that they do not give or constitute adequate notice as to the country of origin. The cartons in which some of said products are packaged are not marked to show the country of origin of the product and others are not marked in such a manner as to give or constitute adequate notice of the country of origin of the product.

PAR. 11. A substantial portion of the purchasing public has a preference for products of domestic manufacture or origin as distinguished from products of foreign manufacture or origin, including the products sold by respondents above referred to.

PAR. 12. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of the same general kind and nature as that sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the failure to disclose the facts as hereinabove alleged 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 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. 14. 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. Frederick McManus for the Commission.

Buckingham, Doolittle & Burroughs, by *Mr. Richard A. Chenoweth*, of Akron, Ohio, for respondents.

INITIAL DECISION AS TO AMENDED AND SUPPLEMENTAL COMPLAINT WITH THE EXCEPTION OF PARAGRAPHS SIX (3), SEVEN, EIGHT, NINE, TEN, AND ELEVEN BY LEON R. GROSS, HEARING EXAMINER

An initial decision which is dispositive of the issues raised in paragraphs 6(3), 7, 8, 9, 10, and 11 of the amended and supplemental complaint is being issued simultaneously herewith.

An amended and supplemental complaint issued June 30, 1960, charged respondents with violating the Federal Trade Commission Act by (1) failing to disclose adequately the foreign origin of certain of their products sold in interstate commerce, (2) using deceptive comparative prices in advertising their products, (3) falsely representing the manner in which their products are guaranteed, and (4) failing to disclose that electronic tubes described in their advertisements are rebuilt tubes which contain used parts.

On February 10, 1962, the parties submitted to the undersigned an agreement dated January 18, 1962, which purports to dispose of all the issues raised by the amended and supplemental complaint and answer thereto with the exception of paragraphs 6(3), 7, 8, 9, 10 and 11 as to all parties involved. Said agreement has been signed by the respondents, their counsel, and by counsel supporting the complaint, and has been approved by the Chief, Division of General Advertising, and the Director, Bureau of Deceptive Practices of this Commission. The said agreement was submitted to the above-named hearing examiner for his consideration, in accordance with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings published May 6, 1955.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the amended and supplemental complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. The parties have, *inter alia*, by such agreement covenanted: (1) the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; (2) the amended and supplemental complaint may be used in construing the terms of said order; (3) the record herein shall consist solely of the amended and supplemental complaint and said agreement; and (4) that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law.

This proceeding having now come on for final consideration on the amended and supplemental complaint and the aforesaid agreement of January 18, 1962, containing consent order, and it appearing that the order provided for in said agreement covers the allegations

of the amended and supplemental complaint with the exception of paragraphs 6(3), 7, 8, 9, 10 and 11 and provides for an appropriate disposition of this proceeding as to all parties, the agreement of January 18, 1962, is hereby accepted, pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings published May 6, 1955; and

The undersigned hearing examiner having considered the amended and supplemental complaint herein and the agreement and proposed order, and being of the opinion that the disposition of this proceeding by means of said agreement will be in the public interest, makes the following jurisdictional findings, and issues the following order.

JURISDICTIONAL FINDINGS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. Respondent Olson Radio Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 260 South Forge Avenue, in the city of Akron, State of Ohio;

Respondents Irving Olson, Sidney Olson and Albert Schultz, are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the corporate respondent. Their address is the same as that of the corporate respondent;

3. Respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act;

4. The amended and supplemental complaint states a cause of action against said respondents under the Act hereinabove named, and this proceeding is in the public interest.

ORDER

It is ordered, That the respondents Olson Radio Corporation, a corporation, and its officers, and Irving Olson, Sidney Olson, and Albert Schultz, 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 merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any amount is respondents' regular and usual price of merchandise when it is in excess of the price at which said merchandise is usually and regularly sold by respondents in the recent course of their business.

2. Representing, directly or by implication, that any saving is afforded in the purchase of merchandise from respondents' price unless the price at which it is offered consitutes a reduction from the price at which the merchandise has been usually and regularly sold by respondents in the recent course of business.

3. Misrepresenting, in any manner, the amount by which the price of merchandise is reduced from the price at which it has been usually and regularly sold by respondents in the normal course of business.

4. Using the words "Reg.", "list" or any other words of similar import or meaning to designate or describe prices of merchandise unless such prices are the prices at which the merchandise has been sold by respondents in the recent regular course of business.

5. Representing, directly or by implication, that merchandise offered for sale or sold by respondents is guaranteed unless the terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

FINAL ORDER

The hearing examiner having filed two initial decisions in this matter on March 7, 1962, and the Commission by its order of April 9, 1962, having placed the case on its own docket for review; and

The Commission now having concluded that the hearing examiner's initial decision, entitled "Initial Decision As To Amended And Supplemental Complaint With The Exception Of Paragraphs Six(3), Seven, Eight, Nine, Ten, And Eleven", is appropriate in all respects to dispose of that portion of this proceeding not excepted thereby:

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

It is further ordered, That respondents, Olson Radio Corporation, a corporation, and Irving Olson, Sidney Olson, and Albert Schultz, 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 said intial decision.

Mr. Frederick McManus for the Commission.

Buckingham, Doolittle & Burroughs, by *Mr. Richard A. Chenoweth*, of Akron, Ohio, for respondents.

INITIAL DECISION AS TO PARAGRAPHS SIX(3), SEVEN, EIGHT, NINE, TEN AND ELEVEN BY LEON R. GROSS, HEARING EXAMINER

The amended and supplemental complaint issued herein charges the corporate respondent with violating the Federal Trade Commis-

sion Act by failing to disclose adequately the foreign origin of certain products sold by it in interstate commerce; using deceptive comparative prices in advertising its products; falsely representing the manner in which its products are guaranteed and failing to disclose that television picture tubes advertised and sold by the corporate respondent in interstate commerce contain used parts.

The individual respondents are charged as officers of the corporate respondent who formulate, direct and control its acts, practices and policies.

Exhibits in support of the amended and supplemental complaint have been stipulated into this record in support of the charges that the corporate respondent has failed to disclose adequately (1) the foreign origin of merchandise imported and sold by it in interstate commerce, and (2) that its television picture tubes contain used parts. The other charges in the amended and supplemental complaint are being disposed by a separate initial decision being issued simultaneously herewith.

On February 12, 1962, counsel for all the parties submitted to the undersigned hearing examiner, in lieu of formal hearings, one Stipulation dated October 9, 1961, and a document entitled "Agreement Between Counsel Relative to the Testimony of Certain Witnesses." It has been represented to the hearing examiner that the aforementioned Stipulation, and the Agreement, plus the exhibits stipulated into the record, shall constitute the entire record on remand upon which paragraphs 6(3), 7, 8, 9, 10, and 11 of the amended and supplemental complaint may be disposed.

Counsel have waived the filing of finding of fact and conclusions of law and have agreed that this proceeding may be disposed on the basis of the October 9, 1961, Stipulation, the aforementioned undated Agreement, and the previously stipulated record.

Based upon the original complaint, and answer thereto, the amended and supplemental complaint and answer thereto, Commission Exhibits 4A, 4B, 5, 6A, 6B, 7A, 7B, 8A, 8B, 9, 10, 11, now in evidence, the Stipulation dated October 9, 1961, and Agreement Between Counsel Relative to the Testimony of Certain Witnesses, the examiner finds and concludes as follows:

1. Respondent Olson Radio Corporation is an Ohio corporation whose principal office and place of business is 260 South Forge Avenue, Akron, Ohio. The former corporate title of the corporate respondent was Olson Radio Warehouse, Inc. Respondents Irving Olson, Sidney Olson, and Albert Schultz are officers of the corporate respondent. The individual respondents are charged with formulat-

ing, directing and controlling the acts, practices and policies of the corporate respondent. This is denied in the answer and this record does not contain preponderant, reliable and probative evidence establishing such fact. Therefore, the charges as to the individual respondents are being dismissed.

2. The corporate respondent is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

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

4. In the course and conduct of its business, the corporate respondent sells certain television picture tubes which are advertised and described in its advertisements in such manner as to create an impression, contrary to the fact, that said television picture tubes are new in their entirety. As a matter of fact, the television picture tubes described in the advertisements are rebuilt tubes containing a used "envelope." Respondents do not disclose on the tubes or on the cartons in which they are packed, or on their invoices or in their advertising that the rebuilt television picture tubes contain used parts. In the absence of disclosure to the contrary, the tubes are understood by the general public to be and are accepted as new tubes. By failing to disclose the fact that the tubes contain used parts, respondents place in the hands of their dealers the means and the instrumentalities by which said dealers may mislead and deceive the public into believing that the television picture tubes are completely new and made only of new parts.

5. The corporate respondent sells in interstate commerce numerous products made in foreign countries and imported into the United States. Some but not all of these products are in evidence as Commission exhibits, i.e., a hole punch; a condensor kit; a stylus pressure gage; a "high efficiency P.M. speaker," a vacuum brush, condensers, and electronic components. Some of these products are enclosed in packages or cartons which are also in evidence. Even though substantially all of the products of foreign origin sold by the corporate respondent in interstate commerce are marked to show the country of foreign origin, some of the markings on the products are so small, or indistinct, or so placed, that they do not give adequate notice to a purchaser concerning the country of foreign origin. In addition, even though some imported products sold by the corporate respondent are labeled to show the foreign country in which the articles are manufactured, some of the containers in which some of said imported products are packaged are not adequately marked to show the foreign origin of the products. As a result prospective purchasers of some of respondents'

imported articles are led to believe and do believe such articles to be of domestic manufacture, unless such purchasers remove the articles from their containers.

6. The corporate respondent's failure to label the products imported by it from foreign countries in a conspicuous, legible and indelible manner, and to label similarly the containers in which said products are packaged and marketed, has had, and will have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such products are of domestic origin, and to induce the purchase of substantial quantities of the corporate respondent's products by reason of said erroneous and mistaken belief. Respondents' failure to indicate conspicuously and clearly to prospective purchasers of their television picture tubes, in advertisements, and otherwise, that said tubes are rebuilt, and that the "envelope" in said tubes is a used "envelope," has had, and has, the capacity and tendency to mislead prospective purchasers of their television picture tubes into the erroneous and mistaken belief that such tubes are made entirely of new parts, when such is not the fact.

7. It is stipulated that a significant number of purchasers of the radio and electronic supplies and equipment, and tools, sold by the corporate respondent in various trade areas would testify, and the examiner hereby finds that such purchasers prefer radio and electronic equipment and supplies, and tools, manufactured in the United States in preference to those manufactured in foreign countries and imported by the corporate respondent into the United States and sold by it in interstate commerce.

8. In the conduct of its business at all times relevant to this proceeding, the corporate respondent has been and is in substantial competition in commerce, with corporations, firms and individuals in the sale of products of the same kind and character as that sold by it.

9. The aforesaid acts and practices of the corporate respondent were and are all to the prejudice and injury of the public, and of the corporate respondent's 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 as amended. Such acts and practices should be proscribed by an appropriate cease and desist order.

The stipulation dated October 9, 1961, filed in this record on February 20, 1962, recites that the selections made by the staff of the Federal Trade Commission of the corporate respondent's products which are not adequately labeled as to foreign origin

. . . represent only a few out of perhaps 500 or more items which respondents sell and which are in whole or in part of foreign origin. * * * Respondents instruct all suppliers to properly mark goods of foreign origin and have made numerous trips abroad to supervise and instruct as to the marking as well as personally inspecting markings to be made for the purpose of attempting to insure marking of all such goods to comply with relevant Federal Statutes.

This Commission has held in *Oxwall Tool Co., Ltd.*, Docket No. 7491, Commission's Decision of December 26, 1961:

. . . Respondent's duty to clearly disclose foreign origin is not satisfied by marking the majority or even 90 percent of their products. All of them must disclose their origin if they are not of domestic manufacture.

Section 304 of the Tariff Act of 1930, *inter alia*,[1] provides that every article of foreign origin or its container imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit, in such manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. When articles and their containers are not so marked, members of the purchasing public assume and believe such articles to be of domestic origin.

Respondents' counsel has, at all times during the pendency of this proceeding, represented that respondents desire to be in compliance with pertinent law. His concern has been that a cease and desist order might impose burdens upon the respondents as to foreign origin labeling which they may not be able to meet, even though (as stated in part of the stipulation quoted above) they have done everything within their power to comply. If the corporate respondent sells in interstate commerce imported merchandise which presents insurmountable difficulties in complying with the foreign labeling laws, its responsible officials must choose between complying with the law or dropping such merchandise from their product line. The injury to the public is just as real whether failure to disclose the foreign origin of a product results from intentional fault, inadvertence, or difficulty of compliance. The implied misrepresentation that the television picture tubes sold by the corporate respondent are new in all respects is likewise equally injurious to prospective purchasers whether made through oversight or by design.

It is therefore ordered, That the respondent Olson Radio Corporation, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of imported

[1] 19 U.S.C.A. 1304 (46 Stat. 590). See also President Kennedy's Message on Trade of January 25, 1962, to the Congress of the United States: "Increased imports stimulate our own efforts to increase efficiency, and supplement anti-trust and other efforts to secure competition. * * *"

merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing legibly and indelibly in a conspicuous place on the products themselves the country of origin thereof, or

2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured, without clearly disclosing legibly and indelibly the country of origin of the products in a conspicuous place on the container or attachment; and

It is further ordered, That respondent Olson Radio Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of articles of merchandise, including television picture tubes, in commerce, as "commerce" is defined in the Federal Trade Commission Act, disclose in a clear and conspicuous manner on the articles and on their containers that all of said articles of merchandise, including television picture tubes, are manufactured in whole or in part from used components, when such is the fact; and

It is further ordered, That paragraphs 6(3), 7, 8, 9, 10 and 11 of this amended and supplemental complaint be and they hereby are dismissed as to the individual respondents Irving Olson, Sidney Olson, and Albert Schultz.

FINAL ORDER

The Commission on May 9, 1962, having issued its order granting respondent Olson Radio Corporation leave to file objections to the Commission's tentative order to cease and desist as set forth therein in modification of the order to cease and desist contained in the hearing examiner's initial decision filed March 7, 1962, entitled "Initial Decision As To Paragraphs Six (3), Seven, Eight, Nine, Ten and Eleven"; and

Respondent having been served with said order of May 9, 1962, and not having filed objections to the tentative order to cease and desist within the time granted in said order; and

The Commission having determined that said tentative order to cease and desist should be adopted as the final decision of the Commission:

It is ordered, That the order contained in the hearing examiner's initial decision, entitled "Initial Decision As To Paragraphs Six (3),

Seven, Eight, Nine, Ten and Eleven", be, and it hereby is, modified to read as follows:

It is therefore ordered, That the respondent Olson Radio Corporation, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of imported merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing legibly and indelibly in a conspicuous place on the products themselves the country of origin thereof.

2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured, without clearly disclosing legibly and indelibly the country of origin of the products in a conspicuous place on the container or attachment; and

It is further ordered, That respondent Olson Radio Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, 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. Representing, directly or by implication, that said television picture tubes are new.

