

# FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JULY 1, 1964, TO DECEMBER 31, 1964

IN THE MATTER OF

J. C. MARTIN CORPORATION ET AL.

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

*Docket 8520. Complaint, July 13, 1962—Decision, July 6, 1964*

Order requiring New York City sellers of merchandise to cease from supplying others with pull cards or other devices intended to be used in the sale of merchandise by means of chance, lottery, or gift enterprise, selling or disposing of merchandise by such means, and rejecting respondent's contention that a previous case had made this one *res judicata*.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that J. C. Martin Co.,\* a corporation, and John Kaslow, individually and as an officer of said corporation, and John Kaslow, an individual trading as The D. A. Sales Company, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent J. C. Martin Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 667 Broadway, in the city of New York, State of New York.

Respondent John Kaslow is an officer of the corporate respondent. He also employs the trade name, The D. A. Sales Company under which all merchandising operations hereinafter described are conducted. He formulates, directs and controls the acts and practices of

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\*The correct corporate name of this respondent is J. C. Martin Corporation.

all respondents, including the acts and practices hereinafter set forth. His address and that of The D. A. Sales Company are the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution, through others, of numerous articles of merchandise to the public.

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

PAR. 4. In the course and conduct of their business as aforesaid, the respondents sell and distribute said articles of merchandise, through others, by means of a lottery scheme. Their operational plan is as follows:

Respondents cause to be distributed through the mails, a brochure or catalog depicting, among other things, pictures or description of prizes or premiums offered to persons who sell their merchandise.

A portion of said sales catalogs consists of a list on which there are designated a number of items of merchandise offered for sale and the prices thereof. Adjacent to the list is printed and set out a device commonly called a pull card. Said pull card consists of a number of tabs, under each of which is concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers, or prospective purchasers, of the tabs or chances are unable to ascertain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached the tab and learned which article of merchandise he is to receive and the price thereof and paid for same, his name is written on the list opposite the named article of merchandise.

When the person or representative operating the pull card has succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the amount collected to the respondents, the said respondents thereupon ship to said operator, salesman or representative, the merchandise designated on said card, together with a premium as compensation for operating the pull card and selling the said merchandise listed thereon. The said operator of the card delivers the merchandise to the purchasers of tabs from said pull cards in ac-

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cordance with the list filled out when the tabs were detached from the pull card.

PAR. 5. The persons to whom respondents furnish the said pull cards use the same in purchasing, selling and distributing respondents' merchandise in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their merchandise in accordance with the sales plan hereinabove set forth.

The sale of merchandise by the sales plan set forth and described in Paragraph Four hereof also constitutes the sale of merchandise by means of a chance or gaming device inasmuch as the identity of the article involved and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the sales catalog or card.

The use by respondent of the aforesaid sales plan in connection with the sale of their merchandise is a practice which is contrary to established public policy of the Government of the United States and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

*Mr. Thomas Whitehead* supporting the complaint.

*Mr. Miles Warner* of Philadelphia, Pa. for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

NOVEMBER 1, 1963

## STATEMENT OF PROCEEDINGS

The Federal Trade Commission on July 13, 1962 issued its complaint charging J. C. Martin Co.,<sup>1</sup> a corporation, and John Kaslow, individually and as an officer of said corporation, and John Kaslow, an individual trading as The D. A. Sales Company, with violation of Section 5 of the Federal Trade Commission Act. The individual respondent, John Kaslow, is alleged to formulate, direct and control the acts and practices of all the named respondents, and said respondents are alleged to be engaged in the interstate sale and distribution of mer-

<sup>1</sup> The corporate respondent's correct name is J. C. Martin Corporation. See respondents' answer, page 2.

chandise, through others, by means of a sales plan charged to be both a lottery scheme and a gaming device contrary to the established public policy of the Government of the United States.

In Docket No. 6145 [52 F.T.C. 1674], a prior complaint was issued on December 2, 1953, which charged J. C. Martin Corp., a corporation, and Jack Kaslow<sup>2</sup> and Seymour Orenstein, as corporate officers and as individuals, with violation of the Federal Trade Commission Act by use of a sales plan involving the distribution of merchandise by means of chance, lottery, or gift enterprise. The Commission's order to cease and desist in this prior proceeding was vacated and set aside by the appellate court<sup>3</sup> due to the stated absence of the presentation of proof of the element of prize, held essential along with the elements of consideration and chance as being necessary to a lottery.

Respondents filed answer in the instant proceeding on July 19, 1963. Respondents admit in part and deny in part the various allegations of the complaint and aver that the allegations of the present complaint are but a virtual duplication of those in the prior complaint in Docket No. 6145. Respondents aver that the Commission sought no review of the adverse court decision in this prior proceeding, that it remains conclusive and binding to all parties to the said litigation, and that the institution of the instant proceeding without leave sought or granted by the said court is a violation of the court's mandate.

Respondents' answer also further avers that in the absence of any allegations in the instant complaint of changed facts, changed circumstances, or changed considerations affecting the public interest, the final result in Docket No. 6145, wherein the Commission's order to cease and desist was judicially vacated and set aside, bars the instant proceeding as *res judicata*.

Intervening between the issuance of the complaint and the filing of answer in the instant proceeding,<sup>4</sup> respondents filed a motion to dismiss the complaint, also based on the aforesaid grounds of alleged violation of the appellate court's mandate and *res judicata*. This motion to dismiss was denied both at the opening and the closing of the hearing held on the merits herein.<sup>5</sup>

<sup>2</sup> The time period covered in Docket No. 6145 is different from that of this proceeding, but the corporate respondent and Jack Kaslow and John Kaslow, the individual respondent herein, are one and the same. See Tr. 19-23 : 161.

<sup>3</sup> *J. C. Martin Corp., et al. v. F.T.C.*, (7th Cir., 1957) 242 F. 2d 530 at 533-534.

<sup>4</sup> A full and complete chronological recital of the plethora of prolix pleadings in the instant proceeding would appear both repetitious and duplicative of matters of record, and, further, unnecessary of being herein again set forth.

<sup>5</sup> See authorities cited in answer by complaint counsel in opposition to said motion filed on September 11, 1962, and Tr. 4-16, containing a discussion as to the extent of the said motion before the hearing examiner prior to the ruling made thereon. The motion to dismiss was renewed at the close of the hearing and denied on the record at Tr. 187-191 and if perchance considered renewed by paragraph 4, page 2, of respondents' proposed findings and conclusions, it is again herein made subject to the same ruling.



The hearing on the merits was concluded in approximately a day and a half. Three individuals using respondents' merchandise sales plan and the individual respondent testified during the presentation of the case-in-chief and the individual respondent alone for the defense, after which the case was closed on the record.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings. The transcript of record consists of 200 pages and Commission Exhibits marked for identification Nos. 1 through 5 were received in evidence. Also marked for identification and received in evidence were respondents' Exhibits Nos. 1 through 3.

Proposed findings of fact, conclusions, proposed order to cease and desist, and a supporting brief were duly filed by counsel supporting the complaint. Counsel for respondents belatedly filed a page and one-half document entitled "Respondents' Proposed Findings and Conclusions" together with motion for leave to file which further stated their brief would follow by the end of October.<sup>6</sup> No brief was filed by respondents at such time. Proposed findings, conclusions and order submitted by respective counsel and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following Findings of Fact and Conclusions therefrom are made, and the following Order issued:

#### FINDINGS OF FACT

1. Respondent J. C. Martin Corporation is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 667 Broadway, in the city of New York, State of New York. Respondent John Kaslow is the principal officer and stockholder of said corporate respondent and formulates, directs and controls the acts and practices of said corporate respondent. The business address of said individual respondent is the same as that of the corporate respondent.<sup>7</sup>

2. Respondents are now, and for a number of years past have been, engaged in the business of the sale and distribution, through others, of various articles of merchandise to the public. Respondent John

<sup>6</sup> See, Tr. 197-200.

<sup>7</sup> See, answer, page 2; Tr. 19-20.

Kaslow, individually and in conjunction with said corporate respondent, employs various trade names under which the said merchandising operations as hereinafter described are conducted. Some of the said operations were and are conducted by the respondents under the name of J. C. Martin Co., and others under the name of The D. A. Sales Company.<sup>8</sup> Respondents, in the course and conduct of the said business, cause and have caused the said merchandise products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other states of the United States, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.<sup>9</sup>

3. Respondents, in the interstate sale and distribution of their aforesaid merchandise, operate the following sales plan :

(a) Names of prospective sales representatives or solicitors for the sale of said merchandise are first secured from commercial lists variously obtained by the respondents.<sup>10</sup>

(b) Sales catalogs or brochures prepared by the respondents and illustrating the items of merchandise therein being offered for sale and the prices therefor are caused by respondents to be mailed to the names and addresses of the persons appearing on said lists. Said catalogs or brochures also contain illustrations of a choice of merchandise premiums, or cash amounts in lieu thereof, which are offered by respondents to said prospective representatives or solicitors as an inducement for the making of the aforesaid sales of respondents' merchandise.<sup>11</sup>

(c) In addition to illustrating the merchandise items of respondents being offered for sale, said catalogs or brochures contain a series of detachable tabs inscribed "PULL HERE", which normally are used in connection with the sale of said merchandise items. On the reverse side of each tab, and concealed from the purchaser until the tab is pulled and detached, is the designation of the item of merchandise and the purchase price therefor being offered for sale or sold to the person pulling or detaching the particular tab. Each of the designated merchandise items and the price for each item, which is concealed under the particular tab, is also set forth in a printed list in said catalogs or brochures opposite or adjacent to said tabs. This list con-

<sup>8</sup> See, answer, page 2 ; Tr. 19-21 ; 151-154 ; and Comm. ex. Nos. 1, 2, 3, 4, 5.

<sup>9</sup> See, answer, page 3 ; respondents' merchandise sales in 1962 approximated from \$300,000 to \$325,000 (Tr. 36) and covered the entire United States (Tr. 155). Of these total sales, \$275,000 were made in states other than the State of New York (Tr. 37).

<sup>10</sup> Tr. 52 ; respondents annually mail from 350,000 to 1,000,000 sales catalogs or brochures to prospective sales representatives or solicitors (Tr. 69) and the proportion of such number of said recipients answering would run from half a percent to two percent of such mailings (Tr. 68-70).

<sup>11</sup> Tr. 53 ; 154-155 ; Comm. ex. Nos. 1-B, 2-B, 3-B, 4 at page 17, 5 at page 17.

tains three vertical columns, labeled respectively "Price", "Name of Purchaser", and "Article".

