IN THE MATTER OF

JOSEPH A. KAPLAN & SONS, INC.

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

Docket 7813. Complaint, Mar. 10, 1960—Decision, Nov. 15, 1963

Order requiring a Yonkers, N. Y., manufacturer of shower curtains, shower curtain sets and accessories under the trade name of "Jakson", to cease discriminating in price in various ways in its favored treatment of, among others, some 26 large retail customers which were the stockholders of a corporate wholesaler they organized in 1946—soon after the Commission issued a desist order against their knowingly inducing and receiving discriminations in price through a corporate agency created by them for such purpose, *Associated Merchandising Corp. (AMC) et al.*, Docket 5027, 40 F.T.C. 578—for the purpose of providing special prices to them; respondent's price discriminations including charging differences in cost of as much as 18 percent in favor of AMC stores and regularly favoring the AMC stores with markdown allowances resulting in lower net prices which were not made to AMC's competitors, in violation of Sec. 2(a) of the Clayton Act; negotiating with AMC and other customers on an individual basis in granting advertising allowances on close-out sales while not making such allowances to competing stores, in violation of Sec. 2(d); and accepting the return of merchandise from some of its customers but not all, thus providing those favored with a service not provided others, in violation of Sec. 2(e).

COMPLAINT

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

COUNT I

PARAGRAPH 1. Respondent Joseph A. Kaplan & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with office and place of business located at 1 Jakson Place, Yonkers, New York.

PAR. 2. Respondent Joseph A. Kaplan & Sons, Inc., is now, and for many years has been, engaged in the business of manufacturing, selling and distributing shower curtains, shower curtain sets and accessories under the trade name "Jakson".

Said products are now and have been manufactured from various materials including rubber, cotton and plastics.

Respondent is one of the leaders in the industry. Its sales of said products amount to approximately $2,500,000 annually.

PAR. 3. Respondent manufactures its products in Yonkers, New York, from which point the products are shipped to purchasers located in various cities and states of the United States.

Respondent sells said products for use, consumption or resale within the United States, and, when said products are sold, respondent ships or causes the products to be shipped to purchasers thereof located in states other than the state wherein said products are manufactured. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the various states of the United States and the District of Columbia.

PAR. 4. Respondent, in the course and conduct of its business as aforesaid, is now and for many years has been engaged in active and substantial competition with others engaged in the manufacture, sale and distribution of products of like grade and quality in commerce between and among the various states of the United States and in the District of Columbia.

Many of the purchasers of respondent's products are competitively engaged with each other and with customers of respondent's competitors in the resale of shower curtains and shower curtain sets. Among said purchasers are retailers such as specialty shops, variety and department stores.

PAR. 5. Respondent, in the course and conduct of its business as aforesaid, has been and is now, directly or indirectly, discriminating in price between different purchasers of its products of like grade and quality by selling said products to some purchasers at higher prices than those charged competing purchasers.

PAR. 6. Illustrative of, but not limited to the method or methods by which respondent has discriminated, and is now discriminating in price as referred to in Paragraph Five, and illustrative of, but not limited to the times and trading areas involved in such discriminations is the following:

For many years past, and specifically during the period from 1958 to date, and in many areas including but not limited to Boston, Massachusetts, Stamford, Connecticut and Philadelphia, Pennsylvania, respondent sold and is now selling products of like grade and quality to purchasers who compete with the purchasers receiving the favored prices. The favored purchasers are billed by, and submit payments to, respondent through an intermediary corporation owned and controlled by said purchasers. Said intermediary is sometimes hereinafter referred to as the "buying agency".

In return for the price advantages granted said favored purchasers, respondent seeks and obtains, through the buying agency or otherwise, all or substantially all of said purchasers' business in shower curtains and shower curtain sets. In addition, respondent's products are displayed and sold exclusively, or substantially so, in the most advantageous sales space in said purchasers' stores, namely, the housewares departments.

PAR. 7. The effect of such discriminations in price made by respondent, as alleged in Paragraphs Five and Six, may be to substantially lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and its favored purchasers are respectively engaged, or to injure, destroy, or prevent competition with the respondent, its purchasers who receive the benefits of such discriminations, or with customers of either of them.

PAR. 8. The aforesaid acts and practices of respondent constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

COUNT II

PAR. 1. Paragraphs One through Three of COUNT I are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 2. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution of its products.

PAR. 3. Included among and illustrative of the payments alleged in Paragraph Two of COUNT II, were payments, or credits paid by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities, including newspaper and magazine advertising, furnished by customers in connection with the offering for sale or sale of respondent's products.

During the time and in the areas as alleged in Paragraph Six, COUNT I, respondent offered to pay and paid, some customers varying percentages of the cost of promotional services or facilities furnished by such customers in promoting the sale of respondent's products.

The respondent did not offer, or otherwise make such allowances available, or did not make the allowances available in proportionally equal terms to all customers competing in the sale or offering for sale of respondent's products.

PAR. 4. The acts and practices of respondent as alleged above violate subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

COUNT III

PAR. 1. Paragraphs One through Three of COUNT I are hereby adopted and made part of this COUNT as fully as if herein set out verbatim.

PAR. 2. In the course and conduct of its business in commerce, and during the time and in the areas as alleged in Paragraph Six of COUNT I, respondent discriminated in favor of some purchasers against other purchasers of its products bought for resale by contracting to furnish or furnishing, or by contributing to the furnishing of services or facilities connected with the handling, sale or offering for sale of such products so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

PAR. 3. Included among and illustrative of the services or facilities furnished some customers, as alleged in Paragraph Two of COUNT III, is that of accepting the return for credit of unsold Jakson products.

This service consists of periodically accepting, from some purchasers, the return of unsold merchandise thereby enabling said favored purchasers to maintain and display a more readily saleable, fresh and newly styled stock of respondent's shower curtains and shower curtain sets.

PAR. 4. During the same period of time, respondent sold its products to retailers competing with said favored purchasers and has not furnished or offered to furnish the services or facilities as set forth in Paragraph Three of COUNT III herein, to said nonfavored retailers on proportionally equal terms.

PAR. 5. The acts and practices of respondent as alleged above violate subsection (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Mr. Peter J. Dias, supporting the complaint.

Mr. Gilbert H. Weil, *New York*, *N.Y.*, for the respondent.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

MAY 21, 1962

The Federal Trade Commission issued its complaint charging Joseph A. Kaplan & Sons, Inc., the respondent herein, with violations of the provisions of subsections (a), (d), and (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13). Respondent, in its answer, denied the violations charged. Pursuant to notice, hearings were held in New York, New York, Philadelphia, Pennsylvania, and Boston, Massachusetts, where extensive testimony was given and many exhibits received in evidence. Proposed findings and briefs have been submitted by the parties, and oral argument held thereon. Upon the record thus constituted, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Joseph A. Kaplan & Sons, Inc., hereinafter sometimes referred to as Kaplan, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with office and place of business located at 1 Jakson Place, Yonkers, New York.

2. Respondent is now, and for many years has been, engaged in the business of manufacturing, selling, and distributing shower curtains, shower curtain sets, and accessories under the trade name "Jakson." Said products are now, and have been, manufactured from various materials, including cotton and plastic. Respondent is one of the leaders in the industry. Its sales of said products amount to approximately $2,500,000 annually.

Respondent's products, although classified in certain price lines, are identifiable and catalogued by pattern as well. Patterns have a considerable effect upon the sales appeal and the consumer acceptance of the product. These products are considered to have style and fashion attributes.

3. Respondent sells said products for use, consumption, or resale within the United States and ships, or causes the products to be shipped, from Yonkers, New York, its manufacturing point, to purchasers located in other states. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products among and between the various states of the United States and the District of Columbia.

4. Many of the purchasers of respondent's products, referred to above, are competitively engaged with each other in the resale of those products.

5. Among the purchasers to whom sales and shipments of respondent's products were made in 1958 and 1959 were Bloomingdale's in Stamford, Connecticut, Filene's in Boston, Massachusetts, and Strawbridge & Clothier in Philadelphia, Pennsylvania.

6. The three stores referred to in Finding No. 5, above, are three of 26 retail department stores located in various States of the United States which together wholly own a subsidiary corporation known as Associated Merchandising Corporation, hereinafter referred to as AMC, located at 1440 Broadway, New York City. Each of these 26 stores owns one share of Class A voting stock and a certain quantity of Class B non-voting common stock. The voting stock is held by each stockholding store in the name of a nominee. The record is silent as to the amount of Class B non-voting stock each store owns. The brief of the respondent advises, however, that such stock is distributed among the stores on the relative basis of each store's volume of retail sales at the time it first became a shareholder.

7. The shareholding stores of AMC paid for their shareholdings at the time they became shareholders. AMC operates on an expense budget, the monies for which are received from the stores on a service charge formula, which is based on sales made by the stores. While there are 26 stockholding stores, the service charge is computed on the basis of 27 stores, since two of the stores are treated separately for service charge purposes, but as one for stockholding purposes. The service charge is paid by the stores in monthly installments.

8. The directors of AMC are chosen by the Class A stockholders from among the Class A stockholders. Each director of AMC is also an officer or director of the respective stockholding store. The officers of AMC are chosen by the directors of AMC and are in no other way connected with or related to the stockholders of AMC.

9. AMC's principal functions are: researching operating problems found in department stores such as receiving, marketing, display and fixturing, publicity, personnel problems, electronic methods; merchandising services by representatives who constantly scout the market for new and exciting merchandise and communicate their findings to the stores. Occasionally, AMC will buy as an agent at the direct request of a store, but that is not its prime function. AMC does not purchase any merchandise from respondent.

AMC's operating level parallels that of a department store. Thus, there are AMC merchandise representatives who are counterparts to store buyers, and who consult with store buyers to determine their desires and advise the buyers as to sources of supply for desirable merchandise at the most favorable price. This AMC merchandise representative works on a so-called "steering committee," consisting of himself, store buyers, and, occasionally, a divisional manager from the store as well. This committee assesses and determines what the market seems to be for their items or classifications of merchandise. Since these committees do not have the buyers from all the stores, they pass on the information which they have developed to all the other stockholding stores.

10. In or about 1946, AMC founded a wholly owned subsidiary corporation, the Aimcee Wholesale Corporation, hereinafter referred to as AWC. AWC's offices are located at the same address as the parent corporation, 1440 Broadway, New York City, and AWC also maintains a warehouse located at 469-10th Avenue in the same city. Prior to 1946, respondent dealt directly with AMC, knowing it was owned by certain retail stores, and granted it a quantity discount. In 1946, respondent was told by the housewares buyer of AMC that AMC had formed a wholly-owned subsidiary corporation, AWC, which would function as a wholesaler, reselling to retailers. Respondent, having at that time one customer classified as a jobber, agreed to afford AWC a similar pricing arrangement.

11. In 1946, the Executive Committee of AMC passed the following resolution:

> Upon Motion duly made, seconded and unanimously carried, it was
>
> *RESOLVED:* That the Associated Merchandising Corporation be and hereby is authorized to and does guarantee the payment of any and all obligations of the Aimcee Wholesale Corporation; and it is
>
> *FURTHER RESOLVED:* That any duly elected officer of the Associated Merchandising Corporation be and hereby is authorized to certify to any person, firm or corporation and to execute any and all papers required to be executed in connection with effecting the guaranty of the payment of any and all obligations of the Aimcee Wholesale Corporation.

This resolution has never been rescinded.

12. Kaplan's price lists contain two columns of prices, one entitled "cost" and the other "retail." The former is Kaplan's price to dealers, and the latter is Kaplan's suggested retail price which is referred to as "list price." Pursuant to negotiations between Kaplan and the AMC buyer, it was agreed that the price to AWC would be "list price" less a discount, except for Aquafaille, for which there was a specially negotiated price. During 1958 and 1959 and up to this time, AWC was and is the only Kaplan account classified as a jobber, all others, except one not relevant here, being retailers.

13. AWC sells not only to stores which are stockholders of AMC, but also to other stores. Of more than 100 stores which are customers of AWC, only 26 are stockholders of AMC. In 1958, however, 98.8 per cent of AWC's sales of Jakson products were made to AMC stores, and, in 1959, 98.6 per cent of such sales. In those two years, AWC sold from .8 to 1 per cent to various units of Fedway Stores.

Fedway Stores is one of ten divisions of Federated Department Stores, Inc., all the other nine being AMC stockholder stores. Many of the officials of Federated Department Stores, Inc., are directors of AMC. AWC's average sales of Jakson products during both 1958 and 1959 to AMC stockholder stores alone amounted to 98.7 per cent of total sales, and combined with sales to the Fedway Stores, amounted to 99.6 per cent of the AWC's total sales for the two-year period.

14. The officers of AMC and AWC during 1958 and 1959 were as follows:

AMC	*AWC*
Joseph P. Kasper, Pres.	Joseph P. Kasper, Pres.
John C. Oram, Vice Pres.	John C. Oram, Vice Pres.
Chas. G. Taylor, Vice Pres.	Chas. G. Taylor, Vice Pres.
Lewis B. Sappington, Vice Pres.	Norman Tarnoff, Vice Pres.
Richard G. Tinnerhold, Sec'y-Treasr.	Richard G. Tinnerhold, Vice Pres. and Treasr.
	Leo A. Nunnink, Sec'y

The officers of AWC, with the exceptions of Tarnoff and Nunnink, were also its directors during the same years. During the same years, Mr. Nunnink was also controller of AMC and AWC.

15. In the conduct of its affairs during 1958 and 1959, AWC employed, among some 200 other personnel, six salesmen who travelled throughout the country calling on AMC stockholder stores as well as other stores. AWC also contracts with AMC for the services of AMC's merchandise representatives (Finding No. 9 above) and AWC pays AMC for such services. These personnel are used for the procurement functions of AWC. One such is Mr. Hodges, AMC's home furnishings division manager, which division is responsible for the purchase of shower curtains.

16. AWC places its own order for Jakson products on its own order form, called Form 500. A typical Form 500 would read as follows:

Aimcee Wholesale Corporation
Shipping Instructions: Shipping instructions on drop shipments to follow.
To: Joseph A. Kaplan, Yonkers, New York.
Shipping date: 12/1/59.
Cancelled: 2/28/60.
Assorted styles and colors of Koroseal and taffeta shower curtains, drapes and ensembles as detailed on 502 shipping authorizations or direct store orders ---------- $100,000.00
List Price less 50% (except Aquafaille which is $2.81).
Signed: ------------------ (Merchandise Representative) Signed: ------------------ (Merchandise Officer)

AWC places its orders with respondent before receiving orders for such merchandise from its customers, although efforts are made by

AWC to predict their behavior based upon previous business. No store customer of AWC, whether stockholder of AMC or otherwise, was under a direction or instruction by its management or otherwise to purchase respondent's merchandise from AWC.

17. Retail stores customarily select the shower curtain lines which they will handle in particular seasons at the housewares show which is held twice a year. At such times, AWC representatives attempt to sell the merchandise which it has purchased from respondent. AWC customers, however, consider the merchandise of the respondent as well as competitive merchandise from suppliers other than AWC, and make their own decisions of what merchandise they wish to buy. If the decision is to buy Kaplan merchandise, the store will generally place an opening order with AWC and, subsequently, sometimes, fill-in orders. Upon receipt of such orders, AWC issues shipping instructions to respondent against the Forms 500 previously executed. Respondent then drop ships the merchandise to the customer store, AWC never taking physical possession of the goods or warehousing it.

In addition, the AMC stores buy a small quantity of Jakson merchandise directly from Kaplan without going through AWC. Such purchases are usually for special sizes, small amounts, or close-out merchandise.

18. Sales of goods of like grade and quality as those sold to the AMC stores were made by Kaplan to other retailers, at or about the same time, in the trade areas where the AMC stores were located, such retailers being in competition with the AMC stores.

Prices

19. During 1958 and 1959, Kaplan charged retailing purchasers the price contained in the "cost" column of its price list. The price charged AWC was the so-called "list price" less a fixed discount, which resulted in cost differences between AWC and retailers of as much as 18 per cent in favor of AWC. In the case of Aquafaille, the cost difference ranged from 5 to 15 percent in favor of AWC. AWC, in turn, sold such merchandise, except for Aquafaille, to its customer stores at a mark-up of 5 per cent over its cost. The resultant cost to the AMC stores was still as much as 13 per cent below Kaplan's charge to other retailers. When the AMC store bought directly from respondent, its cost was the same as that paid by all retailers, or the "cost column" price.

Competitive Injury

20. The record contains no evidence regarding primary line injury; that is, injury to the competitors of the respondent.

21. Despite the higher price paid by the retailers who purchased direct from Kaplan as compared with AWC or the AMC stores, such unfavored customers trade in shower curtains at a gross margin of approximately 42 per cent, which is at least equal to, if not higher than, the average at which they customarily operate the *department* in which the goods are sold. A Stamford retailer, however, enjoyed only a 4 per cent net profit on total *store* sales in 1958, during which time he paid between 11 and 17 per cent more for respondent's curtains than the competitive AMC store in Stamford did.

22. There is no significant resale price competition at the retail level in respondent's goods. In one area, the merchandise is fair-traded. In the other areas, the suggested retail price or Kaplan's "list" price is generally observed.

23. Although some of respondent's retailer customers find retail sales activities in respondent's goods "not very rugged," there are other retailers who describe that activity as "keen" and "strong." Similarly, some retailers consider themselves competitive with the AMC stores, while others, for various reasons, do not.

24. In Stamford, the AMC store suffered a decrease of almost 9 per cent in sales of respondent's shower curtains from 1958 to 1959. During that time, a competitor, Redmond, enjoyed a 42 per cent increase. These comparisons are on the basis of *net* sales which are defined as gross sales minus mark-down allowances and return merchandise. As will appear later, the AMC store had some return-goods privileges and possible mark-down allowances which were not granted Redmond, making a comparison of net sales difficult.

25. In Philadelphia, where the AMC store and a competitor, Wanamaker, were treated alike except for the difference in cost price, the AMC store's purchases of Kaplan merchandise increased about 20 per cent from 1958 to 1959, While Wanamaker's purchases declined about 26 per cent during the same period.

26. *Net* sales figures for 1960 and several years prior show no appreciable change in the AMC stores' share of the market in Stamford, Philadelphia, or Boston. In Philadelphia and Boston, however, the AMC stores did show a marked increase in their share of the market from 1958 to 1959:

Year	Stamford	Philadelphia	Boston	Year	Stamford	Philadelphia	Boston
1951		25.3	35.7	1956	81.4	18.8	27.1
1952		24.2	40.6	1957	89.2	17.4	41.1
1953		30.6	41.5	1958	88.6	13.9	32.8
1954	92.5	22.3	38.5	1959	88.5	19.5	36.4
1955	82.5	20.1	24.5	1960	87.5	18.9	35.6

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27. The following table shows the number of Kaplan's nonfavored customers in the same three areas:

Year	Stamford	Philadelphia	Boston	Year	Stamford	Philadelphia	Boston
1951		14	12	1956	2	21	15
1952		20	10	1957	4	20	12
1953		24	11	1958	4	19	15
1954	3	19	11	1959	4	26	16
1955	3	19	12	1960	3	19	14

28. Despite the lower amounts of price favoritism practiced by the respondent in its sales of Aquafaille as compared with its sales of non-Aquafaille, the AMC stores in the areas studied bought a greater percentage of respondent's Aquafaille than of the non-Aquafaille.

Advertising

29. In order to promote the sale of its products, Kaplan occasionally grants so-called "advertising allowances" to retailers. Respondent employs no printed matter relative to such allowance. Such allowances are granted on three occasions:

a. To assist the retailer in reselling respondent's merchandise in the normal course of dealing in such products, i.e., at regular rather than close-out prices, and where the advertising allowance is not negotiated as part of the price of such merchandise, but is specially negotiated as an allowance *per se*, and is actually intended by respondent as consideration for the retailer's performing the advertising.

Respondent consents to the entry of a cease and desist order with regard to this type of advertising.

b. The great bulk of respondent's "advertising allowance," which actually constitute a part of the price negotiated, in special situations where respondent sells slow-moving merchandise in its own inventory. This monetary allowance, given the purchaser to consummate the sale, is represented as an "advertising allowance," Although respondent has no real interest in whether the money is actually used for advertising, this attitude is not made known to the purchaser who gets the allowance.

c. When retailers are overstocked.

30. During the years 1958 and 1959 and in the course of its business in interstate commerce, respondent made payments or contracted to make payments to or for the benefit of some of its retailer customers in various competitive areas as compensation or in consideration for the three types of advertising referred to in Finding

29, above. AMC stores received such payments for advertising both on goods bought directly from respondent as well as goods acquired through AWC.

31. During the same period of time and in the same competitive areas referred to in Finding 30, above, respondent failed to make, offer, or otherwise make available payments to or for the benefit of some other retailer customers as compensation or in consideration for advertising services to be furnished by or through such other customers competing in the distribution of respondent's products.

a. In the case of advertising allowances granted by respondent to retailers in the normal course of business at regular prices, the record discloses varying payments, or no payments whatever, to competing retailers in the same competitive areas for advertising services on goods of identical grade, quality, and pattern.

b. In the case of "advertising allowances" granted by respondent to move its own slow-moving inventory, the record discloses that such allownaces were negotiated with some of the retail customers. In Philadelphia, the AMC store received an advertising allowance for advertising two patterns in September 1958 which had last been sold to a competing purchaser in February and May of that same year. Two other patterns which were advertised by the AMC store in October 1959 had last been sold to a competing purchaser in February and September 1958. In both Stamford and Philadelphia, however, the allowance granted the AMC stores on purchases of certain patterns of curtains was not offered or made available to competing retailers who had at the same time purchased respondent's curtains bearing the same list price and made of the same material as the one on which the AMC store received an allowance, *but with a different pattern.* Thus the AMC store was able to advertise and sell a certain Jakson curtain (*e.g.*, *Fishnets*) at "$3.99, former price $6.95," during the same time that a competitive retailer in that area was buying a differently patterned curtain of the respondent, made of the same material and with the same suggested retail price of $6.95, but getting no advertising allowance from respondent.

c. In the case of advertising allowances paid by respondent to help move a retailer's slow-moving stock, respondent admits granting such allowances without specifying time or place, and avers additionally that such allowances were given to all retailer customers without distinction. Respondent expects its customers to ask for advertising allowances and its salesmen consult with the retail customers to expedite their sale of slow-moving stock. Several retailer customers in the Stamford, Boston, and Philadelphia areas testified, however, that no advertising allowances were made known to them by respondent. Respondent did not contradict such testimony.

Markdown Allowances

32. In addition to the differences in prices charged by respondent, referred to in Finding 19, above, respondent also paid the AMC stores markdown allowances during 1958 and 1959, both on goods bought directly from respondent and on goods acquired through AWC. When a store wished to move a particular pattern by lowering its sales price and the supplier paid the store a sum of money to do so, such transaction was called a markdown allowance. These allowances were generally granted prior to the introduction of respondent's new line in order to aid the customer in clearing out his slow-moving stock. The amount granted was negotiated between Kaplan and the customer, and resulted in a substantial reduction in cost to the retailer. Thus, Filene's, finding themselves over-stocked with a Kaplan pattern costing them $4.95 and marked to sell for $9.90, reduced the price to $5.95 and received a markdown allowance of $1.60 from the respondent, making its net cost for that pattern $3.35. Competitive stores in Boston were charging $6 for the same pattern by respondent. Similarly, another pattern priced to sell at $7.95 cost Filene's $3.98. When Filene's reduced the price to $4.95, it received a markdown allowance of $1.20, making its net cost $2.78. During the same time, competitors were paying the respondent $4.50 for the same pattern.