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

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

It is further ordered, That Paragraphs Six (3), Seven, Eight, Nine, Ten and Eleven of this amended and supplemental complaint be, and they hereby are, dismissed as to the individual respondents Irving Olson, Sidney Olson, and Albert Schultz.

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

Complaint

IN THE MATTER OF

ARROW FOOD PRODUCTS, INC., ET AL.

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

Docket 8212. Complaint, Dec. 7, 1960—Decision, June 26, 1962

Consent order requiring Dallas, Tex., wholesalers of dried beans and peas and other food products which they purchased and packaged under the trade names "Arrow" and "Rose" and private brands and sold to distributor-customers principally in the southwest and southeast, to cease discriminating among such purchasers in violation of the Clayton Act by:

I. Such practices as giving to certain large retail chains and wholesalers (1) one case free with each 10 purchased, (2) so-called "advertising" and "promotional" allowances for which no services were rendered, and (3) special selling terms and conditions of sale such as trucking allowances, cash discounts, and advance notice of price changes of as much as 30 days, in violation of Sec. 2(a);

II. Making to a limited number of large purchasers allowances for advertising their products in catalogs, price lists, and on radio; paying "push money" to customers' salesmen; and making allowances for promotions of their products at new retail store openings and for other special promotions, in violation of Sec. 2(d); and

III. Furnishing only to certain large purchasers special packaging in connection with aforesaid promotions, and prizes in the form of their products for special promotional contests, in violation of Sec. 2(e); and,

With regard to the alleged violation of Sec. 5, of the Federal Trade Commission Act covered by Count IV of the complaint, to cease representing falsely that their food products conformed to standards established by the U.S. Department of Agriculture.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents named in the caption hereof and hereinafter more particularly designated and described have violated the provisions of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C Title 15, Sec. 13), and Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent Arrow Food Products, Inc., is a corporation organized, existing and doing business under and by virtue

of the laws of the State of Texas with its principal office and place of business located at 5051 Sharp Street, Dallas, Tex.

Respondents Markus Rosenberg, Emanuel Rohan and David Rosenberg are brothers and are President, Vice President and Secretary-Treasurer, respectively, of the corporate respondent, with their addresses the same as that of the corporate respondent. These individual respondents formulate, direct and control the policies, acts and practices of the corporate respondent.

The individual respondents first started business as a partnership in Dallas, Texas, in 1950. On June 5, 1956 they incorporated under Texas law and the name Arrow Spice and Food Company, Inc., was adopted. On December 16, 1958, a charter amendment was made, changing the corporate name to Arrow Food Products, Inc.

PAR. 2. Respondents are now, and for some years last past have been, engaged in the wholesale distribution of spices, dried fruits, candies, dried beans and peas and other food products. Respondents' sales for 1958 were approximately $4,600,000, most of which were in the sale of various types of dried beans and peas (hereinafter referred to as "dried beans").

Respondents buy dried beans from growers and shippers located in various States, principally California, Colorado, and Michigan. Respondents process and package these dried beans and sell them under the trade names "Arrow" and "Rose", and under private brands, to food distributors located in several States within the United States, principally in the Southwest and Southeast sections of the country, including Texas, Arkansas, Tennessee, Mississippi, Alabama and Louisiana, among others. These food distributor-customers include principally wholesalers, wholesaler-retailers and retail grocery chains, among others.

PAR. 3. In the course and conduct of their business, respondents are now, and at all times mentioned herein have been, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and in the Federal Trade Commission Act, by virtue of purchasing their products in various States of the United States and, after processing and packaging them, transporting said products, or causing them to be transported, from their place of business in the State of Texas to customers with places of business located in the State of Texas and other States of the United States.

PAR. 4. In the course and conduct of their business, respondents are now, and at all times mentioned herein have been, in substantial competition with other corporations, partnerships, individuals and firms engaged in the packaging and processing of comparable products

for resale and distribution to the wholesale and retail food products trade.

Many of the wholesale purchasers of respondents' products are competitively engaged with each other in the resale of said products; many of the retail purchasers of respondents' products are competitively engaged with each other in the resale of said products; and many of respondents' wholesale purchasers resell to retail outlets who are competitively engaged with one another and with respondents' direct buying retail customers.

PAR. 5. Respondents, in the course and conduct of their business, as aforesaid, have been, and now are, discriminating in price, directly or indirectly, between different purchasers of dried beans by selling such products of like grade and quality to some of their purchasers at substantially higher prices than to other of their purchasers.

PAR. 6. Respondents have been, and now are, effecting said discriminations in price in the sale of dried beans between and among their customers by many methods and means, some, but not all, of which are more particularly described as follows:

(a) Allowances in the form of free goods generally, but not always, consisting of one case free with each ten purchased.

(b) So-called "advertising allowances" in varying amounts, such as six or ten cents per case, for which services are neither required by respondents nor rendered by the purchaser.

(c) So-called "promotional allowances" in varying amounts, such as fifteen, twenty, twenty-five or fifty cents per case, for which services are neither required by respondents nor rendered by the purchaser.

(d) Special terms and conditions of sale, including, but not limited to, drayage or trucking allowances in varying amounts; cash discounts in varying amounts and with varying payment terms, and advance notice of price changes to some customers, of as much as thirty days, with either shorter or no advance notice to other customers.

Among customers receiving some or all of such price reductions are:

(1) *Merchants Company, Jackson, Mississippi.* A wholesale grocery company selling to retailers within a sixty mile radius of Jackson, Mississippi.

(2) *McCarty-Holman Company, Jackson, Mississippi.* A wholesale grocery company which owns fourteen retail outlets located in Mississippi, known as Jitney Jungle Stores. This company also sells at wholesale to many independent retail customers operating under the Jitney Jungle Stores franchise, as well as to other retail customers, all located principally in Mississippi.

(3) *Liberty Cash Grocery Company, Memphis, Tennessee.* A wholesale grocery company selling to retailers located principally in Arkansas, Tennessee, Louisiana and Mississippi.

(4) *National Tea Company.* A national chain of retail food stores. Respondents sell their products thereto for distribution to National Tea retail outlets located principally in Tennessee, Alabama and Mississippi.

(5) *The Kroger Company.* A national chain of retail food stores. Respondents sell their products thereto for distribution through the Child's Big Chain Division to Kroger retail stores located principally in Arkansas, Louisiana and Texas.

(6) *Operator's Warehouse, Inc.* A wholesale grocery company located in Shreveport, Louisiana, selling principally to independent franchised Piggly-Wiggly retail stores located principally in Arkansas, Mississippi, Texas and Louisiana.

(7) *W. B. Mallory & Sons, Memphis, Tennessee.* A wholesale grocery company selling to independent retail outlets located principally in Arkansas, Tennessee and Mississippi.

(8) *Lewis Grocer Company, Indianola, Mississippi.* A wholesale grocery company which owns twelve retail outlets, known as Sunflower Food Stores, located in Mississippi and Arkansas. This company also sells at wholesale to approximately twenty-three franchised Sunflower Food Stores in various States, which are independently owned retail outlets, and to about 475 other independent retail outlets located principally in Mississippi, Tennessee, Arkansas and Louisiana.

Respondents' discriminations in price vary in amount or terms and conditions of sale among and between the above-named customers. In addition, the great majority of respondents' more than 300 customers are smaller wholesale grocery companies than those wholesale grocery companies designated above and they receive no such price reductions at all or, if so, receive them in lesser amounts or on less favorable terms and conditions of sale than the above-named customers.

PAR. 7. The effects of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and their customers are respectively engaged, or to injure, destroy or prevent competition with respondents or with purchasers therefrom who receive the benefits of such discriminations, or with customers of either of them.

PAR. 8. The aforesaid acts and practices of respondents constitute violations of the provisions of subsection (a) of Section 2 of the

Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13).

COUNT II

PAR. 9. The allegations of paragraphs 1 through 4 of this complaint are hereby adopted and incorporated herein by reference and made a part of Count II as if they were repeated herein verbatim.

PAR. 10. In the course and conduct of their business in commerce, and at all times mentioned herein, respondents have paid, or contracted for the payment of, something of value to or for the benefit of some of their 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 said respondents, and such payments were not made available on proportionally equal terms to all customers competing in the resale and distribution of respondents' products.

PAR. 11. The payments as alleged in paragraph 10 are made by various methods and means including, but not limited to, the following:

(a) Allowances for advertisements of respondents' products in catalogs, price lists, and on radio.

(b) "Push money" paid directly to customers' salesmen for services performed by the latter in promoting the sale of respondents' products.

(c) Allowances for the promotion of respondents' products at new retail store openings, either in the form of money or free goods.

(d) Payments for special promotions of respondents' products, such as the 1959–1960 Sugar Bowl contest whereby the winner was awarded a free trip to New Orleans, Louisiana, for the annual Sugar Bowl events.

Compensation or allowances for the foregoing illustrative services or facilities were made to a limited number of large purchasers, including Lewis Grocer Company, Indianola, Mississippi, a wholesale-retail customer, and Liberty Cash Grocery Company, Memphis, Tennessee, and W. B. Mallory & Sons Co., Memphis, Tennessee, wholesale customers, among others. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to other customers competing with the favored customers in the resale and distribution of respondents' products.

PAR. 12. The acts and practices of respondents as alleged in paragraphs 10 and 11 above in Count II violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

COUNT III

PAR. 13. The allegations of paragraphs 1 through 4 of this complaint are hereby adopted and incorporated herein by reference and made a part of Count III as if they were repeated herein verbatim.

PAR. 14. In the course and conduct of their business in commerce, and at all times mentioned herein, respondents have discriminated in favor of some purchasers and against other purchasers of their products brought for resale by contracting to furnish or furnishing services or facilities connected with the handling, resale, or offer for resale of such products so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

PAR. 15. The services or facilities accorded in a discriminatory manner as alleged in paragraph 14 include, but are not limited to, the following:

(a) Special packaging in connection with the promotion of respondents' products, such as the 1959–1960 Sugar Bowl promotion contest.

(b) Prizes, in the form of respondents' products, for special promotional contests.

The foregoing illustrative services or facilities were accorded to a limited number of large purchasers, including Lewis Grocer Company, Indianola, Mississippi, a wholesale-retail customer, and W. B. Mallory & Sons Co., Memphis, Tennessee, a wholesale customer. Such services or facilities were not offered or otherwise made available or furnished on proportionally equal terms to other purchasers competing with the favored purchasers in the resale and distribution of respondents' products.

PAR. 16. The acts and practices of respondents as alleged in paragraphs 14 and 15 above in Count III violate subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

COUNT IV

PAR. 17. The allegation of paragraphs 1 through 4 of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count IV as if they were repeated herein verbatim.

PAR. 18. In the course and conduct of their business in commerce, and at all times mentioned herein, respondents have pursued a course of conduct by which they represent, through labels and otherwise, that their food products conform in quality or type to standards established for the industry by the United States Department of Agricul-

ture, when in fact respondents' products do not at all times conform to such quality or type standards.

Such misrepresentations in the offering for sale, sale and distribution of respondents' products are illustrated by the following examples, among others:

(a) In 1959, the State of Texas issued an invitation to bid on dried beans of United States Department of Agriculture Grade No. 1 (U.S.D.A. Grade No. 1) quality. Respondents were awarded the contract on U.S.D.A. Grade No. 1 Blackeye Peas, having submitted the lowest bid thereon. Deliveries were subsequently made pursuant to such contract, at which time, or times, respondents certified that the products were of U.S.D.A. Grade No. 1 quality. Subsequent tests by the United States Department of Agriculture at the request of the State of Texas disclosed that such products were actually U.S.D.A. Grade No. 3, an inferior quality to U.S.D.A. Grade No. 1.

(b) In 1956, respondents sold dried beans known in the trade as "Michigan Peas" under labels designating them as California small white beans, a type of dried bean which resells at a higher price than the aforesaid Michigan type.

PAR. 19. The acts and practices of respondents, as alleged in paragraph 18 of Count IV, 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. James P. Timony supporting the complaint.

Mr. William L. Keller of *Clark, Reed & Clark*, of Dallas, Tex., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 7, 1960, charging in four separate counts, violations respectively of subsections (a), (d) and (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), and of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45).

On August 14, 1961, the parties filed with the Secretary of the Federal Trade Commission a notice advising him that they wished to avail themselves of the privilege of disposing of this proceeding by a consent order.

An agreement dated April 24, 1962 and duly executed by respondents, their counsel, and counsel supporting the complaint was on

May 11, 1962 submitted to the undersigned because of proceedings in the matter heretofore had before him.

The agreement provides for the entry without further notice of a consent order and was duly approved by the Directors of the Bureaus of Restraint of Trade and Deceptive Practices and by the Chief of the Division of Discriminatory Practices.

The hearing examiner finds that said agreement includes all of the provisions required by Section 3.25(b) of the Rules of the Commission, that is:

A. An admission by respondents of all jurisdictional facts alleged in the complaint.

B. Provisions that:

1. The complaint may be used in construing the terms of the order;

2. The order shall have the same force and effect as if entered after a full hearing;

3. 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;

4. The entire record on which any cease and desist order may be based shall consist solely of the complaint and the agreement;

5. The order may be altered, modified, or set aside in the manner provided by statute for other orders.

C. Waivers of:

1 The requirement that the decision must contain a statement of findings of fact and conclusions of law;

2 Further procedural steps before the hearing examiner and the Commission;

3 Any right to challenge or contest the validity of the order entered in accordance with the agreement.

In addition the agreement contains the following provisions:

A. A statement that the signing of 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.

B. This agreement disposes of all of this proceeding as to all parties. All parties agree that the allegations of discriminations in price insofar as they relate to primary line injury, as set forth in paragraphs 5 and 6, Count I, of the complaint, and the alleged effects thereof insofar as they relate to primary line injury, as set forth in paragraph 7, Count I, of the complaint, be dismissed. From the information in the files and the investigational report, and facts discovered subsequent to the issuance of the complaint, there can be gleaned no evidence that respondents engaged in systematic price differences through territorial

price discrimination. Furthermore, the facts in this case show that if there was injury to the primary line it was caused by discriminations between competing purchasers in the secondary line of commerce. Therefore, any injury to the primary line which has resulted from respondents' price discriminations will be effectively remedied by an order which prohibits discriminations between competing purchasers.

Having considered said agreement, including the proposed order, and being of the opinion that it provides an appropriate basis for settlement and disposition of this proceeding; the hearing examiner hereby accepts the agreement but orders that it shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The following jurisdictional findings are made and the following order issued:

1. Respondent Arrow Food Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its principal office and place of business located at 5051 Sharp Street, in the city of Dallas, State of Texas.