Under the first column labeled "Price" is a printed alphabetical list of a number of different boys' and girls' names with a price appearing under each name. The name and price concealed under one of the adjacent pull tabs will correspond with one of the names and the price thereunder appearing on said list. Under the second column labeled "Name of Purchaser" is a blank space opposite each of the boys' and girls' names in the first column labeled "Price" for writing in the name of the purchaser pulling and detaching the particular tab bearing that boy's or girl's name. Under the third column labeled "Article" is a printed description of the item of merchandise illustrated in the catalog or brochure and being purchased by the person drawing the particular name tab calling for the said item.<sup>12</sup>

(d) Upon pulling and detaching the tab bearing a certain boy's or girl's name, the purchaser pays the price of the merchandise item designated on the pull tab and the buyer's name is written in the appropriate blank space provided for each purchaser's name on the adjacent list. When all the tabs are detached and the money therefor collected, it is remitted to the respondents by the sales representative or solicitor making the sales. Upon its receipt, the respondents ship to said sales representative or solicitor the sold merchandise items for delivery to the respective purchasers, and either the merchandise gift selected or the cash compensation chosen by said representative or solicitor for the making of such sales.<sup>13</sup>

(e) In addition to the making of the aforesaid merchandise sales by the method aforesaid, respondents' sales catalogs and brochures also provide for the sale of said items of merchandise without the use of the pull tabs therein contained. That is, the prospective purchaser may purchase from the descriptive merchandise list adjacent to the pull tabs any or all of the items, or any number of each item, at the prices for the same shown on the said list, without the necessity of detaching any of the pull tabs to obtain the said merchandise.<sup>14</sup> This alternative given the purchaser, however, has no bearing on the legality or illegality of respondents' merchandise sales when made through use of the pull-tab device. Further, the record herein discloses that sales by respondents of the merchandise items on the said list are both dollar-wise and number-wise, designedly and preponderantly made through use of the pull-tab device contained in respondents' said sales catalogs or brochures.<sup>15</sup>

<sup>12</sup> Comm. ex. Nos. 1-D, 2-D, 3-D, 4 at page 20, 5 at page 20.

<sup>13</sup> See footnotes 11 and 12, *supra*.

<sup>14</sup> Tr. 55-56; see, also, footnote 12, *supra*.

<sup>15</sup> Tr. 46-47; 61-64; 155-157; 182-183; 192-197; Respt. ex. No. 1.

4. Respondents' sales catalogs and brochures, as shown to prospective purchasers and purchasers by respondents' sales representatives or solicitors, make various comparative representations as to the retail values of the merchandise items and the respective listed prices for such items as offered for sale and sold under the various pull tabs, as for example:

Show these useful items to your friends!  
They are so easy to sell because  
they're ALL WORTH MUCH MORE!<sup>16</sup>  
ALL outstanding values \* \* \*  
ALL worth more than the \* \* \* listed prices.<sup>17</sup>

These representations as to greater value can do nothing other than stimulate and contribute to the prospective purchaser's and purchaser's inclination to obtain a seeming bargain, no matter which pull tab is detached and which item of merchandise is thereby obtained at its designated price. Respondents would contend, however, that, notwithstanding these representations of greater value than the designated prices for the various merchandise items being offered for sale, each item's cost price bore the same ratio to its designated sales price as did any other of the said items, and, accordingly, all items were of the same relative value no matter which pull tab was detached and which item was drawn.<sup>18</sup>

In support of such contention, respondents' exhibits Nos. 2 and 3 were submitted in evidence. These exhibits, however, fail to support respondents' contention. Respondents' exhibit No. 3, for example, based upon the figures appearing on said exhibit when submitted, following the addition of further computations, shows the contrary to respondents' contention to be the actual fact:

*Respondents' Exhibit No. 3—Comparisons of Cost Price and Selling Price of 14 Articles Listed*

No.	Code	Articles	Cost price	Selling price	Ratio of selling price to cost price <sup>1</sup>	Percent cost price is of selling price <sup>1</sup>
1	Ann	3 pc. heart trays.....	\$0.33	\$1.49	4.5	22.1
2	Bob	6 pc. steak knife set.....	.73	1.98	2.7	36.9
3	Cam	Make-up mirror.....	.59	1.95	3.3	30.3
4	Dan	Bench S & P set.....	.45	1.60	3.8	26.6
5	Eva	Gold lighter.....	.34	1.49	4.4	22.8
6	Flo	Family tree.....	.48	1.59	3.3	30.2
7	Gay	Frozen food knife.....	.34	1.79	5.3	19.0
8	Hal	Flower vase set.....	.51	1.99	3.9	25.6
9	Ida	Register desk set.....	.48	1.89	3.9	25.4
10	Jen	Cig. box and ash trays.....	.40	1.69	4.2	23.7
11	Ken	New mag. can opener.....	.61	1.98	3.2	30.8
12	Lil	Brass pen and pencil set.....	.43	1.95	4.5	22.1
13	May	Kitchen utensil set.....	.62	1.98	3.2	31.3
14	Nan	Nail clipper set.....	.40	1.49	3.7	26.8

<sup>1</sup> Computed on the basis of monetary amounts appearing in above "Cost Price" and "Selling Price" columns on respondents' exhibit No. 3 as submitted in evidence.

<sup>16</sup> Comm. ex. No. 1-D.

<sup>17</sup> Comm. ex. No. 3-D.

<sup>18</sup> Tr. 65.

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It is apparent from the foregoing analysis of respondents' exhibit No. 3, that the ratio of selling price to cost price is not the same for all the items, nor is the percentage that cost price is of selling price the same for all items.<sup>19</sup> For example, a purchaser pulling the tab with the concealed name of "Bob" and the designated sales price of \$1.98 would get an item costing \$.73, sold at only 2.7 times its cost price. The percentage this cost price is of the selling price would amount to 36.9%.

If, on the other hand, the purchaser pulled the tab concealing the name of "Gay" and the designated sales price of \$1.79, he or she would get an item costing \$.34 and sold at 5.3 times its cost price. The cost price here would be only 19.0% of selling price. It is, accordingly, quite obvious that the purchaser drawing the name "Bob" rather than "Gay" would get much the better relative value over cost and a more favorable and relatively lower buying price. These existing differences between the cost price and the designated selling price of the various items so sold by chance, amount to a gain in price advantage to the purchasers pulling the tabs concealing the items bearing the lower ratio of selling price to cost price and the higher percentage that the cost price is of the selling price.

Whether or not the designated sales prices of any or all the items being offered are lower than an actually prevailing higher retail market value, as is represented by the respondents, or whether or not the actual prevailing retail market value is, in reality, lower or much the same as the designated sales prices is not shown by the record. The record only shows, for example, as to respondent exhibit No. 3, that the cost price to respondents of all the merchandise items appearing thereon totals but \$6.71, while the designated selling prices of all such items total \$24.95, of which total selling price amount respondents' sales representative or solicitor has the option of retaining \$10 in lieu of taking a merchandise premium for the making of the sales.<sup>20</sup>

5. Respondents would further contend that the pull tabs in their sales catalogs or brochures, shown by respondents' sales representative or solicitor to prospective purchasers and purchasers, serve a purpose other than the plain, intended use to be made of the said tabs.<sup>21</sup> This contention is rejected for, while the pull tabs might serve to help make an easier selection between the various available items by undecided customers, as is argued by respondents, and also act as a receipt for the money paid and as a reminder to the purchaser of merchandise yet to be delivered, it is clear that their intended main purpose and use

<sup>19</sup> Respondents' exhibit No. 3 is directly related to Commission exhibit No. 4 at page 20 (Tr. 174-175). (See also, Tr. 165-179.)

<sup>20</sup> Commission exhibit No. 4 at page 17.

<sup>21</sup> Tr. 51-52; 64.

is to sell respondents' merchandise by means of chance. The fact that respondents' merchandise can be and is sold without use of the pull tabs is also of no moment for the emphasis in respondents' sales catalogs or brochures is for their sales representatives or solicitors to sell such merchandise by use of the pull tabs.<sup>22</sup>

For example, Commission exhibit No. 1-A shows the following:

IT'S SO SIMPLE, ANYONE CAN DO IT! You are in business for yourself, so just ask your friends to buy from you, instead of at the store \* \* \* one or more of the 20 useful articles listed on page 4. Each article and its price is also clearly printed UNDER THE PULL RECEIPT ON PAGE 4. You and your friends will enjoy this new way of buying.

In the space provided on page 4, list the buyer's name next to the articles purchased. When you have sold the 20 articles, you will have \$39.95. Fill out the order blank on page 2. Detach and mail it together with money order for \$39.95. Be sure to indicate on order blank which Big Premium you want for yourself.

Further, in Commission exhibit No. 1-D, the following appears:

We are able to give these values because our overhead is low based on uniformity of packing. Do try to sell the 20 useful items. If unable to do so, we will fill your order allowing you a discount of 25% on articles sold, which you deduct from your remittance. If order is less than \$39.95, include list of items sold. To receive a premium, a complete order of \$39.95 must be received by us.

Respondents' sales representatives or solicitors are also afforded a strong incentive to sell all the items called for under the pull tabs because in so doing they obtain the option of either a merchandise premium or of deducting a cash premium in remitting to the respondents. With regard to Commission exhibit No. 1, this cash premium amounts to \$15.00, or nearly 40% of the selling price in comparison to the 25% deducted when selling only a part, and not all, of the said items.<sup>23</sup>

Further, respondents' exhibit No. 1 in evidence shows that during the sample month of July 1963, respondents filled a total of 460 orders forwarded by respondents' sales representatives or solicitors in the dollar sales amount of \$13,641.35, and that of this total, 387 orders or 84.1% were for the complete packaged unit of all the merchandise covered by the sales catalog or brochure pull tabs. These sales amounted to \$11,159.82 of the \$13,641.35 of total sales. The balance of \$2,481.52, or 18.2% of the total dollar sales, were accounted for by 73 orders or 15.9% of total orders not calling for the complete packaged unit. These latter sales cover orders forwarded in which all the pull tabs

<sup>22</sup> Tr. 58; 155-157; 196-197.

<sup>23</sup> Commission exhibit Nos. 2, 3, 4 and 5, similarly, provide a merchandise or cash premium option and for only a 25% deduction when all the items are not sold.

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were not used or where additional items were sold without use of the pull tabs in making the sale.<sup>24</sup>

Three persons making sales of respondents' merchandise through use of respondents' sales catalogs or brochures testified in this proceeding as to the procedures they followed in the making of such sales.<sup>25</sup> The first witness used Commission exhibit No. 2, the second used Commission exhibit Nos. 3 and 5, and the third used Commission exhibit No. 4.

All the merchandise items under the pull tabs were sold and such sales were stated to have resulted only from the use of the pull tabs in said catalogs or brochures.<sup>26</sup> The testimony was to the effect that when prospective purchasers were shown the said catalogs or brochures with relation to the buying of respondents' merchandise, they were told by respondents' sales representative or solicitor, "Okay, pull here"<sup>27</sup> or asked if they would like to "take a chance."<sup>28</sup>

6. There can be no reasonable doubt, based on the testimony and an examination of the exhibits of record in the instant proceeding, that respondents' merchandise sales solicited by means of respondents' said sales catalogs or brochures containing the hereinbefore described pull tabs, placed in the hands of others a sales device which had, and now has, the capacity and tendency to give prospective purchasers and purchasers the impression and belief that, upon detaching any of the said pull tabs, they were thereby taking a chance and were engaging in an obvious gamble as to which of the particular various items they would thus obtain and what designated price they would pay.

The very make-up of the sales catalogs or brochures admits and unmistakably brands them to be nothing other than lottery schemes and gaming devices, because the pull tabs therein contained serve no purpose other than to act as an invitation to prospective purchasers and purchasers to take a chance and see what item of merchandise and sales price the luck of the draw would designate. In so doing, such a solicitation cannot be found to be other than a flagrant appeal to the gambling instincts of the public, which is an act and practice

<sup>24</sup> Tr. 59; 182-187; 192-194.