33. Although it was to respondent's advantage to clear out slow-moving stock in the hands of all of its customers, it did not grant or offer markdown allowances to all its customers. Such markdown allowances facilitate the clearing out of troublesome merchandise and are an aid to the respondent and the respondent's customers as well. Although respondent was interested in having its customers clear the slow-moving stock, the fact that a markdown allowance could be negotiated was not made known by the respondent to all its customers.

Returns

34. It is respondent's policy, as stated on its invoice, that:

Perfect merchandise is not returnable and will not be accepted unless authorized by us.

Respondent disseminates no other printed matter relative to the circumstances under which it will accept the return of merchandise which is not defective. During 1958 and 1959, respondent accepted the return of merchandise from some of its customers, including the AMC stores, in order to expedite their clearance of excess stock. If the goods had been bought by the AMC store directly from Kaplan, the credit was given the store; if it had been acquired through AWC, the credit was given AWC. During the same period, respondent failed to inform competitors of such favored customers of the availability of this privilege. Thus, although Kaplan accepted return merchandise from Bloomingdale's in Stamford, a competitor in that area, when inquiring about a "program" of returns, was not informed of any such benefit nor was he told of the possibility of any returns under any circumstances. In Boston, Filene's and Jordan Marsh were allowed return credits. A competitor testified that returns could help him, but such benefits had not been made known to him by the respondent.

35. The return privilege accorded by the respondent, although negotiated on an individual basis by pattern, is allowed by respondent not merely on the basis of pattern, but on the basis of the particular store's difficulty in selling the item. Thus, one store's slow-moving item, eligible for return privileges, could be a good seller at a competitive store and would not be eligible at the latter for any return privileges. The converse is also true. It is, thus, immaterial whether the respondent allowed return privileges on a particular pattern. Rather, it is the practice of the respondent to allow some of its customers returns on slow-moving items regardless of patterns. This service or facility is not made available or known to all of respondent's customers.

DISCUSSION

The complaint in this proceeding charges the respondent with violations of the Clayton Act and in particular with violations of subsections (a), (d), and (e) of Section 2 of that Act.

The Purchase Issue

With respect to subsection (a), the complaint alleges that the respondent has discriminated in price between different purchasers of its products of like grade and quality by selling said products to some purchasers at higher prices than those charged competing purchasers. Counsel supporting the complaint contends that the AMC stores are direct purchasers from or customers of Kaplan not only on their purchases direct from Kaplan, but even on the purchases they make of Kaplan's products through AWC. In essence, urges the Commission counsel, AWC is merely a buying front for a group of retailers and respondent's sales to AWC are, in effect, sales to the retailer stockholders of the parent corporation.

In opposition thereto, respondent points to the separate corporate status of AWC and the apparent autonomous operations of that corporation. Like an ordinary wholesaler, AWC places its own orders on its own order forms with the respondent at prices which were negotiated between it and the respondent. These orders, however, argues the Commission counsel, were not firm orders inasmuch as they called for an aggregate dollar amount of merchandise for future delivery, without specification of patterns, sizes, colors, materials and other information necessary to performance. *Nebraska Aircraft Corporation* v. *Varney, et al*, 282 Fed. 608 (8th Cir. 1922). The weight of legal authority, however, appears to support the respondent's position that an agreement giving the buyer an election to select the goods specified in the contract of sale from a general grouping is sufficiently definite and mutual as to obligations to be enforced. *Moon Motor Car Co. of New York* v. *Moon Motor Car Co., Inc.*, 29 F. 2d 3 (2d Cir. 1928); 105 A.L.R. 1100 (1936).

If, of course, AWC's order with Kaplan on its Form 500 was not a binding contract unless and until shipments were authorized at the request of the retail stockholding stores involved, it would be easier to find that the real purchaser in such situations was the store rather than AWC. Assuming, nevertheless, without deciding, that the Form 500 constituted a binding contract in accordance with the weight of authority above, I reach the same result.

Respondent argues that it cannot be held to have violated subsection 2(a) of the Act unless it charged discriminatory prices to *competing* purchasers and, although it charged a lower price to AWC, there was no violation since AWC did not compete with the retail stores that were being charged a higher price. Respondent cites the indirect purchaser cases such as *American News Co.* v. *F.T.C.*, 300 F. 2d 104 (2d Cir. 1962), citing *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310 (D.C.S.D.N.Y. 1961), *Kraft Phenix Cheese Corp.* 25 F.T.C. 537 (1937), *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953), and *Dentists Supply Co. of New York*, 37 F.T.C. 345 (1940), which absolved the discriminating supplier where there was no control by such supplier over the price at which the customer bought from an intermediary wholesaler. Here it is undisputed that Kaplan exercised no control over the prices charged by AWC.

It also cites the parent-subsidiary cases such as *National Lead Co.* v. *F.T.C.* 227 F. 2d 825 (7th Cir. 1955) where the court held that a parent corporation could not be held for the illegal acts of a wholly owned subsidiary corporation without evidence of such complete control of this subsidiary by the parent as to render the former a mere tool of the latter. Here respondent argues that the separate operations of AWC and AMC negates any inference of control by AMC over AWC.

I find it unnecessary to pass upon these arguments of respondent. Assuming, *arguendo*, that the indirect purchaser cases and the parent-subsidiary cases indicate no culpability on respondent's part, I feel that the position taken by the Commission and the courts in the so-called "automotive parts" cases is controlling.[1] In these cases, jobbing members of a buying organization ordered merchandise from the manufacturer, who then shipped direct to the jobbing members. The buying organization was invoiced by the manufacturer and paid it. The jobber members of the buying organization were in turn billed by the buying organization at the exact price charged by the manufacturer. The manufacturer allowed the buying organization discounts based on the aggregate volume of purchases and such rebates were distributed by the buying organization to the jobber members in proportion to their individual purchases.

The operation in these automotive parts cases was an obviously transparent performance. The buying organization was a mere conduit or bookkeeping device. Here the relationships are much more sophisticated and complex. The price offered by the respondent to AWC was not conditioned upon volume of purchases; the orders came from AWC and not from the member stores; AWC sold to the stores at a profit; these profits have never been distributed outside the AWC corporation. Nevertheless, the philosophy underlying the automotive parts cases controls. As the court held in *K. S. Corp.* v. *Chemstrand Corp.*, *supra*, "each case must be decided on its own facts." It must be noted that the respondent orignially dealt directly with AMC, allowing it a volume discount. This arrangement was discontinued in 1946 when AMC formed a wholly-

[1] *Standard Motor Products* v. *Federal Trade Commission*, 265 F. 2d 674 (2d Cir. 1959), *cert. den.*, 361 U.S. 826 (1959); *P. Sorensen Mfg. Co.* v. *Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957); *P. & D. Mfg. Co., Inc.* v. *Federal Trade Commission*, 245 F. 2d 281 (7th Cir. 1957), *cert. den.*, 355 U.S. 884 (1957); *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957), *modf'd*, 355 U.S. 411 (1958), *rehearing denied*, 355 U.S. 968 (1958); *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. den.*, 355 U.S. 941 (1958); *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956), *cert. den.*, 353 U.S. 938 (1957); *Moog Industries* v. *Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958).

owned subsidiary, AWC. It was an AMC representative, however, who negotiated the best price possible on behalf of AWC and secured a wholesale price for it. Furthermore, it was AMC which undertook to underwrite and guarantee the financial obligations of AWC. AWC undertook no warehousing or handling operations as might be expected of a wholesaler. AWC has not been called upon to pay for merchandise it has ordered from Kaplan which it found it did not need. The record contains only an expression of an attitude that Kaplan did expect AWC to carry out its commitments.

Perhaps the most important single fact in the relationship existing between these parties is the actual business done by AWC in shower curtains. Of its total sales in 1958 and 1959, 98.7 per cent were to the AMC stores. If we include the Fedway Stores as AMC stores by reason of their close affiliation, we find that 99.6 per cent of AWC sales were made to such purchasers. In any event, less than 1.3 per cent of AWC sales were made to purchasers other than the stores which owned AWC. In that connection, it should be noted that the stores owned equal shares of the AMC voting stock; the stores' officers or directors were chosen as directors of AMC, who in turn selected the officers of AMC. These AMC directors would also, presumably, select the directors of AWC. The AWC directors were also its officers and, by a curious coincidence, these same individuals were the officers of AMC, chosen by the directors of AMC. The conclusion is inescapable that AMC created AWC *for the purpose* of buying for AMC stores. To assure this result, identity of control was provided both in the corporate structure as well as in the operations where the corporate officers were similar and the buyers used were from both corporate organizations. To assure favorable results, an AMC representative who had been dealing with the respondent secured the wholesale price for AWC—a most anamolous situation if AMC and AWC were as truly separate as claimed. One seldom finds a buyer importuning a supplier to give an intermediary wholesaler a low price unless the buyer has some reason to be quite sure that such low price will inure to his, the buyer's benefit. In *Mennen Company* v. *F.T.C.*, 288 Fed. 774 (2d Cir. 1923) *cert. den.* 262 US 759 (1923), retailers in the same line of trade organized themselves into a corporation. The court found:

The persons who constitute these mutual or cooperative concerns are buying for themselves to sell to other consumers and not to other "jobbers" or to other "retailers." The nature of the transaction here involved is not threatened by the fact that they make their purchases through the agency of their corporation. For some purposes a corporation is distinct from the members who compose it. But that distinction is a fiction of the law and the courts disregard the fiction whenever the fiction is urged to an intent or purpose which is not within its reason and policy. And in such a case as this the fiction can not be invoked. The important fact is that the members of the corporation are all retailers who buy for themselves to sell to the ultimate consumer.

It is obvious to me that AWC *is* buying for the AMC stores and not for the other retailers. Certainly other retailers would be interested in buying from AWC and thus save some 15 per cent in costs if AWC were willing to do business with them. AWC, however, grants this boon, at least in about 99 per cent of its sales, only to its owner stores. Despite the trimming, therefore, the situation is like that of the automotive parts cases and the lower price obtained by AWC from the respondent in the form of an instant price reduction, rather than a deferred price reduction based upon volume of business, inures to the benefit of the AMC stores, first, in the form of lower costs, and second, in profit sharing, presently or eventually, by reason of their ownership of the buying organization.

This is not to say, however, that the buying stores have no right to own stock in a wholesale corporation. Rather, it is the nature of the wholesaling function which controls. Where the sole *raison d'etre* of the wholesaling corporation lies in the benefits it can confer upon its own retailer stockholders to whom it makes all, or practically all, of its sales, it can be no longer be called a true wholesaler but becomes a mere dummy or front for such retailer stores. Such is the characteristic that may be applied to AWC in this instance. This characteristic is also the feature which distinguishes this case from the parent-subsidiary cases (*e.g.*, *National Lead*, *supra*) and the indirect purchaser cases (*e.g.*, *American News Co.*, *supra*) cited by the respondent. In all those cases the subsidiary or intermediary was not created and doing business solely for the benefit of the parent or supplier but was, apparently, in business for all desirable trade.

Kaplan, having dealt with the AMC retailer stores and having been informed of the corporate relationship existing between the proposed wholesaler, AWC, and its former retailer customers, the AMC stores, and knowing to whom AWC was selling, cannot be heard to plead ignorance of the true state of affairs.

The Injury Issue

It is conceded that primary line competitive injury need not be considered in the absence of evidence to that effect in the record.

As to secondary line competitive injury, respondent concedes that AWC and AWC's customers pay less for respondent's merchandise than do their competitors. It points out, however, that 2(a) of the

Act requires proof of the likelihood of competitive injury between the two sets of retailers. Respondent further concedes that the decision in *F.T.C.* v. *Morton Salt*, 334 U.S. 37 (1948) permits an inference of competitive injury from a record of price discrimination between competing purchasers. This prima facie presumption is described by the Court as follows:

We think that the language of the Act and the legislative history * * * show that Congress meant by using the words "discrimination in price" in Section 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitor's. * * * It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by the evidence.

To refute this prima facie presumption of competitive injury due to price discrimination, respondent argues:

1. That the price differentials are not converted into competive resale pricing;

2. That the price differences do not subsidize discernible, additional competitive vigor, but rather that competition in the resale of respondent's brand of shower curtains is a stable and routine matter;

3. That the margin of profit realized by the retailers who pay the higher price is unusually high, and more than adequate to support their successful and healthy trade in the commodities involved;

4. That the share of market of the retailers purchasing at the lower prices has not increased;

5. That the progress of the business of the retailers who buy at the lower prices has not been any better than their competitors';

6. That there has been no decrease in the number or proportion of the "unfavored" retailers in the market place.

These arguments in rebuttal have been given careful consideration. As to the lack of competitive resale pricing, it is true that the retail price of respondent's products are generally observed, voluntarily or otherwise, but proof merely that the favored purchaser has not used his price advantage to cut resale prices is not controlling. *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956).

Price competition is but one form of competition. Additional service to customers, additional salesmen to call on them carrying a larger or more varied stock, branch houses * * * all aid respondent's customers to stay in business and to prosper. The institution or expansion of these competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased. *In the Matter of Namsco, Inc.*, Docket No. 5711, 49 F.T.C. 1161 (1953).

As to "discernible additional competitive vigor," it would be hard to make much of this fact in view of the insignificance of the shower curtain business in an average department or specialty store. Nevertheless, it must be indisputable that the price advantages enjoyed by the AMC stores must inure to their benefit in AMC merchandising services or otherwise. As to respondent's theory of stable and routine competition, it cannot be accepted as a fact in the light of some of the contradictory descriptions given by retailers.

As to the unusually high margin of profit, it should be noted that the high margin of profit is a departmental margin only. It is common knowledge that store-wide margins in retail selling do not begin to approach 42 per cent. In fact, the record shows that one of the nonfavored customers had only a 4 per cent store-wide profit. For him and others like him, a price discrimination of as much as 18 per cent must hurt in direct proportion to the sales volume of the commodity so affected.

As to the share of market of the favored customers, it is true that in the decade of the 1950's the net sales of the AMC stores indicate no appreciable change in their share of the market. On the other hand, however, they did increase their market share from 1958 to 1959 in Philadelphia and Boston. Moreover, the respondent's use of net sales figures for these comparisons fails to give an accurate picture since such figures exclude markdown allowances and return merchandise.

As to the progress of business, at least in Philadelphia, Wanamaker's a nonfavored customer, was treated the same as Strawbridge & Clothier, the favored customer, except as to price. There, where competitive comparisons are apparently appropriate, Wanamaker's purchases declined 26 percent compared with Strawbridge & Clothier's increase of about 20 per cent from 1958 to 1959.

Finally, respondent points to its sales of Aquafaille and the fact that the favored customers bought more Aquafaille than non-Aquafaille, although the price advantage they enjoyed on the former was less than on the non-Aquafaille. The differences, however, were not very great. In the case of Aquafaille, price discrimination ranged from 5 to 15 per cent. In the case of non-Aquafaille, the price differences ran as high as 18 per cent. Consumer preference for one as against another type of shower curtain might very well account for a store's purchase of an item, even at a slightly less advantagous price.

In sum, the prima facie case of competitive injury, predicated upon mere price discrimination alone, has not been rebutted by these various contentions of the respondent.

The Markdown Allowance Issue

The markdown allowance given by respondent to some of its customers has been defined in Finding 32 above. Respondent argues that the allowance is not a service or facility but only money, rendering the transaction outside the scope of Section 2(e) of the Act. Moreover, argues the respondent, these allowances are not an element of the price agreed upon for the sale of any commodity, but an individual gratuity to expedite the retailer's sale of his slow-moving stock.

The complaint makes no specific mention of markdown allowances, citing only price discrimination, discriminatory payments for services, and discriminatory services. A discriminatory program of markdown allowances might well be considered within the contemplation of Section 2(d) of the Act as a payment for services rendered by the customer, the services being the customer's offering of such merchandise for resale at a reduced price. More properly, however, it would appear that such practices are covered by Section 2(a) of the Act prohibiting direct or indirect price discriminations. The markdown allowance has the effect of reducing the buyer's cost and giving such buyer a price advantage over competitors receiving no such allowance. Whether or not the allowance is negotiated at the time of sale, the effect is the same. To make the coverage under 2(a) conditional upon being negotiated at the time of sale is not required by the language of that Section and would only encourage avoidance of the Act. Thus, a seller could charge all customers the same sale price and, having made the sale, give markdown allowances to some. The purposes of the Act should not and cannot be frustrated in that manner.

Respondent contends, however, that if the markdown allowance is within the coverage of Section 2(a), it is expressly excluded therefrom by the last proviso of that Section which permits "price changes * * * in response to changing conditions affecting the market for or the marketability of the goods concerned." This affirmative defense, however, is obviously intended for the seller who must make prompt disposal of his merchandise and who may find it necessary, therefore, to sell to different purchasers at different prices. It has nothing to do with the marketability of the goods in the hands of the buyers. Nor is the exemption applicable to mere changes in market demand in the regular course of business, as here. See Cyrus Austin, *Price Discrimination*, p. 80 (1959).

The Advertising Allowances

As noted in Finding 29, above, respondent consents to the entry of a cease and desist order with respect to advertising allowances made by it to assist the retailer in reselling merchandise in the normal course of dealing in such products. It opposes, however, a cease and desist order with respect to the two other types of advertising allowances involved, those granted to sell respondent's close-out merchandise in its own inventory and those granted a retailer to help move excess stock in the retailer's inventory.

As to respondent's close-out merchandise, respondent argues that the allowance granted is merely a bookkeeping transaction, the respondent being interested only in the net realization. As a component in the respondent's formula for determining its price, the allowance should be governed by 2(a), according to the respondent, rather than as a payment for services under 2(d). If so, applying the affirmative defense of sales in discontinuance of business in the goods concerned contained in 2(a) would absolve the respondent.

I cannot agree. There are many elements of cost which enter into any formula for determining a sales price by a seller. There may be no basis for segregating any one of them, such as advertising, and treating such segment separately, except where the seller, by his own behavior, so treats it. This is the case here. Kaplan negotiated a sales price for its close-out merchandise and deducted therefrom an advertising allowance separately stated. Having done so, the allowance came within Section 2(d) of the Act and had to be made available to all customers. The respondent's intent becomes immaterial. *P. Lorillard Co.* v. *F.T.C.*, 267 F. 2d 439 (3rd Cir. 1959) *cert. den.* 361 U.S. 923 (1959); *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831 (7th Cir. 1958), *cert. den., sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947 (1959).

Respondent also contends that since the record fails to show discriminatory advertising allowances on close-out merchandise of the same pattern and at the same time, there has been no prohibited discrimination. The record does, however, admittedly disclose that respondent granted advertising allowances on certain patterns of close-out merchandise to some of its customers, but failed to grant such allowances to other customers purchasing different patterns but bearing the same suggested retail price. Although Section 2(d) does not contain the language of "like grade and quality" found in Section 2(a), it would appear that such limitation should be read into 2(d). Cyrus Austin, *supra*, page 128. Pattern is an important consideration in the sale of shower curtains, a commodity which is considered to have style and fashion attributes. In such case, a seller's choice of a pattern in is excess stock for close-out sale and advertising allowances should not require him to offer his whole price line on similar terms. Otherwise, Kaplan, finding Pattern X in its $7.95 price line slow moving, would be obliged to offer promotion allowances, if at all, on all its $7.95 curtains. This would be an intolerable hindrance to sales. *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket No. 6212, 52 F.T.C. 1535 (1956); *Atalanta Trading Corp.* v. *F.T.C.*, 258 F. 2d 365 (2d Cir. 1958).

In the *Atalanta* case, the promotional allowance given by the seller to a customer on certain items of its meat products was not offered to any other customer. There were no other sales at the same time and of the same item to competing purchasers. The Court held there was no discrimination. The failure to make the allowance must be to a purchaser. The fact that there may have been potential purchasers was considered immaterial because the Act imposes no duty to sell all potential customers. All the Act requires of a seller is that he give equal treatment to those he chooses to sell.

Here Kaplan did not sell the particular close-out, slow-moving pattern on which an advertising allowance was granted except to the single purchaser. There being no other purchaser of that item, but only potential purchasers, the *Atalanta* case requires a finding of no discrimination.

Had there been other purchasers of that close-out item who received no advertising allowance, then respondent's failure to inform such purchaser of the advertising allowance would have violated the Act and its expectation that the buyer would ask for the allowance no defense. *Chestnut Farms Chevy Chase Dairy*, Docket No. 6465, 53 F.T.C. 1050 (1957); *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (March 21, 1962) [60 F.T.C. 568]; *Liggett & Myers Tobacco Co., Inc.*, Docket No. 6642 (Sept. 9, 1959) [56 F.T.C. 221]; *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89 (1954).

As to advertising allowances to help the retailer move his own excess stock, respondent contends that it has not been shown that it actually paid such an advertising allowance. Mr. Kaplan, a corporate officer, testified, however, that the respondent did grant such allowances although no specific instance was mentioned. There is nothing in the record to indicate that the respondent denied such allowances to some customers while granting them to others.

Here, however, there is no difficulty respecting discrimination as in the case of advertising allowances on Kaplan's close-out merchandise. The allowance given by Kaplan to move a retailer's stock, as distinguished from Kaplan's own stock, is made because the *retailer* has a slow-moving item which he wants to move. The allowance is made for a retailer's slow-moving item regardless of patterns. Indeed some patterns, slow-moving in some stores, are good sellers in other stores and would not qualify for an advertising allowance in such stores. The record makes it obvious that retailers often and normally experience slow-moving items. If so, respondent's failure to deny an advertising allowance to such retailers is no defense. Rather, it is its failure to inform all competing customers that an advertising allowance was available on their own slow-moving items that violates the Act.

The Return Merchandise Issue

Respondent concedes that it has accepted the return of merchandise from some of its customers, but not from all. Respondent argues, however, that it has not violated the Act in this respect because such credits are not services or facilities connected with the handling, sale, or offering for sale of such commodities; that dealers prefer not to qualify for the return payment, for it represents a loss of money to them in failing to get the full retail price; that nondiscriminatory return payments are in respondent's own best interests; that only the "uncondonably incompetent" buyers will fail to ask for return credits if they want them, and respondent has not refused such requests; that the record fails to show that return payments on a specific pattern were granted to any customer and denied another competing customer seeking to return the same pattern.

These arguments are not persuasive. Payments for return merchandise are properly within the coverage of Section 2(e) of the Act. The Commission, in the Matter of *Appleton-Century-Crofts, Inc.*, 47 *F.T.C.* 1371 (1951), held such payments to be so covered. Although the return payment privilege was part of the purchase transaction in that case, I see no distinction. Section 2(e) of the Act prohibits discriminatory furnishing of services or facilities connected with the processing, handling, sale, or offering for sale of the commodity. The clearance of excess stock in the hands of the retailer is an obvious aid both to that retailer and to the respondent. The return service provided by the respondent in this case is obviously connected with the processing and handling of that commodity, even if it is in the cessation of handling of the commodity. Certainly, a retailer can hardly undertake the return of merchandise without some handling. In this respect, *Secatore's Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665 (D.C. Mass 1959), and *Skinner* v. *U.S. Steel Corporation*, 233 F. 2d 762 (5th Cir 1956), are distinguishable in that the services or facilities involved, viz., credits and wage assignments, were not necessarily involved with the handling or sale of the merchandise.

The fact that dealers may not prefer to qualify for return payments and that nondiscriminatory payments would be in the respondent's own best interest is beside the point. The issue is whether there was discrimination in fact, regardless of intent and injury.

As to the alleged custom in the trade of requesting return payments, the Commission's position in the *Matter of Chestnut Farms Chevy Chase Dairy*, and other cases cited, *supra*, is pertinent both here and in the case of advertising allowances discussed above.