2. Respondents Marcus Rosenburg (erroneously named in the complaint as Markus Rosenberg) and David Rosenberg are President and Secretary-treasurer, respectively, of the corporate respondent, with their addresses the same as that of the corporate respondent. Respondent Emanuel Rohan is Vice President and an employee of said corporate respondent, with his address the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondent Arrow Food Products, Inc., a corporation, and its officers, representatives, agents and employees, and respondents Marcus Rosenberg, Emanuel Rohan and David Rosenberg, individually and as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of food 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 one purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale and distribution of the respondents' products with the purchaser, or the customer of the purchaser, paying the

higher price. "Net" price as used in this order shall mean the ultimate net cost to the purchaser.

2. Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondents as compensation or in consideration for advertising, promotional, or any other services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of food products processed, manufactured, sold or offered for sale by respondents, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer 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 respondents' food products to any purchaser from respondents of such products bought for resale, when such services or facilities are not accorded, affirmatively offered or otherwise made available on proportionally equal terms to all other purchasers from respondents who resell such products in competition with such purchasers who receive such services or facilities.

It is further ordered, That the allegations of discriminations in price insofar as they relate to primary line injury, as set forth in paragraphs 5 and 6, Count I, of the complaint, and the alleged effects thereof insofar as they relate to primary line injury, as set forth in paragraph 7, Count I, of the complaint, be dismissed.

It is further ordered, That respondent Arrow Food Products, Inc., a corporation, and its officers, representatives, agents and employees, and respondents Marcus Rosenberg, Emanuel Rohan, and David Rosenberg, individually and as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of food products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing that their food products conform in quality or type to standards established for such products by the United States Department of Agriculture, when such is not a fact, or in any other manner misrepresenting the quality, type, origin, or other characteristics of such food products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing

examiner shall, on the 26th day of June 1962, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Arrow Food Products, Inc., a corporation, and Marcus Rosenberg (erroneously named in the complaint as Markus Rosenberg), Emanuel Rohan and David Rosenberg, 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

FRANK A. GORDON TRADING AS GORDON OF CALIFORNIA ET AL.

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

Docket 8443. Complaint, Oct. 3, 1961—Decision, June 26, 1962

Order requiring a San Francisco furrier to cease violating the Fur Products Labeling Act by failing to show on labels and invoices when fur was dyed and the country of origin of imported furs; failing to label fur products with the true animal name of the fur used; and failing to comply in other respects with labeling and invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Frank A. Gordon, an individual trading as Gordon of California, and Ida Gordon, an individual, hereinafter referred to as respondents, have violated the provisions of such Acts and the Rules and Regulations promulgated under the Fur 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 Frank A. Gordon is an individual trading as Gordon of California, with his office and principal place of business at 16 First Street, San Francisco, Calif. Individual respondent Ida Gordon is the wife of, and is employed by, respondent Frank A. Gordon, and has her office at the same address. Both individual re-

spondents formulate, direct, and control the acts, practices and policies of the business.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged, in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, or fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as the terms "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products whose labels failed:

(1) To show the true animal name of the fur used in the fur product;

(2) To disclose that the fur contained in the fur product was dyed, when such was the fact;

(3) To show the country of origin of imported furs used in the fur product.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respect:

(a) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products whose invoices failed:

(1) To disclose that the fur contained in the fur product was dyed, when such was the fact;

(2) To show the country of origin of imported furs used in the fur product.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they

were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. The acts and practices, as set forth above, were and are in violation of the Fur Products Labeling Act 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.

Mr. Bruce T. Fraser supporting the complaint.

Mr. Frank A. Gordon, Mrs. Ida Gordon and Gordon of California, Pro se.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the respondents on October 3, 1961, charging that the respondents violated certain provisions of the Fur Products labeling Act and the Rules and Regulations promulgated thereunder in that certain of the "fur products" were misbranded and falsely and deceptively invoiced in violation of said Act and the Federal Trade Commission Act. A copy of the complaint was served upon respondents who filed an answer thereto admitting all of the material allegations of the complaint and waiving a hearing. Counsel supporting the complaint filed proposed findings, conclusions and order. Respondents, as previously stated, admitted the allegations of the complaint but stated that the violations were unintentional.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer and proposed findings of fact and conclusions filed by counsel supporting the complaint.

Consideration has been given to the proposed findings of fact and conclusions submitted and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. That respondent Frank A. Gordon is an individual trading as Gordon of California with his office and principal place of business located at 16 First Street, San Francisco, Calif. Individual respondent Ida Gordon is the wife of, and is employed by, respondent Frank A. Gordon, and has her office at the same address. Both individual respondents formulate, direct, and control the acts, practices and policies of the business.

2. That subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, repondents have been and are now engaged, in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported or distributed fur products which have been made in whole or in part of fur which had been shipped or received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

3. That certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products whose labels failed:

(A) To show the true animal name of the fur used in the fur product;

(B) To disclose that the fur contained in the fur product was dyed, when such was the fact;

(C) To show the country of origin of imported furs used in the fur product.

4. That certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respect:

(A) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

5. That certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products whose invoices failed:

(A) To disclose that the fur contained in the fur product was dyed, when such was the fact;

(B) To show the country of origin of imported furs used in the fur product.

6. That certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(A) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(B) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

CONCLUSIONS

That the aforesaid acts and practices of respondents, as herein found, were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act, and that this matter is in the public interest.

ORDER

It is ordered, That respondents Frank A. Gordon, individually and trading as Gordon of California or under any other trade name, and Ida Gordon, individually, 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 sale, advertising, offering for sale, transportation or distribution, of fur products, in commerce, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution of fur products which are made in whole or in part of fur which has been shipped and received in commerce as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

(1) Failing to affix labels to fur products showing in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

(2) Failing to set forth on labels affixed to fur products the item number or mark assigned to a fur product.

B. Falsely and deceptively invoicing fur products by:

(1) Failing to furnish purchasers of fur products invoices showing the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

(2) Failing to set forth on invoices pertaining to fur products the item number or mark assigned to a fur product.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective July 21, 1961, the initial decision of the hearing examiner shall, on the 26th day of June 1962, 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

AMERICAN OIL COMPANY

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

Docket 8183. Complaint, Nov. 23, 1960—Decision, June 27, 1962

Order requiring the distributor of "Amoco" and "American" gasoline, selling its products throughout some 25 states, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by such practices as it engaged in in October 1958, when it sold gasoline to certain dealers in and around Smyrna, Marietta, and Rome, Ga., at prices lower than those it charged their competitors.

COMPLAINT

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

PARAGRAPH 1. Respondent American Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located 555 Fifth Avenue, New York, N.Y.

PAR. 2. Respondent is now and for several years last past has been, among other things, engaged in the offering for sale, and distribution of gasoline and other petroleum products throughout some twenty-five states of the United States and the District of Columbia under the brand names of "Amoco" and "American", as follows: Connecticut, Georgia, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Tennessee and Texas.

PAR. 3. Respondent markets its gasoline and other petroleum products in the aforementioned area through its own company-owned and operated stations, as well as under contracts with independent lessee-dealer stations. In the latter category, respondent has entered into dealer contracts with service station dealers, hereinafter referred to as "Amoco" or "American" dealers, now in force and effect, pursuant to the provisions of which respondent sells and delivers to such dealers its "Amoco" and "American" gasolines, according to their requirements and orders.

PAR. 4. For the purpose of supplying said customers, and in making delivery thereto, respondent ships or otherwise transports, or causes to be shipped or otherwise transported, gasolines from its own refineries, as well as others, located in various states across state lines to bulk stations and other distributing points within the twenty-five state area, and the District of Columbia, in which it does business, from which said gasolines are thence sold and distributed to said Amoco retail dealers. There is now and has been at all times mentioned herein a continuous stream of trade and commerce, as "commerce" is defined in the Clayton Act, of said gasolines between respondent's terminals, bulk stations, or other distribution centers and said Amoco dealers purchasing said gasolines in the twenty-five state area and the District of Columbia. All of such purchases by said Amoco retail dealers and sales by respondent to such dealers are and have been in the course of such commerce. Said gasolines, after transportation and delivery into the twenty-five state area and the District of Columbia by respondent, and after sale and delivery by respondent to its Amoco dealers in said states and the District of Columbia, are then offered for resale and sold to motorists and others in the aforementioned area.

PAR. 5. In the course and conduct of its said business in commerce, respondent American has sold, and now sells, its gasolines to purchasers thereof, some of whom have been and now are in competition

with each other in the resale and distribution of such products and with customers of competitors of respondent selling competing brands of gasolines.

Respondent, in the course and conduct of its business, is now and during the times mentioned herein has been in substantial competition with others engaged in the sale and distribution of gasoline and other petroleum products in commerce between and among the aforementioned states and the District of Columbia.

PAR. 6. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasolines of like grade and quality by selling such gasolines to certain of its customers at higher prices than it did to other of its customers. Commencing on or about October 1958, respondent sold gasolines to certain dealers located in and around Smyrna, Marietta and Rome, Georgia, and other areas, at prices lower than the prices charged by the respondent to its other retail purchasers for gasolines of the same grade and quality in the same competitive market area.

PAR. 7. The effect of the aforesaid discriminations, or of any appreciable part thereof, has been or may be substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices, in the resale of such gasolines at retail in the Smyrna, Marietta and Rome, Georgia, areas, and other areas.

PAR. 8. The discriminations in price as hereinbefore alleged are in violation of the provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Rufus E. Wilson, *Mr. Daniel R. Kane*, and *Mr. Americo M. Minotti* for the Commission.

Kirkland, *Ellis*, *Hodson*, *Chaffetz & Masters*, of Chicago, Ill., and *Kirkland*, *Ellis*, *Hodson*, *Chaffetz & Masters*, of Washington, D.C., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The complaint herein was issued by the Commission on November 23, 1960, and charges that respondent has violated Section 2(a) of the Clayton Act, as amended. The complaint alleges that respondent has discriminated in price between different purchasers of its gasolines of like grade and quality by selling such gasolines to certain of its customers at higher prices than to other of its customers. Specifically, the complaint states that commencing on or about October 1958, respondent sold gasolines to certain dealers in and around Smyrna, Marietta, and Rome, Georgia, and other areas at prices

lower than the prices charged by respondent to its other retail purchasers for gasolines in the same competitive market area. The complaint further states that the effect of the discriminations in price alleged has been, or may be, substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices.

Respondent, in its answer, denies that it discriminated in price and denies that the effect of its alleged acts has been, or may be, substantially to lessen competition. It avers that commencing on or about October 1958, it granted certain temporary competitive allowances to dealers in and around Smyrna, Marietta, and Rome, Georgia, that any lower price to any dealer in those areas was made in good faith to meet an equally low price of a competitor, and that any differences in its prices were the result of price changes in response to changing conditions in the market for, or the marketability of, the goods concerned.

Hearings were held at Marietta, Georgia, from April 18 through April 21, 1961, when counsel supporting the complaint rested their case. On the representation of counsel supporting the complaint that everything with respect to the Rome, Georgia area, including the allegations in the complaint with respect to that area, had been excluded from the case, and that counsel were only concerned with "the Smyrna-Marietta, Georgia area," all documents, data, and testimony having to do with areas other than Marietta and Smyrna were stricken from the record and otherwise disregarded.

Respondent filed a motion to dismiss and a further motion to strike, which in due course were denied. Respondent then rested its case on the record theretofore made without presenting any evidence in addition to that introduced during the course of the case in support of the complaint. Thereafter proposed findings of fact, conclusions of law and order, with reasons therefor, were filed by the parties hereto, and oral argument was had thereon.

The hearing examiner has carefully reviewed and considered the proposed findings of fact and conclusions of law, with reasons therefor, and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

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

FINDINGS OF FACT

1. Respondent American Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Maryland, with its principal executive office and place of business located at 555 Fifth Avenue, New York, N.Y., and its principal office located in Baltimore, Md.

2. Respondent is now and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products under the brand names of "Amoco" and "American", throughout some twenty-five states of the United States and the District of Columbia namely: Connecticut, Georgia, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Tennessee, and Texas.

3. Respondent markets its gasoline and other petroleum products in the aforementioned states, except in the State of Georgia, through its own company-owned and operated stations, as well as under contracts with independent lessee-dealer stations. In the latter category, and in the State of Georgia, respondent has entered into dealer contracts with service station dealers, hereinafter referred to as "Amoco" or "American" dealers. The aforesaid contracts are now in force and effect, pursuant to the provisions of which respondent sells and delivers to such dealers its "Amoco" and "American" gasolines, according to their requirements and orders.

4. (a) For the purpose of supplying said customers and in making delivery thereto, respondent ships or otherwise transports, or causes to be shipped or otherwise transported, gasolines from its own refineries, as well as others located in various states across state lines, to bulk stations and other distributing points within the twenty-five state area, and the District of Columbia, in which it does business, from which said gasolines are thence sold and distributed to said Amoco retail dealers.

(b) There is now, and has been at all times mentioned herein, a continuous stream of trade and commerce, as "commerce" is defined in the Clayton Act, of said gasolines between respondent's terminals, bulk stations, or other distribution centers and said Amoco dealers purchasing said gasolines in the twenty-five state area and the District of Columbia. For the purpose of supplying said Amoco dealers and of making deliveries pursuant to said contracts, respondent ships by pipelines, barges and ocean tankers or otherwise transports its gasoline in tank cars, tankers, and trucks from its different refineries, terminals and distribution points, located in various states of the United States, to distributing points within the State of Georgia, and

from there by tank cars or trucks to said Amoco dealers purchasing said gasoline in the Smyrna and Marietta, Georgia, area. All of such purchases by said Amoco dealers are, and have been, in the course of such commerce. Said gasoline is transported into Georgia and sold by respondent to said Amoco dealers for resale in the Smyrna and Marietta, Georgia, area.

5. (a) In the course and conduct of its said business in commerce, respondent has sold, and now sells, its gasoline to purchasers thereof, some of whom have been, and are now, in competition with each other in the resale and distribution of such products and with customers of competitors of respondent selling competing brands of gasoline.

(b) Respondent, in the course and conduct of its business, is now and during the times mentioned herein, has been in substantial competition with others engaged in the sale and distribution of gasoline and other petroleum products in commerce between and among the aforementioned states and the District of Columbia.

6. (a) Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasolines of like grade and quality by selling such gasolines to certain of its customers at higher prices than it sold to its other customers. Commencing on or about October 1958, respondent sold gasoline to certain dealers located in and around Smyrna, Georgia, at prices lower than the prices charged by the respondent to its other retail purchasers for gasolines of the same grade and quality located in and around Marietta, Georgia. The dealers to whom the lower price was given are George Hicks, H. E. Williams, Billy M. Green & James R. Crowder, and J. C. Mitchell, all of whom are located in and around Smyrna, Georgia. The dealers to whom an equal lower price was not given are Hoyt Seagraves, J. T. Smith, F. E. Hitt, L. W. Raines & Billy G. Pitts, and Roy C. Morris, all of whom are located in and around Marietta, Georgia.[1]

(b) The favored dealers located in and around Smyrna, Georgia, are located, according to reliable and probative evidence, in the same competitive market area as the above-mentioned non-favored dealers located in and around Marietta, Georgia.