<sup>25</sup> All three persons were of Puerto Rican descent and prior to their testimony respondents' counsel objected to its competency on the basis of their alleged inability to properly speak and understand the English language. This objection was not sustained and following the observation of their demeanor on the witness stand, and after listening to their testimony as there given, and judging their capability to understand the questions then asked and the nature of the responses made, full probative value is being given to such testimony. See. Tr. 70-72; 108-109; 115-116; 134; 149.

<sup>26</sup> Tr. 78, 82, 101-102, 123, 128, 133, 137-138, 148.

<sup>27</sup> Tr. 114, 117, 121.

<sup>28</sup> Tr. 136-138.

by respondents contrary to the established public policy of the United States, and, therefore, an unfair act and practice within the intent and meaning and violative of Section 5 of the Federal Trade Commission Act.<sup>29</sup>

7. The 1956 initial decision in Docket No. 6145, at paragraph five, states the following with regard to the complaint in that proceeding:

The three essential elements in a lottery are consideration, chance, and prize. The first two, consideration and chance, obviously are present here; the only question is as to the element of prize. On this point the complaint alleged: "Some of said articles of merchandise have purported and represented retail values greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The prices of other of the articles are higher in proportion than the articles first mentioned. The apparent greater values of some of said articles, induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of greater value than the designated prices to be paid for same."

The complaint in the instant proceeding omits the above allegation of the prior complaint in Docket No. 6145 relative to any representation being made, that some of the merchandise articles listed have greater retail values than the designated prices to be paid for them, with the result that the purchasing public is induced to purchase the pull tabs or chances in the hope of drawing the articles of greater value.

The instant complaint, however, contains the following further and separate charge in paragraph five, which was not stated in the prior complaint in Docket No. 6145:

The sale of merchandise by the sales plan set forth and described in Paragraph Four hereof also constitutes the sale of merchandise by means of a chance or gaming device inasmuch as the identity of the articles involved and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the sales catalog or card.

The use by respondent of the aforesaid sales plan in connection with the sale of their merchandise is a practice which is contrary to established public policy of the Government of the United States and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

The appellate court decision in *J. C. Martin Corp., et al. v. Federal Trade Commission*, footnote 3, *supra*, held that in order to constitute a lottery, the elements of consideration, chance and prize must be present. Pertinent to the lottery question, the *Martin* case held:

<sup>29</sup> Docket No. 8470, *Jonas Gerson, an individual trading as Haven Company*, initial decision filed October 9, 1962 and adopted by the Commission on March 22, 1963 [62 F.T.C. p. 1009, 1011].



1. That notice to a prospective purchaser that he is not obliged to buy the article identified by a tab after ascertaining what it is and the price to be paid, does not eliminate the elements of consideration and chance. The court states, "This is no more than a recognition of the common law rule that a gambling transaction is unenforceable."

2. That notice to a prospective purchaser of an option to purchase a desired article outright rather than utilize the tab device, does not eliminate the element of chance. The court stated, "If an individual exercises his option to take a chance by pulling a tab can it be said that he has not taken a chance? The objection to the pull tab scheme cannot be removed by offering the individual an unobjectionable alternative."

3. That the element of prize is essential to the existence of a lottery. According to the court, where "each participant in the scheme will in any event receive the equivalent of the amount contributed by him, and he is not under any hazard of pecuniary loss, nor offered the chance of receiving something of more value than the amount contributed by him, a lottery does not exist."

4. The court rejected a finding of the presence of the essential element of prize based on a test as to whether or not the article of merchandise designated by the pull tab might be of some use or of no use to the particular purchaser, stating, "We believe that it would be stretching the term lottery to the breaking point to sustain this finding of prize in petitioners' sales method."

The most recent Commission opinion involving a sales plan held to constitute both a lottery and a gaming device appears in Docket No. S740, *Jonas Gerson, trading as Haven Company*, issued March 22, 1963 [62 F.T.C. 1009]. The Commission therein adopted the initial decision of the hearing examiner previously filed on October 9, 1962. In the *Gerson* case, a lottery was held existent, based on the representations contained in the sales brochures that the merchandise items being offered were "worth much more" and were "outstanding values", and the impression thereby found created on purchasers using the pull tabs that they would receive items worth more than the retail sales price amounts designated for such items.

The Commission opinion, in adopting the initial decision in the *Gerson* case, stated, "The *Martin* case held only that the device there involved was not a lottery because the element of prize, essential to a lottery scheme, was not sufficiently proved. On the facts of this record, the case is clearly distinguishable from *Martin* and is governed by *Wolf v. FTC*, 135 F. 2d 564 (7th Cir., 1943), and *E. & J. Distributing Co. v. FTC*, 193 F. 2d 179 (2nd Cir., 1952), cert. denied 344 U.S. 823."

In addition to finding the existence of a lottery, however, the initial decision in the *Gerson* case went further and also upheld the complaint's additional allegation that the sales plan involved was a gaming device calculated to appeal to the public's gambling instincts, and, as such, an unfair act or practice within the meaning of the Federal Trade Commission Act, even if technically it might not have constituted a lottery. The *Gerson* initial decision, as adopted by the Commission, cites various supporting cases in such regard, including the special concurring opinion in *Calvine Cotton Mills* (1954) 51 F.T.C. 294 at 298, wherein, in part, it is stated:

\* \* \* it should be made clear that \* \* \* respondent's practice is not being condemned because it is a technical lottery. but because it is a method of merchandising which constitutes an unfair trade practice \* \* \* the Commission should not be concerned with whether the three essential elements of a lottery, namely, prize, consideration and chance are all present in respondent's sales promotion plan \* \* \* Rather, it should be concerned with only the unfair trade practice of distributing merchandise by means which are contrary to public policy. It is clear that respondent's sales promotion plan was intended to appeal to the gambling instincts of purchasers and prospective purchasers and was therefore contrary to public policy.

8. The present matter being found not to be *res judicata*,<sup>30</sup> the initial decision in the *Gerson* case, as adopted by the Commission, is controlling in the instant proceeding based on the facts of this record, and, accordingly, it is held that respondents' sales plan, used as herein disclosed, constitutes a lottery scheme and the sale of merchandise by means of a chance or gaming device contrary to the established public policy of the United States and is, therefore, an unfair act and practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

#### CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the matter is not *res judicata*.

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

3. It is concluded that respondents' sales plan, as hereinbefore found, involves the use of a lottery scheme and a gaming device in connection with the sale, by chance, of respondents' merchandise, and that respondents have supplied and placed in the hands of others said scheme and device for such use and purpose.

<sup>30</sup> See footnote 5, *supra*.

1

## Opinion

4. It is further concluded that the acts and practices of respondents, as hereinbefore found, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That J. C. Martin Corporation, a corporation, and its officers, and John Kaslow, individually and as an officer of said corporation, and John Kaslow, an individual trading as The D. A. Sales Company, or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others, pull cards or any other device or devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

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

3. Supplying to or placing in the hands of others pull cards or any other device or devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a chance or gaming device.

4. Selling or otherwise disposing of any merchandise by means of a chance or gaming device.

## OPINION OF THE COMMISSION

JULY 6, 1964

By REILLY, *Commissioner*:

The complaint here charges respondent with a violation of Section 5 of the Federal Trade Commission Act. Specifically, it is alleged that respondents sell and distribute merchandise in interstate commerce by means of a sales plan which:

(1) Involves a lottery and places in the hands of others the means of conducting lotteries in the sale of their merchandise.

(2) Constitutes the sale of merchandise by means of a gaming device.

The hearing examiner sustained the complaint on all counts and issued a cease and desist order. Respondents have appealed, and

present the three arguments set out below to support their position that the hearing examiner be reversed and the complaint dismissed.<sup>1</sup>

Respondent argues that:

1. *The Hearing Examiner's Initial Decision Is Unsupported by "Substantial and Competent Evidence"*.

After reading the two hundred (200) pages of record, we hold that the examiner's decision was supported by the preponderance of substantial, reliable and probative evidence on the record as a whole. Respondents assert, however, that the Commission's witnesses were unable to speak or understand English and that therefore they were incompetent. An examination of the record reveals that in fact two of the three witnesses had considerable trouble with English; however, the examiner had an opportunity to listen to and observe all the witnesses. Their competency is clearly a matter to be determined by him. Barring unusual circumstances, not presented on this record, his ruling on such an issue should not be disturbed. "The weight and credibility to be accorded their [the witnesses] testimony was a matter for the trier of the facts." *Basic Books, Inc., et al. v. Federal Trade Commission*, 276 F. 2d 718, 720 (7th Cir. 1960). Moreover, the record reveals that respondents' counsel took some pains to point out that the witnesses possessed little formal education, their lack of familiarity with Commission proceedings, and the awkwardness which they felt in expressing themselves in English. And, John Kaslow, the individual respondent herein, read into the record on direct examination parts of a statement—which had been prepared by him and his counsel—justifying and explaining his sales plan. Finally, the examiner himself, not being satisfied with the exposition elicited by Commission counsel and respondents' counsel, on several occasions closely questioned Mr. Kaslow as to how his sales plan operated. Thus the examiner was fully apprised of whatever infirmities were present in the witnesses' testimony and moreover had other evidence on which to rely. We find nothing to show that he abused his discretion.

2. *The 1957 proceedings are Res Judicata.*

On December 2, 1953, the Commission in Docket No. 6145 issued a complaint against J. C. Martin Corp., a corporation, and Jack Kaslow and Seymour Orenstein, as corporate officers and individuals. The charge there was that respondents had utilized a "game of chance, gift enterprise or lottery scheme."<sup>2</sup> The complaint concluded that:

<sup>1</sup> The details of the merchandising plan are set out in the initial decision at pp. 6-7.

<sup>2</sup> See paragraph 3 of the complaint in Docket 6145 quoted at p. 8 of respondents' appeal brief.

The use by respondents of a sales plan or method involving the distribution of merchandise by means of chance, lottery, or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.<sup>3</sup>

The hearing examiner sustained the complaint and in a per curiam decision the Commission affirmed.<sup>4</sup> The Seventh Circuit, however, reversed.<sup>5</sup> Our reading of that decision convinces us that the court viewed the allegations and proof adduced there as bearing only on the technical presence or absence of a *lottery*. To the court, in order to constitute a lottery, the elements of "consideration, chance and prize must be present." The court rejected the hearing examiner's reasoning, that the element of "prize" was present simply because of the personal preferences of individuals for particular items. It stated that "Since there is no finding here concerning the relative values of petitioner's merchandise,"<sup>6</sup> the lottery could not be sustained.

Subsequently on July 13, 1962, the Commission issued its complaint against the respondents herein. The only difference in parties is that Seymour Orenstein, named as a respondent in the first complaint, is not named in the present complaint. The present complaint, however, has a charge which is not contained *in haec verba* in the 1952 complaint. For respondent is here charged with selling merchandise by means of a "chance or gaming device." The 1952 complaint did not contain that precise allegation. That complaint spoke in terms of a "game of chance, gift enterprise or lottery." Now respondent argues *res judicata*, declaring that there is no difference between a "lottery" and a "gaming device" and that this case involves no new facts. However, a reading of the cases does not reveal a pinpointing of lotteries as the only method by which the public gambling instinct may be aroused. Other methods are comprehended within the more general terms "merchandising by gambling." The courts have stated:

We think the Commission \* \* \* has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandise by gambling. \* \* \* Merchandise by gambling should not be divided into insulated acts which appear innocent when examined separately. *Modernistic Candies, Inc. v. F.T.C.*, 145 F. 2d 454, 455 (7th Cir. 1944).