Similarly, as to pattern: Although the record fails to show that any customer was denied return privileges on a particular pattern for which return privileges were granted by the respondent to competing buyers, return privileges were not granted by the respondent simply on the basis of pattern. Rather, they were granted because a particular item was slow moving with a particular retailer, regardless of pattern. The discrimination, however, was in failing to grant such privileges to some sellers similarly "stuck" whether or not with the same pattern. Some of respondent's customers were not informed of this privilege although in competition with others who were given that privilege.

The Scope of the Order

I have concluded, above, that violations of Section 2(d) have been proven with respect to advertising allowances in the normal course of business as well as for a retailer's slow-moving stock, but not for Kaplan's close-out merchandise. Respondent contends that the cease and desist order is properly limited to the specific practice found violative of the Act.

This proposal is not satisfactory. The order herein regarding discriminatory payments for services is limited to advertising and promotional services. Simply because respondent has elected to segment its program of advertising allowances for the sake of its brief herein, is insufficient justification for further circumscribing the cease and desist order relative to advertising allowances. By its own admission, respondent has engaged in discriminatory payments or a buyer's specific services, viz., advertising. There is no precedent within or without the Commission for making that the basis for an order further limited to the specific type of advertising done. *In the Matter of Shulton, Inc.*, Docket No. 7721 (July 25, 1961) [59 F.T.C. 106]. Even the *Swanee Paper* case, 291 F. 2d 833 (2d Cir., 1961), cited by the respondent, fails to support its position. That case does not require an order to be coterminous with the facts found which is the respondent's position. On the contrary, it simply requires "there must be some relation between the facts found and the breadth of the order." A program of advertising allowances, either in the normal course of business or to expedite the sale of slow-moving stock, cannot be said to be so unrelated in its segments as to require dissection and individual treatment in a cease and desist order.

Respondent also urges that if a cease and desist order is entered regarding price discriminations, it be limited to the type of violation found or, specifically, that it prohibit the respondent from discriminating in price through the medium of an intermediary person. Here, too, the argument is made that since the use of the intermediary person (AWC) was the only instance of price violations, the order must be limited to that type and not cover price discriminations committed without the use of an intermediary. This proposition seems patently absurd. In effect, respondent would have the order prohibit price discrimination done indirectly, leaving the respondent free to do the same directly.

Finally, Commission counsel proposes that the order prohibit all discriminatory furnishing of services not merely the acceptance of return merchandise. Respondent opposes this proposed order, urging that it be limited to the acceptance of return merchandise only and not cover other services. The record contains nothing whatever with respect to any possible violations of the Act by the respondent under Section 2(e) except the acceptance of return merchandise. An authority notes:

> * * * [T]he cooperative-merchandising service involved * * * under Section 2(e) * * * is usually a service furnished by the manufacturer to a retailer * * *. This service * * * has a broad range and includes: providing a demonstrator * * * making a sales promotion discount or payment; allowing a cash discount; offering free goods; providing special containers or labels; allowing mail or telephone orders at a discount; permitting an f.o.b. purchase at a less price; allowing a rebate for the non-return of unsalable merchandise * * *. [These are] simply indicative of it * * *. Charles Wesley Dunn, CHH Robinson Patman Act Symposium, New York State Bar Association. January 23, 1946.

In accordance with the decision of the Commission in *Quaker Oats Company*, Docket No. 8119, April 25, 1962 [60 F.T.C. 798], the order herein is limited to the acceptance of return merchandise, the type of service involved, rather than covering the myriad services possible in

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a merchandising relationship. Similarly, in the case of discriminatory payments for services under 2(d), the order is limited to advertising and promotional services but without further fragmentization into the various facets and techniques of advertising payments possible. In the case of discriminatory pricing under 2(a), the order covers competing purchasers but is not limited to the particular device of discrimination which has been or may be employed by the respondent, to wit, an intermediary person. Unlike the *Vanity Fair Paper Mills* decision, *supra*, where an order covering payments for all services was approved, the order herein is limited to the type of service involved, an advertising allowance in one instance and the acceptance of return merchandise in the other. In the *Vanity Fair* case, the Commission's opinion emphasizes the respondent's policy to consider the customer's request, which could take many forms. In this case, there is no intimation of respondent's interest in services other than those covered by the order. As the Commission stated in the *Quaker Oats* decision:

> There is no reason to believe as in *Vanity Fair Paper Mills, Inc., supra*, in which a broader order issued, that future activities might concern other than advertising, promotional or display services or facilities.

In this case there is no reason to believe that future activities might concern other than discriminatory pricing, including markdown allowances, advertising, and the acceptance of return merchandise.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondent.
2. This proceeding is in the public interest.
3. Respondent is engaged in commerce.
4. Respondent in the course of such commerce discriminates in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or to injure, destroy, or prevent competition with any person who knowingly receives the benefit of any such discrimination or with its customers.
5. The respondent's program of markdown allowances is an element of price within the meaning of Section 2(a) of the Act.
6. Respondent pays advertising allowances for the benefit of a customer in the course of such commerce in consideration for the service or facility of advertising furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of products sold by the respondent, without making such payment available to all competing customers.

7. Respondent discriminates in favor of some purchasers against other purchasers of a commodity by furnishing some purchasers the service or facility of accepting return merchandise for credit, such service or facility being connected with the processing, handling, sale, or offering for sale of such commodity.

ORDER

It is ordered, That respondent Joseph A. Kaplan & Sons, Inc., a corporation, its officers, employees, assignees, and representatives, directly or through any corporate or other device, in or in connection with the sale of shower curtains, shower curtain sets, shower curtain accessories, and related products in commerce, as commerce is defined in the Clayton Act, as amended, forthwith cease and desist from:

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

2. Paying or contracting to pay, or granting or contracting to grant, or allowing, directly or indirectly, anything of value, including checks and credits, to or for the benefit of a customer as compensation or in consideration of any advertising or promotional services or facilities furnished by or through said customer in connection with the sale or offering for sale of respondent's products, unless such payments, credits, grants or allowances are available on proportionally equal terms to all other customers competing in the distribution of said products.

3. Discriminating directly or indirectly among competing purchasers of its products by contracting to furnish, furnishing, or contributing to the furnishing of the service or facility of accepting the return of its unsold products to any purchaser of said products bought for resale, with or without processing, unless such service or facility is accorded on proportionally equal terms to all purchasers competing in the resale of said products.

OPINION OF THE COMMISSION

NOVEMBER 15, 1963

By DIXON, *Commissioner:*

This matter is before the Commission upon exceptions respectively taken by counsel supporting the complaint and respondent to the hearing examiner's initial decision holding respondent in violation of subsections (a), (d), and (e) of Section 2 of the Clayton Act, as amended. The examiner, in his initial decision, included an order against respondent to cease and desist the practices he found to be unlawful.

Complaint counsel has two exceptions to the initial decision. The first is that the order provision relating to the Section 2(e) violation found is limited to the specific method employed by the respondent; the second is that the examiner failed to find a Section 2(d) violation in connection with advertising allowances granted to promote the sale of slow-moving products in respondent's own inventory. Respondent's exceptions, as its counsel states in its brief, cover virtually the entire initial decision. Principal objections seem to go to the scope of the order and to the examiner's findings and conclusions: (a) to the effect that certain retailers buying through an intermediary were purchasers from the respondent; (b) that the price discriminations found would likely injure competition; (c) that respondent had violated Section 2(d) in connection with advertising allowances applicable to slow-moving styles and (d) that its acceptance of returned merchandise from certain purchasers constituted services and facilities within the meaning of Section 2(e) and that respondent had violated this subsection with respect to such returns. It should be noted that respondent does not contest the order to cease and desist covering the Section 2(d) violation insofar as it relates to normal advertising allowances given to promote its merchandise at regular prices.

Joseph A. Kaplan & Sons, Inc., respondent, is a New York corporation with offices located at 1 Jakson Place, Yonkers, New York. It is engaged in the manufacture, sale and distribution of shower curtains, shower curtain sets, and accessories, under the trade name "Jakson." Respondent, one of the industry leaders, sells products in the amount of about $2,500,000 annually. These products are sold in interstate commerce.

Respondent's customers, during the time covered by this proceeding (1958 and 1959), were all retailers, specifically department stores and specialty stores, except one, disregarding for the moment purchases made by or through Aimcee Wholesale Corporation (hereafter referred to as AWC), which transactions are at the center of the instant litigation. The single exception (other than AWC) was the Crane Company, an organization engaged in the distribution of plumbing supplies.

The complaint in Count I charges that respondent discriminated in price in violation of Section 2(a) by selling products of like grade and quality to some purchasers at higher prices than the prices charged competing purchasers and that the favored purchasers were billed by, and submitted payment to, respondent through an intermediary corporation owned and controlled by such favored purchasers.

The basic facts in this case so far as they concern the distribution of respondent's goods to certain retailers through AWC and the different prices charged different purchasers are not in dispute. Twenty-six retail department stores located in various states of the United States together wholly own a corporation known as Associated Merchandising Corporation (hereinafter referred to as AMC), with offices at 1440 Broadway, New York City. Each store owns one share of Class A voting stock and an undisclosed quantity of Class B nonvoting stock. The directors of AMC are chosen by the Class A stockholders from among the Class A stockholders. Among these store owners are Bloomingdale Bros., Stamford, Connecticut; Wm. Filene's Sons Co., Boston, Massachusetts; and Strawbridge & Clothier, Philadelphia, Pennsylvania. For convenience, the twenty-six AMC stockholder stores will hereafter be referred to as the "AMC stores."

AMC and its stockholder stores were the named respondents in the matter of *Associated Merchandising Corp., et al.*, Docket No. 5027, decided by the Commission May 8, 1945 (40 F.T.C. 578). The Commission, in that matter, issued an order requiring those respondents to cease and desist knowingly inducing or receiving discriminations in price. The findings there were in part as follows:

> Respondent, A.M.C., was created, and is now being maintained and operated, by respondent members as an instrument, method, agency, and means whereby said respondent members are enabled to Act collectively to obtain special allowances and discounts on their purchases of goods, wares, and merchandise for resale in their respective stores. (40 F.T.C. 590.)

The record discloses that AMC, as such, now functions as a service organization for its stockholder stores, providing aid in such things as research and merchandising. In about 1946, soon after the aforesaid action by the Commission in Docket No. 5027, AMC formed a wholly owned subsidiary corporation called Aimcee Wholesale Corporation (AWC), already referred to above. AWC occupies the same administrative offices as those of the parent corporation and maintains a warehouse at a different location in New York City.

The officers of the AMC and AWC during 1958 and 1959 were:

AMC	*AWC*
Joseph P. Kasper, Pres.	Joseph P. Kasper, Pres.
John C. Oram, Vice Pres.	John C. Oram, Vice Pres.
Chares G. Taylor, Vice Pres.	Charles G. Taylor, Vice Pres.
Lewis B. Sappington, Vice Pres.	Norman Tarnoff, Vice Pres.
Richard G. Tinnerholm, Sec'y-Treasr.	Richard G. Tinnerholm, Vice Pres. and Treasr.
	Leo A. Nunnink, Sec'y

During these same years the officers of AWC, with the exceptions of Tarnoff and Nunnink, were also its directors.

In 1946, the Executive Committee of AMC passed a resolution, still in effect, providing that AMC guarantees the payment of any and all obligations of AWC.

AWC contracts with AMC and pays for the services of AMC's merchandising representatives. Such personnel are used in the procurement functions of AWC. One of these representatives so used was Mr. Hodges, AMC's manager of the home furnishings division, the divison responsible for the purchase of shower curtains.

AWC sells merchandise to stores other than the AMC stores, but the record does not disclose the volume of such outside sales except as to respondent's products. Virtually no sales were made of respondent's products to non-AMC stores. In 1958, 98.8 percent of the Jakson products distributed through AWC were sent to AMC stores; in 1959, 98.6 percent. In these years up to 1 percent of the goods billed through AWC were sold to Fedway stores, one of the ten divisions of Federated Department Stores, Inc., the other nine being AMC stores. Many officials of Federated Department Stores, Inc., are directors of AMC. Combined with sales to Fedway stores, AWC's average distribution of Jakson products in 1958 and 1959 to AMC stores amounted to 99.6 percent of AWC's total distribution for that period.

AWC placed orders to respondent on its own order forms (called Form 500) at the prices negotiated between it and respondent. In a typical purchase AWC would order "Assorted styles and colors of Koroseal and taffeta shower curtains, drapes and ensembles as detailed on 502 shipping authorizations or direct store orders," and would advise: "Shipping instructions on drop shipments to follow."

Such general orders would be placed before AWC received specific orders from the AMC stores, but efforts were made to estimate closely the needs of these stores.

Retail stores customarily select shower curtain lines they will handle for the coming season at the housewares show held twice a year. AMC stores may place orders for Jakson curtains through AWC or purchase from other suppliers. If they choose Jakson merchandise, the stores will place opening orders with AWC and sometimes later fill-in orders. Upon receipt of such orders, AWC issues shipping instructions to respondent against its Form 500 orders. Respondent then drop ships the goods to the AMC store. AWC never warehouses or takes physical possession of the goods. AMC stores buy some merchandise directly from respondent, usually consisting of special items like close-out merchandise.

Prior to 1946, which also was before the Commission issued its cease and desist order in Docket No. 5027 against AMC and stockholder stores, respondent sold to AMC and granted it a quantity discount. In 1946, respondent was advised by the *AMC* housewares buyer, Mr. John Lyons, that AWC had been formed and that a wholesaler's discount for the new organization was being sought. Respondent agreed to give to AWC discounts on the same special terms then being accorded to the Crane Company.

From all of the circumstances, we conclude that the real purchasers and customers for respondent's shower curtains in the AWC transactions were the AMC stores. The entire ownership and control of AWC was, indirectly through AMC, in the hands of the AMC stores. The benefits in connection with the lower prices received through AWC flowed directly to the AMC stores. While AWC, so far as respondent's products were concerned, was technically a wholesale purchaser, in reality the goods were purchased by the individual stores.

It is contended by respondent that AWC was a distinct corporate entity operating as a wholesaler. However, the purpose or effect of purchasing respondent's products through AWC was clearly to provide special prices to the retailers owning the corporation. The corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute. *Corn Products Refining Company* v. *Benson*, 232 F. 2d 554, 565 (2d Cir. 1956); *Mennen Co.* v. *Federal Trade Commission*, 288 Fed. 774, 782 (2d Cir. 1923), *cert. denied*, 262 U.S. 759.

The respondent knew, or was chargeable with the knowledge, that the special prices it accorded to AWC inured directly to the benefit of the AMC retailers and that it was in effect dealing with such retailers as its purchasers and customers. The facts leave no question on this score. Respondent knew that AWC had been formed by

AMC and it also knew that AMC was owned and operated by a group of retailers, as the testimony of respondent's president, Harold M. Kaplan, indicates.

Moreover, while Mr. Kaplan denied the AMC stores were respondent's customers on regular merchandise, respondent's actions towards these stores denote a buyer-seller relationship. Respondent treated the AMC stores as its customers, as shown by the regular contacts. Its salesmen called periodically on all AMC stores, looked over stocks, tried anticipating merchandising problems, and recommended measures, such as advertising campaigns to keep products moving. Respondent's representatives worked closely with the AMC stores on the questions of advertising allowances, markdown allowances, return of goods and other merchandising problems.

To illustrate, on markdown allowances, respondent's representative would work out the whole arrangement with the retail store. The representative in such case had to know the size of the stock, the nature of the market and the terms of sale and resale before he could intelligently recommend a markdown allowance. These allowances were given after mutual agreement between the store and respondent that the retail price was too high and that lower prices were necessary to move the goods. The close working relationship between respondent and AMC stores is pointed up by various documents relating to the receipt of advertising allowances and other benefits which show specific authorization by respondent for payments to stores for particular promotions. Respondent, from such contacts, was bound to know and did know the relationship between the AMC stores and AWC and the terms and conditions under which the goods were received by the AMC stores.

There is also evidence that respondent influenced, at least to some extent, the terms upon which the AMC stores bought. The testimony of Mr. Kaplan brings out that the price to be paid by the AMC store, in certain circumstances, is in part established by respondent. He testified that in the case of AMC stores, the credit for markdowns, advertising allowances and such like went to the AWC organization but he stated, "I think there is inducement, because I think that it is a transfer, and I think that the store does get proper credit." Respondent, in short, refunded a portion of the price which it knew went back to the particular store to permit that store to resell at a new lower price. The court, in *American News Company, et al.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962), *cert. denied*, 83 Sup. Ct. 44 (1962), held that if a manufacturer deals with a retailer through the intermediary of wholesalers, dealers or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailer and controls the terms upon which he buys.

AWC was technically the customer but the real purchasers and customers were the stores. Except for the mechanics of ordering and billing, respondent dealt with AMC stores exactly the same way as if AWC were out of the picture. From all the circumstances we conclude that the individual AMC stores were the purchasers and customers for the purposes of the Robinson-Patman Act. Cf. *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958).

Discrimination in Prices

In 1958 and 1959, respondent charged retailers the prices contained in the "cost" column of its price lists (Commission Exhibits 2 through 5 and subparts). AWC was billed at the so-called "list price," less a discount of 50 percent resulting in cost differences between AWC (AMC stores) and other retailers of as much as about 18 percent in favor of AMC stores. In the case of Aquafaille curtains, the cost difference was 5 and 15 percent in favor of AMC stores. AWC billed the AMC stores at list prices less a discount of 47½ percent, or, to put it another way, at a markup of about 5 percent over its costs.

Examples of the price differences charged between favored AMC stores and nonfavored retail stores in the same markets are as follows: Filene's, AMC store in Boston, Massachusetts, bought the Zephyr pattern set on September 22, 1959, for $2.95 a set, while Walpole Bros., in the same city, on August 24, 1959, paid $3.60 a set. The unfavored store was charged 18 plus percent more than the favored. Bloomingdale's, AMC store in Stamford, Connecticut, paid in January, April and May 1958, for Windswept pattern, $4.95 a set, whereas Redmond's, in the same city, paid $6 per set, or a 17 plus percent difference in the same period.

Competitive Injury

The basis for determining the likelihood of competitive injury in secondary line cases, as set forth in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), and followed in a series of subsequent court and Commission cases, *e.g.*, *Moog Industries, Inc.* v. *Federal Trade Commission* 238 F. 2d 43 (8th Cir. 1956); *Whit-*

aker Cable Corp. v. *Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956); *Mueller Co.* v. *Federal Trade Commission*, 323 F. 2d 44, 46 (7th Cir. 1963), points to a finding of adverse competitive effect in this proceeding. In *Morton Salt*, the court found that "* * * competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay," (334 U.S. at 46–47), and that "* * * there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and pro ducers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." (334 U.S. at 50.) The United States Court of Appeals for the Seventh Circuit, in its recent decision in *Mueller Co., supra*, said:

> There is evidence that the profit margin for a wholesaler in the business is "very, very low" and an additional 10% margin "extremely important"; that a retailer seeing one competitor's lower price on one item will think "you are out of line" on other items and this has a harmful effect on the regular jobbers; that a regular jobber changed to a different seller to get a discount equalling the competition of stocking jobbers; and that some of petitioner's jobbers wrote complaining of the discount to stocking jobbers. Moreover, there is apparent from the difference in discounts themselves a "reasonable possibility" that the regular jobbers would be adversely affected by petitioner's discounting practice.
>
> We think there is a substantial evidentiary basis to support the finding that the effect of discrimination in discounts "may be substantially to injure competition." * * *. [Citing cases.]

Here some of the retailers in the markets covered described the competition as keen—one competitor called it "very rough and very extreme"; a purchaser testified that he "cannot be five cents off" what competitors charge; and various retailers testified that cash discounts were important. For some the cash discount was a very large part of their profit. In one instance, a nonfavored retailer competing with an AMC store in Philadelphia, Pennsylvania, testified, "Well, it's [cash discount] important because it adds to it. Department stores traditionally work on a very, very slim margin and the cash discount that we get when we pay our bills on time is a large part of that." Another witness, Raymond Cohen of Redmond's, Stamford, Connecticut, a specialty store selling soft goods, home furnishings and other such products, testified that Redmond's net profit was 4 percent in 1959 and that if the store did not receive the 2 percent cash discount its net profit would be reduced by about 1 percent. In the circumstances, price differences of 18 percent and even as little as 5 percent are substantial. Respondent's sales to the AMC stores in the years here covered were in excess of one-half million dollars annually. Thus, the total of the discounts received by the favored customers would come to substantial amounts. In view of the continuous large differences in prices here shown between the favored and nonfavored purchasers, the latter, over a period of time would surely lose the competitive contest in the sale of respondent's goods.[1] We conclude that the effect of the price discriminations here shown "may be substantially to injure competition" within the meaning of Section 2 of the Clayton Act, as amended.

The probable competitive effects may, of course, be determined by considering only respondent's shower curtain product. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock, and there is no possible way effectively to protect the retailer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store. *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 49 (1948).

Respondent's exceptions on the Section 2(a) charge are rejected, but we do not agree with all of the examiner's comments in connection with this and other matters in the "Discussion" portion of the initial decision. Accordingly, that part of the initial decision will be stricken by the accompanying order.

Markdown Allowances

Respondent, in the years 1958 and 1959, granted so-called markdown allowances to AMC stores on goods purchased directly from respondent, as well as on the goods these stores acquired through AWC. Other retailers not in the AMC group also received markdown allowances. The terms of such allowances were negotiated between respondent and the retailer. These allowances were granted mainly prior to the introduction of a new line to aid the customer in clearing up slow-moving stock. Since they were on an individual store basis, some stores received the allowances while other pur-

[1] We do not attach any particular significance to the data in the record showing market shares for the years 1951–1960 for the AMC stores in the three markets analyzed. Respondent contends in effect that the data fails to record any consistent loss of sales by unfavored customers. The court, in *Whitaker Cable Corp.* v. *Federal Trade Commission*, *supra*, observed: "* * * it is rather tenuous to argue that because particular purchasers did not lose sales notwithstanding the disparate prices charged by petitioner, there can be no finding of probable injury to competition." (239 F. 2d at 255.) Moreover, as the examiner has found, the AMC stores in Philadelphia and Boston did show a marked increase in their share of the market from 1958 to 1959.

chasers competing in the sale of respondent's goods of the same grade and quality did not. The effect was that the favored purchasers ultimately paid lower net prices. The AMC stores appear to have been regularly favored in this connection. Witnesses representing competing stores, usually small decorator shops but included some larger stores, testified that they had not received and did not even know about the markdown allowances.

The following is an example of this type of price discrimination: On February 13, 1958, John H. Pray, a store in Boston, bought Lace Stripe pattern curtains for $6 a set, while at the same time, Filene's, AMC store in Boston, received this item through AWC at $9.90 less 50 percent, or $4.95 per set. There was, however, a 5 percent additional charge to the AMC store by AWC. Filene's marked this item down in August 1958 from $9.90 to $5.90 and received a markdown allowance of 40 percent of the difference, or $1.60 per set. This brought Filene's ultimate price down to $3.35 as compared with the $6 paid by John H. Pray of Boston. The price paid by Pray was about 45 percent more than the new net price paid by the AMC store.

Where, as here, the larger stores received preferential terms which were in effect lower net prices on particular patterns purposefully granted to lower the retail prices, and where at or about the same time smaller competing retailers buying goods of the same grade and quality paid the regular, higher prices, we conclude that the resulting different prices are price discriminations within the meaning of Section 2(a). For the same reasons referred to above under "Competitive Injury" we conclude that the effect of these price discriminations in the form of markdown allowances likewise "may be to substantially injure competition."