7. The lower price at which respondent sold its gasoline to said dealers located in and around Smyrna was not granted in good faith to enable the respondent to meet *its* price competition in the competitive marketing area of the gasoline stations operated by the American lessee-dealers in and around Smyrna.

[1] A tabulation based on information contained in Commission exhibits 156(A–B) through 180(A–B), which exhibits consist of respondent's price sheets authorizing competitive

8. The price advantage which respondent granted to dealers located in and around Smyrna, Georgia, did substantially lessen, destroy and prevent the competition of each of the unfavored dealers located in and around Marietta, Georgia, with the dealers receiving lower prices.[2]

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price assistance (CPA) to dealers in Smyrna and Marietta for the period preceding, during and following the price discrimination charged reflects the following:

COMM. EXHIBIT NUMBER	Effective date of CPA	Area and service station (S/S) number	Amount of CPA granted	
			Amoco (premium)	American (regular)
156a-b	8-22-58	Marietta (area No. 1)	----------	0.7
157a-b	9- 4-58	Smyrna (area No. 5)	----------	.7
158a-b	10- 7-58	Smyrna (area No. 1)	0.7	.7
159a-b	10- 7-58	Marietta (area No. 5)	.7	.7
160a-b	10-11-58	Smyrna and S/S 3071 and 7126 (area No. 1).	4.2	4.2
161a-b	10-14-58	Smyrna and RFD, S/S 3071, 7126, 1546 and 1513 (area No. 1).	6.7	6.7
162a-b and 163a-b	10-15-58	Smyrna and RFD, S/S 1513, 1546, 3071 and 7126 (area No. 1).	8.7	8.7
164a-b and 165a-b	10-17-58	Smyrna and RFD, S/S 1513, 1546, 3071 and 7126 (area No. 1).	10.7	10.7
166a-b and 167a-b	10-18-58	Marietta and RFD and S/S 1558 (area No. 5).	3.2	3.2
168a-b	10-20-58	Smyrna and RFD, S/S 1513,1546, 3071, 7126 and 7360 (area No. 1).	11.7	11.7
169a-b	10-21-58	Smyrna and RFD, S/S 1513, 1546, 3071, 7126 and 7360 (area No. 5).	14.7	14.7
170a-b through 173a-b	10-22-58	Marietta and RFD and S/S 1558 (area No. 5).	9.7	9.7
174a-b	10-28-58	Smyrna and RFD, S/S 1513, 1546, 3071, 7126 and 7360 and Marietta and RFD (area No. 5).	4.7	4.7
175a-b through 179a-b	10-29-58	Smyrna and RFD and Marietta and RFD (area No. 5).	4.2	4.2
180a-b	11-13-58	Smyrna and RFD and Marietta and RFD.	1.7	1.7

[2] The contrast in tank wagon prices per gallon (regular gasoline) shown by invoices during the most critical period of the price war, which was approximately from October 14 to October 27, 1958, is illustrated by the following tabulation:

TABULATION OF COMPETITIVE PRICE ALLOWANCES AND TANK WAGON PRICES GRANTED BY RESPONDENT TO DEALERS IN AND AROUND SMYRNA AND MARIETTA FROM OCTOBER 14 TO OCTOBER 27, 1958

Date	Smyrna dealers tank wagon prices	CPA	Marietta dealers tank wagon prices	CPA
	cents		*cents*	
November 14	19.7	(6.7)	25.9	(0.7)
November 15	17.7	(8.7)	25.9	(.7)
November 16	17.7	(8.7)	25.9	(.7)
November 17	15.7	(10.7)	25.9	(.7)
November 18	15.7	(10.7)	23.4	(3.2)
November 19	15.7	(10.7)	23.4	(3.2)
November 20	14.7	(11.7)	23.4	(3.2)
November 21	11.9	(14.7)	23.4	(3.2)
November 22	11.9	(14.7)	16.9	(9.7)
November 23	11.9	(14.7)	16.9	(9.7)
November 24	11.9	(14.7)	16.9	(9.7)
November 25	11.9	(14.7)	16.9	(9.7)
November 26	11.9	(14.7)	16.9	(9.7)
November 27	11.9	(14.7)	16.9	(9.7)

DISCUSSION OF EVIDENCE AND APPLICABLE LAW

1. The Discriminatory Allowances.

The evidence relating to the discriminatory price practices charged reveals that in August and September of 1958, and as late as October 7, 1958, dealers located both in and around Smyrna and Marietta were receiving a similar competitive price allowance of $\frac{7}{10}¢$ per gallon, regardless of the fact that Smyrna is designated by respondent as being in Area #1 and Marietta as being in Area #5. Under normal market conditions, therefore, as they existed prior to October 7, 1958, the dealers located both in and around Smyrna and Marietta were treated equally by respondent in that the amount of competitive price allowance (CPA) was granted to them on an equal basis.

However, on October 11, 1958, respondent increased its competitive price allowance from $\frac{7}{10}¢$ to 4.2¢ per gallon on Amoco and American deliveries to its dealers in Smyrna only (Area #1). This, according to uncontradicted testimony, was done as a result of the price war which was being waged in Smyrna by Shell Oil against Paraland, a private brand station.

The Marietta dealers continued to receive the $\frac{7}{10}¢$ competitive price allowance per gallon on both grades of gasoline which had been granted to them on October 1, 1958, together with the Smyrna dealers, until October 18, 1958, when they were granted a 3.2¢ per gallon increase. By this time, the favored dealers in and around Smyrna were receiving a competitive price allowance of 10.7¢ per gallon. The record shows that their competitive price allowance was continuously and increasingly raised from 4.2¢ to 6.7¢ per gallon on both grades of gasoline on October 14, 1958. On October 17, the day before the unfavored Marietta dealers received their 3.2¢ competitive price allowance, the Smyrna dealers' competitive price allowance was again increased to 10.7¢ per gallon on both grades of gasoline. On October 21, 1958, the favored dealers in Smyrna received an additional 4¢ increase in competitive price allowance, thus bringing their total competitive price allowance at this time up to 14.7¢ per gallon on both grades of gasoline. Meanwhile, the unfavored Marietta dealers did not receive until the following day, October 22, 1958, a 9.7¢ per gallon allowance. Up to this time, the unfavored Marietta dealers' competitive price allowance had remained at 3.2¢ per gallon. Thus the record discloses that the 14.7¢ per gallon competitive price allowance to favored dealers located in and around Smyrna and the 9.7¢ per gallon competitive price allowance to favored dealers located in and around Marietta were the maximum discounts which both groups of dealers ever received during

the period in issue. This resulted in a discrimination in price of 5¢ per gallon on both grades of gasoline. In this connection the evidence establishes that a discount of 1¢ is an important factor in competing or meeting competition in the retail sale of gasoline. A discriminatory 5¢ per gallon allowance could therefore be disastrous to competition and it apparently was since business according to the testimony was diverted to dealers who received the most favorable allowances.

2. The Relevant Geographic Market.

On October 21, 1958, respondent changed Smyrna from Area #1 to Area #5. Thus, the dealers located in and around Smyrna it would seem were designated as being in the same geographic market as the dealers in and around Marietta. Other reasons evidenced are not suggestive of plausibility.

The non-favored Marietta dealers testified that during the time of the price war, they failed to receive an appropriate competitive price allowance from respondent as would place them in a position that would enable them to lower their selling prices to meet the competition of the favored dealers in Smyrna. This evidence suggests that these dealers recognized both Smyrna and Marietta were in the same competitive market.

Dealer Anderson of Marietta testified that the lower prices being posted by his Smyrna competitors, including Mr. George Hicks (an Amoco dealer nearest Marietta), during the price war cut his gasoline sales at least in half. This competitive effect would also suggest both municipalities were a part of the same market.

That Smyrna and Marietta, Georgia, four miles apart, consist of one competitive area is further supported by the fact that the pattern of traffic flow in and around Smyrna and Marietta, Georgia, is such that motorists traveling from Marietta to Smyrna and vice versa and also to and from industrial plants in this area have ready access to all of the favored Smyrna stations.

In connection with the inter-community proximity of Amoco gasoline stations, dealer Anderson, whose Amoco station is located on Route 3, or old Route 41, in Marietta, testified that the George Hicks Smyrna station is located only about a mile and a quarter from his station. Dealer Smith, another Amoco dealer, testified that his station was only about two miles from the George Hicks station.

The two communities also appear to be inseparable competitively because of shopping facilities. Testimony by dealers Seagraves, Smith, and Anderson, indicates that the large Belmont Hills Shopping Center, which is located in Smyrna and close to the favored George

Hicks station, is the only shopping center of size which, because of its location, is used by residents of both Smyrna and Marietta. Dealer Anderson further testified that the George Hicks station was located between his station and the Belmont Hills Shopping Center. Dealer Seagraves also testified that he had customers from Smyrna and Marietta who travel to Smyrna by way of the Smyrna-Roswell Road adjoining his station. This road leads into old Route 41 in Smyrna and the Belmont Hills Shopping Center. That the goods marketed and prices of one community must necessarily affect the other competitively is clearly evident.

3. Meeting Competition in Good Faith.

Respondent advances as an affirmative defense that its prices to dealers were reduced in good faith to meet competition. Counsel in support of the complaint contends that (1) this was arbitrarily done without regard to meeting an individual competitive situation, (2) that the defense is not available under the facts herein since the price reduction was to meet the buyer's competition (i.e., gasoline dealers' competition and not the seller's competition), and (3) the price reduction was not in good faith to meet competition since the competition met was not lawful.

Section 2(a) of the Clayton Act requires a seller to charge uniform prices to competing purchasers; proof of a price discrimination is essential in establishing a prima facie violation of Section 2(a). A price difference is the primary element of price discrimination. *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1960, 363 U.S. 536, 80 S. Ct. 127, 74 L. Ed. 2d 1385. As the Seventh Circuit pointed out in Anheuser-Busch on remand, "the Supreme Court, at 553 disclaimed any flat prohibition of price differentials, recognizing that price differentials constitute but one element of a Section 2(a) violation. *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1961, 289 F. 2d 835." *Sun Oil Company* v. *Federal Trade Commission*, No. 17658, (5th Cir.) U.S. Court of Appeals, July 24, 1961, decided July 24, 1961 (F.T.C. Docket 6641). Other parts of the statute allow price reductions which meet established criteria; the Act clearly places emphasis on meeting individual competitive situations in establishing permissible reduced prices.[3]

Section 2(b) of the Act, on which American relies, allows a seller, in an individual competitive situation, to rebut a prima facie violation of Section 2(a) by showing that his "lower price * * * was made in

[3] *Federal Trade Commission* v. *Staley*, 1945, 324 U.S. 746, 753, 65 S. Ct. 971, 89 L. Ed. 1338.

good faith to meet an equally low price of a competitor". This proviso creates a substantive defense or "justification" that overrides the importance of any competitive injury and is absolute in nature.[4] The Section 2(b) defense raises a question of fact in each case as to whether the competition justifies the discrimination.[5]

In *Enterprise Industries, Inc.* v. *Texas Co.*, D.C. Conn., 1955, 136 F. Supp. 421; rev'd on other grounds, 2 Cir., 1957, 240 F. 2d 457; *cert. den.*, 1957, 353 U.S. 965, 77 S. Ct. 1048, 1 L. Ed. 2d 915, the plaintiff operated a Texaco station selling gasoline purchased only from the defendant, Texas Company. The plaintiff's station, near Hartford, Connecticut, on a well-traveled interstate highway, competed with other stations on the highway for the business of transient motorists, and it also competed for local business with nine stations off the highway selling Texaco. Hartford gas stations were in a price war. Texas Company, under the spur of declining sales, made price allowances to both local and highway Texaco dealers in the gas war area on condition that they match (but not undercut) the prices of their competitors selling rival brands. The amount of the allowance depended on the prevailing neighborhood price. The price in Hartford was lower than it was on the highway, so that Texas Company sold to its Hartford dealers at a lower price than it sold to the plaintiff. The plaintiff sued for treble damages for price discrimination under Section 2(a). The district court rejected the meeting competition defense, holding that by granting a price differential between purchasers who competed with each other Texas Company violated Section 2(a) of the Act.[6]

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[4] *Standard Oil Co.* v. *Federal Trade Commission,* 1951, 324 U.S. 746, 71 S. Ct. 240, 95 L. Ed. 239.

[5] Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it "shall prevent" discriminations in price made in good faith to meet competition. The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong. 2d Sess., pp. 6, 7; see also the statement of Representative Utterback, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418. *Federal Trade Commission* v. *Staley Mfg. Co.,* 1945, 324 U.S. 747, 752, 65 S. Ct. 971, 89 L. Ed. 1338.

[6] In *Enterprise* the district court pointed out that the burden was on Texas Company to prove the price of its competing refiner. There was no evidence of such price and none that the Texas Company's prices were not lower than its competitors. Further, there was no evidence that the prices of the competitors were lawful prices. The defense of meeting competition failed on these grounds. The district court did not rule on whether a supplier was meeting his competition in giving an allowance to a dealer who also had competition to meet. That was not the case before it.

On appeal the Second Circuit did not reach the substantive issue, dismissing the case on the ground that the plaintiff had failed to prove the amount of its injuries. Nevertheless, Judge Hand, speaking for the Court, seemed to take it for granted that the supplier's action was the natural and lawful response to a price raid from a competitor. He said:

"It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war'; that is to cut the prevailing price of gasoline, which other com-

The district court stated:

Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company. In view of the short term station and equipment leases in effect with some stations, perhaps it is a fiction to speak of price competition at the oil company sale to the station level. That is the competitive level at which the justification is provided for defendant in the Act however. The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet price competition, but only to enable the seller to meet a lawful price of the seller's competitor. (136 F. Supp. 421)

However, referring to the *Enterprise* case, the United States Court of Appeals for the Fifth Circuit in its review of *Sun Oil Company* v. *Federal Trade Commission*, No. 17658, decided July 24, 1961 (F.T.C. Docket 6641) states:

Nevertheless the district court was fully aware of the status of its approach, as is evident from the court's admission that it is a "fiction to speak of price competition at the oil company sale to the station level"; a filling station operator carrying a brand-name gasoline does not buy from several competing oil companies.[7] Inherent in the court's conclusion is the notion that although a supplier's product competes with the products of other suppliers for the motorists' trade a supplier is not in competition at the consumer level—even with a supplier-retailer; or, if he is, the Act ignores it. * * *

To our way of thinking, the court's approach in Enterprise, and the Commission's doctrinaire approach here are inconsistent with the view of gasoline marketing taken in the "Detroit" opinion, *Standard Oil Company* v. *Federal Trade Commission*, 1951, 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239.[8] Standard Oil of Indiana, to meet a competitor's price, sold gasoline to four wholesalers, jobbers, in the Detroit area at a lower price than it charged its retail dealers. The

peting stations must meet by a corresponding cut in order to keep up their sales; and that makes it important for the producing companies to reduce their prices to their own competing stations." (240 F. 2d 457, 458)

[7] 'W. W. Wright, 35 years with Sun, Sales Manager and Vice President of Sun, testified: "I would say all gasoline is sold to the public through stations operating or handling one brand of gasoline."