True, the applicability of *res judicata* to administrative agencies has involved some controversy. But the vast majority of courts and commentators are agreed that it does not apply to administrative agencies

<sup>3</sup> See paragraph 5 of the complaint in Docket 6145 quoted at p. 9 of respondents' appeal brief.

<sup>4</sup> 52 F.T.C. 1674 (1956).

<sup>5</sup> 242 F. 2d 530 (1957).

<sup>6</sup> *Id.* at 534.

with the same force as it does to courts. See generally, Davis, *Administrative Law Treatise*, Sec. 18.01-18.12 (1958). This Commission declared in the *Manco* case, "We are dealing here with new and different issues of fact and law."<sup>7</sup> This is the case here. The time period covered by this complaint is different, comprehending the period from approximately May 1957 to 1960. Moreover, the theory of this complaint, and the examiner's decision are more comprehensive than the first complaint. They both speak broadly in terms of gaming devices. The proof and theory here are similar, if not identical, to that adduced in *Jonas Gerson T/A The Haven Company*, Docket 8470, 1963 Trade Cases, Para. 70947 [62 F.T.C. 1009], aff'd. 325 F. 2d 93 (7th Cir. 1964), and this case is governed by our decision in that matter.<sup>8</sup>

### 3. Jurisdiction of the 7th Circuit

Finally, respondent argues that "the Commission lacked authority to reopen the proceedings at Docket 6145 under color of a new docket number without leave of the Court of Appeals for the Seventh Circuit."

We have held above that the doctrine of *res judicata* does not apply to this case. And therefore the argument that this complaint involves a reopening of "the proceedings at Docket 6145" assumes a premise which is at variance with that holding, and so we reject respondents' contention.

At the oral argument before the Commission respondents' counsel alluded to the fact that they had unsuccessfully sought an injunction in both the District and Circuit Courts to stay these proceedings and were at that time seeking Supreme Court review of these unfavorable decisions. Respondents' counsel urged that it would be "unseemly for this Commission to take final action with respect to the matter of jurisdiction before the Supreme Court has had an opportunity to act on the pending petition for certiorari." (Tr. 4.)

On April 20, 1964,<sup>9</sup> the Supreme Court denied respondents' petition for certiorari. And therefore respondents' argument on this issue is moot.

Respondents' appeal is therefore dismissed and the initial decision and order are hereby adopted by the Commission.

<sup>7</sup> *Manco Watch Strap Co., Inc.*, Docket 7785, CCH Trade Reg. Rep. Transfer Binder, Para. 15781 at p. 20,591 (1961-1963).

<sup>8</sup> Considering our limited resources and manpower, the "plethora of prolix pleadings in this matter" (Initial Decision p. 4) seems somewhat out of proportion with whatever public interest is inherent in the present case and similar matters.

<sup>9</sup> 32 U.S.L. Week 3368 (April 21, 1964).

## Complaint

## FINAL ORDER

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

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

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

## IN THE MATTER OF

## COLVINNI LTD., ET AL.

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

*Docket C-782. Complaint, July 7, 1964—Decision, July 7, 1964*

Consent order requiring New York City importers of wool products to cease violating the Wool Products Labeling Act by such practices as labeling sweaters falsely as "65% Mohair, 30% Wool, 5% Nylon," failing to label certain sweaters with the percentage of woollen and other fibers contained therein, and using the term "Mohair" in lieu of "Wool" on wool product labels without setting forth the correct percentage of the mohair present.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Colvinni Ltd., a corporation and Seymour F. Silver, Harold Silver, and Sol Bier individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Colvinni Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Seymour F. Silver, Harold Silver, and Sol Bier are officers of the said corporation and cooperate in formulating, directing and controlling the acts, policies, and practices of the corporate respondent, including the acts and practices hereinafter referred to.

Respondents are importers of wool products with their office and principal place of business located at 41 West 25th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 65% Mohair, 30% Wool, 5% Nylon, whereas in truth and in fact, said sweaters contain substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain sweaters with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation, not exceeding five percentum of said total fiber weight of; (1) woolen fiber; (2) each fiber other than wool if said percentage by weight of such fiber is five percentum or more; (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that the term "Mohair" was used in lieu of the word "Wool" in setting forth the required fiber content information on



## Decision and Order

labels affixed to wool products without setting forth the correct percentage of the mohair present, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

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

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Colvinni Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 41 West 25th Street, in the city of New York, State of New York.

Respondents Seymour F. Silver, Harold Silver and Sol Bier, are officers of said corporation and their address is the same as that of said corporation.

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

Syllabus

66 F.T.C.

## ORDER

*It is ordered,* That respondents Colvinni Ltd., a corporation, and its officers, and Seymour F. Silver, Harold Silver and Sol Bier, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or the offering for sale, sale, transportation, distribution or delivery for shipment, or shipment in commerce, of sweaters or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

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

2. Failing to securely affix to, or place on, each product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Using the term "Mohair" in lieu of the word "wool" in setting forth the required information on labels affixed to wool products without setting forth the correct percentage present.

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

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IN THE MATTER OF

J. S. RICH FURS, INC., ET AL.

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

*Docket C-783. Complaint, July 8, 1964—Decision, July 8, 1964*

Consent order requiring manufacturing furriers in Chicago to cease violating the Fur Products Labeling Act by misbranding its fur products by deceptively identifying any such product as to the animal which produced the fur, failing to indicate when fur is artificially colored, failing to use the proper term to designate the fur is from lamb, and using the term "blended" to describe the otherwise artificial coloring of furs; and falsely invoicing

fur products by failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act, failing to set forth on invoices information as to the animal that produced the fur, failing to use the term "Dyed Broad-tail-processed Lamb" where required, failing to set forth the term "Natural" as part of the information when it is required on invoices, and failing to set forth on invoices the item number or mark assigned to fur products.

#### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that J. S. Rich Furs, Inc., a corporation, and Joseph Magit, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent J. S. Rich Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois.

Respondent Joseph Magit is an officer of the corporate respondent and formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers, wholesalers and retailers of fur products with their office and principal place of business located at 555 Roosevelt Road, Chicago, Illinois.

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

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they

were falsely and deceptively labeled or otherwise falsely and deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 5. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

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

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed or otherwise artificially colored, when such was the fact.
3. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.

PAR. 6. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(b) The term "blended" was used on labels as part of the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs, in violation of Rule 19(f) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not completely set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder

was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

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

PAR. 7. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

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

1. To show the true animal name of the fur used in the fur product.
2. To show the country of origin of imported furs used in fur products.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(b) The term "Natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

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

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

Decision and Order

66 F.T.C.

## DECISION AND ORDER

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

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

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

1. Respondent J. S. Rich Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 555 Roosevelt Road, Chicago, Illinois.

Respondent Joseph Magit is an officer of the corporate respondent and his address is the same as that of said corporation.

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

## ORDER

*It is ordered*, That respondents J. S. Rich Furs, Inc., a corporation, and its officers, and Joseph Magit, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are

defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

2. Representing directly or by implication on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

4. Failing to set forth the term "Dyed Broadtail-processed Lamb" on labels in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb."

5. Setting forth the term "blended" or any term of like import on labels as part of the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs contained in fur products.

6. Failing to completely set out information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder on one side of the labels affixed to fur products.

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

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

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any

false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

4. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Failing to set forth on invoices the item number or mark assigned to fur products.

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

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IN THE MATTER OF

GRACE'S INC., ET AL.

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

*Docket C-784. Complaint, July 8, 1964—Decision, July 8, 1964*

Consent order requiring retail furriers in Nashville, Tenn., to cease violating the Fur Products Labeling Act by representing falsely, in advertising and on labels, that prices of fur products were reduced from former prices which were, in fact, fictitious; failing, in invoicing and advertising, to show the true animal name of fur and the country of origin of imported furs, and to use the word "Natural" for fur that was not bleached or dyed; failing, on invoices, to disclose when fur was artificially colored and to use the terms "Persian Lamb" and "Dyed Broadtail-processed Lamb" as required; failing to maintain adequate records as a basis for pricing claims; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having rea-



son to believe that Grace's Inc., a corporation, and George Marshall Trammell, Jr., individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Grace's Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee.

Respondent George Marshall Trammell, Jr., is an officer of the corporate respondent and formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 219 Sixth Avenue North, city of Nashville, State of Tennessee.

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

PAR. 3. Certain of said fur products were misbranded in violation of Section 4(1) of the Fur Products Labeling Act in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified in that labels affixed to fur products, contained representations, either directly or by implication that the prices of such fur products were reduced from respondents' former prices and the amount of such purported reduction constituted savings to purchasers of respondents' fur products. In truth and in fact, the alleged former prices were fictitious in that they were not actual, bona fide prices at which respondents offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and savings were not afforded purchasers of respondents' said fur products, as represented.

PAR. 4. Certain of said fur products were falsely and deceptively in-

voiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

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

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
3. To show the country of origin of imported furs used in fur products.

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

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

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

(c) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(d) The term "Natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or

indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appear in issues of the Nashville Tennessean, a newspaper published in the City of Nashville, State of Tennessee.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show the country of origin of imported furs contained in fur products.

PAR. 8. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of Section 5(a)(5) of the Fur Products Labeling Act by featuring the term "Broadtail" in large conspicuous print while the correct description "Dyed Broadtail-processed Lamb" is set forth in less conspicuous print. By means of the aforesaid practice respondents implied that such products are entitled to the designation "Broadtail Lamb" when in truth and in fact they are not entitled to such designation.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) The term "Dyed Broadtail-processed Lamb" was not set forth in the manner required, in violation of Rule 10 of the said Rules and Regulations.

(c) The term "Natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

(d) All parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder were not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of the aforesaid Rules and Regulations.

PAR. 10. By means of the aforesaid advertisements and other advertisements of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products

in that said advertisements represented that the prices of fur products were reduced from respondents' former prices and that the amount of such price reductions afforded savings to the purchasers of respondents fur products when, in truth and in fact, the alleged former prices were fictitious in that they were not actual, bona fide prices at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 11. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented either directly or by implication that prices of such fur products were reduced from respondents former prices and the purported reductions constituted savings to purchasers of respondents fur products. In truth and in fact, the alleged former prices were fictitious in that they were not the actual, bona fide prices at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein respondents falsely and deceptively advertised fur products in that said advertisements used comparative prices which failed to give a designated time of a bona fide compared price, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(b) of the Rules and Regulations promulgated under the said Act.

PAR. 13. In advertising fur products for sale as aforesaid respondents represented through such statements as "our entire fur inventory, 33 $\frac{1}{3}$ % off" that prices of fur products were reduced in direct proportion to the percentages stated and that the amount of said reduction afforded savings to the purchasers of respondents' products when in fact such prices were not reduced in direct proportion to the percentages stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 14. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered

by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

#### DECISION AND ORDER

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

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

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

1. Respondent Grace's Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its office and principal place of business located at 219 Sixth Avenue North, city of Nashville, State of Tennessee.