Respondent argues that since the purpose of the mark-down allowances was to spark the sale of slow-moving goods, such come within the changing conditions of marketability provision of Section 2(a). This defense is not available here because there has been no showing of "changing conditions affecting the market for or the marketability of the goods concerned." Even if it is assumed that the mere fact that the goods are slow-moving is a changing condition of marketability, respondent has not adequately demonstrated that this was a characteristic of the goods upon which the allowances were granted. For instance, there has been no attempt to show a comparison in the volume of sales between normal goods and the allegedly slow-moving goods. There has been no real justification under the proviso. Moreover, we are not at all convinced that the mere slow movement of goods in the circumstances shown would constitute a changing condition of market or marketability within the meaning of the pertinent proviso in the Act. We believe that there must be shown a pronounced and serious deterioration or alteration in the market conditions. Nothing like that has been demonstrated here. *Cf. Moore* v. *Mead Service Co.*, 190 F. 2d 540 (10th Cir. 1951); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 369 (9th Cir. 1955). We therefore reject respondent's argument on this defense.

Advertising Allowances

The hearing examiner found in substance that respondent violated Section 2(d) of the Robinson-Patman Act in granting advertising allowances to some customers, which allowances were not made available to competing customers on proportionally equal terms. He differentiated between (a) advertising allowances granted in the normal course of business at regular prices, (b) advertising allowinces granted by respondent to move its own slow-moving inventory and (c) advertising allowances to help the retailer sell the retailer's slow-moving stock. He found respondent in violation as to (a) and (c) but not as to (b).

Complaint counsel has excepted to the examiner's determination as to (b) above; respondent apparently appeals primarily from the scope of the order. The examiner ruled that the respondent consented to the entry of the cease and desist order with respect to advertising allowances made in the regular course of dealing in respondent's products and the respondent, in its brief, states that it does not contest the issuance of such an order. The examiner found that respondent granted discriminatory advertising allowances on goods purchased directly from respondent, as well as on respondent's goods purchased through AWC, which finding is not opposed by respondent. Respondent therefore apparently agrees that at least for the purpose of Section 2(d) the AMC stores are its "customers." The issue on advertising allowances is not whether a Section 2(d) order should be entered, since this is conceded; it is how broadly the order will be construed to cover different tyes of advertising allowances.

In connection with category (c), above, that is, advertising allowances to the retailer on the retailer's stock, we have only certain testimony to indicate that such allowances were granted, and this testimony alone does not show any discrimination in the availability thereof. Complaint counsel seems to have recognized a possible deficiency in the record on this point and fails to mention any evidence supporting contentions of a violation. The hearing examiner based his conclusion on evidence showing a failure to inform competing customers of its availability. It is true that some retailers from Stamford, Connecticut, Boston, Massachusetts, and Philadelphia, Pennsylvania, testified that the availability of advertising allowances was not made known to them. This, however, falls short of adequate proof of any violation, since there is nothing to indicate that allowances of the kind here considered were granted in these three particular localities. We believe the evidence is insufficient to support a finding that respondent discriminated among competitors as to advertising allowances given on a retailer's own stock and we reject the examiner's holding to such effect.

The hearing examiner found that the respondent had made a third category of advertising allowance, which was that granted by respondent to move its own slow-moving inventory. This has been referred to as a close-out sale.[2] Mr. Kaplan defined this type of allowance in part as follows:

> * * * One important group is our closeout sale. This is a very large proportion of the total advertising that we cooperate with the store on. But a closeout sale is a negotiation. It is merchandise that is sitting in our inventory that is not moving as well as we would like to. We want to be through with that pattern. We offer the pattern on a bargaining basis to a particular buyer * * *. (Tr. 431.)

The term "close-out" as used in the testimony suggests the elimination or discontinuance of an item or pattern from the stock. The testimony indicates that certain advertisements on which allowances were made, such as the advertisements identified as Commission Exhibits 41 and 43, concern merchandise purchased by the AMC store directly from the respondent. These advertisements apparently relate to special promotional merchandise, since that was all that AMC stores purchased directly from respondents. It is not at all clear from the record, however, that any of the goods on which advertising allowances were accorded were in fact discontinued items. The documents tell us very little. Strawbridge & Clothier,

[2] We concur in the examiner's disposition of respondent's argument that the allowances it granted on close-out merchandise was in effect a part of the price and should be governed by Section 2(a), at page 1329 of the initial decision, where he states:

"I cannot agree. There are many elements of cost which enter into any formula for determining a sales price by a seller. There may be no basis for segregating any one of them, such as advertising, and treating such segment separately, except where the seller, by his own behavior, so treats it. This is the case here. Kaplan negotiated a sales price for its close-out merchandise and deducted therefrom an advertising allowance separately stated. Having done so, the allowance came within Section 2(d) of the Act and had to be made available to all customers."

in its invoice to respondent for respondent's share of the advertisement appearing in the record as Commission Exhibit 41, merely described the transaction as follows: "To advertising 'Shower Curtains' in the Sunday-Inquirer . . Sept. 14— Your share as per agreement . . $200.00" (Commission Exhibit 36A). In other words, there is little, if anything, in the record to show that the allowances received for the advertisements, such as those represented by Commission Exhibits 41 and 43, are in a particular category relating to so-called close-out merchandise and thus different from respondent's regular advertising allowances. Nevertheless, because of the question raised, we believe it appropriate to proceed and consider the matter as though it were clearly shown that respondent had such a special category.

The hearing examiner decided the question on "close-out" advertising allowances on the basis that no other customer competing with the favored customer had purchased the same particular "close-out slow-moving pattern," citing *Atalanta Trading Corporation* v. *Federal Trade Commission*, 258 F. 2d 365 (2d Cir. 1958), as his legal authority. He is wrong in this determination. In the first place, goods of like grade and quality, in fact identical goods, were sold to competitiors of the favored customer, although there was a time difference in the sales. As an example, the Americana pattern which was advertised by Strawbridge & Clothier of Philadelphia, Pennsylvania, on September 14, 1958 (Commission Exhibit 41), had been sold to a competing purchaser on February 28, 1958, and May 28, 1958. (Commission Exhibit 12.) If it is assumed that respondent sold the pattern about the same time it was advertised, there is a time difference here of a number of months between the transactions, but we do not believe that such a fact is fatal to a finding of sales of the same item to competing customers. This matter is clearly distinguishable from the *Atalanta* case on the point because here, unlike *Atalanta*, there is a showing of continuous sales of regularly promoted items. In *Atalanta* there were only isolated sales.

Secondly, the close-out allowance question was incorrectly decided by the examiner because goods of "like grade and quality" were sold to or handled by competitors of the favored retailers at the same time. In one instance, Strawbridge & Clothier of Philadelphia, Pennsylvania, an AMC store, advertised certain of respondent's curtains in the *Philadelphia Inquirer* on September 14, 1958, for which it received an allowance from respondent. (See Commission Exhibits 36A, B; 41.) At or about the same time, Gimbel's, Philadelphia, Pennsylvania, purchased and marketed respondent's products, some of which were apparently the same in everything except pattern. The Strawbridge & Clothier ad, for example, mentioned "Barbary," a Koroseal curtain priced "Reg. 4.95, 2.99 ea." Gimbel's purchased "Bouffant" on August 26 and September 11, 1958, which product was also a Koroseal curtain, and it carried a suggested retail price of $4.95. Gimbel's was not advised of the availability of any advertising allowance (nor were such allowances in any sense available) on the Bouffant pattern or similar curtains. While such goods differed as to pattern, the difference, in the circumstances, is not enough to distinguish the products. We have here a line of products promoted as a line, that is, the shower curtain line, and all of the items in the line are used for the same purpose. The fact that this case deals with such a unified line of goods clearly distinguishes the case from *Atalanta*.

What respondent has done is to segregate a particular pattern in its line of shower curtains and decide that one purchaser out of a number of purchasers in a particular territory will receive an allowance for advertising on the particular pattern. The competitors, although they are handling goods of like grade and quality, receive nothing. The availability of the particular pattern and the advertising allowance on such pattern is not known to them. The withholding of an opportunity to buy the special pattern was in effect a withholding of an opportunity to share in the allowance. The customers involved are generally competing in the sale of respondent's whole line of goods, and it would be completely contrary to the purpose of Section 2(d), aimed at equality of opportunity for competing merchants, who acquire products for resale, if some are so denied a chance to participate.

We do not think that the principles involved, however, go so far as to require in this case that an advertising allowance on a specific item, though it be distinguished from a line by no more than a style or pattern difference, need be given on the whole line in all circumstances. If, for instance, it is shown that a particular item is to be discontinued and the manufacturer desires to grant an allowance on this item alone so that he can quickly clear his warehouse of the merchandise, as respondent claims it was seeking to do here, it may do so providing all customers competing in handling respondent's line in the affected market are given an equal opportunity to purchase this specific item and to share in the allowance.[3]

[3] This has nothing to do with a seller's qualified right to refuse to deal with a potential purchaser. Here we are considering a situation in which competing purchasers handling respondent's line are purchasers of goods of "like grade and quality."

In other words, the availability of the advertising allowance would depend upon the availability of the specifically promoted item or pattern itself. Here there has been no showing by respondent, as to the particular patterns on which payments were made, that competitors of the favored customers had an opportunity to buy the goods and receive a share of such payments. *Cf. State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (7th Cir. 1958). In fact, the record affirmatively shows that respondent treated customers on an individual basis in the granting of advertising allowances on the close-out sales and that such allowances were not available to customers competing with the favored customers in the sale of respondent's goods. We therefore overrule the hearing examiner in his holding on this question and find and conclude as to the close-out advertising allowances that respondent has violated Section 2(d) of the Robinson-Patman Act.

Return of Merchandise

The examiner found that respondent conceded that it had accepted the return of merchandise from some of its customers, but not all. Moreover, the record clearly shows this to be the case. In Stamford, Connecticut, Bloomingdale's returned merchandise; but Redmond's was not offered the opportunity. Nor did respondent agree to grant such privilege when that customer specifically requested it. In Boston, Filene's and Jordan Marsh were privileged to return good merchandise, but respondent did not make the same service available to competitors Howell Brothers and Walpole Brothers. The benefits which the favored customers received were aptly described in the words of one of the customers, as follows:

> Well, the shower curtain business is one that depends upon running it with clean, liquid stock. It is to our advantage to be injecting new styles, fresh styles, into that stock repeatedly. In this manner we are able to stimulate customer business. If our stocks become bogged down with undesirable sellers or with sellers that are—that our customers tell us they don't desire or demand, it is this that would affect our shower curtain business greatly. (Tr. 996-7.)

Respondent does not contest the finding and holding as to the difference in treatment in regard to returns of merchandise. It argues, however, that the returns are not within the meaning of Section 2(e) because they are not connected with the "processing, handling, sale or offering for sale" of such merchandise. We believe the argument is without merit. In the examples mentioned above, the competing retailers buy the respondent's merchandise regularly. This merchandise is bought for resale. It will obviously help the favored purchaser to move the merchandise which he has purchased from the respondent if he can return slow-moving patterns. Thus, the service provided is connected not only with the handling of the product returned, but also with the "handling, sale, or offering for sale" of the entire line of respondent's products. This we think is a service within the meaning of Section 2(e). See *Appleton-Century-Crofts, Inc.*, 47 F.T.C. 1371 (1951). Respondent has violated this subsection of the Clayton Act, as amended, since it did not accord such service to all purchasers on proportionally equal terms.

Form and Scope of Order

Respondent objects to the form of paragraph 1 of the order contained in the initial decision. It contends that words such as "charged to any other purchaser" renders that paragraph ambiguous, uncertain and vague. It questions whether this means prices charged by respondent or by persons other than respondent. We see no difficulty in light of the holding herein, which makes plain that the favored purchasers in this case include AMC stores buying through the AWC organization. Thus, in this instance, the prices charged are those charged the AMC store through AWC. Whatever the arrangement is between AWC and its owners, the AMC stores, this is no concern of the respondent. All benefits of the lower prices go to the AMC stores. Also, respondent need not proceed at its peril under the order, since, as the court observed in *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962), the Commission's offices are open for discussion of any problems which may arise under the order. We therefore reject respondent's request for modification of paragraph 1 thereof.

Complaint counsel contends that paragraph 3 of the order is too narrowly written and we agree. We have found that respondent has violated Sections 2(a), (d) and (e) of the Clayton Act, as amended, and to have violated these subsections in a variety of ways. The violations shown herein cover a long period of time and tend to show favored treatment towards certain large retail customers. In the circumstances, we believe that an order broad enough to prevent future violations through variations in the methods engaged in is fully justified. Commission orders are not designed to punish for past transgressions but are designed as a means for preventing illegal practices in the future. *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir.

1960), *cert. denied*, 364 U.S. 883; *cf. Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962). Paragraph 3, therefore, will be modified to cover discriminatory furnishing of services and facilities beyond that of accepting the return of unsold products by changing the pertinent phrase to read: "the service of accepting the return of its unsold products or any other service or facility connected with the handling, sale or offering for sale of said products."

The exceptions of complaint counsel are sustained and the respondent's exceptions are sustained to the extent above indicated and otherwise rejected. The initial decision will be modified in accordance with the views expressed in this opinion and as modified will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioners Elman and Higginbotham concur in the result.

FINAL ORDER

NOVEMBER 15, 1963

This matter having come on to be heard upon the exceptions of counsel supporting the complaint and of the respondent to the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to the exceptions respectively taken; and

The Commission, for the reasons stated in the accompanying opinion, having sustained the exceptions of complaint counsel and sustained in part and rejected in part the exceptions of respondent and having further directed that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

It is ordered, That the portion of the initial decision under and including the heading "Discussion" be, and it hereby is, stricken.

It is further ordered, That paragraph 3 of the order contained in the initial decision be, and it hereby is, modified to read as follows:

> 3. Discriminating, directly or indirectly, among competing purchasers of its products by contracting to furnish, furnishing, or contributing to the furnishing of, to any of respondent's customers the service of accepting the return of its unsold products or any other service or facility connected with the handling, sale or offering for sale of said products, unless such service or facility is made available on proportionally equal terms to all customers competing with such favored customers in the sale of said products.

It is further ordered, That the initial decision, as so modified and as supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

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

By the Commission. Commissioners Elman and Higginbotham concurring in the result.

IN THE MATTER OF

AL ROBBIN TRADING AS A. ROBBIN & COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket 8532. Complaint, Oct. 2, 1962—Decision, Nov. 15, 1963

Order requiring a Chicago importer, wholesaler and retailer of fabric piece goods to cease violating the Flammable Fabrics Act by importing or selling in commerce any fabric—including silk illusion used for the manufacture of bridal and communion veils—which was so highly flammable as to be dangerous when worn.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Al Robbin, an individual trading as A. Robbin & Company, hereinafter referred to as respondent, has violated the provisions of said Acts, and the Rules and Regulations promulgated under said Flammable Fabrics 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 Al Robbin is an individual trading as A. Robbin & Company with his office and principal place of business located at 321 West Jackson Boulevard, Chicago, Illinois. Said Respondent is an importer, wholesaler and retailer of fabric piece goods.

PAR. 2. Respondent subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, has sold and offered for sale, in commerce; has imported into the United States; and has introduced, delivered for introduction, transported, and caused to be transported, in commerce; and has transported and caused to be transported, after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

PAR. 3. The aforesaid acts and practices of the respondent were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such 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. Michael P. Hughes, counsel supporting the complaint.
Mr. Irvin H. Weiss, Chicago, Ill., for respondent.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

The complaint in this matter charges respondent with violation of the Flammable Fabrics Act[1] and the Federal Trade Commission Act in connection with prohibited transactions involving the importation and sale of fabric alleged to be so highly flammable as to be dangerous when worn by individuals. The evidence shows the involved fabric to be a silk illusion used for the manufacture

[1] The pertinent Sections of the *Flammable Fabrics Act* are as follows:

Sec. 3(b) "The sale or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any fabric which under the provisions of section 4 of this Act is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. (It should be noted that the above-quoted Section of the *Flammable Fabrics Act* expressly makes transactions prohibited under its provisions subject to the *Federal Trade Commission Act.*)

Sec. 4(a) "Any fabric or article of wearing apparel shall be deemed so highly flammable within the meaning of section 3 of this Act as to be dangerous when worn by individuals if such fabric or any uncovered or exposed part of such article of wearing apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the Commercial Standard promulgated by the Secretary of Commerce effective January 30, 1953, and identified as "Flammability of Clothing Textiles, Commercial Standard 191–53." * * * For the purposes of this Act, such Commercial Standard 191–53 shall apply with respect to the hats, gloves, and footwear covered by section 2(d) of this Act, notwithstanding any exception contained in such Commercial Standard with respect to hats, gloves, and footwear.

Sec. 4(c) "Notwithstanding the provisions of paragraph 3.1 Commercial Standard 191–53, textiles free from nap, pile, tufting, flock, or other type of raised fiber surface when tested as described in said standard shall be classified as class 1, normal flammability, when the time of flame spread is three and one-half seconds or more, and as class 3, rapid and intense burning, when the time of flame spread is less than three and one-half seconds."

of bridal and communion veils. (See opening page of Respondent's Proposed Findings of Fact.)

A similar bridal veil fabrics case under the same Acts was recently before the Commission in *Novik & Co., Inc.*, Docket No. 8452, February 8, 1963 [62 F.T.C. 229]. The Initial Decision in the *Novik* case was also rendered by the undersigned hearing examiner.

The complaint herein was issued on October 2, 1962. Prior to answering the complaint, respondent moved "for a more definite statement in complaint" which, pursuant to order of the undersigned, was duly furnished by counsel supporting the complaint. Treating this response to the motion as an amendment to the complaint, respondent on December 5, 1962, filed his answer to the complaint "and amendment thereto." The answer in its opening paragraph expressly denies that respondent at any time has been in violation of "* * * the provisions or the Rules and Regulations of the Flammable Fabrics Act, and for further answer states that all fabrics purchased by said Respondent was accompanied by a warranty as provided by said Rules and Regulations from his supplier."

As a still "further answer" to the complaint, respondent pleads that the complaint "does not allege a cause of action against respondent as it contains no allegations that its proposed order is necessary and that there exists some cognizable danger of recurrent violations, or that there is any reason to presume they will be resumed, or that there is a likelihood that any violation could occur in the future."

Hearing in this matter was deferred pending the opinion and final order of the Commission in the aforementioned *Novik* case in order to give the parties opportunity to consider the Commission decision therein and to further explore the possibilities of settlement herein in the light of the *Novik* case. The Commission's opinion of February 8, 1963 [62 F.T.C. 238], in the *Novik* case having failed to bring the parties together in a settlement of the instant matter, the case was set for trial and heard at Chicago, Illinois, on April 30 and May 1, 1963, immediately following an all day prehearing conference in the matter on April 29, 1963.

Towards the end of the presentation of complaint counsel's case-in-chief, respondent through his counsel announced his intention not to further contest the charges of the complaint and submitted a motion to withdraw respondent's original denial answer and for leave to file in lieu thereof a substituted answer admitting all of the material allegations of the complaint. He reserved, however, the right to adduce evidence on the basis of which respondent proposed to seek an amendment to the complaint's proposed cease and desist order which will be shown below to be outside the scope of the complaint and evidence.

The motion was allowed and the substituted admission answer was duly filed. The motion was not made, however, until after respondent's counsel had exhaustively cross-examined the Commission's fabric flammability test technician, Miss Idelle Shapiro, on her testimony that samples of the fabric in question had failed to meet the flammability time limitation tests established under the provisions of the Flammable Fabrics Act. The cross-examination was so searching as to even include questions as to whether the involved samples of respondent's fabric had been stored in a moisture proof cabinet prior to testing, notwithstanding the fact that respondent's counsel then had knowledge (Tr. 115) of test reports made for respondent at his request and expense by an independent testing laboratory (later placed in evidence as part of respondent's case) showing that samples of respondent's subsequent purchases of the same fabric had failed to pass the Commission's flammability test standards.

Respondent's motion for leave to file a substituted admission answer was not made until after respondent's counsel was completely satisfied in his own mind (Tr. 237) that complaint counsel had established or nearly established all of the charges of the complaint.

At the end of the pre-hearing conference in this matter and after the establishment of certain facts therein, respondent moved for a dismissal of the complaint on the ground stated in his heretofore noted original denial answer to the complaint, to wit, "that the complaint herein does not allege a cause of action against this respondent as it contains no allegations that its proposed order is necessary and that there exists some cognizable danger of recurrent violations, or there is any reason to presume they will be resumed." The examiner being of the opinion that the motion was wholly without merit, the motion was denied. Notwithstanding respondent's substituted admission answer admitting all of the material allegations of the complaint, respondent in his proposed findings of fact again seeks a dismissal of the complaint on the ground "* * * that the circumstances and the evidence introduced warrants a dismissal * * *." Elsewhere in his proposed findings of fact, respondent refers to such circumstances as "extenuating circumstances."

The same alleged "extenuating circumstances" are offered by respondent as justification for either an order dismissing the complaint or in the alternate, if dismissal is denied, for an amendment to the proposed cease and desist order which as heretofore indicated injects an issue in the case not presented by the complaint or evidence. These "extenuating circumstances" will be discussed below at their appropriate place.

Under respondent's substituted admission answer, all charges of the complaint now stand admitted as follows:

PARAGRAPH ONE: Respondent Al Robbin is an individual trading as A. Robbin & Company with his office and principal place of business located at 321 West Jackson Boulevard, Chicago, Illinois. Said Respondent is an importer, wholesaler and retailer of fabric piece goods.

PARAGRAPH TWO: Respondent subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, has sold and offered for sale, in commerce; has imported into the United States; and has introduced, delivered for introduction, transported, and caused to be transported, in commerce; and has transported and caused to be transported, after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

PARAGRAPH THREE: The aforesaid acts and practices of the respondent were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such 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.

Additional pertinent facts are these. Respondent commenced his fabrics piece business in 1937 at the above-stated address in Chicago. He has eight employees. His business is exclusively a piece goods business: he is not engaged in any manufacturing and does not sell dresses or garments of any sort. He handles many different kinds of piece goods, including in addition to the silk illusion here involved, such fabrics as rayon, taffeta, satins, chiffon, and organdy. Approximately 5,000 yards of his total annual sales of about 400,000 yards consist of silk illusion. A little over half of his total sales are at the wholesale level and the balance to the retail trade. Except for the involved silk illusion, which is manufactured abroad, all other fabrics handled by respondent are manufactured in the United States. Part of his silk illusion purchases are made directly from a manufacturer in France, the Aime Baboin & Co. of Paris. The remainder is purchased from Gelmore Trading Company of New York, New York, a broker-importer, whose foreign source of supply is not established by any reliable and probative evidence of record. In the past year and half, the bulk of respondent's purchases of silk illusion have been direct imports from Aime Baboin & Co.

Under invoice dated December 13, 1960, respondent purchased and imported approximately $700 worth of French silk illusion from

Aime Baboin. Under invoice dated July 27, 1961, he also purchased about $200 of imported French silk illusion from Gelmore. The merchandise under both of these invoices was offered for sale and sold to various customers during 1961. Contrary to later invoices, neither of these two invoices carry guaranties that the fabrics shipped thereunder comply with the test requirements of the Act.

Flammability tests of samples of the fabrics under the above-described invoices, conducted in accordance with Commercial Standard 191–53, as provided for in Section 4 of the Flammable Fabrics Act, showed that the average flame spread, before washing, was less than the 3.5 seconds time limitation specified in Section 4(c) of said Act and the time limitation in said Commercial Standard. These test results place the involved fabrics in Class 3 category deemed to be so highly flammable as to be dangerous when worn by individuals.