'Although the Standard Stations and Richfield cases dealt primarily with exclusive dealing in gasoline, there is in fact little future in the attempt to have stations handle more than one brand. "Split pump stations," as they were called, were formerly quite common, but defects of the system caused most of them to disappear. As early as 1931 two surveys showed 85 and 95 percent of motorists expressing themselves as opposed to it, primarily out of fear that the dealer would substitute the second brand for the desired one. Not only did dealers find that handling one brand required less investment and less bookkeeping, but six out of seven felt that it actually increased sales. As to suppliers, they naturally dislike operating through dealers whose lack of special enthusiasm for their own brand is obvious to the customer.'

[8] 'The canons of construction applied by the Supreme Court in the 1951 "Detroit" opinion are the direct antitheses of those employed by the District Court in Enterprise, Steed, Antitrust Problems Under Price War Conditions, Southwestern Institute on Antitrust Laws, 77, 100 (1958). (It should be pointed out that Steed is an attorney for the Texas Company).'

'The Enterprise view of the good faith defense is in sharp contrast with that expressed by the Supreme Court in *Standard Oil Co.* v. *FTC.* Note, The Good Faith Defense of the Robinson-Patman Act, 66 Yale L. J. 935, 938 (1957).'

jobbers passed on this saving to their customers who were able to undercut retail dealers buying directly from Standard Oil. The Commission took the position that section 2(b) merely allowed rebuttal of a prima facie case, and was not a substantive justification of an otherwise unlawful price discrimination. The Supreme Court held that section 2(b) good faith defense was absolute even though a substantial lessening of competition might result, and remanded the case to allow Standard "to show that its lower price to each jobber was made in order to retain that jobber as a customer and in good faith to meet an equally low price offered by one or more of its competitors." 340 U.S. 231, 236. The case is distinguishable on the facts, but the Court was acutely aware of the interaction of competition at various levels and recognized the validity of the defense even though the price differential would have an injurious effect on competition among the supplier's dealers and the dealers' purchasers:

"It must have been obvious to Congress that any price reduction to any dealer may always affect competition at the dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller." 340 U.S. 231, 250.

The "actual core of the defense," the Supreme Court stated, "still consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." 340 U.S. 231, 242. Here, there is no doubt that Super Test's prices threatened "to deprive" Sun of McLean as a customer. They did in fact deprive Sun of McLean as a customer. And they deprived Sun of sales, through McLean, to the motoring public. "Clearly, a seller's need for a lower price in response to a decrease in his sales is the same whether the decrease occurs because his purchasers switch to a price cutting competitor or because [his purchasers] are unable to protect their share of the retail market from distributors of a rival product." [9]

The Federal Trade Commission [10] and Senate Subcommittee on Retailing, Distribution and Fair Trade [11] have endorsed the *Enterprise* decision [12] as distinguished from the concept enunciated by the Circuit Court of Appeals in the *Sun Oil* case. Thus it would ap-

[9] Note. The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 939 (1957). See also Casady & Jones, The Nature of Competition in Gasoline Distribution at the Retail Level, 79–92, 122–38 (1951).

[10] Hearings Before the Subcommittee on Retailing, Distribution, and Fair Trade of the Senate Committee on Small Business, 84th Cong., 1st Sess. and 2d Sess. pt. 3, at 450, 458 (1956). See also *Pure Oil Co.*, F.T.C. Dkt. No. 6640 (complaint filed September 26, 1956).

[11] S. Rep. No. 2810, 84th Cong., 2d Sess. 20, 28–29 (1956).

[12] The position taken by the Commission in the *Enterprise* case represents a shift in its views. Before 1956, the Commission's position appears to have been similar to those enunciated in the *Sun Oil* case. See testimony of Gwynne, Chairman, Federal Trade Commission, before the Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, "To Amend Section 2 of the Clayton Act" Hearings, 84th Cong. 2d Sess. (1956), p. 229–232; cf. ibid., p. 89–92. In 1956 the Senate Sub-Committee on Retailing, Distribution and Fair Trade endorsed views similar to those now held by the Commission. S. Rep. No. 2810, 84th Cong. 2d Sess. 20, 28–29 (1956).

pear that under the Commission's policy the Clayton Act 2(b) defense is not available to respondent since the proof indicates respondents price reduction was to meet its customers competition and not its own competition at the seller level. As pointed out by the court in the *Enterprise* case, "* * * * The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet competition, but only to enable the seller to meet a lawful price of the seller's competitor." The language of the statute itself is clear in this respect since the defense is permitted if the lower price is "to meet an equally low price of a competitor." Meeting the price of a competitor is distinctly different than meeting competition.

In the *Sun Oil* case, the Circuit Court of Appeals' decision not only opens the door to economic inequities, which the Clayton Act purports to prevent, but also interprets Section 2(b) in a manner that clearly makes it ambiguous. Under the legal theory enunciated by the Circuit Court of Appeals in its Sun Oil interpretation, a seller may not only adjust the price to meet the price of other sellers who are his competitors, but he may adjust his price to meet any competition with his product at any market level regardless of whether or not his seller competitor's price is the cause requiring him to meet competition. This approach if generally applied to construction could become economically disastrous. If the concept is inconsistently applied to different business situations and fictional relationships between sellers and customers, it would make the 2(b) defense provision incapable of foreseeable construction despite the present clarity of this part of the statute and its economic soundness. Such an interpretation of Section 2(b) is unrealistic and violates the rule of required reasonable statutory construction.

Under a general application of the Fifth Circuit's concept no independent retailer can successfully challenge price-wise an independently operated major station because, if the lower price is successful in substantially diverting business, the major station operator can call upon his nationally established supplier and make use of its power and size to wage a price war, obviously detrimental to the independent and competing purchaser-resellers of the same major supplier. This theory also gives a major supplier the opportunity to subsidize an inefficient retailer to the detriment of other efficient retailers, and inhibits the use of a lower price which reflects sound, lower-cost methods of merchandising.

Under the *Enterprise* concept adopted by the Commission as its policy, respondent has completely failed to establish that its 2(b) defense has merit, since the evidence, even assuming it does reflect a

meeting of competition, does not reflect that the competition met is at the gasoline supplier level. Furthermore the proof does not establish as evidenced in the *Sun Oil* case that there was not a price the respondent could meet at the supplier level since the competing suppliers were the retailers. In fact there is no evidence whatsoever of what the individual competitive situations were that respondent made an effort to meet at the supplier or dealer level. The respondent, therefore, is also precluded from prevailing in a Section 2(b) defense under the specific facts of the *Sun Oil* case if the Circuit Court's opinion is to be construed in the light of those facts only.[13]

Regardless of whether or not one accepts the concept enunciated in the *Enterprise* case, *supra*, or the *Sun Oil* case, *supra*, the respondent as heretofore stated has not adequately sustained its required burden of proving its price reductions were in good faith to meet individual competitive situations, as required in the *Staley* case.[14] Such affirmative proof must be explanatory of each and every competitive situation and reflective of the competitive price met, when met, where met and the circumstances indicative of good faith in meeting competitors prices as distinguished from meeting prices known to be or which should have been known to be unjustifiably discriminatory. Rather than assume this burden, the respondent has rested its case and relied upon the proof in the Commission's case that there was a price war and that they reduced their prices to meet the general competitive situation in which their customer-dealers were involved at first in Smyrna and then in Marietta.

Not only has the respondent failed to adduce affirmative evidence of good faith in meeting competition, it has also failed, by resting its case, to rebut prima facie evidence of its knowledge of the illegality of the competition it was meeting. As heretofore stated, the amended Clayton Act does not permit a seller to meet an illegal price of a competitor. *Standard Oil Co. of Indiana* v. *Federal Trade Commission*, 340 U.S. 231 (1951). The element of scienter introduced by *Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956) does not remove respondent from the ambit of the Supreme Court rule.[15] In the within case, as the evidence would seem to indicate, the respondent had full knowledge of how the price war began, of the attempt by a

[13] The Circuit Court however appears to give more general application to its theory.

[14] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

[15] This case interprets *Standard Oil of Indiana* case to mean that if the seller discriminates in price to meet prices he knows to be illegal or that are of such nature as are inherently illegal there is a failure to prove the good faith. However, the seller is not required to prove the legality of competition met.

major brand to illegally undercut the price of an unbranded dealer.[16] This appears to have been a matter of common knowledge in the Smyrna-Marietta area.

The evidence herein would seem to indicate that all of the facts concerning the gasoline price war, from its inception and during the time at issue, were a matter of common knowledge in the Smyrna and Marietta areas, as reflected in the newspapers, and were a matter of common knowledge to those in the trade including American who were apprised of every detail of its inception and continuance. Thus, the initial price reduction by respondent in favor of the Hicks station and other Amoco stations located in and around Smyrna was to meet prices resulting from Shell's discriminatory price reduction to one Shell station to eliminate a private brand station (i.e., Paraland). The effect of this action on the part of Shell was not to meet competition but to beat competition in violation of the Robinson-Patman Act.* Obviously, Shell could not validly interpose a 2(b) defense to Section 2(a) charges under the Clayton Act. If Shell was not in a position to interpose such a defense, American Oil was in no better position to do so since it must be deemed to have had knowledge of the illegal act on the part of Shell. The prices that American Oil was meeting, therefore, are unlawful since they are predicated upon a chain reaction emanating from the unlawful price reduction of Shell in undercutting a normal market, which the evidence substantially indicates traditionally has customarily required a two-cent price differential between a name brand gasoline and unbranded gasoline sold at the lower price.

4. Competitive Injury.

With regard to the issues of the lessening of competition, competitive injury and loss of customers by retail dealers, the evidence is impressive.

Dealer Smith, of Marietta, testified that the competitive price allowance had an effect insofar as his sales were concerned. His daily sales record book shows that on October 14, 1958, he sold a total of 210 gallons and the following day, October 15, he dropped down to 165 gallons. His competitive price allowance on October 14 and 15 was 0.7¢ per gallon. It is noted that October 15 was the day on which the favored Smyrna dealers received 8.7¢ per gallon competitive price allowance. Dealer Smith further testified that on October 20, he

[16] The evidence indicates a normal market requires that unbranded gasoline be sold at 2¢ less than name brand gasoline in order to compete with the latter. Therefore even meeting the unbranded gasoline price constitutes an undercutting of the normal market price which if discriminatory as in the within case is illegal.

* (i.e., Clayton Act, as amended, Section 2 (b))

sold a total of 112 gallons and on October 21, a total of 88 gallons. His competitive price allowance on October 20 and 21 was 3.2¢ per gallon. It is observed that October 20 was the day on which the favored Smyrna dealers received 11.7¢ per gallon competitive price allowance and October 21, the day these same favored dealers received 14.7¢ per gallon competitive price allowance. Dealer Smith testified that during the period of a price war he drove by the George Hicks station and saw that "people were lined up in their cars waiting to get up to the gasoline pumps"; that he observed from the curb sign that the Hicks station had a posted price of 16.9¢ per gallon; that his selling price at that time was 25.9¢ per gallon. Dealer Smith further testified that he lost customers as a result of his high prices compared to the lower prices of others. In this connection he named a specific customer that he had lost.

On cross-examination dealer Smith testified that in October 1958 he lost business to the favored George Hicks station. The reasons advanced by dealer Smith for so stating was the fact that the Hicks station sold the same American Oil Company products that he (Smith) sold and the fact that the majority of the customers that traded with him (Smith) were habitual Amoco customers. Also during cross-examination dealer Smith testified that in October 1958 he bought regular gasoline through a dealer in Smyrna to obtain it at a lower price than it was available in Marietta.[17] The dealer had purchased this gasoline for Smith. Smith repaid him for it.

On direct examination dealer Smith testified that on October 22, 1958, he sold 2,249 gallons of regular gasoline; whereas on the 21st of October, the preceding day, he had sold only 88 gallons of gasoline. The reason for such a difference in gallonage sold was the fact that his price was lower on the 22nd than it was on the 21st. In response to the hearing examiner's question as to "what the difference in price was between the 21st and the 22nd", dealer Smith testified that he had a posted retail price of 14.9¢ per gallon on the 22nd and a posted retail price of 25.9¢ per gallon on the 21st. The price for American gasoline on October 14 for the Marietta dealers was 25.9¢ per gallon. There was no change until October 18.[18] The buying price for the same Marietta dealers then became 23.4¢ per gallon. The 23.4¢ price to dealers in Marietta was not changed by respondent until October 22 when it was dropped to 16.9¢ per gallon. Also on cross-examination, dealer Smith testified that his posted retail price on October 22 was

[17] The testimony reveals the price was 16.9¢ per gallon in Marietta and 11.9¢ per gallon in Smyrna.

[18] Commission exhibit 166(A–B).

14.9¢ per gallon and that this price lasted one day only. On the 23rd the price was raised again to 25.9¢ per gallon, where it remained until prices returned to normal in the low 30's. By raising his price, dealer Smith's gallonage on subsequent days declined as follows: October 23, 695 gallons; October 24, 531 gallons; October 25, 355 gallons; October 26 was a Sunday and the station was closed; October 27, 257 gallons; and on October 28, 168 gallons. This evidence suggests that on October 22, 1958, dealer Smith sold gasoline below the prevailing retail posted price and at a loss.

Also, indicative of competitive injury and loss of customers, dealer Anderson testified that the price reductions of his competitors decreased his gas sales fifty percent; that it has been his experience that on occasion his customers would go to another staion if there was a one-cent differential and that during the price war in question he temporarily lost "quit a few" customers including J. T. Blackwell, J. D. McKee, and A. M. Victory.

To establish actual loss of customers by the F. E. Hitt Amoco station, the unfavored Marietta station located farthest from Smyrna, counsel in support of the complaint called as witnesses two regular customers of the Hitt station, whose names are Henry Brown and George Wright. Brown operates a garage located at 1662 Church Street Extension, Marietta, Georgia, a quarter of a mile from the Hitt station. Wright, a part-time worker at the Hitt station, lives a quarter of a mile from the Hitt station. Both witnesses testified that as they became aware of the lower prices of gasoline in Smyrna during the month of October 1958 they diverted their trade to Smyrna and purchased gasoline from dealers there at cheaper prices.

Brown's testimony also established that it was well known in the area that prevailing prices in Smyrna were less than in Marietta. He stated he had learned of the price war and the prevailing lower prices in Smyrna through the Marietta Journal newspapers and that, on the strength of what he read in the newspapers, he went to Smyrna and more than once purchased gasoline at the George Hicks Amoco Station at 15.9¢ and 16.9¢ per gallon.

Competitive injury appears to have been clearly established since gasoline purchases were substantially diverted from Marietta to Smyrna where gasoline prices were lower.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the acts and practices of the respondent in this proceeding.

2. Respondent has violated section 2(a) of the Clayton Act as amended for the reasons hereinbefore set forth.

3. It is further concluded that this proceeding is in the public interest and the following order shall issue.

ORDER

It is ordered, That respondent The American Oil Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of its products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Discriminating in price by selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's products.