Respondent George Marshall Trammell, Jr., is an officer of the corporate respondent and his address is the same as that of said corporation.

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

## ORDER

*It is ordered*, That respondent Grace's Inc., a corporation, and its officers, and respondent George Marshall Trammell, Jr., individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

## A. Misbranding fur products by:

1. Representing, directly or by implication on labels, that any price, when accompanied or not by descriptive terminology is the respondents' former price of fur products when such amount is in excess of the actual, bona fide price at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business.

2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondents' products.

3. Falsely and deceptively representing in any manner, directly or by implication on labels or other means of identification that prices of respondents' fur products are reduced.

## B. Falsely or deceptively invoicing fur products by:

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

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

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

4. Failing to set forth the term "Persian Lamb" in the man-

## Decision and Order

ner required where an election is made to use that term instead of the word "Lamb."

5. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

6. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

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

2. Falsely or deceptively identifies any such fur products as to the name or designation of the animal or animals that produced the fur contained in the fur product.

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

4. Fails to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

5. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

7. Represents directly or by implication that any price, when accompanied or not by descriptive terminology is the

respondents' former price of fur products when such amount is in excess of the actual, bona fide price at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business.

8. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

9. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

10. Represents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondents' fur products the percentage of savings stated when the prices of such fur products are not reduced to afford to purchasers the percentage of savings stated.

11. Makes use of comparative prices of any fur products unless a bona fide compared price at a designated time is given, unless such compared prices are actual, bona fide prices at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business.

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

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

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IN THE MATTER OF

INSUL-SEAL PRODUCTS, INC., ET AL.

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

*Docket 8598. Complaint, Sept. 30, 1963—Decision, July 8, 1964*

Order requiring Van Nuys, Calif., sellers to distributors of insulation for homes and other buildings to cease making a variety of misrepresentations in



## Complaint

advertising and by oral statements of salesmen as to profits to be derived from ownership of distributor franchises, security of investments, size of their business, national advertising of product, consumers' savings on fuel bills, and use of product in missile research.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Insul-Seal Products, Inc., a corporation, and Robert S. Moffett and Morey Selly, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Insul-Seal Products, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 5947 Sepulveda Boulevard, Van Nuys, California.

Respondents Robert S. Moffett and Morey Selly are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of insulation for homes and other buildings to distributors for resale to the public.

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

PAR. 4. In the course and conduct of their business and for the purpose of inducing the sale of their insulation, respondents through advertisements in newspapers and other periodicals, sales literature and oral representations by their salesmen, agents and representatives,

have made certain statements and representations, directly or by implication, of which the following are typical, but not all inclusive:

1. That profits to be derived from ownership of distributor franchises to sell respondents' products approximate \$25,000 annually.
2. Franchised factories can sell distributorships for \$12,000 to \$15,000 each.
3. That investment is secured by inventory and equipment.
4. That respondent corporation is a multimillion dollar corporation.
5. That respondents advertise in Life magazine.
6. That consumers of respondents' products realize a saving of 25% or more on fire insurance rates.
7. Consumers save 50% or more on gas bills for heating their homes.
8. That consumers can recover the cost of installation through a referral plan.
9. That respondents' product was used in connection with missile and rocket ablation research.

PAR. 5. In truth and in fact:

1. Owners of distributor franchises of respondents' products cannot realize profits of \$25,000 annually.
2. Respondents' franchise factories cannot sell distributorships for \$12,000 to \$15,000.
3. The investment of a distributor franchise holder is not secured by inventory and the equipment.
4. The respondent corporation is not a multimillion dollar corporation.
5. Respondents do not advertise and have not advertised in Life magazine.
6. Consumers of respondents' products do not realize a saving of 25% on fire insurance rates or any other amount.
7. Consumers do not save 50% or more on gas bills for heating their homes or any other amount.
8. Consumers cannot recover the cost of installation through a referral plan.
9. Respondents' product was not used in connection with missile and rocket ablation research or any other type of research.

Therefore, the statements and representations as set forth in Paragraph Four hereof were and are false, misleading and deceptive.

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

PAR. 7. The use by respondents of the aforesaid false, misleading

and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

*Mr. Harry E. Middleton, Jr.*, supporting the complaint.

No appearance for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

MARCH 11, 1964

The Federal Trade Commission issued its complaint in this proceeding on September 30, 1963, charging the respondents hereinabove named with having engaged in unfair methods of competition and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act, by making certain false, misleading and deceptive claims in connection with the sale of insulation by them. The initial hearing, scheduled in the complaint for December 12, 1963, was cancelled by order of the undersigned, on motion of counsel supporting the complaint, due to the inability to obtain service of the complaint on respondents by registered mail. Personal service of the complaint was thereafter made upon said respondents on January 8, 1964. Respondents have failed to file answer to the complaint within thirty (30) days, as required by the Notice served with said complaint, and are now in default under Section 3.5(c) of the Commission's Rules of Practice for Adjudicative Proceedings.

It appearing that respondents are in default in answering the complaint and that, by reason thereof, they have waived their right to appear and contest the allegations of the complaint, this proceeding is now before the undersigned for final consideration on the complaint and the proposed order attached thereto. The undersigned finds that this proceeding is in the interest of the public and that the Federal Trade Commission has jurisdiction over respondents and the subject

Initial Decision

66 F.T.C.

matter of this proceeding and, in accordance with Section 3.5(c) of the Commission's Rules of Practice for Adjudicative Proceedings, makes the following findings of fact, conclusion and order:

## FINDINGS OF FACT

1. Respondent Insul-Seal Products, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 5947 Sepulveda Boulevard, Van Nuys, California. Respondents Robert S. Moffett and Morey Selly are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as the corporate respondent.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of insulation for homes and other buildings to distributors for resale to the public.

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

4. In the course and conduct of their business and for the purpose of inducing the sale of their insulation, respondents through advertisements in newspapers and other periodicals, sales literature and oral representations by their salesmen, agents and representatives, have made certain statements and representations, directly or by implication, of which the following are typical, but not all inclusive:

a. That profits to be derived from ownership of distributor franchises to sell respondents' products approximate \$25,000 annually.

b. Franchised factories can sell distributorships for \$12,000 to \$15,000 each.

c. That investment is secured by inventory and equipment.

d. That respondent corporation is a multimillion dollar corporation.

e. That respondents advertise in Life magazine.

f. That consumers of respondents' products realize a saving of 25% or more on fire insurance rates.

g. Consumers save 50% or more on gas bills for heating their homes.

h. That consumers can recover the cost of installation through a referral plan.

i. That respondents' product was used in connection with missile and rocket ablation research.

5. The statements and representations set forth in paragraph 4 hereof were and are false, misleading and deceptive since, in truth and in fact:

a. Owners of distributor franchises of respondents' products cannot realize profits of \$25,000 annually.

b. Respondents' franchise factories cannot sell distributorships for \$12,000 to \$15,000.

c. The investment of a distributor franchise holder is not secured by inventory and the equipment.

d. The respondent corporation is not a multimillion dollar corporation.

e. Respondents do not advertise and have not advertised in Life magazine.

f. Consumers of respondents' products do not realize a saving of 25% on fire insurance rates or any other amount.

g. Consumers do not save 50% or more on gas bills for heating their homes or any other amount.

h. Consumers cannot recover the cost of installation through a referral plan.

i. Respondents' product was not used in connection with missile and rocket ablation research or any other type of research.

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

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

#### CONCLUSION

The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts

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and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

## ORDER

*It is ordered.* That respondents Insul-Seal Products, Inc., a corporation, and its officers, and Robert S. Moffett, and Morey Selly, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of insulation or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That owners of distributor franchises of respondents' products realize annual profits of \$25,000, or that they realize profits in any amount which is in excess of the average amounts customarily realized.

2. That owners of respondents' franchised factories can sell distributor franchises for \$12,000 to \$15,000, or any other amount in excess of the average amounts actually realized.

3. That the investment of a distributor franchise owner is secured by the inventory and equipment he acquires from respondents.

4. That respondent corporation is a multi-million dollar corporation, or misrepresenting the size or type of respondents' enterprise in any other manner.

5. That respondents advertise in Life magazine or any other publication, unless respondents in fact currently advertise in such publications.

6. That consumers of respondents' products realize a saving of 25% or any other amount on fire insurance rates, or misrepresenting in any manner the savings on insurance afforded purchasers of respondents' products.

7. That any specific percentage or any specific amount of savings on heating bills will result from the use of respondents' products.

8. That consumers can recover the cost of installing respondents' product through a referral plan, or misrepresenting in any manner the compensation or money recovered by purchasers participating in the respondents' referral plan.

9. That respondents' product has been used in connection with any type of research.

## FINAL ORDER

The Commission, on April 14, 1964, having issued an order staying the effective date of the decision herein and, subsequent thereto, having extended the time to and including June 12, 1964, for the filing of an appeal brief by respondents; and

Respondents having failed to perfect their appeal within the time allowed and the Commission now having determined that the case should not be placed on its docket for review:

*It is ordered*, That the initial decision of the hearing examiner, filed March 11, 1964, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That the respondents, Insul-Seal Products, Inc., a coporation, and Robert S. Moffett and Morey Selly, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth in the initial decision.

## IN THE MATTER OF

## SANTA'S OFFICIAL TOY PREVUE, INC., ET AL.

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

*Docket 8231. Complaint, Dec. 22, 1960—Decision, July 9, 1964*

Order modifying, pursuant to authorization therein, consent order of Apr. 3, 1964, 65 F.T.C. 129 requiring a Philadelphia association of toy jobbers to cease inducing and receiving, or receiving, from toy suppliers payments for advertising in toy catalogs or other publications when they knew, or should have known, that proportionally equal payments were not made available to all their jobber competitors.

## ORDER MODIFYING CONSENT ORDER

On June 10, 1964, the respondents in this proceeding, with the exception of ABC Toy Company, Morton Spolter, Arnold Spolter and E. Winick & Co., Inc., filed a motion requesting modification of their consent order pursuant to the authorization granted by the Commission's order of April 3, 1964. The Bureau of Restraint of Trade has joined in respondents' motion. The Commission has determined the request should be granted. Accordingly,

Order

66 F.T.C.

*It is ordered,* That the consent order in this proceeding be, and it hereby is, modified to read as follows:

*It is ordered,* That respondents Santa's Official Toy Prevue, Inc., Ring Brothers, Inc., Beacon Sales Co., Funtime Distributors, Inc., Halco Sales Co., Inc., Long-Lewis Hardware Company, Maines Candy and Paper Company, Inc., Onondaga Hobby & Toy Co., Inc., M.D. Orum Company, Public Service Paper Company, Inc., Louis M. Saunders Co., Inc., S. E. Sanders Company, Incorporated, Shepher Distr's and Sales Corp., Standard Paper & Merchandise Company Incorporated, Tak-A-Toy Corp. of Washington, Toy Novelty Co., corporations, their officers and directors; individual respondents David W. Ring, Maurice W. Ring, Mrs. Howard Armstrong, Albert Baldwin, Sr., D. B. S. Baldwin, Vincent D. Botto, Edward Feldman, Louis Feldman, Philip Feldman, Frank Marescalco, Joseph F. Crans, Samuel Link, James M. Kidd, M. Maurice Kind, Max Pikelny, Leo Pikelny, Seymour Pikelny, Mary Milner, Ari Newman, Meyer Burg, Morris Belau-sky, Myer Mont, Janet Mont, Irving I. Bimstein, Sr., Mrs. Irving I. Bimstein, Sr., E. D. Westerman, R. H. Westerman, Seymour Lieberman, and L. D. Friedland; and their respective representatives, agents and employees directly or through any corporate or other device in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing and receiving, or receiving, the payment of anything of value to or for the benefit of the respondents, or any of them, as compensation or in consideration for any services or facilities consisting of advertising or other publicity furnished by or through respondents, or any of them, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, in connection with the processing, handling, sale or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier, when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with said respondents in the distribution of such toy, game or hobby products.