The "extenuating circumstances" offered by respondent as justification for either a dismissal of the complaint, notwithstanding his substituted admission answer, or, in the alternative, for an order which injects a new issue, are that shortly after the commencement of the pre-complaint investigation herein in September 1961 he commenced a course of action which he believes has placed him in full compliance with the requirements of the Flammable Fabrics Act at all times since that time.

The record shows that shortly following the commencement of the pre-complaint investigation herein there were communications between respondent and the Commission with reference to the subject matter of the investigation.

On November 13, 1961, respondent addressed a letter to the Commission which reads as follows:

Gentlemen:

This is to advise you that our firm will not sell any silk bridal tulle (illusion) purchased by us from Gelmor Trading Company or Aime Baboin unless it complies with the Flammable Fabrics Act.

We further advise you that we have one piece from Gelmor which has not been tested by you, but which we agree not to sell until it has been tested and complies with the Flammable Fabrics Act. Other than this one piece, we have no further merchandise on hand from these two suppliers.

We further wish to advise you that we have in transit merchandise from Aime Baboin and we agree that when same is received it will not be sold until such time as a sample has been tested either by your department or the U.S. Testing Company in Hoboken, New Jersey, and unless same complies with the Flammable Fabrics Act, it will be returned to our supplier. (CX 37.)

On November 27, 1961, Mr. Henry D. Stringer, then Assistant Director of the Commission's Bureau of Textiles and Furs and presently Director of the Bureau, addressed the following letter to Mr. Robbin:

Dear Mr. Robbin:

Reference is made to the conversation had with you today concerning the importation of approximately 100 pieces of bridal illusion of approximately 40 yards each.

The purpose of the tests mentioned in the Flammable Fabrics Act is to determine whether the goods are so highly flammable as to be dangerous when worn by individuals. Also, if a guaranty is given it must be based upon reasonable and representative tests as prescribed in Rule 7 of the Regulations under the Flammable Fabrics Act.

By testing ten percent of the pieces, assuming them to pass, this would be sufficient under Rule 7 for the giving of a guaranty. I understand four lots are involved and there should be representative samples from each lot. Of course, as to each piece of fabric, whether it is dangerously flammable, it must stand on its own merits. (CX 43.)

The final letter of record is one dated December 22, 1961, by respondent to Mr. Stringer, reading as follows:

Dear Mr. Stringer:

I met today with Miss Stein of your Chicago office, and exhibited to her the matters contained herein, and she suggested we forward the within enclosures.

As suggested in your letter to us of November 27, 1961, we had samples tested by the U.S. Testing Company, and a copy of their report is enclosed herewith. We are also enclosing a copy of the warranty received on these goods from our supplier. For your further consideration, we wish to advise, that on all our invoices of these and similar goods, we advise customers, "Goods not inflammable if dry cleaned or washed". (CX 38.)

If there is any further information needed, please feel free to call upon us.

Subsequent to the investigation, respondent made three additional purchases of silk illusion from the Baboin firm. The first of these is reflected by an invoice dated October 6, 1961, in the amount of \$4,279.93; the second, dated September 27, 1962, is in the amount of \$1,026.37; and the third, dated December 11, 1962, is in the amount of \$4,832.55. Various grades of silk illusion are shown on each of the three invoices and their varying prices appear to average about 45 cents per yard.

The last two mentioned invoices are typed or stamped with the following guaranty under the signature of Aime Baboin & Co.:

The undersigned hereby guarantee that reasonable and representative tests made according to the procedures prescribed in Section 4(a) of the Flammable Fabrics Act show that fabrics used or contained in the articles of wearing apparel and fabrics otherwise subject to said act covered by and in the form delivered under this document are not under the provisions of such act so highly flammable as to be dangerous when worn by individuals.

No such guaranty appears on the Baboin invoice dated October 6, 1961, but in response to respondent's wired request therefor, Baboin, sent both a telegram and confirming letter stating that the fabric was "treated with flame retardant finish and has passed test." The letter response, dated November 22, 1961, also states that "Tests were made before dispatching, by the 'Centre Recherche Soieries Industries Textiles', 7 Rue St. Polycarpe LYON, under numbers:

7095–104
7249–52
7546–51

and results of these tests can be sent to you if necessary."

Testimony shows that respondent sent samples from 10 percent of the pieces purchased under the above-described, post-investigation Baboin invoices to the United States Testing Company, Inc., a reputable and qualified testing company, with laboratories at Hoboken, New Jersey, for testing for compliance with the flammability time limitation requirements of the Act. (See Respondent's Proposed Findings of Fact, page 5.)

A test report (RX6 A–C) dated December 11, 1961, by the Testing Company on samples of fabric submitted to it by respondent from the shipment under the Baboin invoice dated October 6, 1961, shows that all samples passed the prescribed flammability tests.

The Testing Company's report (RX2 A–E) dated October 26, 1962, on samples submitted by respondent from the shipment under the Baboin invoice dated September 27, 1962, shows that 4 of the submitted 28 samples failed to pass the test and that the remaining 24 samples passed the tests.

The final test report of record (RX4 A–E) by the Testing Company on samples submitted by respondent from the shipment under the Baboin invoice of December 11, 1962, showed that out of 16 samples tested, 15 passed and 1 failed to pass the test.

The expenses incurred by respondent for the testing of samples from 10 percent of the pieces of silk illusion received from the Baboin firm under the above noted invoices increased the cost of each shipment thereunder about 10 percent.

Respondent testified that he destroyed all pieces or bolts of silk illusion purchased from Baboin which reports from the Testing Company showed did not pass the prescribed flammability test. While the examiner is skeptical that respondent would destroy such non-test meeting fabric rather than to return same for credit, respondent's testimony, being uncontested, is accepted as establishing the fact of destruction of fabric failing to meet the test.

Similarly after the commencement of the investigation leading to the complaint herein, respondent has also made a number of purchases of silk illusion from the aforementioned Gelmore Trading Company of New York City. There were 13 such post-investigation purchases in 1962 totaling $2,427.36 and 3 such purchases in 1963 totaling $978.19. All the invoices reflecting these purchases carry the following guaranty:

> We hereby guarantee that reasonable and representative tests made according to Commercial Standard 191–53 [foregoing number reflects correction of typographically erroneous number shown in transcript] show that the fabrics covered by this invoice are suitable for wearing apparel use under the provisions of the Flammable Fabrics Act. Silk, bridal illusion will be dangerously flammable if dry cleaned or washed. (Tr. 293.)

Respondent has not tested or caused to be tested any of the silk illusion purchased from Gelmore in 1962 and 1963 for compliance with the Act but relies exclusively for such compliance on the said guaranties from Gelmore.

The "extenuating circumstance" urged by respondent for a dismissal of the complaint in connection with his domestic source of supply from Gelmore Trading Company of the involved fabric is the fact that at all times after the commencement of the investigation leading to the complaint herein he has received the aforementioned written guaranties from Gelmore of compliance with the Flammable Fabrics Act and that this gives him "protection". The argument stated in respondent's own phraseology is as follows:

> * * * It is our understanding of the Flammable Fabrics Act that a warranty received by the respondent from a supplier in the United States protects the respondent under the Act. However, the party giving the warranty to the respondent for merchandise purchased in New York must be relying upon a warranty which he received from France. Under Rule 11 of the Act, a guaranty furnished under Section 8 by a person who is not a resident of the United States may not be relied upon as a bar to prosecution under Section 7 of the Act for a violation of Section 3 of the Act. This puts the respondent in this position. If he imports from France under this rule, he cannot protect himself by a guaranty received from the manufacturer in France, but if he purchases the same goods from a jobber or sales representative in the United States and received a guaranty and it is from the same source as whom the respondent would have purchased said bridal illusion, then he is protected * * *. See Respondent's Proposed Findings of Fact, p. 4.

Preliminarily, it should be noted that although respondent contends that Gelmore purchases its silk illusion from Baboin and that Baboin guarantees to Gelmore that the fabric complies with the Flammable Fabrics Act, there is no proper basis in the record for such purported statements of fact. There was no testimony in this proceeding by any representatives of Gelmore: none of Gelmore's invoices showing its sources of supply or guaranties received from its supplier were offered in evidence; and respondent, as throughout his proposed findings of fact, does not support his statements by references to the record. But even if the purported statements of fact were true, they would not give respondent "protection" against a cease and desist order sought under the complaint in this proceeding for the reasons hereinafter indicated.

The difficulty with respondent's aforesaid contention "* * * that a warranty received by the respondent from a supplier in the United States protects the respondent under the Act * * *" is that it erroneously assumes that a "guaranty" of the kind here under consideration is a defense to a "cease and desist" order sought as in this proceeding under Section 3(b) of the Flammable Fabrics Act whereas our analysis will show that a "guaranty" is a defense or bar only against misdemeanor charges under Section 7[2] of the same Act.

Section 3 bears the caption "PROHIBITED TRANSACTIONS" and subsection (b) thereof[3] makes the importation, sale, or offering for sale of any fabric so highly flammable as to be dangerous when worn by individuals "an unfair method of competition and an unfair and deceptive act or practice in commerce under the *Federal Trade Commission Act*." (Emphasis supplied.)

The Commission's only empowerment against a transaction prohibited by Section 3(b) of the Flammable Fabrics Act is to issue a cease and desist order under the provisions of the Federal Trade Commission Act against the proscribed practice. (See Section 5(a)(6) and Section 5(b) of the *Federal Trade Commission Act*.)

An administrative cease and desist order such as sought in this proceeding is in the nature of an injunction. Its purpose is to prevent future violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which have been found to have been committed by the party in the past. 73 *Corpus Juris Secundum* 483, par. 151. The complaint in this matter seeks *only* a cease and desist order prohibiting in the future the transactions barred by the Flammable Fabrics Act which respondent under his substituted admission answer now admits that he has engaged in in the past. The Commission has no power to punish for past offenses and the complaint does not seek to punish.

On the other hand, Section 7 of the Flammable Fabrics Act is definitely a penal Section but since the Commission has no penal jurisdiction, the enforcement of such Section lies with the courts, as

[2] Sec. 7 of the Flammable Fabrics Act provides:

"Any person who willfully violates section 3 or 8(b) of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $5,000 or be imprisoned not more than one year or both in the discretion of the court: *Provided*, That nothing herein shall limit other provisions of this Act."

[3] For text of Sec. 3(b) of the Flammable Fabrics Act, see footnote on page 1353 herein.

indeed the Section shows. Section 7 defines a *willful* violation of Section 3 of the same Act as a misdemeanor and fixes the penalty for such willful violations by fines up to $5,000 or by imprisonment up to one year "or both in the discretion of the *court*." (Emphasis supplied.)

Section 8(a)[4] gives a person charged with a Section 7 prosecution a defense thereto if he establishes that he has received in good faith a written guaranty from his supplier that the fabric complies with the flammability time limitations imposed by the Act. However, under the Regulations of the Commission "A guaranty furnished under Section 8 of the Act by a person who is not a resident of the United States may not be relied upon as a bar to prosecution under Section 7 of the Act for a violation of Section 3 of the Act." See *Commission's Rules and Regulations Under the Flammable Fabrics Act*, effective July 1, 1954, as amended to date on October 1, 1961.

But while a guaranty, as defined by Section 8(a), is a defense against a prosecution for a Section 7 misdemeanor, there are no provisions under either the Flammable Fabrics Act or the Federal Trade Commission Act making such a guaranty a defense against a proposed cease and desist order. The obvious reason for this is that the objective of Section 3 of the Flammable Fabrics Act is to prevent future violations of "Prohibited Transactions" or practices, whereas the objective of Section 7 of the same Act is to punish for willful past violations of practices prohibited by the Section 3 of the Act.

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[4] Sec. 8(a) of the Act provides:

"No person shall be subject to prosecution under section 7 of this Act for a violation of section 3 of this Act if such person (1) establishes a guaranty received in good faith *signed* by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received, to the effect that reasonable and representative tests made under the procedures provided in section 4 of this Act show that the fabric covered by the guaranty, or used in the wearing apparel covered by the guaranty, is not, under the provisions of section 4 of this Act, so highly flammable as to be dangerous when worn by individuals, and (2) has not, by further processing, affected the flammability of the fabric or wearing apparel covered by the guaranty which he received. Such guaranty shall be either (1) a separate guaranty specifically designating the wearing apparel or fabric guaranteed, in which case it may be on the invoice or other paper relating to such wearing apparel or fabric; or (2) a continuing guaranty filed with the Commission applicable to any wearing apparel or fabric handled by a guarantor, in such form as the Commission by rules or regulations may prescribe. (Emphasis supplied.)

"(b) It shall be unlawful for any person to furnish, with respect to any wearing apparel or fabric, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received) with reason to believe the wearing apparel or fabric falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act."

Accordingly the fact that respondent has been receiving guaranties from his domestic silk illusion supplier of compliance with the test requirements of the Flammable Fabrics Act on purchases of the fabric made subsequent to the "prohibited transactions" charged by the complaint, or more importantly, the fact, if it were a fact as in truth it is not, that respondent had such guaranties from his domestic supplier at the time he made the sales charged in the complaint, would not constitute a defense against the cease and desist order sought in this proceeding. This is specifically spelled out by Rule 7 of the Commission's aforementioned Rules and Regulations which respondent's counsel had in his possession at the hearing and which reads in pertinent part as follows:

> * * * While one establishing a guaranty received in good faith would not be subject to criminal prosecution under Section 7 of the Act, he, or the merchandise involved, would nevertheless, remain subject to the administrative processes of the Federal Trade Commission under Section 5 of the Act, as well as the injunction and condemnation procedures under Section 6 of the Act. * * *

The other "extenuating circumstance" urged by respondent for a dismissal of the complaint relates to his imports of silk illusion from France. In part the claimed "extenuating circumstance" is that since the prohibited transactions charged in the complaint respondent has received from his foreign supplier guaranties of compliance with the test requirements of the Act identical with that received from his domestic supplier. Our conclusion above that such guaranties are not a defense to cease and desist orders is also for the same reasons applicable here. But in addition we have here with respect to these imports from France the aforementioned express and explicit Regulation of the Commission that "A guaranty furnished under Section 8 of the Act by a person who is not a resident of the United States may not be relied upon as a bar to prosecution under Section 7 of the Act for a violation of Section 3 of the Act."

The other part of the claimed "extenuating circumstances" relating to respondent's importations from France is that respondent has caused to be tested by an independent testing laboratory 10 per cent of all pieces or bolts of such importations of silk fabric purchased and received from his foreign supplier since the investigation (leading to the complaint herein) for compliance with the applicable test requirements and has offered for sale only those fabrics which have passed the test and destroyed all others.

In his brief, as well as at the hearing, respondent insists that he was "advised" by the national office of the Commission "* * * that if he would receive a guaranty under the Flammable Fabrics Act and *would in addition thereto test 10% of the bridal silk illusion imported from France, this would satisfy the Commission's requirements.*" (Emphasis supplied.) See Respondent's Proposed Findings of Fact, etc., at page 5.

Based on this assumption, respondent continues his argument as follows:

This procedure has been followed by this Respondent and is still being followed as the evidence submitted so clearly proves. The respondent's position, therefore, is that if he continues as he so testified to follow the recommendations of the Commission that there is no necessity in this cause for a cease and desist order to issue. The purpose of a cease and desist order is not to punish, but to prevent similar violations in the future. Where there is no likelihood of a practice complained of being resumed, all extenuating circumstances should be considered by the hearing examiner and a dismissal of the complaint would be in order * * *. Idem, page 5.

Respondent's difficulty here again is that he is relating the "guaranty" protection features of Section 8(a) against prosecution for "misdemeanors" under Section 7, to the administrative processes of the Federal Trade Commission Act under Section 5 of that Act. Under the "guaranty" provisions of Section 8(a) of the Act, the receipt in good faith of a written guaranty by a supplier to a buyer that "*reasonable and representative tests* * * * show that the fabric covered by the guaranty * * * is not * * * so highly flammable as to be dangerous when worn by individuals" relates exclusively to the protection afforded by said Section 8(a) to criminal prosecution under Section 7 of the Act and does not afford a defense against "* * * administrative processes of the Federal Trade Commission under Section 5 of the * * *." (Emphasis supplied.) See *Rules and Regulations Under the Flammable Fabrics Act*, Rule 7, *supra*.

As heretofore noted, respondent contends that he was "advised" by the Commission in a letter (CX 43) dated November 27, 1961, signed by Henry D. Stringer, Assistant Director, Bureau of Textiles and Furs, "that if he would receive a guaranty under the Flammable Fabrics Act and would in addition thereto test 10% of the bridal silk illusion imported from France, this would satisfy the Commission's requirements. (See *Respondent's Proposed Findings of Fact*, etc., at page 5.)

This contention is based upon a completely erroneous interpretation of Mr. Stringer's letter. Mr. Stringer merely advised in his letter that "* * * *if a guaranty is given* it must be based upon reasonable and representative tests * * *" as prescribed under the Commission's Regulations. (Emphasis supplied.) The letter then goes on to advise *with reference to such guaranties* that "By testing

10 per cent of the pieces, assuming them to pass the test, this would be sufficient under Rule 7 [of the Commission's aforementioned Rules and Regulations] for the giving of a guaranty." This is a warning to respondent that the guaranty provisions of Rule 7 relates only to a person's protection under Section 8 of the Act against prosecution under Section 7 of the Act for a *willful violation of Section 3* of the Act, i.e., that Section which prohibits the sale in commerce of fabric which is so highly flammable (as defined by Section 4 of the Act) as to be dangerous when worn by individuals.

To make doubly certain that there would be no misunderstanding that such a "guarantee" gives immunity for violations of the prohibitions contained in Section 3 of the Act against the sale of fabrics which are dangerously flammable, Mr. Stringer's letter concludes with the following express and explicit warning that "Of course, as to each piece of fabric, whether it is dangerously flammable, it must stand on its own merits."

In summary, it is manifest that a guaranty such as is here under consideration plus the testing of 10 per cent of all fabrics for conformity with prescribed test requirements, even if these circumstances had been present as they admittedly were not with respect to the transactions charged in the complaint, would not give protection from and immunity to a cease and desist order against future violations. The purpose of Section 3 of the Act is to give the public absolute protection against dangerously flammable fabrics through the absolute prohibition of the sale of such fabrics to the public.

Respondent, however, in effect is seeking a dismissal of the complaint on the ground of "abandonment" of the practices charged in the complaint, notwithstanding his counsel's oral disclaimer of such at the hearing. (TR 122.) This appears from his answer in which he pleads, as heretofore noted, "* * * that the complaint does not allege a cause of action against this respondent as it contains no allegations * * * that there exists some cognizable danger of recurrent violations, or that there is any reason to presume they will be resumed, or that there is a likelihood that any violation could occur in the future." All the cases cited by respondent in his brief to support his argument for dismissal of the complaint involve issues popularly known as "abandonment" issues.

The only evidence offered by respondent to show "abandonment" of the practices charged in the complaint with respect to his post-investigation purchases of silk illusion from his domestic source of supply is the heretofore shown fact that he has obtained guaranties from his domestic supplier on all such purchases of compliance with the test requirements of the Act.

With respect to his post-investigation direct importations from France, respondent offers as proof of his "abandonment" of the proscribed practices the fact that he has similarly received guaranties of compliance with the prescribed test requirements from his foreign supplier on such subsequent shipments and the further fact that he has subjected 10 per cent of such importations to the prescribed tests and has offered for sale only such of the tested fabrics as have passed tests.

Requests for dismissals of complaints on grounds of abandonment of charged unlawful practices are addressed to the discretion of the Commission. *Ward Baking Co.*, (1958) 54 F.T.C. 1919, at 1921. The Commission has held that dismissals of complaints due to the discontinuance of an unlawful practice "should be limited to the truly unusual situation." *Ward Baking Co., supra.* The primary consideration in the determination of whether a dismissal should be granted due to discontinuance of proscribed practices is whether or not an order is needed for the protection of the public to prevent the resumption of such unlawful acts at some future date.

The case law on dismissals due to discontinuance of proscribed practices was developed mostly in cases involving harmful practices other than those involving as here potential grave bodily injury or danger to life itself. If in the ordinary case not involving danger to the human body, dismissals due to discontinuance of an unlawful practice are "limited to the truly unusual situation", dismissals for discontinuances of prohibited practices in cases such as the instant matter involving potential serious personal injury or possible death should be granted only by the establishment of facts showing beyond any question of doubt that the discontinued practices cannot under any circumstances be resumed in the future.

It is difficult to conceive a case in which there is less justification for a dismissal of a complaint for alleged discontinuance of an unlawful practice than in the instant matter. The record shows that there has been no abandonment of the proscribed practice in the absolute sense that respondent has gone out of business, or changed his business so as to be no longer engaged in the sale of fabrics of any sort, or that he has even given up the handling and sale of silk illusion.

Respondent is still engaged in the sale of silk illusion. His annual silk illusion purchases of $5,000 are sufficient to furnish bridal veils to hundreds of brides. The steps he has taken to avoid future violations of the sale of dangerously flammable silk illusion are woefully insufficient to protect these brides from possible bodily harm from wearing such fabrics as bridal veils in the event they accidentally catch on fire. The guaranties he receives from his

French supplier of compliance with the test requirements of the Act are untrustworthy as respondent's own tests show that some of his importations from his French supplier, despite the supplier's guaranties thereon, do not meet the test requirements.

Furthermore, respondent tests only 10 per cent of his French importations. It is reasonable to assume that there will be at least the same percentage of failures in the 90 per cent of the shipments which were not tested as there were in the tested 10 per cent. These highly probable failures in the untested 90 per cent of respondent's foreign shipments will be passed along to the consuming public to its peril. It was found above, chiefly due to the lack of any evidence to the contrary and with some skepticism, that respondent has destroyed and thereby withdrawn from the market those fabrics included in the 10 per cent of his foreign shipments subjected to testing which failed to pass the test. There is nothing in the record established by respondent herein to inspire confidence he will continue in the future to withhold from sale bolts of silk illusion which do not pass the test.

On the issue of the alleged abandonment of the proscribed practice with respect to respondent's post-investigation purchases of the foreign fabric under "guaranty" from his domestic source of supply, Gelmore, there is even less assurance of compliance with the statutory testing requirements, as respondent does not even attempt to have his supplies from this source tested in any part for compliance with the flammable standards of the Act. If as claimed by respondent that Gelmore in turn purchases its supplies of silk illusion from Aime Baboin & Co., respondent's primary source of supply, then upon the basis of respondent's own testing experience with the Baboin silk illusion it is virtually certain that some of respondent's purchases from Gelmore would also fail to pass the prescribed test.

Wholly aside from the fact that the actions taken by respondent to place himself in compliance with the flammable standard of the Act must be regarded as ineffective, there is nothing in the conduct of respondent in this proceeding to inspire confidence in the sincerity of his professions of desire to respect the law in the future. Such professions come with poor grace from a respondent who, as in the instant matter, compelled counsel supporting the complaint to prove facts well known to respondent before he came to a decision to file a substitute answer admitting all of the material allegations of the complaint. Nor can we place much confidence in a respondent who, as in the present matter, saw fit through his counsel to engage the Government's technician-expert witness in an exhaustive cross-examination on the latter's direct testimony that samples of respondent's involved silk illusion had failed to pass the prescribed flammability tests, notwithstanding the fact that respondent himself then had in his possession test reports made by an independent laboratory at respondent's request and expense showing that some samples of his post-investigation importations of the same fabric had failed to pass the prescribed tests.