OPINION OF THE COMMISSION

By DIXON, *Commissioner:*

This matter is before the Commission on the appeal of respondent, American Oil Company, from an initial decision of the hearing examiner holding that respondent had violated subsection (a) of Section 2 of the Clayton Act, as amended, and ordering respondent to cease and desist from the practices found to be unlawful.

Respondent sells and distributes gasoline and other petroleum products in twenty-five states, and in the District of Columbia. Its products are sold to the public by company-owned and independent lessee-dealer stations.

In substance, the complaint alleges that respondent sold gasolines of like grade and quality at different prices to competing retailer customers located in and around Smyrna, Marietta, and Rome, Georgia, and that the effect of such price discriminations has been or may be substantially to lessen competition or to destroy or prevent competition in the resale of such gasolines with those customers who received the lower prices. The allegations with respect to price discriminations on the part of respondent in the Rome, Georgia, area were, in effect, abandoned by counsel supporting the complaint, and the evidence of record pertains only to alleged violations of Section 2(a) in the Smyrna-Marietta area.

The hearing examiner held that respondent had discriminated in price between competing customers and that "the price advantage which respondent granted to dealers located in and around Smyrna, Georgia, did substantially lessen, destroy and prevent the competition of each of the unfavored dealers located in and around Marietta, Georgia with the dealers receiving lower prices." He also rejected respondent's attempt to justify its discriminations by a showing under the Section 2(b) proviso, holding that this defense was not available to respondent as a matter of law and that, in any event, respondent had failed to establish on the record that its lower prices to certain customers were made in good faith to meet the equally low prices of its competitors.

The pertinent facts concerning respondent's alleged discriminatory pricing practices are as follows: On or about October 10, 1958, a gasoline price war began just north of the city limits of Smyrna, Georgia. Prior to that time respondent had been selling its regular and premium grades of gasoline at the same prices to nine independent lessee-dealers located in and around Smyrna, and Marietta, a town about two miles north of Smyrna. There is some disagreement between counsel as to the actual distance between the city limits of the two towns, but the record is clear that the towns are in such close proximity that their residential areas adjoin each other. On October 14, respondent began to grant lower prices to its dealers in and around Smyrna. These lower prices were given in the form of "competitive price allowances", known as CPAs, or discounts from the prevailing tank wagon prices of both the premium and regular grades of gasoline. The CPAs given to this group of dealers ranged from 6.7 cents a gallon on October 14

to 14.7 cents a gallon from October 21 through October 27. On October 18, respondent gave its customers in and around Marietta a competitive price allowance of 3.2 cents per gallon, which it increased to 9.7 cents on October 22. Throughout the period of the price war, the price differential between the two groups of dealers ranged from 5 cents per gallon to 11½ cents per gallon.

Respondent does not take issue with the finding that it had discriminated in price in favor of its Smyrna dealers, and, indeed, it could not since the evidence of record leaves no doubt on this point. It argues, however, that these price discriminations did not result in actual injury to competition and that there was no showing that competitive injury was likely to occur. Respondent contends that the record fails to show that customers receiving the benefit of the discriminatory prices were competing with nonfavored customers or that there was any causal connection between any competitive injury sustained by nonfavored dealers and the price discriminations in question. It also points out that the price discriminations lasted only about two weeks and argues that there is no evidence that there was a substantial diversion of trade from its nonfavored customers.

Although Section 2(a) does not require a finding that a price discrimination has, in fact, caused injury to competition, the hearing examiner nevertheless found that respondent's price differences had that effect in the Smyrna-Marietta area. As the Supreme Court [1] has pointed out, the statute is designed to reach price discriminations before harm to competition is effected and requires only that the effect of the discrimination "may be substantially to lessen competition . . . or to injure, destroy or prevent competition." In this case, the competition alleged to be affected is competition between respondent's customers in the resale of respondent's products. Consequently, proof that the competitive opportunities of any respondent's customers, were injured by reason of the discrimination is sufficient to establish a *prima facie* violation of Section 2(a). Hence, it is unnecessary to determine whether the hearing examiner's finding of actual injury is supported by the record.

The Supreme Court has held in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), that in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. Complete reliance

[1] *Corn Products Refining Co. et al.* v. *Federal Trade Commission*, 324 U.S. 726 (1945).

upon this doctrine, however, is not crucial here. The record in this case contains evidence of a positive character fully justifying a finding of probable injury to competition.

The evidence in this case establishes that competition did exist between the favored and nonfavored customers in the resale of respondent's gasolines and that the price difference between the two classes of customers was sufficient to give the former a significant competitive advantage. The nonfavored dealers were located at distances of approximately one to four miles from the station of George Hicks, one of the beneficiaries of respondent's price discriminations. The proximity of these dealers to the stations of Hicks and other favored customers, together with the showing that people residing in and around Marietta regularly drove into or near Smyrna to work or to shop, and the further showing that there was a preference on the part of some motorists for the brands of gasolines sold by respondent convinces us that competition did exist between the favored and nonfavored customers. Respondent's District Sales Manager admitted that a price difference of 5 to 6 cents a gallon at retail would be sufficient to affect competition between dealers located in Smyrna and those located in Marietta. One dealer testified that differences of a cent or two a gallon can cause a diversion of business from one dealer to another.[2] The evidence also shows that the normal gross profit realized by a dealer is 5 cents per gallon of gasoline. As stated above, the differences in the prices charged favored and nonfavored customers ranged from 5 cents to 11½ cents per gallon. These price differences are so clearly substantial on their face that no further evidence would be necessary to show that the competitive opportunities of those dealers who were required to pay the higher prices were seriously impaired. The testimony of various nonfavored dealers, of which the following is illustrative, convinces us that respondent's price discriminations did have the prescribed effect on competition in the resale of its products:

Mr. Seagraves testified: I felt it [business] slacking up each day, and the customers would stop up there and want to know when I was coming down, and I told them I couldn't come down until I got relief on it, and they were heading for George Hicks [a favored customer], and if I hadn't had my tank full in my car I'd of went over there.

Mr. Smith testified: Well, Mr. Hicks sold the same brand product that we did, and the majority of customers that traded with us were customers—I mean

[2] Dealer Anderson so testified. His station was located about 1 mile from Hicks and we think that at that distance a difference in price of 1 or 2 cents would be sufficient to divert business from one to the other. We do not believe that the record supports a finding that such a small price differential would necessarily attract customers from respondent's dealers located several miles from a favored station.

had bought American Oil Company products, and they would have gone to the nearest American Oil Company station, which was Mr. Hicks, and we were concerned more with losing customers that were habitual Amoco buyers than people who just bought anywhere.

Respondent argues, however, that the nonfavored customers would have been injured in any event by the lower prices of dealers selling other brands of gasoline. The record shows in this connection that the nonfavored customers were competing with customers of other major oil companies as well as with favored customers of respondent. We agree that some users of American Oil Company's products may have been attracted by the low prices of service stations selling other brands of gasoline. Since the nonfavored customers could not meet these low prices, they were undoubtedly at a disadvantage insofar as competition with other major brand dealers is concerned. It is also true, as respondent points out, that any injury to the nonfavored customer's ability to compete with Texaco, Shell or other brands of gasoline cannot be attributed to the price discriminations challenged by the complaint. We fail to see the relevancy of this argument, however. The fact that nonfavored customers of respondent may have been unable to compete effectively with other major brand dealers does not tend to rebut the finding that competition between respondent's customers in the resale of respondent's gasoline may have been adversely affected by respondent's discriminatory prices.

Respondent also contends that its price discriminations could not have had any harmful effects on competition since its disparate competitive price allowances between Smyrna and Marietta dealers existed for a period of only about two weeks and since there is no evidence and no suspicion that any difference in its prices to dealers existed after October 27, 1958, in Smyrna, Marietta, or elsewhere. In so arguing, respondent is in effect saying that a violation of Section 2(a) did not occur since it discontinued its discriminatory pricing practices before they caused actual injury to competition. As we have previously stated, however, Section 2(a) requires only that there be a reasonable probability of substantial injury to competition and this probability existed when respondent granted price concessions to its Smyrna dealers. Moreover, it was not incumbent upon counsel supporting the complaint to prove that respondent would resume the practices shown to be unlawful. The burden of proof is on respondent if it would have us believe that these practices were discontinued and that there is no reasonable likelihood that they will be resumed in Smyrna, Marietta, or elsewhere. Not only has respondent failed to make this showing but we are convinced from our examination of the evidence

of record that respondent will continue to violate Section 2(a) unless ordered to cease and desist.

Respondent also contends that a price discrimination which substantially lessens competition between customers of the seller who grants the discrimination is prohibited by Section 2(a) only if the customer or customers receiving the low prices did so with knowledge that such prices were lower. There is no support for this position, however, either in the language of the statute or in applicable case law. Nor is there any logical reason why, in the factual situation before us, protection of nonfavored customers from the harmful effects of respondent's discriminatory practices should be made to depend upon the state of knowledge of the favored customers. Section 2(a) prohibits price discriminations which may injure competition "with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*" (italics supplied). The words "either of them" include the seller or person granting the discrimination and, in this case, the dealers receiving the lower prices were customers of respondent, the person granting the discrimination.

We will next consider respondent's argument that the hearing examiner erred in rejecting its defense that its lower prices were made in good faith to meet the equally low prices of competitors. Respondent first takes exception to the hearing examiner's ruling that this defense is not applicable where a seller reduces its prices to certain of its customers when those customers were not offered lower prices by competing suppliers. In so ruling, the hearing examiner followed our decision in *Sun Oil Company*, Docket No. 6641 (1959), wherein we held that the Section 2(b) proviso has reference to the good faith meeting of the competition of the seller, rather than that of the buyer, and that the defense is inapplicable where a supplier of gasoline reduces its price to help a customer meet its competition. Our order in that case was set aside by the Fifth Circuit (*Sun Oil Company* v. *Federal Trade Commission*, 294 F. 2d 465 (1961)), and the matter is now pending before the Supreme Court on certiorari. The holding of the hearing examiner that respondent cannot, as a matter of law, avail itself of this defense is in accord with the position we have taken on appeal and it will, therefore, be sustained.

We also agree with the hearing examiner that even if the Section 2(b) proviso could be interpreted to permit justification of discriminatory price concessions granted to enable a customer to meet competition, respondent has failed to establish this defense. In so holding, the hearing examiner ruled that respondent had failed to rebut *prima facie* evidence of its knowledge of the illegality of the competition it

was meeting. He found, in this connection, that the price war in the Smyrna area had begun when a Shell service station had undercut the price of a competing private brand station. He further held that the discriminatory price reduction made by Shell Oil Company to its service station could not be justified under the Section 2(b) proviso as a good faith meeting of competition and that respondent met this price reduction, knowing it to be illegal.

Respondent takes issue with the hearing examiner's holding that Shell's price was illegal and points out that the hearing examiner's conclusion that Shell had undercut a competitor's price was based on the finding that it had posted the same price as a private brand station. It argues in this connection that there is nothing in the record to show that the private brand gasoline customarily sold at a lower price than major brands and that, even if this fact had been established, there is no valid reason why the price of a major brand could not be reduced to eliminate this differential.

This argument must be rejected. The following testimony by respondent's District Sales Manager, Mr. Doyle A. Myers, fully supports the hearing examiner's finding that the private brand gasoline, Paraland, normally sold for two cents less than major brands:

Q. You testified that Paraland started the price war in 1958, or Paraland posted the price?

A. That is my opinion; yes.

Q. In other words, Shell Oil Company or the Shell dealer posted the same price as Paraland—

A. Yes, sir.

Q. —as the Paraland independent cutrate private brand station?

A. They post under the major brands; yes, sir.

Q. And at that time what was Paraland posting, that is, immedately prior to Shell meeting it?

A. Whatever the normal posted price was; I don't recall right offhand.

Q. You mean the normal posted price for private brand stations?

A. Posted 2 cents under.

Q. And at that time Paraland was posting 2 cents under?

A. When they opened up they posted 2 cents a gallon under the major brand prices.

Q. And Shell, instead of posting prices 2 cents over that of the independent Paraland, met Paraland on the nose?

A. Yes, sir.

There is also ample precedent for the ruling that a seller is not meeting competition or equalizing an actual competitive situation when it reduces the price of its product to the level of a competitor's product which normally sells at a lower price. *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2nd Cir. 1929); *Federal Trade Commission* v. *Standard Brands*, 189 F. 2d 510 (2nd Cir. 1951);

Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948); *Anheuser-Busch, Inc.*, Docket 6331 (1959). See also the court's opinion in *Sun Oil Co.* v. *Federal Trade Commission*, *supra*. If two products usually sell in competition with each other at a price differential, it is unnecessary for the seller of the premium product to eliminate this differential in order to meet competition. In this case, the record clearly establishes that not only had the private brand gasoline, Paraland, traditionally sold at a lower price than the major brands but that the Shell station which reduced its price to the level of Paraland had not been injured in any manner whatsoever by the lower price of the private brand station. Under the circumstances, we think the hearing examiner was fully justified in concluding that the Shell station, with the assistance of Shell Oil Company, had undercut the price of a private brand gasoline for the purpose of "beating competition".

Respondent also contends that there is no evidence in the record to show that the Shell station was operated by the Shell Oil Company rather than by an independent dealer. This argument is defective in two respects. In the first place, respondent and not counsel supporting the complaint would have had the burden of showing who operated the station if such information had any bearing on the lawfulness of the price cut. In the second place, respondent loses sight of its basic premise that an oil company and its dealer are a "marketing unit." [3] Certainly respondent cannot in good conscience contend that this "marketing unit" concept exists only when the oil company is "meeting competition" in good faith and can be discarded when the dealer is engaged in activities which would be unlawful if engaged in by the oil company. If such were the case, competition which now exists between private brand gasolines and the major brands could be effectively eliminated. The major brand dealer could reduce his price to the level of or below that of a private brand gasoline and could then call upon his supplier for assistance in the event the private brand station attempted to restore the price differential. Contrary to respondent's position, we do not belive that a supplier could justify a discriminatory price concession to such a dealer as a good faith meeting of competition.

Respondent also argues that even if Shell's price was illegal, the evidence is unchallenged that on each occasion when respondent met Shell it also met, at the same time, the pre-existing price reduction

[3] Respondent contends that "an oil company and the dealers to whom it sells gasoline together constitute a marketing unit competing for the motorists' trade with other such units, each made up of another oil company and its dealers or of a single supplier-retailer."

of at least one of the other major oil companies, i.e., Texaco, Sinclair and Gulf. The obvious answer to this argument is that the other major oil companies also met Shell's price which they knew or had reason to believe was unlawful and that they were in no better position than respondent to justify their discriminatory prices under the Section 2(b) proviso.