*It is further ordered,* That the aforesaid respondents shall, within sixty (60) days after service upon them of this order, file with the



Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

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IN THE MATTER OF  
WASHINGTON CRAB ASSOCIATION ET AL.

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

*Docket 7859. Complaint, Apr. 7, 1960—Decision, July 10, 1964*

Order requiring a cooperative organization and its membership comprising some 250 crab fishermen fishing for Dungeness crabs off the coast of Washington and Oregon, for whom the association acted as exclusive marketer, to cease curtailing and preventing the "catch" of any fisherman by use or threats of use of physical violence or reprisals against persons or property, compelling any person to become a member of said association by any method whatsoever, and limiting or preventing any person from selling or offering for sale Dungeness crabs or any sea product by any means or method.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; 15 U.S.C.A., Sec. 41) and by virtue of the authority vested in it by the said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and hereinafter more particularly described and designated as respondents, have violated and are violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The Washington Crab Association is a corporation organized and existing under and by virtue of the laws of the State of Washington. Said corporation's principal office and place of business is located in Westport, Grays Harbor County, Washington.

The Washington Crab Association is a fisherman's cooperative organization, operating under the provision of a Federal Statute, The Fisherman's Cooperative Marketing Act, 15 U.S.C.A. 521, and its membership is composed of a large number of crab fishermen fishing for crabs in the waters off the coasts of Washington and Oregon. Under the terms of its charter, by-laws and membership agreement, and pursuant to the terms of 15 U.S.C.A. 521, the Washington Crab Association acts as the sole and exclusive marketer of all crabs caught by its member fishermen.

However, respondent Washington Crab Association at no time takes title to, or possession of, the crabs caught by its members. The principal activity of respondent Washington Crab Association has been, and is, the fixing of the price to be paid by canners to its members for crabs caught by said members.

The Washington Crab Association has the power to determine which canners and crab processors it and its members will deal with, since the "Membership Agreement" of the Washington Crab Association, which agreement is in force between respondent Washington Crab Association and all member fishermen of said respondent Washington Crab Association, provides in part: "7. Association to Choose its Buyers: The association shall have the exclusive right to make its own choice as to what dealer or dealers it sells the fish of the members. The member agrees to abide by such selection as the association may make and the association has full power to contract for sales, or to make such sales without contract \* \* \*."

PAR. 2. The control, direction and management of said Washington Crab Association are vested in a board of trustees elected by and from the membership. The board of trustees then elects the corporate officers from among the membership of the association. Said officers of this corporate respondent include a president, vice president and a secretary-treasurer.

Respondent, Richard E. Rydman, resides at Westport, Washington. He was the president, as well as a member of the board of trustees, of the respondent association from its inception in March 1958 until late in 1959. At the present time he is a member of the board of trustees of respondent association. Furthermore, as hereinafter pointed out, he is a trustee of Washington Crab Producers, Inc., and is the manager of its cannery and crab processing operations.

Respondent, Ernest H. Hanson, resides at Westport, Washington. He was the vice president, as well as a member of the board of trustees, of the respondent association from its inception in March 1958 until late in 1959. At the present time he is a member of the board of trustees of said association.

Respondent, Floyd Furfiord, resides at Westport, Washington. He was a trustee of said respondent association from its inception in March 1958 until late in 1959. At the present time, he is president, as well as a member of the board of trustees, of the respondent association.

Respondent, Donald Stedman, resides at Westport, Washington. He has been secretary-treasurer and a member of the board of trustees of respondent association since its inception in March 1958, which positions he still retains.

Respondent, Guy Spooner, resides at Westport, Washington. He has been a member of the board of trustees of respondent association from its inception in March 1958, which position he still retains. He is also vice president of respondent association at the present time.

Respondent Lief M. Anderson, resides at Westport, Washington. He has been a member of the board of trustees of respondent association since its inception in March 1958, which position he still retains. Furthermore, as hereinafter pointed out, he is a trustee of the Washington Crab Producers, Inc., at the present time.

Respondent, Dick Strong, resides at Westport, Washington. He has been a member of the board of trustees of said respondent association since its inception in March 1958, which position he still retains.

Respondent, Fritz Bold, who resides at 122 West 3rd Street, Aberdeen, Washington, has been a member of the board of trustees of respondent association from its inception in March 1958, which position he still retains.

Respondent, G. F. Damon, resides at Bay City, Washington. He has been a member of the board of trustees of respondent association since its inception in March 1958, which position he still retains.

Respondent, Charles Fisher, resides at Westport, Washington. He is at present a member of the board of trustees of respondent association.

Respondent, Gilbert Krigbaum, resides at Westport, Washington. He is a member of the board of trustees of the respondent association at the present time.

Each of said individual respondents is personally engaged in, or connected with, the business of fishing for and marketing crabs in the coastal waters of the States of Washington or Oregon, or in the adjacent ocean.

All of the individual respondents named herein: Richard E. Rydman, Ernest H. Hanson, Floyd Furfiord, Donald Stedman, Guy Spooner, Lief M. Anderson, Dick Strong, Fritz Bold, G. F. Damon, Charles Fisher and Gilbert Krigbaum, as officers and trustees of the respondent, Washington Crab Association, have directed or controlled the policies, acts and practices of said association, including one or more of the policies, acts and practices which are complained against herein.

Also, said individual respondents, in their individual capacities, and as members of the Washington Crab Association, have performed, authorized, or adopted one or more of the policies, acts and practices which are complained against herein.

PAR. 3. Membership of said Washington Crab Association is composed of a large number of persons engaged in the business of fishing for and marketing crabs. Because of the large membership of said Washington Crab Association, it is impractical to specifically name each member as a party respondent herein. Furthermore the membership of said association, as a class, is adequately represented and can be defended in this proceeding by the aforementioned individual respondents, all of whom are members of the respondent association. Therefore, said members are not only named individually as respondents, and as officers, and as trustees, but also as representatives of the entire membership of respondent association as a class, so that the members of said respondent association, not named specifically, are made parties respondent as though they had been named individually herein.

PAR. 4. All of the respondents named herein are engaged in doing business in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that the individual member respondents are crab fishermen, fishing for crabs in commercially navigable territorial waters, or in the open ocean, and causing such crabs to be sold and shipped to buyers located in the States of Washington and Oregon, and in that the corporate respondent, Washington Crab Association, is engaged in selling, shipping and marketing crabs, or causing crabs to be sold, shipped or marketed, to buyers located in the States of Washington and Oregon, and in the other states of the United States. The respondents, and the other buyers and sellers of such crabs or crab products, buy and sell crabs or crab products in one continuous flow of commerce between parties located in states of the United States other than the States of Washington and Oregon.

The respondents have performed in commerce, as "commerce" is defined in the Federal Trade Commission Act, one or more of the acts, policies or practices complained of and hereinafter set forth.

PAR. 5. Fresh, or "green", Dungeness crabs, which are the species or type of crab referred to herein, are caught in the coastal waters of the States of Washington and Oregon and in the adjacent ocean in crab "pots" or traps. These traps are placed and marked with buoys by the fishermen, who then return periodically to each pot to collect their catch. The "green" crabs are delivered to a cannery's docks where they are sold to the cannery by the pound on a whole weight basis. A small portion of such crabs is subsequently resold by the cannery whole, in fresh or frozen form; but the greater part of the catch is first processed to separate the meat from the shell and other inedible parts of the crab, and the separated meat is then either cooked and canned, or packed as frozen crab meat, and resold by the canners in commercial

channels. The term "crab products" is used in this complaint to indicate such processed crabs or crab meat, while the term "crab" is used to indicate unprocessed crabs.

Almost all of the fresh crabs caught in the coastal waters of the State of Washington and in the ocean adjacent thereto, are caught by respondent members of the respondent Washington Crab Association, and are then marketed through respondent Washington Crab Association. The total value of the crab and crab products originating in the State of Washington is estimated to be in the neighborhood of \$2,000,000 annually.

PAR. 6. Approximately 250 fishermen, so engaged in fishing for crabs in the coastal waters of the States of Washington and Oregon and in the ocean adjacent thereto, comprise the membership of the respondent Washington Crab Association. In May of 1959, approximately ninety of the respondent members of the respondent Washington Crab Association formed a cooperative corporation known as Washington Crab Producers, Inc., and purchased a cannery equipped to cook, can, freeze, store and otherwise process the fresh crab catch into saleable crab and crab products.

Washington Crab Producers, Inc., is engaged in canning and processing crab or crab products, and in subsequently selling, shipping and marketing said crab or crab products in commerce as "commerce" is defined in the Federal Trade Commission Act. As such, Washington Crab Producers, Inc., is in competition with all other canners and processors of crabs or crab products in the sale and marketing of such crabs or crab products in commerce. Washington Crab Producers, Inc., is not itself engaged in fishing for or catching crabs, although its stockholders and officers, as members of respondent Washington Crab Association, are so engaged. Respondent Washington Crab Association is not engaged, directly or indirectly, in the canning or processing of crabs or crab products.

Although Washington Crab Producers, Inc., is a legally distinct entity from respondent Washington Crab Association, all of its stockholders and the members of its board of trustees (directors) are members of respondent Washington Crab Association. Two of the trustees of Washington Crab Producers, Inc., respondents Richard E. Rydman and Lief M. Anderson, are also trustees of respondent Washington Crab Association, and the manager of Washington Crab Producers, Inc.'s cannery and crab processing operations is respondent Richard E. Rydman. The trustees and officers of respondent Washington Crab Association, who direct and control, and have directed and controlled,

the policies and actions of said Washington Crab Association, are all stockholders in Washington Crab Producers, Inc.

PAR. 7. Since about 1958, respondent Washington Crab Association, respondent members, officers and trustees of said respondent Washington Crab Association, and respondents Richard E. Rydman, Ernest H. Hanson, Floyd Furford, Donald Stedman, Guy Spooner, Lief M. Anderson, Dick Strong, Fritz Bold, G. F. Damon, Charles Fisher, Gilbert Krigbaum, individually, and as officers and trustees of said respondent association, have conspired to engage, and have engaged, in unfair and unlawful acts, policies and practices, the result of which is or may be to unlawfully hinder, restrain and destroy competition in the fishing for, processing, shipping, selling and marketing of crabs in commerce as "commerce" is defined in the Federal Trade Commission Act.