For the reason shown above, it is found that there has been no "abandonment" or discontinuance of the practices charged in the complaint subsequent to the investigation leading to the issuance of the compliant herein. Respondent's request or motion for a dismissal of the complaint by reason of such alleged abandonment of the unlawful practices is denied.

Finally, as heretofore noted, respondent, in the event his request for a dismissal of the complaint is denied, seeks an amendment to the proposed order set forth in the complaint. The amendment consists of two parts. In the first part, respondent would add to the complaint's proposed cease and desist order a brand new prohibition not contained in the complaint's proposed order. This new self-imposed prohibition would bar respondent from issuing false guaranties on his fabrics of their compliance with the test requirements of the Act. No such issue was raised by the pleadings or litigated by consent. The second part of respondent's proposed amendment would give him an "escape clause" from the first part of his proposed amendment on fabrics sold which he directly imported from abroad. The first part of his proposed amendment has a similar "escape clause" on foreign fabrics purchased from domestic suppliers.

It should be noted initially that the complaint's proposed cease and desist order would merely prohibit respondent from handling any fabrics which are so highly flammable, as measured by statutory standards, as to be dangerous when worn by individuals. The text of the complaint's proposed cease and desist order is as follows:

It is ordered, That the respondent Al Robbin, an individual trading as A. Robbin & Company, or under any other trade name, and his representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

(a) Importing into the United States; or

(b) Selling, offering for sale, introducing, delivering for introduction, transporting, or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or

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

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

The text of the amendment desired by respondent to the proposed cease and desist order is as follows:

2. (a) Furnishing to any person a guaranty with respect to any fabric which Respondent has reason to believe may be introduced, sold or transported in commerce, which guaranty represents, contrary to fact, that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations thereunder, show and will show that the fabrics covered by the guaranty, is not, in the form delivered or to be delivered by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by indivduals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon, a guaranty to the same effect received by Respondent in good faith signed by and containing the name and address of the person by whom the fabric was manufactured or from whom it was received.[5]

(b) And provided further, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon a guaranty to the same effect received by Respondent in good faith signed by and containing the name and address of the person by whom the fabric was manufactured or from whom it was received even though such person, firm or corporation is not a resident of the United States, upon the Respondent in addition to receiving said guaranty shall subject ten percent of the shipment involved, to reasonable and representative tests as prescribed in Rule 7 of the Regulations under the Flammable Fabrics Act.

It is difficult to understand why respondent is seeking the above amendment to the proposed cease and desist order. It would appear that he is so intent on having the "escape clause" shown in paragraph 2(b) above that he is overlooking the fact that he would not need such escape clause if it were not for his own self-imposed prohibition in paragraph 2(a) above. Since the complaint does not ask for the prohibition shown in said paragraph 2(a), it is evident that respondent is seeking an escape from a non-existing bogy.

We have carefully reviewed and considered all of the proposed findings of fact, conclusions of law, and arguments in support thereof filed by the parties. Such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance,

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[5] The above quoted paragraph (2(a)) appears to have been copied verbatim from one of the paragraphs in the Commission's cease and desist order in the *Novik* case, *supra*, which was the first case involving silk illusion under the Flammable Fabrics Act to come before the Commission for final decision. It is possible that respondent was misled by the appearance of this paragraph in the *Novik* order into believing that it had application to the instant matter. But in the *Novik* case there was justification for the order bceause the issue thereunder had been raised by the pleadings and because the *Novik* complaint had requested such an order in its proposed cease and desist order. In the instant matter, as shown above, the same issue was not raised by the pleadings and the instant complaint's proposed cease and desist order does not contain the order here under discussion.

are rejected as not supported by the record or as involving immaterial matters.

ORDER

It is ordered, That the respondent Al Robbin, an individual trading as A. Robbin & Company, or under any other trade name, and his representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

(a) Importing into the United States; or

(b) Selling, offering for sale, introducing, delivering for introduction, transporting, or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or

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

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard upon the appeal of the respondent from the hearing examiner's initial decision and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that respondent's appeal should be denied and that the initial decision should be modified by striking therefrom the paragraph beginning at the bottom of page 1367 and ending at the top of page 1368 and that such decision as so modified should be adopted as the decision of the Commission:

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

It is further ordered, That the paragraph beginning at the bottom of page 1367 and ending at the top of page 1368 in the initial decision be, and it hereby is, stricken.

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

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

IN THE MATTER OF

SUN OIL COMPANY

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

Docket 6934. Amended Complaint, April 7, 1959—Decision, Nov. 22, 1963

Order requiring one of the Nation's major integrated producers of oil and other petroleum products, to cease entering into such arrangements for fixing and maintaining resale prices as that under which it imposed upon its independent retail dealers in the Portsmouth-Norfolk-Virginia Beach, Virginia, area an alleged agency consignment agreement which was not a bona fide agency but was a fiction and a subterfuge, the primary purpose of which was to enable it to fix the retail price for its "Blue Sunoco" gasoline in the area concerned.

AMENDED AND SUPPLEMENTAL COMPLAINT

The Federal Trade Commission, having reason to believe that Sun Oil Company, a corporation, hereinafter referred to as respondent and more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45), 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 with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent, Sun Oil Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania. 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 throughout some 22 states in which the respondent markets its products. Said gasoline is extensively advertised and sold under the brand name "Blue Sunoco" and enjoys wide public acceptance in such states. Respondent, one of the nation's leading producers and marketers of gasoline and other petroleum products, comprises an integrated unit in the petroleum industry. It is engaged in the acquisition, development and exploitation of oil and other petroleum products as well as the purchase, sale and transportation of crude oil, and the refining of crude oil and its derivatives, and the subsequent transportation and marketing at wholesale and retail of the products of its refineries in the United States, Canada and foreign countries. Respondent has refineries at Marcus Hook, Pennsylvania, and Toledo, Ohio. It also owns and operates a number of steel tank steamers in addition to leasing and operating approximately 1,400 tank cars and approximately 2,700 motor vehicles. Respondent also owns and operates various distributing plants as well as approximately 1,800 service stations in some 22 States of the United States and Canada. Sun Oil Company has approximately 8,900 outlets selling Sunoco products. In 1956 its gross sales of petroleum products totalled $731,412,219.

PAR. 2. Respondent markets its gasoline and petroleum products through its own company-owned and operated stations as well as under contract with independent dealer stations.

Respondent in the sale of its gasoline to independent Sunoco dealers located in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, as well as in other areas in different States of the United States, has entered into certain contracts or leases, now in force whereby respondent sells and delivers to such independent retail dealers all of their respective requirements of respondent's brand of gasoline during the terms of such contracts. For the purpose of supplying said customers and making deliveries pursuant to said contracts, respondent ships or otherwise transports its gasoline from its refineries across state lines to bulk stations and other distributing or terminal points in or near the specified area or areas from which it is delivered to said retail dealers. There is now and has been at all times mentioned herein, a continuous stream of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said gasoline between respondent's refineries, terminals and bulk stations and said independent retail dealers purchasing said gasoline in the areas mentioned herein. All of said purchases from respondent by the said independent Sunoco dealers are and have been in the course and furtherance of such commerce. Said gasoline is transported into Virginia and sold by respondent for resale in the Portsmouth-Norfolk-Virginia Beach, Virginia, area and other areas.

PAR. 3. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this amended and supplemental complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the sale and distribution of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 4. It is now and has been for the past few years the policy of Sun Oil Company to enter into certain agreements, understandings and arrangements with various of its independent Sunoco dealers located in certain areas throughout the United States whereby respondent is able to dictate or fix the retail price at which Blue Sunoco gasoline is sold to the purchasing public through such dealers.

One of the means and methods employed by respondent to enable it to dictate or fix and maintain the price of Blue Sunoco gasoline is through what is termed or designated as an Amendment to the Dealer's Agreement existing between said respondent and what has heretofore been its independent Sunoco retail dealers. This Amendment takes the form of an alleged consignment whereby respondent undertakes to place certain of these heretofore independent Sunoco retail dealers in the position of a consignee of respondent. This has the effect of terminating the said dealer's status as an independent Sunoco service station dealer for the duration of the alleged consignment agreement. Respondent's plan is referred to in some areas as the "C" plan. Under the terms of this alleged consignment plan respondent and dealer agree, among other things, that title to all gasoline delivered to said dealer will be retained in respondent; that respondent may fix the price at which said gasoline is to be sold by the said dealer to the purchasing public; and that said dealer, in return for his services, shall receive a certain designated commission on each gallon of gasoline sold. In no instance does the commission received approximate the margin of profit formerly enjoyed by such dealer and in most, if not all, instances the said dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded, through various means and methods employed by respondent, to enter into such agreement.

This alleged consignment is, in effect, a fiction and a subterfuge, the primary purpose of which is to enable respondent, through such agreement to fix and maintain the price at which its gasoline will be sold at retail, through the stations of these dealers to purchasing members of the public.

Beginning on or about November 1956, and at different times thereafter, certain Sunoco dealers located in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, as well as in other areas, upon being urged, threatened, coerced or otherwise persuaded by respondent, in various ways and by different means, entered into a combination, planned common course of action, agreement and understanding with respondent under the terms and conditions of which the aforesaid consignment policy of respondent was placed into effect, maintained and carried out by said respondent and each of the said independent dealers concerned.

PAR. 5. Pursuant to and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement, respondent, acting together and in combination as aforesaid with such Sunoco dealers, agreed to fix and maintain, and did fix and maintain, the retail price at which gasoline was to be sold or was sold at retail stations of the said Sunoco dealers to the purchasing public.

PAR. 6. This alleged unlawful planned common course of action is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors and retailers of gasoline in the Portsmouth-Norfolk-Virginia Beach, Virginia, area and other areas, and has a dangerous tendency to unduly restrain, hinder, suppress, and eliminate competition between and among respondent's retail dealers, and others, in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act, destroys the freedom of action that is customarily enjoyed by independent businessmen and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 7. The allegations of paragraphs ONE through sub-paragraph Two of paragraph FOUR of this amended and supplemental complaint are hereby adopted and made a part of this COUNT as fully as if set out herein verbatim.

PAR. 8. In the Portsmouth-Norfolk-Virginia Beach, Virginia, area, and other areas, there exists a number of so-called private-brand or unbranded service stations which sell gasoline at retail to the public in direct competition with respondent's Sunoco dealers and the independent dealers of other major oil companies. These unbranded or private-brand stations have been in existence for a number of years and have uniformly and consistently posted a pump price of two cents, or more, below the posted pump price of major oil company stations. This historical two cent or more differential is necessary to the unbranded or private-brand stations in order that they may compete in a market with major oil company stations having such competitive advantages as national advertising, wide public acceptance, national credit cards, and better facilities and locations. Beginning on or about November 1956, and at different times thereafter, respondent, fully aware of the aforementioned conditions, through and together with its aforesaid Sunoco dealers, adopted, placed in effect and followed a pricing policy in the Portsmouth-Norfolk-Virginia Beach area, and other areas, whereby Sunoco stations posted a pump price which was uniformly and consistently within one cent of the posted pump price of the aforementioned unbranded or private-brand stations. This aggressive move was in fact a predatory pricing policy entered into by respondent with the avowed purpose and intent of shrinking the historical two cent differential to the point where unbranded or private-brand competitors were unable to compete, and survive, in the market. This aggressive and predatory pricing policy of respondent had the tendency or effect of diverting substantial gallonage from the private-brand or unbranded stations to Sunoco stations and stations of other major oil companies, thus increasing respondent's share of the market, to the detriment of competition in the area, and other areas.

PAR. 9. This alleged unlawful predatory pricing practice is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors and retailers of gasoline in the Portsmouth-Norfolk-Virginia Beach marketing area and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers and the independent retail dealers located in the area, or others, and has unduly restrained, hindered, suppressed and eliminated competition therein in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson, Mr. Ross D. Young, Jr., Mr. Daniel J. Baum, and *Mr. A. M. Minotti,* for the Commission.

Mr. Leonard J. Emmerglick, of Washington, D.C., and *Mr. Henry A. Frye,* and *Mr. Richard L. Freeman,* of Philadelphia, Pa., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

MAY 17, 1962

PRELIMINARY STATEMENT

On November 8, 1957, the Federal Trade Commission issued its complaint against Sun Oil Company, a corporation (hereinafter called respondent or Sun), charging it with unfair methods of competition and unfair acts and practices in violation of § 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41 *et seq.*, by entering into an agreement or combination with its retail dealers to fix resale prices. Copies of said complaint together with a notice of hearing were duly served upon respondent.

On April 7, 1959, after the conclusion of the case-in-chief, the Commission granted the motion, certified to its by the undersigned, of counsel supporting the complaint to amend the complaint by adding a second count charging respondent with engaging in a predatory pricing practice in violation of § 5 of the Act. Respondent appeared by counsel and filed answer denying all the substantive allegations of the complaint, including the allegation that the alleged practices were engaged in in commerce within the meaning of the Act.

Pursuant to notice hearings were held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places. Both prior to the commencement of hearings and after the conclusion of the case-in-chief, respondent's motions to dismiss the complaint for want of jurisdiction and want of proof were denied.

Both parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Both parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[1]

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

FINDINGS OF FACT

I. The Business of Respondent

The respondent is a New Jersey corporation with its principal office and place of business at 1608 Walnut Street, Philadelphia, Pennsylvania.

II. Interstate Commerce and Competition

Respondent is an integrated oil company engaged in the production, purchase and sale of crude oil, the refining of crude oil and its derivatives, the transportation of crude oil and refined petroleum

[1] 5 U.S.C. § 1007(b).

products, and the sale and distribution of gasoline and other petroleum products in various states of the United States, Canada and foreign countries, including the Norfolk, Portsmouth and Virginia Beach area, in the State of Virginia. Respondent has refineries at Marcus Hook, Pennsylvania, and Toledo, Ohio, and distributes gasoline under the brand name "Blue Sunoco" through approximately 8,900 outlets in 22 states of the United States and in Canada. In 1956 respondent's gross sales of petroleum products exceeded $731 million. Respondent markets its gasoline and petroleum products through wholesale distributors, company-owned and operated stations, and sales to independent dealer stations.

In the course and conduct of such business, respondent ships 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 retail dealers located in the Norfolk, Portsmouth and Virginia Beach area and in various other states of the United States. Respondent itself is, of course, engaged in interstate commerce and so concedes. In addition, it is well-established that such sales of gasoline and petroleum products to retail dealers are in interstate commerce.[2] However, Sun contends that the practices alleged in the complaint are not in interstate commerce within the meaning of the Act. Count I of the complaint alleges that an agency consignment agreement entered into between Sun and its dealers was a fiction or subterfuge, and was in fact an agreement or combination to fix the resale price of gasoline. Respondent contends that because such resales are local and intrastate, an agreement or combination fixing such prices is not in commerce. Count II of the complaint alleges that, assuming the consignment agreement was valid and title to the gasoline remained in Sun, Sun engaged in a predatory pricing practice with the purpose and effect of destroying or substantially lessening competition. With respect to this count, Sun contends that its sales at retail were not in interstate commerce because they were local and intrastate.

With respect to the first Count, for the reasons adverted to in the orders denying the motions to dismiss the complaint, it seems well-established that an agreement or combination between Sun and its dealers fixing the retail resale prices is in interstate commerce, as that term has been interpreted by the courts. While it may be that the sales of such dealers are not in interstate commerce (although there are some rulings to the contrary), the agreement or combination concerning the resale prices was made prior to the sale by re-

[2] *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951).

spondent to the dealers. As noted above, such sales are definitely in interstate commerce. While the alleged price-fixing concerns retail sales made by the independent dealers, respondent is a party to the transaction and indeed the principal proponent and beneficiary thereof, and the agreement or combination concerns gasoline which moves in interstate commerce from respondent to the dealers. It is apparent that the price-fixing conspiracy or combination concerns a product which, without respondent, who admittedly moves it in interstate commerce, would not be available to the dealers who sell it locally. The resale prices are fixed by agreement or combination in advance of the movement of the product in interstate commerce, even though at the time of resale the product may have come to rest and no longer be in interstate commerce.

Upon substantially similar facts, a federal court has decided that such price-fixing, in advance of a sale in intrastate commerce, concerning products which move in interstate commerce prior to such sale, constitutes an unlawful interference with that commerce.[3] The Supreme Court has decided that it is unlawful to fix local prices through the use of interstate commercial transactions.[4] In addition, the Supreme Court in the *Cement Institute* case held that the Commission has authority under § 5 to restrain a price-fixing conspiracy involving some parties in interstate commerce and other parties not engaged in interstate commerce.[5]

In *Moore* v. *Mead's Fine Bread*,[6] the Supreme Court held that local intrastate price-cutting and discrimination designed to injure or destroy a local competitor, even though purely intrastate in character, was a violation of the Clayton Act when engaged in by one also engaged in interstate commerce, because the effect was to tend to monopoly and substantially to lessen competition locally through the use of the power of the organization engaged in interstate commerce. In *Dr. Miles*, *Beech-Nut*, and *Parke, Davis*,[7] the lower courts and the Supreme Court had no difficulty in concluding that an agreement or combination to maintain retail resale prices was in commerce, even though such retail resales were, as here, intrastate.

With respect to the second count, which assumes that the sales at retail were by Sun itself, such sales would be part of the flow or

[3] *United States* v. *Food & Grocery Bureau of Southern California*, 43 F. Supp. 966 (D.C. S.D. Cal. 1942).

[4] *United States* v. *Frankfort Distilleries*, 324 U.S. 293 (1945).

[5] *FTC v. Cement Institute*, 333 U.S. 683 (1948). See also, *Standard Container Mfg. Assn.* v. *FTC*, 119 F. 2d 262 (5th Cir. 1941).

[6] 348 U.S. 115 (1954).

[7] *Dr. Miles Medical Co.* v. *Parke & Sons Co.*, 220 U.S. 373 (1911); *FTC* v. *Beech-Nut*, 257 U.S. 441 (1922); and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

stream of commerce from the refinery to the customer, and as such clearly would be in interstate commerce for the reasons enunciated by the Supreme Court in the *Standard Oil* case.[8] It is concluded and found that the activities and practices alleged in both counts of the complaint were in commerce within the meaning of the Act.

In the course and conduct of its business, including its sales to retail dealers and direct sales to the consuming public, respondent is in direct and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline.

III. The Unlawful Practices

A. The Issues

The amended complaint contains two counts. Count I alleges that an agency consignment agreement between Sun and its dealers was a fiction and subterfuge, and in fact was an agreement or combination to fix the resale prices of gasoline. Count II alleges that, assuming such consignment agreement created a valid agency, Sun engaged in a predatory pricing practice for the purpose of destroying competition or competitors, with the effect of unduly restraining and lessening competition.

B. Background Facts

1. The market area involved in this proceeding is comprised of the metropolitan areas and contiguous territory of the cities of Norfolk, Portsmouth and Virginia Beach, Virginia, hereinafter referred to as the Norfolk area. The period of time encompassed by the complaint is from November 1956 through April 1959.

2. The nature of competition in the market area was somewhat unusual because of the presence of more than 12 military exchanges selling major-brand gasoline at prices substantially below those prevailing in the Norfolk area. In 1956 there were 12 such Navy exchange stations plus several other PX stations. They normally posted prices which were from four to five cents below the prevailing prices of major brands for regular gasoline. However, only authorized military personnel and their dependents could purchase at such exchange stations. During the relevant time period, with a universe of approximately 100 million gallons of gasoline a year in the Norfolk area, the Navy exchanges accounted for approximately 8 million gallons thereof.

[8] Footnote 2, *supra*.

In addition to the Naval exchanges, in 1956 there were 21 private-brand stations in the area. They normally and customarily posted a price for regular gasoline two cents below the prevailing price at the stations of the major oil companies. The private-brand stations accounted for about 9 million gallons of the same universe. At the time of the hearings herein, Sun accounted for approximately 7 million gallons of the total sales in the area. The large share of the market accounted for by the military exchange stations was a circumstance not usual in other areas.

In purchasing gasoline wholesale, the military exchanges received a discount from the tankwagon price (the posted price to dealers and commercial users) of approximately 3.69 cents per gallon, and the private-brand operators received a discount of approximately 3 cents net from the tankwagon price. The area was an unstable market in which depressed prices occurred spasmodically. There were occasional price wars, and a price disturbance in one section, in time, usually would spread throughout the entire area.

3. Sun entered the gasoline market in the Norfolk area in 1946. Sun marketed its gasoline exclusively through a wholesale distributor, Taylor. Taylor sold Sun gasoline at prices equal to the lowest posted by the private-brand operators. As a result, the purchasing public did not think of Sun's gasoline as a major brand, and was accustomed to purchasing it at the same price level as the private brands. In 1951, Taylor's share of the overall market was approximately 7.4 percent; in 1952, approximately 6.5 percent; and in 1953, approximately 7 percent.

4. In July 1954, Taylor was operating 34 stations with an overall gallonage of approximately 723,000 gallons per month, or an average of 21,272 gallons per station. In September 1954, Sun took over the operation from Taylor. Sun began to open its own stations, leased to independent dealers, and operated as a major, with its dealers and company-operated stations generally posting the prices prevailing at the stations of the other major oil companies. At the time Sun took over from Taylor he had about 6 percent of the overall market. Sun commenced operations with substantially fewer stations and its share of the market declined substantially from that enjoyed under Taylor. In addition, Sun was handicapped by the aforesaid public concept, and the public being accustomed to a price similar to that posted by the private brands, i.e., two cents or more below the prevailing major prices.

During early 1955, with from twelve to fourteen stations, Sun averaged about 20,000 gallons per station. Sun gradually increased its number of stations. Near the end of 1955 it had 20 stations selling approximately 300,000 gallons a month, or an average of 15,000. Sun accounted for about 2.65 percent of the market in 1955. By October 1956, Sun had 29 stations selling approximately 391,000 gallons, or an average of 13,488 gallons per station. Sun accounted for approximately 3.85 percent of the overall market in 1956. Although never reaching the gallonage sold under Taylor, Sun's share of the market gradually increased from its time of entry in 1954 to November 1956. However, its gallonage per station was declining as the number of stations increased.

5. After taking over from Taylor and prior to November 5, 1956, Sun sold its gasoline to retail dealers, who were independent contractors operating filling stations. Sun and such independent dealers entered into contracts providing for the sale of gasoline and other petroleum products by Sun to the dealers, and also entered into leases of the stations from Sun to the dealers. The agreements required the purchase of specified minimum amounts of gasoline. The leases contained a specified base monthly rental plus an additional rent of one-half cent per gallon sold. The computation of the specified base rental was based upon Sun's estimate of the potential gallonage the station might be expected to sell. Such estimates (and hence such base rental figures) were in all instances substantially in excess of the actual gallonage achieved. At nearly every station the actual gallonage sold was approximately one-half of the estimated potential. As a result, the stated base rental in each lease was substantially in excess of what it would have been, computed on the basis of the actual gallonage, and substantially in excess of what a dealer could afford to pay.

The leases were for year-to-year periods. At the time of the execution of the original lease, and every three months thereafter, an amendment to the lease was executed, reducing the base rent to a figure in most cases slightly less than half of the base rent set forth in the lease. In the event that such a quarterly amendment to the lease was not entered into, the rent set forth in the original lease immediately became effective. This situation gave Sun a potential power of coercion over its dealers because, if a quarterly amendment was not executed, the rental immediately more than doubled, which would probably force the dealer out of business. This could occur if the dealer declined to execute such a quarterly amendment to the lease, or if Sun chose not to execute such an amendment for any reason, including lack of cooperation.