In any event, we find no merit to respondent's contention that counsel supporting the complaint had the burden of proving the illegality of all prices which respondent now claims to have met. In *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, *supra*, the Supreme Court stated that there was a "clear Congressional purpose not to sanction by Section 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another". And in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951), the court stated that the interpretation put on the proviso in the *Staley* case is "that the lower price which lawfully may be met by the seller must be a lawful price". We have not construed the proviso, however, as placing on respondent the burden of proving the legality of the price it was meeting although the Supreme Court has indicated that the person claiming the defense has this burden, 340 U.S., at 249, n. 14. And we need not decide at this time whether proof of the illegality of a competitor's price in itself is sufficient to rebut a claim of meeting competition. We are of the opinion, however, that a seller who meets a competitor's lower price which he knows or has reason to believe is illegal has failed to meet the good faith requirement of the defense. *Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956). Since the seller claiming this defense has the affirmative duty of establishing each element thereof, including good faith, we think it incumbent upon him to show, at least the existence of facts which would lead a reasonable and prudent person to believe that the price he was meeting was lawful. In this case, however, respondent not only did not sustain this burden but merely averred good faith in the face of evidence that it knew or should have known that it was meeting discriminatory prices which could not have been justified under any of the exceptions to the prohibitions of the statute.

Respondent also attempts to justify its discriminatory prices under the "changing conditions" proviso to Section 2(a) [4] It contends in this connection that its lower prices to favored Smyrna dealers were

[4] "*And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

"price changes . . . in response to changing conditions affecting the market for or the marketability of" its gasoline. The examples of "changing conditions" which may justify a price discrimination set forth in the aforementioned proviso are deterioration of perishable goods and obsolescence of seasonal goods, distress sales under court process, and sales in good faith in discontinuance of business in the goods concerned. Apparently the condition affecting the market for or the marketability of respondent's products was a change in the retail price of gasoline brought about by discriminatory price concessions granted by a major oil company to permit its dealer to eliminate the usual and customary price differential between a major brand and a private brand gasoline. We do not believe that this situation is in any way analogous to the conditions referred to in the statute.[5] Respondent's argument is, therefore, rejected.

Respondent's final contention is that the order to cease and desist contained in the initial decision is too broad in that it would prohibit respondent from discriminating in the price of products other than gasoline and would apply to sales made by respondent outside of the Smyrna-Marietta area. There is no evidence that respondent has discriminated in price in the sale of products other than gasoline, nor does the record indicate that respondent may discriminate in the price of other products. Consequently, we are of the opinion that the order should be limited in its application to the sale of gasoline. There is no substance to respondent's argument, however, that the order should not prohibit it from engaging in unlawful price discrimination outside of the Smyrna-Marietta area. The purpose of the order is to prevent respondent from engaging in a practice found to be unlawful. There is certainly nothing to indicate that respondent has engaged, or will engage, in discriminatory pricing only in the Smyrna-Marietta area. To the contrary, the record reveals that respondent has granted discriminatory price concessions whenever it has deemed it expedient to do so during a "price disturbance." It is also clear from the testimony given by Mr. Myers and a former official of American Oil Company that "price disturbances" occur frequently and that they occur in areas other than Smyrna-Marietta. On the basis of the evidence relating to respondent's participation in the "price disturbance" in the Smyrna-Marietta area and the testimony concerning respond-

[5] In *Moore* v. *Mead Service Co., et al.*, 190 F. 2d 540 (1951), the court said:

"It is evident that it [the 'changing conditions proviso'] deals with special situations in connection with specific lots of goods which are of a perishable nature or become obsolete with the seasons or distress sales under court process or goods sold when a business is discontinued in good faith. The exceptions are not confined specifically to those set forth but the plain language of the statute limits the exceptions to those which are 'such as' or similar to those named."

ent's policy of granting competitive price allowances, it is our opinion that, unless prohibited from doing so, respondent will probably continue to discriminate in price between competing customers in any area in which it is doing business.

To the extent indicated herein, the appeal of respondent is granted; in all other respects it is denied. The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission.

The motion filed by respondent March 6, 1962, requesting the Commission to strike the hearing examiner's order of February 26, 1962, correcting the initial decision will be granted.

Commissioner Elman dissented to the decision herein.

DISSENTING OPINION

By ELMAN, *Commissioner:*

I

The Commission's disposition of this case calls to mind the observation of Mr. Justice Holmes that "To rest upon a formula is a slumber that, prolonged, means death." (*Collected Legal Papers*, p. 306) In the same vein he had warned, when he sat on the Supreme Judicial Court of Massachusetts, of the danger "of being misled by ready-made generalizations, and of thinking only in phrases to which as lawyers, the judges have become accustomed, instead of looking straight at things, and regarding the facts in all their concreteness, as a jury would do. Too broadly generalized conceptions are a constant source of fallacy." *Lorenzo* v. *Wirth*, 170 Mass. 596, 600.

It seems to me, with all deference to my colleagues, that they are deciding this case by resting upon, and applying uncritically, "formulas" and "too broadly generalized conceptions" derived from significantly different factual contexts. I shall not attempt to catalogue all the difficulties and doubts that, in my mind at least, are engendered by the majority opinion. My disagreement here is with the basic presuppositions underlying the Commission's decision.

In a Section 2(a) Robinson-Patman Act case, two elements of proof are crucial to a finding of violation: price discrimination, and probable injury to competition. The former is clearly present here, as all agree. Respondent does not deny that the differences in price to its customers constituted "discriminations". It contends rather that the price differentials were not shown to have caused the requisite injury to competition, and were in any event justified by its competitive need to meet the lower prices of rival sellers.

The Commission finds no difficulty in disposing of the question of probable injury to competition. The law on this point, it declares, has been authoritatively settled by the Supreme Court's decision in *Federal Trade Commission* v. *Morton Salt Co.* 334 U.S. 37 (1948). There, the Commission's opinion states (p. 1806), the Supreme Court held "that in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial". The Commisson's opinion continues: "Complete reliance upon this doctrine, however, is not crucial here. The record in this case contains evidence of a positive character fully justifying a finding of probable injury to competition." The "positive" evidence cited by the Commission, however, simply shows that "competition did exist between the favored and nonfavored customers * * * and that the price difference between the two classes of customers was sufficient to give the former a significant competitive advantage." (Opinion, p. 1807)

In other words, the legal formula which the Commission derives from *Morton Salt* is that "competition between buyers" *plus* "substantial difference in price" *equals* "significant competitive advantage" to the favored buyers, which in turn *equals* "probable injury to competition".

The attractiveness of this formula cannot be denied. Its application dispenses with the need for inquiry into the probable effects on competition, either generally or with disfavored customers, of a price discrimination, so long as the difference in price is substantial in amount. But the Supreme Court surely did not intend in *Morton Salt* to relieve the Commission of the duty to make an informed expert judgment, based upon the relevant economic facts, as to the likelihood of injury to competition resulting from differing kinds of price discrimination. The Court did not lay down a hornbook black-letter formula, to be applied automatically and indiscriminately to every type of price discrimination without regard to differences in economic effect.

Morton Salt was a classic "secondary line" case, where the seller established and regularly maintained a discriminatory "two-price system" under which his favored, usually larger, customers paid substantially less for the same products than other customers with whom they were in competition. Quite obviously, as the Supreme Court held, the systematic and continued maintenance of such discriminatory price differentials had the inevitable result of impairing the ability

of the disfavored customers to hold an effective competitive position vis-a-vis their favored rivals. 334 U.S. at 47–50; *cf. Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F. 2d 674 (C.A. 2), *cert. denied*, 361 U.S. 826. In *Morton Salt*, the probable injury to competition was clearly and easily identifiable as an inevitable aspect of the discriminatory two-price system. But, in so holding, the Supreme Court was expressing a conclusion based on the particular facts, not a universal rule of law.[1]

A finding of probable injury to competition does not require evidence that the disfavored buyers have gone out of business or are on the verge of bankruptcy. By the same token, evidence that such buyers have suffered a temporary loss of sales does not, without more, establish that their capacity to compete vigorously and effectively in the market has probably been injured. Whether probable injury to competition will result from a price discrimination entails, at the least, an inquiry into the nature, size, scope, and duration of the differential. Where, as in *Morton Salt*, a systematic, established, and continuing price discrimination between competing groups of buyers is maintained, the injury to competition is manifest, and no one would seriously suggest in such a case that the Commission must show that the disfavored buyers have been driven to the wall. But where the price discrimination is not comparable to that involved in *Morton Salt*, the effects on competition should be found "in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal," *Fred Bronner Corp.*, Docket 7068 (September 29, 1960)[2]

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[1] "The scope given to the new concept of injury in the *Morton Salt* case was explicitly justified by the Supreme Court on the ground that without it *cumulative* effects would go uncurbed. A question necessarily arises as to whether or not the scope of the concept of injury to a class of competitors should vary from one context to another with changes in the probability that there will be such cumulative effects." Edwards, *The Price Discrimination Law* (1959), p. 538 (emphasis added).

As Edwards also points out:

"It is unreasonable to use the law of price discrimination to attack minute inequalities among buyers. Where such inequalities are ephemeral or have no central pattern, they may well be offset at other times or on other commodities. Any one buyer may sometimes be favored and sometimes disfavored. Moreover, since the defense of cost justification is not readily available, insistence on equal treatment in all particulars except where cost differences can be shown tends to make price structures unduly inflexible." (at p. 639)

"There is little reason to try to assure by law an equality of prices so pervasive that it prevails generally in the relation among small and numerous buyers. Though price discrimination may create disparities of opportunity among such concerns, the likelihood of offsetting disparities on other goods or at other times is so great that little would be gained from an effort to curb such inequalities. Substantial, consistent, cumulative inequality is to be expected only where favored buyers are relatively large and strong. Only in such circumstances are we justified in considering an intervention that subjects the detail of price relationship to pervasive control." (at p. 641)

[2] The same requirement is reflected in the Commission's 1948 Policy Statement, issued immediately after the Supreme Court's decision in *Morton Salt*. Relevant portions of this Statement are quoted in *General Foods Corp.*, 50 F.T.C. 885, 887–888 (1954).

At this point, perhaps, it might be helpful to refer to another leading Robinson-Patman Act case, *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). That case is relevant here not because of any similarities in the factual situations involved, but because it makes clear the inappropriateness of adopting an automatic, verbal-formula approach in determining probable injury to competition. In *Anheuser-Busch* the Court held that under the Act a price "discrimination" is merely a difference in price. But, as the Supreme Court was careful to point out, its decision in that case "does not raise the specter of a flat prohibition of price differentials inasmuch as price differences constitute but one element of a Section 2(a) violation. In fact, as we have indicated, respondent has vigorously contested this very case on the *entirely separate grounds of insufficient injury to competition* and good faith lowering of price to meet competition." (*Id.*, p. 553; emphasis added.)

Anheuser-Busch exemplifies what are described in antitrust jargon as "territorial" price discriminations. As the legislative history of the Clayton Act of 1914 shows, one of the primary evils at which it was directed was injury to seller competition resulting from geographical or area price discrimination, typified by destructive local raids against small competitors by large multi-state sellers. As was stated in the House Judiciary Committee Report (H. Rept. 627, 63d Cong., 2d Sess., p. 8):

> It [Section 2] is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country.

In the instant case, it must be emphasized, neither the complaint alleges nor the proof shows that respondent, a major producer of gasoline, acting individually or in concert with other majors, engaged in selective price warfare directed against individual outlets of smaller, independent producers. Independents, as is well known, do not ordinarily have the resources to compete successfully with the majors in such price warfare; and where undertaken by major producers, its purpose and effect may well be either to drive the independents out of business or to coerce them into avoiding price competition, with the inevitable long-range result of rigidifying the price structure in the industry and thus injuring competition in a most vital way.

But that is not this case. The facts here present a special and unique kind of price discrimination, with effects on competition that

cannot automatically be assimilated to the familiar, systematic, continuing price discriminations which the Commission is accustomed to dealing with and to which it customarily applies the *Morton Salt* formula. What this case involves is a short-lived flurry of competitive price-cutting by all sellers of gasoline in a local area. This phenomenon, usually described with dramatic hyperbole as a "price war", has long been familiar in the gasoline industry. But, although price wars have large importance to the gasoline industry and have been the subject of extensive study, no apparent consensus exists as to whether this phenomenon signifies the vigor of competition in this industry or the lack of it.

Ordinarily, of course, consistent uniformity of price between competitors is not regarded as proof of the existence of healthy, free competition in the industry. Nor, by the same token, would it generally be said that fluctuations in price and active underselling of competitors reflect unhealthy and restrictive competitive conditions. Whether particular price activity manifests the "competition that kills" or the competition that enables a free economy to grow and expand can only be determined upon inquiry into the relevant economic facts. Such inquiry has not been made in this case. The Commission's conclusion that the gasoline price "war" here was injurious to competition reflects only an unverified assumption based on a legal formula derived from *Morton Salt*. Thus, whether the periodic or occasional outbreak of gasoline price-cutting in a local area serves to increase or decrease competition at the producer, distributor and retailer levels of distribution remains an unresolved question of fact on which the Commission's opinion casts no light.

To repeat: my main difficulty with the majority opinion springs from its failure to recognize and to bring to bear an expert evaluation of the special and distinctive effects on competition of a local, limited gasoline price war. The Commission, it seems to me, has transformed a hard case into an easy one by applying an old well-worn formula taken from a different economic context and which, though appropriate for the situation in which it was developed, is out of place as applied to the facts of this situation—to which I now turn.

II

Respondent, a major gasoline producer, was caught squarely in the middle of a brief but intense price "war" that flared up in and around Smyrna and Marietta, Georgia, for about two weeks in October of 1958. The complaint charged that, in the course of this two-week skirmish, respondent lowered prices to its dealers in Smyrna by greater

amounts than to its competing dealers in Marietta. It was alleged that the result of respondent's actions "may be substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices." (This is the boiler-plate allegation of injury to competition at the "secondary" line of commerce.)

Smyrna is located approximately five miles northwest of Atlanta on State Route 3. Marietta is approximately four miles farther north at the point where Route 3 and U.S. Route 41—which parallel each other from Atlanta—converge. Route 41 is a major north-south artery extending from Copper Harbor, Michigan to Miami, Florida. In 1958 American sold gasoline in four States along this route—namely, Kentucky, Tennessee, Georgia, and Florida.

The price melee here began about October 10, 1958, when a Shell station lowered its price to meet the price of a newly-opened Paraland station. Shell is, of course, a major producer. Although "Paraland" is not regarded in the industry as a major brand, respondent's district sales manager testified that the company was owned by or affiliated with Phillips, another major producer. From this humble beginning the price-cutting rapidly spread throughout the Smyrna area. As in the case of most so-called "wars" in the gasoline industry, the dealers were not left to fight it out by themselves, but received the ammunition of "competitive price allowances" (or CPA's) from their suppliers. These lowered prices, in the form of CPA's, were apparently a matter of general knowledge in the trade. Unless he received these CPA's from his supplier, a particular dealer would not be able to survive very long. If he had to pay more for gas than the price at which a station across the street was selling a competing brand, a dealer would not be likely to stay in business.