Pursuant to and in furtherance of said conspiracy, said respondents have engaged in the following acts, policies and practices, among others:

(1) Respondent Washington Crab Association, respondent members, officers and trustees of said respondent Washington Crab Association, and respondents Richard E. Rydman, Guy Spooner, Donald Stedman and Lief M. Anderson, individually, and as officers and trustees of said respondent association, have engaged in various coercive and unfair acts, policies, and practices in the conduct of the business of selling, shipping, and marketing crabs and crab products, including threats of reprisals, intimidation and physical violence against buyers and sellers, other than respondents, of crabs or crab products and against employees of such other buyers and sellers of crabs or crab products, in order to prevent the purchase or sale of crabs or crab products by, to or between such other dealers in crabs or crab products;

(2) Respondent Washington Crab Association, respondent members, officers and trustees of said respondent Washington Crab Association, and respondents Richard E. Rydman, Ernest H. Hanson, Dick Strong, and Lief M. Anderson, individually, and as officers and trustees of said association, have engaged in coercive and unfair acts, policies and practices in procuring, or attempting to procure, the membership in said Washington Crab Association of various individuals engaged in fishing for crabs, including threats of reprisals, intimidation, and physical violence against such individuals engaged in fishing for crabs.

PAR. 8. The control of the crab fishing fleet, through respondent Washington Crab Association, by respondent officers and trustees of

said respondent Washington Crab Association, and respondents, Richard E. Rydman, Ernest H. Hanson, Floyd Furford, Donald Stedman, Guy Spooner, Lief M. Anderson, Dick Strong, Fritz Bold, G. F. Damon, Charles Fisher and Gilbert Krigbaum, individually, arising from the charter, by-laws and "membership agreements" of said respondent Washington Crab Association, together with the ownership or control, by substantially the same respondents, of Washington Crab Producers, Inc., creates in the respondents an actual or potential power and ability to monopolize, or to attempt to monopolize, the fishing for, processing, selling, shipping and marketing of crabs caught in the coastal waters of the States of Washington and Oregon and in the adjacent ocean, or crab products processed from such crabs, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. The capacity and tendency of the conspiracy, acts, policies and practices of the respondents as alleged in Paragraphs Seven and Eight, have been, are, or may be to unlawfully restrict, restrain, hinder, and destroy competition in fishing for, processing, shipping, selling and marketing of crabs or crab products in commerce as "commerce" is defined in the Federal Trade Commission Act, within the intent and meaning of Section 5 of said Act.

PAR. 10. The conspiracy, policies, acts and practices of respondents, as hereinbefore set forth, are to the prejudice and injury of the public, and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

*Mr. John J. McNally, Mr. Hugh Helm, Mr. Rufus E. Wilson, Mr. George W. Elliott and Mr. Dennis McFeely for the Commission.*

*Helsell, Paul, Fetterman, Todd & Hokanson by Mr. William A. Helsell, Mr. Richard S. White and Mr. Donald Dahlgren of Seattle, Wash., for respondents.*

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER<sup>1</sup>

MAY 13, 1963

*In General—The Issues*

The complaint in this proceeding charges the corporate respondent Washington Crab Association (hereinafter usually referred to as the Association) and the named individual respondent members, officers and directors with violations of the Federal Trade Commission

<sup>1</sup> Respondent Leif M. Anderson spelled incorrectly in the complaint as Lief M. Anderson.

Act by conspiring to engage in, and engaging in, unfair and unlawful acts, policies, and practices, including threats of reprisals, intimidation, and physical violence against other parties, the result of which is alleged to be conducive or actually to hinder, restrict, or destroy competition in the fishing, processing, shipping, selling, and marketing of crabs and crab products in commerce, as "commerce" is defined in the Federal Trade Commission Act. This proceeding is brought in the nature of a representative or class suit, following well-established precedent. The officers and other directors of the corporate respondent, Washington Crab Association, have been properly made respondents, both individually and in their official capacities, and as representatives of the entire numerous membership of said Association. See *Chamber of Commerce of Minneapolis, et al. v. FTC* (C.C.A. 8, 1926), 13 F. 2d 673, 684. The complaint substantially follows long-accepted form in the Commission's proceedings and upon its face states ample cause for exercise of the Commission's jurisdiction.

By their answer, respondents, although admitting certain allegations of the complaint pertaining to the organization of the corporate respondent and the existence of the membership in, and official character of each of the individually named respondents in respondent corporation, deny the allegations of the complaint relative to the respondents' alleged unlawful acts and practices and the alleged effects thereof and deny that there is any public interest in the proceeding.

By way of affirmative defense, respondents plead that "The Washington Crab Association is a fishermen's cooperative organization, operating under the provisions of the Fishermen's Cooperative Marketing Act," 15 U.S.C.A. §§ 521 and 522. It is further pleaded that such Act entrusts exclusive jurisdiction to the Secretary of the Interior "to determine whether any such association monopolizes or restrains trade in interstate or foreign commerce"; and that "The Department of the Interior has heretofore considered the same practices and acts herein complained of and determined that there is no evidence of any monopolistic practices unduly enhancing the price of crabs."

Respondents plead another defense in their answer in the nature of an objection to the Commission's jurisdiction over the subject matter, made by way of demurrer or motion to the complaint, that respondent corporation and its members "are immune from civil proceedings based on the antitrust laws in the absence of any allegation or contention that respondents have entered into transactions with persons or organizations not accorded immunity under the Fishermen's Cooperative Marketing Act."



In the course of this initial decision, each of the foregoing defenses is appropriately disposed of, and it is found and determined that counsel supporting the complaint have sustained the burden of proof incumbent upon them<sup>2</sup> since they have presented sufficient probative and substantial evidence to establish that the respondents in the material respects alleged in the complaint have violated the Federal Trade Commission Act, and, therefore, an appropriate order to cease and desist is herewith issued.

#### *History of the Litigation*

The Commission issued its complaint herein on April 7, 1960. Respondents were duly served and filed their joint answer on May 5, 1960. Collaterally therewith they also filed three motions: (1) for continuance of the hearing, (2) for change of place of hearing, and (3) for dismissal of the complaint. On May 16, counsel supporting the complaint filed answer to said motions. On May 19, the hearing examiner assigned to this proceeding canceled the hearing scheduled in the complaint for June 20, 1960, without a definite resetting and also issued his order denying the motion to dismiss.

Nothing further appears of record until after December 22, 1960, when the undersigned hearing examiner was substituted for his predecessor to hear and determine the case. On February 17, 1961, a prehearing conference was held at Seattle, Washington, where a number of procedural matters were agreed upon and hearings were set for dates in May 1961, in Aberdeen, Washington, and Astoria, Oregon. On and between May 15 and 25, 1961, some eight days of hearings were held in such places, at the end of which the trial was recessed indefinitely because of the sudden illness of one of counsel supporting the complaint and the inability of his associate counsel to then proceed. Thereafter further hearings to complete the trial were ordered for October 1961 in several cities in the Pacific Northwest. Prior to the time so set, however, on September 15, 1961, William A. Helsell, then sole counsel actively representing the respondents and familiar with the case, filed his motion for continuance because of his unforeseen recall to extended active duty on October 1, 1961, in the U.S. Naval Air Reserve due to the national emergency then existing. (He returned from such duty to his law practice some ten months later and again became active in this litigation.) This motion for continuance was not opposed insofar as a reasonable time was concerned, and on September

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<sup>2</sup> Administrative Procedure Act, Sec. 7(c) (5 U.S.C.A. § 1006(c)); Federal Trade Commission Rules of Practice for Adjudicative Proceedings, § 4.12(a).

19, such October hearings were therefore canceled to be reset at some satisfactory later date.

Ultimately other members of the firm representing respondents were able to prepare for further hearings, and fourteen hearings were duly noticed and thereafter held in Aberdeen and Astoria on and between May 1 and 23, 1962. During this period, counsel supporting the complaint rested their case-in-chief on May 16, subject to the submission of certain stipulations, which in due course were filed herein. Respondents then moved for a dismissal of the complaint, which was extensively argued by counsel for the parties on May 16, at the conclusion of which the examiner elected to defer ruling thereon until the closing of the case for the reception of evidence as provided in what was then § 3.8(e) of the Commission's Rules of Practice for Adjudicative Proceedings, April 1960, as amended September 29, 1960.<sup>3</sup>

Respondents then presented evidence on their behalf from May 17 through May 23, 1962, on which latter date the examiner recessed the case, with leave to the respective parties, to present any further evidence they might desire by stipulation and deposition. The time for this, for good cause shown, was extended to November 15, 1962. Certain stipulations pertaining to testimony and economic facts were filed, and respondents, in accordance with said leave and under the Commission's Rules pertaining thereto, also took and filed the deposition of one James A. Crutchfield, who was also fully cross-examined.

On November 28, 1962, all parties having rested, the examiner closed the record for the taking of evidence, and within the time authorized, the parties on January 9 and 11, 1963, filed their respective proposed findings of fact, conclusions of law and order, together with extensive incorporated or accompanying briefs. Advance draft copies of such briefs having been furnished the examiner, oral arguments of counsel were heard in Seattle on January 7, 1963, and as no further briefs before the examiner were then requested by counsel, the proceeding was thereupon submitted for initial decision.

#### *General Findings of Fact*

The record is replete with numerous motions, objections, arguments and rulings, but appropriate references are hereinafter made only to such of those matters which are material to a comprehensive discussion of the entire proceeding. The parties have been accorded, and fully exercised, their respective rights to examine and to cross-examine

<sup>3</sup> This rule is now embodied in § 4.6(e) of the Commission's Rules of Practice, Procedures and Organization, June 1962.

the witnesses, to present documentary evidence and to make proper record of their respective positions and reservations on all disputed matters of evidence or procedure.

All proposed findings of fact, conclusions of law and orders submitted by the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected; and any pending offers of evidence, motions or objections made during the course of the proceedings not heretofore expressly granted, denied, or overruled are hereby denied or overruled.

The hearing examiner has given full, careful and impartial consideration to all the testimony, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All documents, physical exhibits, stipulations of fact and the deposition as well as those facts alleged in the complaint which are admitted in the answer also have been duly considered. And all statements, arguments, proposals and briefs of counsel have been closely studied in the light of all the evidence. Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint have fully sustained the burden of proof incumbent upon them, and have established by a preponderance of the reliable, probative and substantial evidence and the fair and reasonable inferences drawn therefrom, sufficient of the material allegations of the complaint to establish the findings hereinafter made, which findings, together with the conclusions of law applicable thereto, fully warrant the order herewith issued. He further finds generally that the evidence submitted by respondents is insufficient to establish any valid defense to such material violations of law charged in the complaint as are established by the evidence. More specifically, upon consideration of the whole record, the hearing examiner makes the following specific findings of fact:

#### SPECIFIC FINDINGS OF FACT

##### *Most Factual Questions in Dispute*

The record in this case consists of 3,135 pages, approximately one-third of which is devoted to objections, motions, arguments, statements, and rulings. The case was very ably and vigorously tried by the respective counsel, and numerous points of difference were strongly debated at length during the hearings, as well as in the many excellent briefs filed throughout this litigation, and during the eloquent oral arguments made on respondents' Motion to Dismiss and on the final submission of the case.