6. Sun originally conceived and adopted its commission consignment plan in 1953 in other areas of the United States. As set forth in Sun's policy directives, the plan originally was designed to assist

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individual dealers in isolated cases of depressed prices. Sun used it in the Norfolk area for a two-week period in April of 1956 without agreement of the dealers.

C. The Price-Fixing Agreement or Combination

1. During late October and early November 1956, a localized price disturbance occurred in Norfolk on upper Hampton Boulevard in a few blocks stretch near the seven military exchange stations clustered in that area at the Naval Base. Several major stations, namely, Cities Service, Esso, Pure, Shell and Texaco, posted prices three cents under the major price generally prevailing in the Norfolk area. There was one Sun station located in the same general neighborhood.

2. On November 5, 1956, as a result of this price disturbance, Mr. Southard, Norfolk District Manager of Sun, called all of the Sun dealers to a meeting at his office. Southard explained the details of Sun's commission consignment plan to the dealers, pointing out to them the situation on Hampton Boulevard, the declining gallonage per station, the fact that Sun had not achieved a share of the market comparable to that enjoyed under Taylor, the need to be more competitive in price with the military exchange stations and the private-brand stations, and indicating the probable necessity in the near future of Sun's posting a price within one cent of the prevailing private-brand price and an intention of maintaining such a differential no matter how low the private brands might reduce their prices.

Southard explained to the dealers that under the consignment plan they would be company agents for the sale of gasoline only, the company would retain title to the gasoline, establish the prices to be posted, and pay the dealers a minimum commission of four and one-half cents per gallon. This was 1.6 cents less than the 6.1-cent margin the dealers were then receiving. Primarily for this reason most of the dealers were opposed to the consignment plan. However, economically they had no other choice. While Sun gave them the alternative of accepting commission consignment or continuing to purchase gasoline at the established tankwagon price and posting whatever retail price they saw fit as independent dealers, because Sun intended to reduce the posted price at its own stations and those which went on consignment to 27.9 cents, and the tankwagon price was 24.8 cents and was to remain unchanged, the dealers who rejected consignment and continued to post a price of 30.9 cents would be unable to achieve sufficient gallonage to survive, while those who met the price of 27.9 cents would realize a margin of only 3.1 cents per gallon, less than the 4.5-cent minimum commission offered by Sun.

3. In view of the above economic realities, as well as the power inherent in Sun through the quarterly amendments to the basic lease rentals and the contractual requirement to purchase a specified minimum amount of gasoline referred to above, the bargaining between Sun and the dealers concerning commission consignment was hardly as equals.

4. Except for the price disturbance on upper Hampton Boulevard the prevailing major price in the Norfolk area was 30.9 cents, the prices at the military exchanges were 25.9 cents in Norfolk and 26.9 cents in Portsmouth, and the prevailing private-brand price was 28.9 cents. Although the price disturbance was limited to upper Hampton Boulevard, and therefore had little if any effect on any of the Sun stations other than the one in that neighborhood, the nearest being approximately three miles away while the Sun stations in Virginia Beach were over 20 miles away, and such other dealers did not need or want assistance, Southard advised the dealers that Sun intended to adopt the consignment plan throughout the entire Norfolk area and reduce the price to 27.9 cents, that posted by the other majors on upper Hampton Boulevard.

5. The proposed consignment agreement constituted a written amendment to the sales agreement. By its terms it purported to retain title to the gasoline in Sun, provided for deliveries of gasoline to the dealer upon consignment as an agent, Sun fixed the prices at which the gasoline was to be sold, and until August of 1957 the amendment contained a specified minimum commission. At that time Sun dropped the stated minimum commission fee from the consignment contracts, which were amended to provide that it was to be in the discretion of the company. Sun purchased the gasoline already in the dealers' tanks. The gasoline in the tanks was measured each time the posted price was changed by Sun, and the dealers were required to account for that sold at the previous price.

Under this arrangement, the dealer purportedly acted as a commission agent in the sale of gasoline although he remained an independent dealer in the sale of all other products and services. The dealers were required to segregate the funds from the sale of gasoline, but in fact never did so. All risk of loss or shortage was on the dealer. Collateral deposit agreements which the dealers previously had entered into as independent contractors to secure the payment of certain indebtedness were amended also to secure Sun for the payment of the consigned gasoline. The consignment agreements were terminable on five days' notice except for defaults which made them terminable upon 24 hours' notice.

6. All of the dealers except Mr. Williams in Portsmouth, who owned his own station, accepted commission consignment on November 5, 1956. On November 6, although the price disturbance was limited to upper Hampton Boulevard, Sun posted a price of 27.9 cents throughout the entire area. The nearest private-brand station to the area of disturbance was a Stallings station 3½ miles south on Hampton Boulevard. At that time the generally prevailing price of the private brands was 28.9 cents. Sun's area-wide reduction necessarily had the effect of spreading the price war throughout the entire area. Within a few days the other major dealers met Sun's price and the private-brand operators reduced their prevailing price to 25.9 cents, attempting to restore the 2-cent differential. Prices continued to decline for several months. Each time that Sun and the other majors reduced their prices, the private brands in general posted a price two cents lower. However, in the latter part of March 1957, the private brands apparently gave up the fight and posted one cent below Sun's prevailing prices, which then were 26.9 in Norfolk and 24.9 in Portsmouth. Shortly thereafter, in April, the prices at most Sun stations returned to the pre-price-war level of 30.9, and the private brands posted at a price of 29.9.

7. After the adoption of commission consignment, Sun's gallonage increased overall and at nearly all of its stations. During 1957 Sun's share of the market was 4.15 percent and during 1958 it was 4.25 percent. By June of 1959 Sun had increased the number of its stations to 32 and its gallonage to approximately 567,000 gallons per month, or an average of 17,715 gallons per station.

8. Although their gallonage increased, most of the dealers were financially hurt rather than helped, because the increased gallonage was more than offset by the decreased amount received per gallon plus the increase in cost necessitated by pumping the additional gallonage. Prior to November 6 their margin had been 6.1 cents per gallon. With a commission of 4.5 cents, they were receiving 1.6 cents less per gallon. Under a commission of 4.5 cents per gallon, the dealer bore more than half of the cost of the reduction to 27.9 cents, the price posted by Sun at the inception of the plan. At this price and commission, the dealers lost 1.6 cents per gallon while Sun realized 1.4 cents less per gallon, of the 3 cents reduction in price from 30.9 to 27.9 cents. Increased gallonage but decreased income did not help the dealers but it did increase Sun's share of the market.

The average increase in gallonage per station was less than 4,000 gallons. Even if the gallonage increased as much as 4,000 gallons a month, any dealer with a prior average gallonage of 11,250 gallons or more lost money under the commission consignment plan. With an increase of 4,000 gallons a dealer previously selling 11,250 gallons gained $180, 4.5 cents per gallon on the extra 4,000 gallons, but lost $180, 1.6 cents difference on the 11,250 gallons. With the added labor cost of increased pumping, he suffered a loss. As noted above, the average dealer gallonage in 1956 prior to consignment was approximately 13,500 gallons. At 13,500 gallons a dealer netted $823.50, yet with a 4,000-gallon increase after commission consignment he would net only $787.50.

A tabulation in the record reveals specifically what happened to most of the dealers. For example, although dealer Bates sold 1,800 more gallons of gasoline in November than in October, his net commission was $172 less than his margin in October. Although he sold about 300 gallons more in December than in October, his commissions netted him $236 less. Dealer Hudgins pumped about 4,400 more gallons in November, yet netted $163 less. He pumped only 300 gallons less in December than in October, yet his gross income declined $378. Dealer Stone pumped the same gallonage in December as he had in October, yet under the plan his commissions amounted to $490 less than his margin of profit in October.

9. Williams, the only dealer who refused commission consignment, held out for a few months. He was required to pay the tankwagon price of 24.8 cents. Sun and the other majors in his neighborhood reduced the posted prices to 24.9 cents, at which price he would have netted one-tenth of a cent per gallon. Williams posted 29.9 cents, and necessarily sold very little gasoline. On February 1, 1957, he gave up and accepted commission consignment.

10. To some extent a tankwagon reduction in price only would have reduced the prevailing retail price without benefit to the marketer, because the military exchanges and some of the private-brand operators purchased their gasoline at a fixed discount below the tankwagon price.

11. A survey by Sun prior to its decision to adopt the consignment plan indicated that Sun was not getting a "normal" share of the market at posted prices of 30.9 or 31.9, but that it could do so at 29.9. This would have been within one cent of the price posted by the private brands.

12. The adoption of the plan on November 5 was contrary to the stated purpose set forth in Sun's written policy directives concerning

its use. Those directives in effect on November 5, 1956, provided, *inter alia:*

> Where a dealer is confronted with depressed price conditions that affect his net profit to such an extent it becomes impossible for him to continue operations on a normal basis, the plan * * * may be offered to him.
>
> * * * * * * *
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> In these cases, if we should offer this plan to any one dealer, we must make it available to all dealers in the "same competitive marketing area" (i.e., an area in which all Sunoco dealers are faced with the same competitive pricing conditions).
>
> Dealers should not be offered the plan in anticipation of a depressed price condition which later *might* require assistance on the part of the Company. The plan should be offered only where the dealer will immediately benefit (i.e. will enjoy a higher commission than the margin he could realize on a tank-wagon basis).

It is clear that the plan did not conform to this policy. Instead of benefiting the dealers financially it cost them money. The directive provides that it should be offered *only* where the dealer will immediately benefit by enjoying a higher commission than the margin he could realize. On the contrary, the dealers received 1.6 cents less than the margin they were receiving. Also contrary to the policy directive, the plan was inaugurated in anticipation of a price condition which later might require assistance. As found above, most of the dealers neither wanted nor needed assistance.

13. As found above, one part of the lease rental consisted of the payment of one-half cent a gallon on all gasoline sold in a month. The leases contained a provision that this part of the rent "represented the value of those portions of said demised premises suitable for the storage and dispensing of gasoline and motor fuel". Although purportedly title to the gasoline was retained by Sun and the dealers were acting only as agents, nevertheless this provision of the lease was never amended. The dealers continued to pay one-half cent a gallon rent to store and dispense gasoline.

14. The original sales contract contained a provision that the dealer was required to operate the station under his own name, post a sign with his name and the word "Proprietor" thereon, and not represent the business as an agency of Sun or himself as an agent of Sun. This provision was not amended by the consignment amendments.

15. Under local law the dealers were required to pay a retail merchants' license to sell gasoline. After the adoption of commission consignment, they continued to pay this license or tax until 1958, when Sun began to pay it after the tax officials called it to Sun's

attention. Sun did not refund the license payments theretofore made by the dealers.

D. The Alleged Predatory Pricing Practice

The record contains no substantial evidence that the private brands lost gallonage or share of the market after the adoption of the consignment plan. On the contrary, it contains affirmative evidence that the private brands did not suffer competitively from the one-cent differential. The record establishes that many private brands had better locations, facilities and services than many of the major stations, sold either identical gasoline or gasoline of equal quality, gave coupons and other discount premiums, enjoyed greater gallonage per station, possessed a larger share of the overall market than Sun, and from the time of the adoption of the consignment plan to 1960 increased in number from 21 to 26 stations. The record contains no proof of predatory price-cutting, i.e., selling at unreasonably low prices (such as selling below cost or below a competitor's cost), for the purpose of destroying competition or eliminating a competitor.

CONCLUSIONS

I. The Price-Fixing Agreement or Combination

As hereinabove found, the allegations of Count I of the complaint embrace both an agreement or conspiracy to fix resale prices through the fiction or subterfuge of commission consignment agreements, and, sans agreement, a plan or combination to fix such resale prices by means of commission consignment. It is respondent's position that the commission consignments were genuine agency contracts entered into for the bona fide purpose of assisting its dealers in a depressed price or price war situation. Of course it is well settled that price-fixing agreements are illegal *per se* regardless of their purpose and hence in this respect consideration of purpose or intent is immaterial. However while on its face the commission consignment agreement constituted the creation of an agency relationship between Sun and its dealers the complaint alleges it was a fiction and subterfuge and in fact an agreement to fix resale prices or a plan or combination for the same purpose. In evaluating whether or not the consignment arrangement was a fiction or subterfuge, it becomes pertinent to consider its purpose and intent.

The record reveals clearly and it has been found that, contrary to respondent's contention and its stated policy requirements, the program was not a bona fide attempt to assist the dealers financially. Instead it was adopted to enable Sun to post uniform lower retail prices throughout the area, increase its share of the market, and attempt to reduce the differential between Sun and the private-brand operators to one cent a gallon. It hurt the dealers financially instead of assisting them. Almost all of the dealers neither wanted nor needed assistance, and were opposed to the plan, but the economics of the situation as well as the contractual power possessed by Sun left them no alternative except to go out of business. If the plan had been adopted in good faith to assist the dealers financially in meeting depressed prices in individual situations, instead of to enable Sun to post a uniform area-wide price reduction and attempt to increase its market share, it would not have been necessary for Sun to adopt it throughout the entire area.

In addition, Sun could have offered the dealers a choice between accepting consignment with a guaranteed minimum commission, or buying at an equivalent tankwagon price. Under the program adopted, Sun originally posted a price of 27.9 cents and gave a commission of four and one-half cents. Thus Sun's net was 23.4 cents per gallon, which in effect became its tankwagon or wholesale price. Sun could have given the dealers the alternative of a tankwagon price of 23.4 instead of 24.8, and permitted them to elect what price to post as needed competitively. It seems apparent that this alternative, which would have assisted each dealer and permitted him to select an appropriate price and margin, was not adopted because it would not have enabled Sun to fix a uniform price throughout the area and post a price one cent above the private brands, and because the dealers unaffected by the price disturbance would in all probability continue to post a price of 30.9 cents, and in any event not within one cent of competitive private brands.

The election offered was only in theory and not in reality. Clearly there was no real choice between accepting commission consignment and economic failure. Instead of assisting the dealers as claimed, the program forced them to bear part of the costs of the plan to increase Sun's gallonage. Because of the power inherent in Sun as a result of its sales contracts and leases with its dealers, as well as their inability to compete with Sun at its lower prices if they purchased gasoline at the prevailing tankwagon price, the dealers were economically coerced into accepting commission consignment. Under somewhat similar circumstances in the *General Motors* case,[9] the court found a conspiracy among General Motors and its independent

[9] *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941).

dealers to use GMAC financing to the exclusion of all others, because the economic power of General Motors over its dealers left them no other choice. It is concluded and found that the agency plan was not adopted in good faith to assist the dealers.

In the light of the decisions of the Supreme Court, it makes little difference whether this arrangement be construed as a contract, agreement or conspiracy to fix resale prices, or as a plan or combination without agreement to fix prices achieving the same result. The Court has held both to be violations of the Sherman Act and unfair methods of competition in violation of § 5, because of their dangerous tendency unduly to lessen competition. If the agency consignment agreement be regarded as a fiction or subterfuge and in fact an agreement to fix prices, such agreements are illegal *per se.* As the Supreme Court stated in *Socony-Vacuum:*[10]

> * * * Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.
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> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. * * * Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon * * *.

As far back as 1911, before the Supreme Court's decisions in the *Standard Oil* and *American Tobacco* cases,[11] the precursors of modern antitrust law, the Court in *Dr. Miles*[12] found a similar agency consignment arrangement between a manufacturer and its dealers an agreement to fix resale prices. In that case a manufacturer of patent medicines entered into contracts with its wholesalers and retailers purporting to make them agents, consigning the goods to them and fixing minimum resale prices. The manufacturer required each "agent" to resell at fixed prices whether the products were secured

[10] *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940).

[11] *Standard Oil Company* v. *United States,* 221 U.S. 1 (1911), and *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1911).

[12] *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U.S. 373 (1911).

from the manufacturer or obtained from other wholesalers or retailers. The Court found the arrangement to be a sale and not an agency, and hence a restraint of trade in violation of the Sherman Act.

If the agency consignment agreement be regarded as a plan or combination designed to fix resale prices, without any agreement, express or implied, to do so, such a plan or combination has been held to be an unfair method of competition and indeed a violation of the Sherman Act. Probably the most pertinent and controlling reference is the Supreme Court's decision in *Beech-Nut*,[13] where the Court found a plan or policy to control resale prices of dealers, without any agreement, express or implied, an unfair method of competition in violation of the Act. In that case the manufacturer adopted a program or policy designed to control the resale prices of its dealers at minimum levels fixed by the manufacturer. The parties expressly stipulated that there was no contract or agreement. The Court held that such a plan or policy had the same effect as an agreement to fix resale prices, and was against public policy as expressed in the Sherman Act. The Court stated:

> If the "Beech-Nut System of Merchandising" is against public policy because of its "dangerous tendency unduly to hinder competition or create monopoly", it was within the power of the commission to make an order forbidding its continuation. We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer.
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> The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the antitrust acts to maintain. In its practical operations it necessarily constrains the trader, if he would have the products of the Beech-Nut Co., to maintain the prices "suggested" by it. * * *
>
> From this course of conduct a court may infer, indeed cannot escape the conclusion, that competition among retail distributors is practically suppressed, for all who would deal in the company's products are constrained to sell at the suggested prices. * * * Nor is the inference overcome by the conclusion stated in the commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose.

[13] *FTC* v. *Beech-Nut*, 257 U.S. 441 (1922).

It seems clear and is found that Sun's commission consignment plan herein constituted a scheme or device, by which respondent was enabled to control and fix the resale price of its products, "quite as effectual as agreements express or implied intended to accomplish the same purpose". As in *Beech-Nut*, that competition among retailer distributors was practically suppressed is an inescapable conclusion.

Several subsequent decisions of the Supreme Court have noted that the plan or policy in the *Beech-Nut* case was there found to be a combination in violation of the Sherman Act as well as an unfair method of competition. In the recent *Parke, Davis* case [14] the Court found a similar plan of maintaining or fixing the resale prices of the company's products a combination in violation of the Sherman Act, absent any agreement express or implied to do so. The Court stated:

> The Court [in *Beech-Nut*] held further that the nonexistence of contracts covering the practices was irrelevant since "the specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers which are quite as effectual as agreements express or implied intended to accomplish the same purpose."

The Court further stated:

> That *Beech-Nut* narrowly limited *Colgate* and announced principles which subject to Sherman Act liability the producer who secures his customers' adherence to his resale prices by methods which go beyond the simple refusal to sell to customers who will not resell at stated prices, was made clear in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 722 * * *.
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> In other words, an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. * * * Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used.

In addition to the principles already discussed, the Supreme Court has made it clear that agreements, conspiracies, or combinations which give a party or the parties the power to fix, maintain or stabilize prices, as distinguished from agreements to fix, maintain or stabilize prices, are also in violation of the Sherman Act and illegal *per se*. In the *Ethyl Gasoline* case,[15] the defendant patent holder licensed the various oil companies to make and sell ethyl gasoline at fixed prices, a right of a patent holder. However, the defendant also entered into a system of licenses with all jobbers as well, without which they could not purchase, so that the defendant was enabled to

[14] *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

[15] *Ethyl Gasoline Co.* v. *United States*, 309 U.S. 436 (1940).

control their purchases and resale prices of ethyl gasoline by refusing or cancelling licenses. The jobber licenses fixed no prices but gave the defendant the power to do so, which power was used to stabilize resale prices. The Court held that such agreements giving one the power to fix or control resale prices were illegal *per se*, just as were agreements actually fixing such prices.

In the *Socony-Vacuum* case[16] the Court held that any agreement which affects prices in any way, such as raising, lowering, stabilizing or tampering with them, is illegal *per se* whether or not it fixes any prices specifically or at set levels. There the defendant oil companies entered into an agreement to buy spot market distress gasoline in order to stabilize spot market prices, with a consequent firming up of jobber and retail prices. The agreement did not fix any specific jobber or retail prices, but had the effect of stabilizing them or preventing their decline. Even though it was found that there was still price competition in jobber and retail sales, the agreement was held illegal *per se*. In the present case it is clear that the agency consignment agreements, in addition to constituting both agreements to fix resale prices and a combination designed to achieve the same purpose, also gave Sun the power to fix resale prices.

Respondent contends that its commission consignment agreements constitute bona fide agency contracts and hence are not unfair methods of competition, in reliance upon the *Curtis Publishing* and *General Electric* decisions[17] of the Supreme Court, principally the latter. If the agreements constituted bona fide agencies the gasoline would, of course, be Sun's. Admittedly, a trader has a right to select or fix the prices at which he sells his own product, absent other considerations not here pertinent. The *Curtis* case involved contracts between Curtis and its distributors, formerly wholesalers and retailers, under which they were made agents for the sale of the respondent's publications. The charge involved was exclusive dealing in violation of § 3 of the Clayton Act. The Supreme Court found that the arrangement was a bona fide agency and hence could not be in violation of § 3.

In the *General Electric* case, the company, holding patents on its light bulbs, entered into agreements with its former dealers, making them *del credere* agents and consigning its products to them to sell as agents. The Court held that there was no evidence that the agency was not created in good faith and actually maintained. In both the *General Electric* and *Curtis* cases, as distinguished from the

[16] Footnote 10, *supra*

[17] *FTC* v. *Curtis Publishing Co.*, 260 U.S. 568 (1923); and *United States* v. *General Electric*, 272 U.S. 476 (1926).

situation here, the former dealers had handled many products other than those of the respondent and clearly had a bona fide economic choice whether to remain independent dealers in such other products or become agents for the respondent. Here, as in the *General Motors* case, the dealers had no economic alternative except to go out of business.

In a more recent decision, the Supreme Court found an agency system designed to fix prices, similar to that established in *General Electric* and herein, an agreement or conspiracy to fix prices in violation of the Sherman Act.[18] Masonite, the holder of a patent on hardboard, entered into agency agreements with competitors under which they were made *del credere* agents, the product was shipped on consignment, title remained in Masonite, and Masonite established the prices at which the product was to be sold. The Court disregarded the agency and found an agreement to fix prices in violation of the Sherman Act. The Court stated, *inter alia:*

> So far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of "sale" and "agency" but on the significance of the business practices in terms of restraint of trade.

While *Masonite* involved competitors rather than vertical customers, unlike *General Electric* and the present case, the Supreme Court has stated clearly that the elimination of competition among retail distributor purchasers by price-fixing is illegal *per se*, just as is such price-fixing among competitors.

In the *Richfield Oil* case,[19] involving exclusive dealing agreements and a contention by the defendant that its dealers were agents, Judge Yankwich cited and relied upon the decision in *Masonite* in finding that the dealers were not in fact agents. He stated:

> In interpreting this and other statutes, we must eschew the tyranny of words or labels. We must, in each case, get behind the facade which the organization has created—as did the Supreme Court in the *Masonite* case, when it went behind a del credere agency which, at first blush, seemed to be a fiduciary relationship established by the concern for its own purposes, and found, instead, a means for monopolization. The Court did not then hesitate to declare the agency a mere cloak for restraints.
>
> Granted that a business may create its own outlets, it can do so only by making them *its agents in truth and fact*. It cannot do so by creating a well-recognized legal estate, superimpose on it oral limitations, the object of which is to restrain trade, and then claim legitimacy for this very restraint.

It is concluded and found that the agency consignment agreement was a fiction or subterfuge, not a bona fide agency, and in fact con-

[18] *United States* v. *Masonite*, 316 U.S. 265 (1941).

[19] *United States* v. *Richfield Oil Co.*, 99 F. Supp. 280 (S.D. Cal. 1951); *aff'd. per curiam*, 343 U.S. 922 (1952).

stituted an agreement or conspiracy among Sun and its dealers to fix resale prices, and to give Sun the power to do so, in violation of the Act. It is further concluded and found that such an agency consignment agreement, absent any agreement express or implied to fix resale prices, constituted an unlawful plan or combination to do so and an unfair method of competition in violation of the Act.