In the series of price reductions which ensued as the Smyrna "war" increased in intensity, American was never the leader. Its price reductions were made only to meet those previously made by its competitors. Thus, on the 11th of October, American increased its dealers' discount in Smyrna to 4.2 cents per gallon, meeting a price reduction by Sinclair on the previous day. On the 14th its discounts were increased to 6.7 cents, to meet Gulf and Shell; on the 15th to 8.7 cents, to meet Gulf and Sinclair; on the 17th to 10.7 cents, to meet Shell, Texas, and Sinclair; on the 20th to 11.7 cents, to meet Gulf, Shell, and Sinclair; and, finally, on the 21st to 14.7 cents, to meet Texas, Shell, and Sinclair. No further price reductions were made after October 21st, and by the 28th higher prices were restored and the

two-week war, in which more gas than blood was spilled, was over.[3]

The impact of these events in Smyrna on prices in Marietta, five miles away, was neither immediate nor severe. Again only following the lead of its competitors, American had by October 22 increased the CPA's granted its Marietta dealers to 9.7 cents, but there still remained a differential of 5 cents per gallon between the prices to its dealers in the two communities.

Since Smyrna and Marietta are geographically adjacent, gasoline dealers in one community compete with those in the other. The price war here gave the Smyrna dealers a brief, temporary advantage in this competition, in that their lower prices attracted business away from gas stations in Marietta. American dealers in Marietta were among those who lost sales and, according to the evidence, customers who usually purchased American's products in Marietta switched to stations in Smyrna. But, so far as appears, the business of the Marietta dealers returned to normal at the end of the two-week war, and this temporary diversion of sales had no effect on their ability to remain in effective competition with other dealers.

III

Although the marketing effects of a concentrated, confined outburst of price-cutting such as occurred here are far from clear, the Commission, relying upon the *Morton Salt* case, infers probable injury to competition from the fact that American charged substantially different prices to competing customers. But, as already pointed out, that case involved a regular, established, continuing multiple-price system, which inevitably impaired the capacity of the disfavored customers to remain effective competitors in the market. American's price discriminations, however, were immediate and transient responses to a temporary competitive situation over which it had no control. This does not mean that what American did was necessarily legal. It does

[3] The following account of the war was given by American's district sales manager:

Q. Mr. Myers, would you tell us your understanding concerning the circumstances relating to the start of the price war in Smyrna in October 1958?

A. Well, I understand it was Paraland who operates or posts prices as an independent. They had a station on South Cobb Drive, and when they had that station under construction Shell or someone indicated that they would post the same price as Paraland should they open up as an independent, and when Paraland did open up as an independent, Shell did meet them. Shell had a station one block north of the Paraland location. Shell did meet them, and Paraland dropped their price again, I believe it was another 2 cents a gallon, and Shell met that when they did.

Then I think the next company was Sinclair, and I think Gulf and several others dropped to meet that competition. Then all companies dropped to meet it to meet the other major competition. And then they kept this price decreasing until it got to the ridiculous extent that it got to. (Tr. p. 576)

mean, however, that the necessary competitive injury cannot be inferred simply on the authority of *Morton Salt*.

In the first place, it appears to have been the price war generally—a situation which American did not create—which was responsible for any competitive injury to its Marietta dealers. Section 2(a) requires that probable competitive injury derive from the discrimination or difference in price charged to different buyers. But American reduced prices to its Smyrna dealers only after equally large price reductions had been made by competing producers and by their dealers. The much lower prices generally prevailing in Smyrna would have diverted customers from American's Marietta dealers, regardless of the prices which respondent charged its dealers in Smyrna. Any injury to American's Marietta dealers was caused not by the difference in the prices which American was charging its dealers in these two communities but by the fact that as long as a general price war was going on in Smyrna, and all dealers there were selling gas far below the prices in Marietta, dealers in the latter town—American dealers included—were bound to lose business. No matter what American did, the lower prices brought about by the war in Smyrna would have caused many customers in Marietta to drive to Smyrna to buy gasoline.

Second, the Smyrna price "war" was but a skirmish, lasting barely two weeks. True enough, in that period many of the Marietta dealers' customers bought gas in Smyrna. But the Act does not insulate businessmen from transient losses of sales, but only against the likelihood of "injury to competition". At the end of the war the business of the Marietta dealers returned to normal, and there is neither allegation nor proof of any permanent diversion of customers. In fact, the record shows that at least one of them enjoyed substantially greater sales in October 1958 than he did in the same month of either the preceding or following year. This is certainly a far cry from the injury to competition found in *Morton Salt*.

I see no justification for the Commission's statement that the burden of proof is on respondent to show that "these practices were discontinued and that there is no reasonable likelihood that they will be resumed in Smyrna, Marietta or elsewhere." The burden is upon the Commission to establish the required competitive injury. A finding that such injury would result from a continuation of the allegedly illegal discriminations must be predicated on facts showing the likelihood of such continuation, not speculations or inferences drawn from the absence of facts in the record. And where, as in this case, the only competitive injury alleged is to particular disfavored customers, the

evidence must relate to them and not to other dealers "elsewhere."[4] This is not an "abandonment" problem. The fact that the Commission is "convinced . . . that respondent will continue to violate Section 2(a) unless ordered to cease and desist" would be relevant if illegality had been proved. It is irrelevant in determining whether the facts in the record prove the requisite competitive injury alleged in the complaint.

Finally, and perhaps most important, the competitive effects of American's price discriminations cannot be viewed apart from the effects of the price war as a whole. American's price cuts to Smyrna dealers were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control. In a price war someone is bound to be hurt, and if American chose the course of action having the least injurious effects on competition, it should not be condemned as a law-violator merely because sales were temporarily diverted from some of its dealers.

IV

In the situation shown by the record in this case, American—which, I repeat, did not start the price fracas but found itself caught helplessly in the middle of all the shooting—had three alternatives open to it.

First, it could have done nothing, maintaining its regular prices to all of its dealers in Smyrna and Marietta. The result would have been that these dealers would have lost all or most of their business to other dealers selling competing brands who had already received price reductions from their suppliers. Competitively, the injury to respondent's dealers would have been far more drastic.

Secondly, American could have done what it in fact did, with the results shown by this record.

Thirdly, American could have done what the Commission apparently thinks it was required to do by Section 2(a)—either reduce its prices equally to all of its dealers, or "feather" them out in some way, perhaps diminishing in concentric circles from the starting point of the war, on the theory that the differentials between stations would then not have been sufficiently large to cause any diversion of business

[4] The recurrence of a price war which would cause American again to disfavor its Marietta dealers seems highly unlikely. As this record clearly shows, gas wars of this type are not planned or the product of a policy of systematic price discriminations, but are the immediate competitive responses to individual competitive situations. The Smyrna price war was not respondent's idea or invention, and respondent terminated its price cuts, for competitive reasons, as soon as the actions of its competitors permitted. The record shows no recurrence of price warfare affecting dealers in either Smyrna and Marietta between October 1958 and the filing of this complaint in November 1960.

between competing stations. But either of these courses of action would surely have intensified the price-cutting, transforming the brief skirmish into a prolonged, widespread, all-out devastating price war. This dilemma is described in the testimony of American's Atlanta branch manager. In response to Commission counsel's question as to whether American's 9-cent differential to dealers two miles apart was a sufficient ground for him to recommend an increase in the unfavored dealer's CPA, he replied:

> Qnite frankly, at that time I was in a dilemma as to what to do. If you put it in you could spread it; if you kept it out you might be hurting your dealers. That was the way I presented it to my Division Manager, and we didn't know what to do (Tr. p. 570)[5]

If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?

Determination of the questions posed by this case, it seems to me, involves much broader considerations than those on which the majority here base decision. For example, the effects upon the independents who seem to provide much of the competition which exists in this industry must be taken into account.[6] I do not believe that these

[5] The possibility of "feathering" would not have resolved respondent's dilemma. In the first place, it ran the risk that any differences in price between competing customers would be regarded by the Commission as "substantial" and hence *prima facie* illegal. Second, if a two-cent reduction was sufficient to start the war, any price cut by American large enough to help its dealers in areas which the war had not yet reached would simply have served to set off the spiral of reductions anew.

[5] The possibility of "feathering" would not have resolved respondent's dilemma. In ducers which might result from the spread of the war would have a far more serious effect upon the vigor of competition in the industry as a whole than would the temporary diversion of sales from a few dealers in Marietta. Commenting upon the current prevalence of price wars in the gasoline industry, a recent article in the New York Times (May 20, 1962) stated:

"In the present disturbed markets, the distributor and also the dealer of the major companies generally are getting at or near their normal margin of profit and they are not being particularly hurt in the present price struggle. But the independent dealer and the distributor who does not have a major company to back him are being hurt badly in the price wars. The independent refiner, who supplies their products, also is finding it difficult to make ends meet."

knotty questions can properly be avoided by focusing narrowly on "secondary line" injury and adopting a mechanical test designed for the entirely different factual situation involved in *Morton Salt*. The Commission's approach here again illustrates the danger of dealing with the complexities of a free competitive economy simply by adopting a verbal formula which seems to provide the easiest route to an order to cease and desist (see my dissent in *National Retailer-Owned Grocers, Inc., et al.*, Docket 7121, May 14, 1962), [p. 1208].

V

The majority opinion also raises substantial questions concerning application of the meeting competition in good faith defense. For example, in its discussion of the lawfulness of the lower competitive prices met by American, the Commission seems again to have overlooked that the controlling inquiry is the seller's subjective good faith. A seller's burden of establishing good faith is satisfied by showing that he had no reason to believe the lower price met was unlawful. He should not be required, as the Commission states (opinion, p. 1812), to go further and show positive facts, known to him when he met the competitive lower price, "which would lead a reasonable and prudent person to believe that the price he was meeting was lawful." See my dissent in *Tri-Valley Packing Association*, Dockets 7225 and 7496, May 10, 1962 [p. 1134].

While the difference between these evidentiary burdens may seem slight, the evidence on which the Commission relies to show that respondent was not acting in good faith illustrates how important the difference actually is.

The Commission finds (opinion, pp. 1810–1812) that the price war in the Smyrna area began when a Shell service station met the price of a competing Paraland station; that Paraland is a "private brand" of gasoline which is "traditionally sold at a lower price than the major brands"; that "the Shell station which reduced its price to the level of Paraland had not been injured in any manner whatsoever by the lower price of the private brand station"; that, therefore, the Shell station was "beating", and not meeting, competition when it reduced its price to the same level as that of its newly-opened Paraland competitor; that Shell's price reduction, being discriminatory and not made in good faith to meet the lower price of a competitor, was therefore illegal; that when respondent and the other major oil companies in turn reduced *their* prices to meet the competition of Shell's lower price, they were meeting a price which was illegal; and that, accordingly, respondent "knew or should have known that

it was meeting discriminatory prices which could not have been justified under any of the exceptions to the prohibitions of the statute."

Let us assume—although I have the most serious doubts about it—that the record supports all of these findings made by the Commission. The Smyrna price war occurred in October 1958. If the Commission had received a telegram from respondent at that time, could and would it have been able to render an advisory opinion that the price reductions made by respondent's competitors were illegal? Now, almost four years later and only after an extensive hearing, the Commission finds that the lower prices of respondent's competitors—who are not parties to this proceeding—were illegal and that respondent's "good faith" defense must therefore be rejected. If they were parties to this proceeding, respondent's competitors might be able to justify the legality of their price reductions. At all events, their "conviction" here, in a case where they are not parties and where no complaint was made against them, is the basis of "convicting" respondent of violating the law in not acting in "good faith".

This seems to me to place an unrealistic and competitively unfair burden on businessmen. "Good faith" does not require businessmen to be put in the impossible dilemma of either (1) losing business by not meeting competitors' lower prices, or (2) meeting the competitive lower prices and running the risk that years later the Commission will find these "third-party" prices to be unlawful, after complex and protracted proceedings whose outcome could not confidently be predicted even by legal experts specializing in the field of trade regulation. In this case, for example, how was respondent in October 1958 to know that "Paraland", owned by a "major" producer (Phillips), would be regarded by the Commission in June 1962 as a "private" brand entitled, apparently as a matter of law, to a "normal" differential of 2 cents a gallon lower than "major" brands? Why should respondent have "known" in October 1958 that the Commission would in June 1962 find that all of the competitive lower prices which it met were discriminatory, injured competition, were not cost-justified, were not made "in response to changing conditions affecting the market", were not made in good faith to meet competition, etc. As I said in my *Tri-Valley* dissent, "The law should not be construed as forcing a seller to compete at his peril." I fail to see what the requirement of this kind of long-range prophesying in the dark by a seller in a competitive market has to do with his subjective good faith.

Finally, as in the *Tri-Valley* case, if the illegality of the prices met by respondent was so apparent, why is it that the Commission did not simultaneously bring price discrimination charges against all of

its competitors who were equally involved in the Smyrna price war? The Commission obviously knew of these "unlawful" price reductions by respondent's competitors before this complaint was issued. It seems to me inequitable and not in the public interest to have proceeded against respondent alone. The order here operates as a broad, floating, punitive restraint on respondent's pricing activities in every market in the United States in which it engages in business in competition with other sellers. But respondent alone is now being subjected to such order, drastically limiting its ability to compete effectively. It seems fair to ask: Has the Commission's action here really promoted the "competition" which the Robinson-Patman Act was intended to protect and encourage?

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 granted in part and denied in part the aforementioned appeal and having modified the initial decision to conform with the views expressed in said opinion:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondent, The American Oil Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of gasoline in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Discriminating in price by selling products of like grade and quality to any purchaser at prices higher than those granted other purchasers who in fact compete with the nonfavored purchaser in the resale or distribution of respondent's products.

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

It is further ordered, That the hearing examiner's order filed February 26, 1962, entitled "Order Correcting Initial Decision", be, and it hereby is, stricken from the record.

It is further ordered, That respondent, The American Oil Company, shall, within sixty (60) days after service upon it of this order, file

with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Elman dissenting.

IN THE MATTER OF

MARY CARTER PAINT COMPANY ET AL.

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

Docket 8290. Complaint, Feb. 15, 1961—Decision, June 28, 1962

Order requiring manufacturers of paint and related products, with principal place of business in Tampa, Fla., to cease representing falsely in advertisements in newspapers and periodicals and by radio and television—by such statements as "Buy only Half the Paint You Need", "Every Second Can Free of Extra Cost", etc.—that the advertised price was their usual retail price for a can of paint and was a factory price, and that if one can was purchased at that price, a second can would be given "free" when, actually, the advertised price was the regular retail price for two cans.

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 Mary Carter Paint Company, Inc., a corporation, and John C. Miller and I. G. Davis, individually and as officers of said corporation, and Robert Van Worp, Jr., individually, 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 as follows:

PARAGRAPH 1. Respondent Mary Carter Paint Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Gunn Highway at Henderson Road, Tampa, Florida. Respondent corporation also maintains offices in New York, said address being 666 Fifth Avenue, New York, N.Y.

John C. Miller and I. G. Davis are officers of said corporation. They presently formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.