II. The Alleged Predatory Pricing Practice

As noted above, Count II of the complaint alleged that Sun, assuming that title to the gasoline remained in it as a result of the agency contracts, engaged in predatory price-cutting by reducing its retail prices to one cent above the prevailing retail prices of the private-brand operators, with the tendency or effect of increasing Sun's sales and unduly lessening competition. There is no allegation in the complaint or proof in this record that this pricing was discriminatory or in violation of § 2(a) of the Clayton Act, and accordingly there is no issue of price discrimination. Apparently this count is based upon the policy enunciated in § 3 of the Robinson-Patman Act, which probihits, *inter alia*, selling goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Absent discrimination or predatory price-cutting prohibited by § 3 of the Robinson-Patman Act, it is not unlawful for a seller to reduce his price and thereby increase his sales or share of the market. This is ordinary price competition which the antitrust laws are designed to protect. Obviously a seller who reduces his prices normally will enjoy increased sales unless and until his price is met by his competitors. Such action, the very essence of competition, might well have the effect of reducing the sales of his competitors, although, as found above, this record does not establish that the private-brand operators lost any sales and in fact there is substantial evidence that the price reduction of Sun did not affect the private-brand operators competitively. Counsel supporting the complaint cite no cases, and it is believed there are none, which prohibit a trader from making a nondiscriminatory, unilateral, non-predatory price reduction. As the Supreme Court observed in *Line Material*,[20] a case involving a price-fixing conspiracy:

> * * * Whatever may be the evil social effect of cutthroat competition on producers and consumers through the lowering of labor standards and the quality of the product and the obliteration of the marginal to the benefit of the surviving and low-cost producers, the advantages of competition in opening rewards to management, in encouraging initiative, in giving labor in each

[20] *United States* v. *Line Material Co.*, 333 U.S. 287 (1948).

industry an opportunity to choose employment conditions, and consumers a selection of product and price, have been considered to overbalance the disadvantages.

An analysis of the court decisions dealing with predatory price-cutting, including the primary line or area price discrimination cases which involve area price reductions which adversely affect the price-cutter's local competitors, reveals that in such cases the courts uniformly have found the presence of price-cutting in a local area, below one's own or one's competitor's costs with the object or effect of driving such competitor out of business, and the financing of such local losses by means of profits derived from other areas. No case holds that unilateral, nondiscriminatory and non-predatory price reductions are illegal. Predatory pricing refers to selling at unreasonably low prices for the purpose of destroying competition or eliminating a competitor, as prohibited in § 3 of the Robinson-Patman Act. The courts in such cases have construed "unreasonably" low prices to mean selling below one's own costs or a competitor's costs, which necessarily if continued would drive the competitor out of business.[21]

Counsel for respondent argue that § 3 of the Robinson-Patman Act is a criminal, not an antitrust, statute, and hence a violation thereof would not be an unfair method of competition. It seems clear that if violations of the Clayton and Sherman Acts are unfair methods of competition, which has been held several times by the Supreme Court, because such Acts reflect the public policy of the Congress, certainly a method of competition which has been declared by Congress to be criminal is against public policy and *a fortiori* an unfair method of competition. In fact, the courts have held such predatory price-cutting to be in violation of the Sherman Act and "unfair methods of competition". Even before the passage of the Federal Trade Commission Act and the use of the term "unfair method of competition", the Supreme Court in 1911 in the *Standard Oil* case,[22] *supra*, at page 43, specifically held local price-cutting to suppress competition an "unfair method of competition". During the same term the Court, in the *American Tobacco* decision,[23] at page 160 described lowering the price of tobacco below cost as "ruinous competition". At page 182 the Court stated:

* * * the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations:

[21] *E.g., Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2nd Cir. 1929); *Muller Company* v. *FTC*, 142 F. 2d 511 (6th Cir. 1944); *Moore*, v. *Mead's Bread Co.*, 348 U.S. 115 (1954); and *Maryland Baking Co.* v. *FTC*, 243 F. 2d 716 (4th Cir. 1957).

[22] Footnote 11, *supra*.

[23] Footnote 11, *supra*.

(b) * * * the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug [price] war which ensued and its results. * * *

In the *Porto Rican American Tobacco* case,[24] a classic illustration of a primary-line price discrimination designed to drive a local competitor out of business, the Court observed:

Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors (citing both *Standard Oil* and *American Tobacco.*)

It is concluded and found that predatory price-cutting (selling at unreasonably low prices, such as selling below either one's costs or a competitor's costs) for the purpose of destroying competition or eliminating a competitor, is an unfair method of competition in violation of the Act. However, as found hereinabove, there is no reliable, probative and substantial evidence in this record that respondent engaged in such predatory price-cutting.

CONCLUSIONS OF LAW

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

2. The acts and practices of respondent hereinabove found in Section III C are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

3. As a result thereof, substantial injury has been done to competition in commerce.

4. Respondent has not, as alleged in the complaint, engaged in predatory pricing practices.

5. This proceeding is in the public interest and an order to cease and desist from the above-found acts and practices should issue against respondent.

ORDER

It is ordered, That respondent Sun 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

[24] Footnote 21, *supra.*

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

A. Entering into, continuing, cooperating in, or carrying out, or attempting so to do, any planned common course of action, understanding, agreement, contract, or conspiracy with any person or persons not parties hereto, including without limitation its independent lessee dealers, either to attempt to, or create the power to, or to establish, fix, adopt, maintain, adhere to, stabilize, or affect, by any means or method, prices at which said products are to be resold;

B. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or combination, or any other equivalent means, for the purpose or with the effect of enabling respondent to establish or fix the prices at which its products are to be resold.

It is further ordered, That the allegations of the complaint that respondent engaged in predatory pricing practices be, and hereby are, dismissed.

Opinion of the Commission

MAY 15, 1963

By MacIntyre, *Commissioner:*

This matter is before the Commission upon respondent's appeal from the hearing examiner's initial decision holding that respondent violated Section 5 of the Federal Trade Commission Act as charged in Count I by entering into an agreement or combination with its retail dealers to fix resale prices. The examiner entered an order to cease and desist such practices. He further ordered the charges under Count II of the complaint dismissed, from which action no appeal has been taken.

Respondent appeals from the initial decision contending (1) that it was not unlawful to market its gasoline directly to the consuming public under commission consignment arrangements with dealers, (2) that the retail sales through dealers operating under consignment arrangements did not constitute sales "in commerce" under Section 5 of the Federal Trade Commission Act, and (3) that, if a violation is found by the Commission, the order in the initial decision is too broad.

The facts in the case are not in substantial dispute. Respondent, Sun Oil Company, is a corporation organized and doing business under the laws of the State of New Jersey. Its principal office and place of business is located at 1608 Walnut Street, Philadelphia, Pennsylvania. Respondent operates an integrated petroleum company engaged in the production, purchase and sale of crude oil, the refining of crude oil and its derivatives, and the sale and distribution of gasoline and other petroleum products in various states of the United States and foreign countries. It has refineries at Marcus Hook, Pennsylvania, and Toledo, Ohio. Respondent distributes gasoline under the brand name "Blue Sunoco" through approximately 8,900 outlets in various states of the United States and in Canada. In 1956, respondent's gross sales of petroleum products exceeded $731,000,000. Respondent markets its products through wholesale distributors, company-owned and operated stations and independent dealer stations.

The market area involved in this proceeding is comprised of the metropolitan areas and surrounding contiguous territory of the Cities of Norfolk, Portsmouth and Virginia Beach, Virginia (sometimes referred to hereafter as the Norfolk area). The period covered by the complaint is November 1956 through April 1959.

In the Norfolk area there were a number of military exchanges selling major-brand gasoline at prices substantially below the prevailing prices in the market. This gasoline was available only to authorized military personnel and dependents. In addition, in this market there were 21 private-brand stations (sometimes also referred to as independents) in 1956 which normally posted prices below the major-brand prices. The Norfolk area was an unstable market in which depressed prices occurred spasmodically.

Respondent entered the Norfolk area market in 1946, selling its gasoline exclusively through a wholesale distributor, Taylor Oil Company. In July 1954, Taylor was operating 34 retail stations and selling respondent's gasoline at prices equal to the lowest posted by private-brand operators. Taylor, in July 1954, sold a volume of 723,275 gallons per month, or an average of 21,272 gallons per station. Sun took over from Taylor in 1954, opening its own stations and leasing stations to independent dealers. Respondent operated as a major-brand seller with its dealers and company-operated stations generally posting the prices prevailing at the stations of other majors. Respondent by October 1956, through 29 stations, was selling 391,177 gallons per month or an average of 13,488 gallons per station.

When respondent took over distribution in the Norfolk area from the Taylor Oil Company, it endeavored to have its product accepted as a major brand at the prices posted by the major brands. Respondent, however, was handicapped, as the examiner found, by the public concept that its accustomed price was that of the unbranded stations and below prevailing major-brand prices. During the period covered by the record, respondent never did attain the percentage of the market it enjoyed formerly when selling through the Taylor Oil Company.

In October of 1956, a price war broke out in the upper Hampton Boulevard area near military exchange stations. A number of major-brand stations posted prices three cents below the generally prevailing major price. On or around November 5, 1956, respondent's district manager, Samuel O. Southard, called respondent's dealers into meetings to discuss the price war situation and the methods to be used to enable the dealers to compete price-wise in the market. Mr. Southard testified concerning such meetings as follows:

Q. Did you hold any meetings, Mr. Southard, prior to the inauguration of the consignment plan in November of 1956 with your dealers?

A. We had three meetings at the time. I explained the commission consignment plan to them, yes.

Q. And at the same time weren't they asked to sign up?

A. No. It was offered to them. Their signature was entirely their own privilege.

Q. Yes. But I will ask you this: Did any of them sign up at those meetings?

A. Yes.

Q. And did you have eight or ten or twelve at each meeting, would you say?

A. The first two meetings I would think there would be eight or ten at each meeting.

Q. Where were these meetings held?

A. In my office.

Q. That was at the Sun Oil Company Offices here in Norfolk?

A. Yes.

Q. Were they held at night?

A. In the day time.

Q. What did you tell them at that time about the consignment plan?

A. I explained the consignment plan to them and how it operated.

Q. Well, now, you explain to us just like you explained it to them, will you? What did you say to them at that time?

A. You want as best I can recall what I said to them during the meeting?

Q. Yes.

A. As I recall I mentioned that the gasoline gallonage at our stations in Norfolk had not been as high or had not reached the potential, and that in analyzing the situation that it was evident that considerable gallonage was being sold by the Government PX Service Station at a much lower price, and that also the independent stations posting a price of two cents generally under the posted price of what is termed "house brand gasoline", together with giving premiums, and with the tremendous gallonage that they were doing, indicated that our price was wrong so far as the consumer was concerned because he wasn't buying our products.

And that a price situation had developed on Hampton Boulevard.

And in order not to penalize any of our dealers we were going to be forced to meet that price with a dealer on Hampton Boulevard which would effect, perhaps our dealers in the Wards Corner area.

And that the commission consignment plan was the only method whereby we could assist them in a situation of this kind.

And that if they felt assistance was necessary or would be necessary, that they could have the commission consignment plan, and make their own decision.

I believe also at that meeting I had mentioned that our price being two cents higher than independents, and with the independents doing tremendous gallonage, indicating our price was wrong, and maybe some time we may have to attempt to sell gasoline at perhaps a one-cent differential rather than a two-cent differential.

I believe that is about all I can recall at the moment.

Impressions of various dealers about these meetings are disclosed in part by items of testimony such as the following:

Witness James J. Helth

Q. Now, Mr. Helth, you were on consignment in April of 1956. Did there come a time when you again began operating your station on a consignment basis?

A. Yes. In November of 1956.

Q. Now, prior thereto, did you attend any meeting or meetings where this plan was discussed?

A. The meeting that Mr. Southard held in his office around—I guess it was around the fourth of November, or the fifth of November.

Q. Who, if anyone, spoke at this meeting?

A. Mr. Southard, and I believe Mr. Lillianthal was there, the salesman.

* * * * * * *

Q. What did Mr. Southard say at this meeting? Do you recall?

A. Well, he explained this consignment plan to us.

And he told us what we would be guaranteed in order to meet the competitive prices on the house side with the unbranded people. I believe to stay within one penny of that.

Q. Did he say that was the reason for asking that you go on consignment?

A. Well, that I guess—there were I guess eight or ten dealers there. And the business I think in general was bad all over as far as the dealers were concerned.

Witness David Sawyer

Q. Now, did there come a time, Mr. Sawyer when you went on what is known as a consignment plan of operation?

A. Yes, sir.

Q. Now, immediately prior thereto on or about that time did you attend a meeting at the offices of the Sun Oil Company at which time this plan of operation was discussed and explained?

A. Yes, sir.

Q. Did anyone from the Sun Oil Company address that meeting?

A. Yes, sir. Mr. Southard.

Q. Mr. Southard?

A. Yes.

Q. And at that time what did Mr. Southard have to say about this plan of operation?

A. Well, as well as I remember it, the main thing that we were interested in were the unbrandeds. And I myself at the time had been staying within a penny of the unbrandeds. And I don't think I made myself very popular by doing so.

But Mr. Southard said at the time that when we went on this consignment that we would stay within a penny of the unbrandeds no matter how low we got. And if my recollection is correct, I think he said no matter if it went to a nickel we would stay within one penny of the unbrandeds.

Of course he said if we got that low, that we would get the 4½—we wouldn't get the four and a half cent that they said we would get on consignment.

That was my big argument. I have always thought we should stay within a penny of the unbrandeds.

Witness William J. Mountjoy

Q. What was said by anyone at that meeting?

A. Well Mr. Southard explained to us that we were going to get competitive with unbranded stations and we were going to stay one cent above them, and he told us that Mr. Lillianthal had papers for us to sign to go back on consignment, and just more or less explained to us and it came down to that.

Accordingly, it is clear that on or about November 5, 1956, respondent and various or all of its dealers met and discussed arrangements for fixing and maintaining retail gasoline prices in the Norfolk area, and that a combination or conspiracy was organized to take action with respect to maintaining such prices. As a result of the meetings all dealers of the respondent accepted its commission consignment plan except Mr. Williams, a dealer in Portsmouth, Virginia. The plan was later also accepted by Mr. Williams.[1]

Thus respondent's consignment contracts were not separately and individually negotiated with each of its dealers. Rather the dealers were called together in groups. Sun then acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices *horizontally;* Sun, in the presence of the dealers, pledged to fix prices *vertically.*

The dealers attending and participating in the meetings, at least tacitly, agreed among themselves and with respondent to the taking of specific action on the maintaining of retail prices in the market. Indeed one dealer reported that the Sun representative stated that "when we went on this consignment * * * if it [the retail price] went to a nickel we would stay within a penny of the unbrandeds."

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[1] The commission consignment agreement was an amendment to the dealers' purchase agreement whereby all provisions of the latter agreement relating to the purchase and sale of motor fuel were suspended. By the terms of the consignment agreement, respondent agreed to deliver gasoline to the dealers, to which it was to retain title. Sales were to be made by the dealer, for which he received a commission. The dealer was required to sell the gasoline at the prices designated by respondent. All risk of loss, damage or shortage was upon the dealer. The consignment agreement was terminable on five days notice except for default, which made it terminable upon twenty-four hours notice. It provided that upon termination the dealer was to deliver to respondent any gasoline left in his tanks.

Thus there is no doubt that Sun *and its dealers* wished and agreed to hold steadfastly to a uniform price line. In order to achieve this end, Sun, unlike *United States* v. *General Electric Co.*, 272 U.S. 476 (1926), did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers. The purpose of the action to be taken, at least in important part, was to capture sales volume from independent dealers. It is conceded by the respondent that part of the purpose of the commission consignment was to rebuild volume and to regain a share of the business which respondent had previously held. (See page 13 of the respondent's brief on appeal.)

The meetings organized by the respondent provided the focal point for the dealers to gather and enter into at least a tacit or implied agreement with other participants as to the fixing of retail gasoline prices. There was an interdependence in the dealers' decisions to participate in respondent's consignment plan. For instance, to the extent that a uniform reduction to within one cent of the independents was to be maintained, cooperation and participation by all was necessary.

A combination or conspiracy was instituted even though dealers were not uniformly desirous of entering into the arrangement proposed by the respondent. This is true even though they may not have intended concerted action. "Acceptance by conspirators, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 227 (1939). The Court, in *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942) held that a price fixing combination was formed although in negotiating and entering into the first agreements, each participant, other than Masonite, acted independently of the others, negotiated only with Masonite, desired agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussion with any of the others. As the Supreme Court stated in the *Masonite Case*, "the result [of this case] must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade."

Here too, the stigma of price fixing cannot be removed by merely waving the verbal wand of "consignment."

Thus we hold that in the circumstances shown in this proceeding respondent and its dealers, at the meetings held on or about November 5, 1956, entered into a combination or conspiracy to fix and maintain the retail prices at which respondent's gasoline was to be sold by dealers to the purchasing public. A means or a method for effecting the price fixing scheme so formed was the consignment method of operation. The consignment arrangement was a fiction and a subterfuge in that it was simply a device by which the unlawful price fixing arrangement was to be implemented. This price fixing, horizontal as well as vertical, makes the case distinguishable from the decision in the *General Electric Co.* case. Respondent also cites in its defense *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U.S. 568 (1923), but we find nothing in that case which would be in conflict with our holding of a violation in this proceeding.

Under these circumstances we hold that respondent's consignment plan was unlawful not because it did not constitute a genuine consignment under the law of agency, but because the proof showed it to be a *vertical* and *horizontal* price fixing device in violation of the Federal Trade Commission Act.

We conclude that the practice shown constitutes an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act.

Respondent next argues that the retail sales through dealers operating under consignment arrangements did not constitute sales "in commerce" within the meaning of the term in the Federal Trade Commission Act.

The examiner found that in the course and conduct of its interstate business, respondent 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 retail dealers in the Norfolk area and in other states of the United States. He held, in effect, that the agreement or combination between respondent and its dealers fixing the retail prices was engaged in the course of such business and, therefore, in interstate commerce. We agree.

Respondent's principal place of business was at the time of this hearing and is in Philadelphia, Pennsylvania, and the dealers with which it entered into an agreement or combination as to prices were in Virginia. Respondent shipped gasoline to such dealers from points outside the State of Virginia. This clearly was the sale of gasoline in interstate commerce. *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951). It was in connection with and in the course of such commerce that respondent engaged in the practices found to be unlawful.

The fact that the retail sales made pursuant to the price fixing scheme were local sales is not the controlling factor. In this case, it is the price fixing scheme which was charged and found to be unlawful. This scheme concerning parties in different states and a product transported across state lines was in our view an interstate scheme or course of conduct and subject to the regulatory powers of the Commission under the Federal Trade Commission Act. *Cf. Holland Furnace Company* v. *Federal Trade Commission*, 269 F. 2d 203 (7th Cir. 1959), *cert. denied* 361 U.S. 932; *General Motors Corporation et al.* v. *Federal Trade Commission*, 114 F. 2d 33 (2nd Cir. 1940); *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941), *cert. denied* 314 U.S. 668; *United States* v. *Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 972 (U.S.D.C. S.D. Cal. 1942). We hold that respondent engaged in an unfair method of competition and practice in commerce.

Respondent lastly challenges the scope of the order. Specifically, it contends (a) that the order should relate only to the sale of gasoline rather than all products respondent sells, and (b) that the order should specifically state that respondent may "Fair Trade" its gasoline under state laws.

Since there has been no showing that the practices herein challenged were used as to products other than gasoline and there being no further showing of a likelihood that they might be used with respect to other products, we will limit the order to gasoline.

Respondent's further request, that a provision be included in the order, as in the matter of *Sun Oil Company*, Docket 6641 (55 F.T.C. 955), excepting from the order contracts entered into in conformity with Section 5 of the Federal Trade Commission Act as amended by the McGuire Act, is granted, and the initial decision will be so modified.

The respondent's appeal is granted to the extent indicated in this opinion and it is otherwise denied. It is ordered that the initial decision be modified in conformity with the views expressed herein and, as so modified, adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Anderson concurs in the result.

OPINION, CONCURRING

MAY 15, 1963

By ANDERSON, *Commissioner:*

I concur in the result. I am not sure that the majority opinion spells out in positive fashion the assurance that the time-honored business practice of consignment selling is not interdicted. It should be clearly understood that the general practice of consignment selling is not attacked by the Commission because of the practices of respondent in this case. This case should stand for this case only.

Consignment selling is a lawful business method. I don't think it is necessary for the Commission to take business enterprisers on its lap and explain how honest "consignment selling" should be carried on, but it should at least say that the practice is not generally condemned.

ORDER MODIFYING AND ADOPTING INITIAL DECISION AND PROVIDING FOR THE FILING OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY*

MAY 15, 1963

The Commission having rendered its decision in this matter, granting in part and denying in part the respondent's appeal, and having ordered that the initial decision be modified in accordance with the Commission's views expressed in the accompanying opinion and, as so modified, adopted as the decision of the Commission; and

The Commission having further determined that the proposed order to cease and desist contained in the initial decision, as modified, is subject to § 4.22(c) of the Commission's Rules of Practice:

It is ordered, That the initial decision including the order, as modified in the manner shown by the proposed order set forth herein, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the order to cease and desist contained in the initial decision be modified as shown by the following proposed order of the Commission and that respondent may, within twenty (20) days after service upon it of this order, file with the Commission its objections to the changes so made in the order to cease and desist contained in the initial decision, together with a statement of the reasons in support of their objections and a pro-

* Proposed Final Order is omitted in printing since it was issued as the Final Order of the Commission.

posed alternative form of order appropriate to the Commission's decision.

Final Order

NOVEMBER 22, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4600, 4621 (superseded August 1, 1963), respondent was duly served with the Commission's decision upon respondent's appeal from the hearing examiner's initial decision and with an order affording it the opportunity to file within twenty (20) days any exceptions it may have to the terms of the Commission's Proposed Order; and

Respondent having filed no exceptions to said Proposed Order within the twenty (20) day time allotted therefor, the Proposed Order becomes, and is hereby issued as, the Final Order of the Commission:

It is ordered, That the respondent Sun 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 gasoline in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong., 2nd Session, approved July 14, 1952).

It is further ordered, That the allegations of the complaint that respondent engaged in predatory pricing practices be, and they hereby are, dismissed.

It is further ordered, That respondent 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 set forth herein.

By the Commission, Commisisoner Anderson concurring in the result.

IN THE MATTER OF

THE ATLANTIC REFINING COMPANY

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

Docket 7471. Complaint, Apr. 13, 1959—Decision, Nov. 22, 1963

Order requiring a major integrated petroleum products marketing company to cease coercing its independent lessee-dealers in the "Delmarva Peninsula" area of Delaware, Maryland and Virginia, during a local price war, to sell its gasoline at uniform and non-competitive prices by means of a so-called "temporary consignment contract"; conspiring with such retail dealers to fix and maintain the uniform prices through the medium of the "consignment contracts"; and conspiring with its independent wholesale distributors to maintain the uniform consumer resale prices by granting the co-conspiring distributors certain rebates to be passed on to their dealer customers maintaining the uniform prices.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Atlantic Refining Company, Inc., a corporation, hereinafter referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereof as follows:

COUNT I

PARAGRAPH 1. Respondent, The Atlantic Refining Company, Inc.,* is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with

* Respondent's correct name is The Atlantic Refining Company.