Most of the material factual questions in serious dispute herein depend upon the weight and credibility to be accorded to the several witnesses who sharply contradict those testifying for the opposition as to many, if not all, of the important occurrences. In short, this initial decision is based in large part upon a determination of the weight and credibility of contradictory testimony. Hence, particularly close and attentive care and consideration have been given by the examiner to the disputed matters and to the prejudices, interest, bias and other ascertainable characteristics of each witness bearing upon his credibility. In addition to the questions and answers shown in the transcript, the examiner must also consider those intangible matters pertaining to each witness, which cannot be translated into the cold record, that which Judge Learned Hand has so aptly described as "the evidence that words do not preserve." *NLRB v. James Thompson & Co.* (C.A. 2, 1953), 208 F. 2d 743, 746.

Most of the witnesses were fishermen, some of whom were members of the Washington Crab Association, while others were persons who had either failed or refused to join the Association in the first place, or after a brief membership had resigned therefrom. All of the witnesses during the case-in-chief appeared under subpoena, most of them evidently reluctant to testify. Counsel supporting the complaint, therefore, had considerable trouble in developing the facts they deemed essential to establish their case. In the light of the serious difficulties which arose among crab fishermen after the Association was planned and organized, the reluctance of such nonmember witnesses is quite understandable, particularly inasmuch as they lived in small villages, and were long-time neighbors and fellow fishermen of various and numerous association members who were exceedingly disgruntled and unhappy over the failure of other crab fishermen in their respective areas to join the Association and go along with its program. One fisherman's wife also testified under subpoena. She and the others who gave testimony against respondents faced the dismal prospect of an unpleasant and fearful future. The reluctance of those respondents who were subpoenaed and testified as adverse witnesses during the presentation of the case-in-chief is also well understood since they were the ones charged and on trial, and as laymen, were very cautious in answering any questions which might unfortunately involve them and their Association adversely. With few notable exceptions the fishermen witnesses, whether members of the Association or not, were far from being entirely fair and unbiased in their testimony. Neighborhood feuds and partisanship do not generate entirely objective viewpoints in the participants.

In addition to the evidence given by these two antagonistic classes of fishermen witnesses, there was also presented during the case-in-chief, the material testimony of a number of the owners or representatives of several firms or corporations who were in the business of buying and processing crabs and other aquatic products. Some of these who also lived in the same villages as did various members of respondent Association were also quite evidently cautious and unwilling to freely testify concerning certain incidents in which they were involved. Most of them also had their business success at stake and were most unhappy about the disturbance to the *status quo ante* which the Association had caused. Such witnesses for the most part also were definitely resistant to inquiries made by respondents' counsel which invaded what such processors deemed to be their private affairs.

There were also certain witnesses who testified as to economic facts or on other matters. They were fair and reasonable men who presented unquestioned public data or gave such general evidence or expert opinions as were elicited from them, and their testimony by and large is unchallenged and found worthy of belief.

The testimony pro and con respective to the various incidents is too extensive to be referred to in complete detail although some of the threats and other acts of respondents are set forth herein. On all of these occasions, members of respondent Association greatly outnumbered those whom they opposed and threats were indulged in by respondents.

#### *Organization of the Association*

During the years prior to the organization of Washington Crab Association, the price of crabs varied, and it is indicated that the fishermen were naturally unhappy when the price was lowered by the processors. Prior to 1959 it had been as high as 20 cents per pound and as low as 8 cents per pound at the Washington docks. In 1958 a large group of these dissatisfied crab fishermen from the Westport, Washington, area under the active leadership of respondent Robert Rydman decided to organize, consulted counsel locally, and after a very active and aggressive membership campaign finally incorporated the respondent Association in the early spring of 1958. Shortly thereafter the members of the Association by official action fixed the price of raw crab delivered to the processors by market orders which ranged from 12 to 16 cents per pound throughout the 1958-1959 crabbing season. Some of the processors either refused to sign such market orders in the early history of the Association, or after signing failed or refused to buy crab from the Association members. This followed a meeting in

Olympia, Washington, of some buyers and processors. A general tie-up of the Westport crab fishing fleet occurred in May 1959, and the Association fishermen, in their own parlance, "sat on the beach." This resulted first in the purchase of members' crabs by the Association which it had processed in a Westport cannery owned by one Kaakinen. Then followed shortly the purchase of such cannery by some fifty of the Association's membership, including most of its officers and directors, who on May 12, 1959, for that purpose had organized a cooperative, the Washington Crab Producers, Inc. (usually hereinafter referred to as the Crab Producers). Still later, during November and December 1960, certain actions were taken to merge the two corporations, at least insofar as providing that all members of the Association became or could become shareholders in the Crab Producers.

After substantial investments in new equipment and other permanent plant improvements had been made, the cannery began production on May 18, 1959. Thereafter most of the series of events with which this case is concerned occurred, although a few of them had preceded and immediately followed the organization of the Association.

The Association invited other crab fishermen to join and in 1959 a number from the Blaine area in northern Washington, about 250 miles from Westport, became members. The Association in 1960 further broadened its membership by a further campaign to include crab fishermen in the Columbia River area, both on the Washington and Oregon sides of the river. There was strong resistance to Association membership in this area by many fishermen who refused to join and trouble ensued. Meanwhile, all those members in the Willapa Bay area in Washington who had joined in the beginning had resigned and trouble also had occurred there.

Article VI of the Articles of Association (CX 1) provides that the Association shall be managed by its Board of Trustees, consisting of eleven members. From this Board membership, the following officers are elected under the provisions of Article VII thereof: a president, vice president, and secretary-treasurer. At the time the complaint was filed, the eleven members of the Board were the individual respondents who were named in the complaint and who answered herein: namely, Richard E. Rydman, Ernest H. Hanson, Floyd Furford, Donald Stedman, Guy Spooner, Leif M. Anderson, Dick Strong, Fritz Bold, G. F. Damon, Charles Fisher, and Gilbert Krigbaum. All of them reside in Westport, Washington, except Bold and Damon who, respectively, reside in Aberdeen and Bay Center, Washington.

At that time, respondents Furford, Stedman and Spooner were, respectively, president, secretary-treasurer, and vice-president of the

Association. There have been various changes in the composition of the board and its officers since the time of its organization. Respondent Rydman was president and respondent Hanson was vice-president at the corporate beginning. Furfiord had succeeded Rydman, as president after Washington Crab Producers was organized. Later and subsequent to the filing of the complaint, respondent Leif Anderson succeeded Furfiord as president. Throughout all of this time, however, Stedman continued to be secretary-treasurer. The corporate minutes are not entirely clear as to just who succeeded whom at various times on the Board of Trustees, but it is unnecessary to detail such changes in this representative suit, wherein the then existing officers were duly named, served, and answered and all members and successor trustees and officers have been included as respondents.

#### *Rydman's Domination*

The theoretical control of the Association's business policies and practices are vested by its Articles of Association in its Board of Trustees, and through such Board, executive power is vested in its three officers, the president, vice-president, and secretary-treasurer, subject to the Board's over-all direction. The actual control of all corporate activities, however, is and always has been vested in the respondent, Richard E. Rydman. It is clearly evident throughout the entire record that he always has been the strong and dominating personality among the Association's membership. This was manifested prior to incorporation. It was Rydman who had the breadth of vision to conceive the vast benefits that would accrue if the crab fishermen were organized as a cooperative. It was Rydman who as the leader disseminated this idea and directed the efforts of this large group of unhappy and disorganized crab fishermen to achieve corporate status and thereby great economic power. It was Rydman who became the Association's first president, which position he retained until after the Crab Producers had been incorporated. It was Rydman who conceived the plan of the Association's purchase of the Kaakinen crab cannery in Westport. It was Rydman who then conceived the Washington Crab Producers, Inc., and became its manager, meanwhile retaining his position as a director of the Association. It was Rydman who directly controlled the chief executive of the Association by the election of respondent Leif M. Anderson, the captain of Rydman's fishing boat, the "John Antler," as president of the Association. It was Rydman who authorized and directed every mass movement of the Association's membership against any nonconforming member

or nonmember fisherman. It was Rydman to whom all other members turned for instruction and advice on every matter concerning the Association's business. It was Rydman who organized the trip to the Tokeland docks to prevent the unloading of crab from Dick Willis' boat. It was Rydman who refused to let the Association's members fish for processors who had not signed the Association's market orders. It was Rydman who directed the rotation of boats and even refused to permit the members to fish for those processors who had signed market orders, to whom said members were then currently obligated for boat and equipment loans. It was Rydman who verbally whipped Maurice Myers and Donald Stedman when they desired to deal with Jack Caston of Whiz Fish Company against Rydman's wishes. In short, Rydman was the driving and guiding force in all of the Association's activities.

There is no question that there never would have been an Association or a Crab Producers had it not been for Rydman's genius for organization, which must be admired. He was innately smart and a born leader of men, although for reasons not clearly appearing of record, he was usually unwilling to discuss matters with others unless there was present with him the powerful backing phalanx of his reliable lieutenants, such as respondents Anderson, Krigbaum, Hanson, and Fisher. In connection with all of the transactions which are hereinafter narrated in some detail, which counsel are pleased to refer to as incidents, Rydman was either present as the Association's leading actor or was directing the activities of other members from his Westport office.

The record indicates that Rydman was well advised, no doubt by competent counsel, that neither he nor other members of the Association should do physical violence to other persons. The examiner is sure that none of the several fine and ethical counsel who have represented respondents would ever have advised Rydman or any other Association member to threaten or coerce others or to do any of the other things out of which this case arises. And during and in connection with the various so-called incidents, it is undisputed that no violence occurred to the persons of others, although many personal threats were made and much damage was threatened on several occasions and was actually done on one occasion to the property of others.

But the ruthless keynote of respondents' conspiracy and the plan of action to effectuate it as envisioned, planned and directed by respondent Rydman is well epitomized in the credible testimony of a Chinook fisherman, Lee Timmens, Jr., who attended a meeting at Warrenton, Oregon, on January 5, 1960, whereat Rydman and other respondents



presented a plan in which all the crab fishermen on both sides of the Columbia River would be compelled to join the Association. Timmens testified that there was discussion by Rydman as to how the activities and aims of the Association could be carried out, and that Rydman

\* \* \* stated that they weren't allowed to picket or use force but a show of force by a group of men on the dock would do a lot to persuade other fishermen. (R. 962.)

This testimony was never contradicted by Rydman or others at the meeting, although Rydman and some other officers and directors of the Association testified generally to the effect that Rydman never advised that any illegal methods should be used in getting Association members or in carrying out any of its activities.

Although Rydman conceived and directed the execution of every act of the conspiracy in compelling nonmember fishermen by intimidating threats and show of force to cease fishing for or unloading and selling crabs, and likewise brought the crab producers to heel, it is not found that the other respondents participating in any of such conduct were the unwilling followers of Rydman's leadership. The evidence is to the contrary. While some respondents at rare times may have evinced a qualm of conscience, as Stedman and Myers in wanting to deal with Caston which Rydman opposed, in general and particularly in the major incidents hereinafter discussed, the Association members were enthusiastically vigorous in their efforts to force membership on unwilling fishermen and to deprive the processors of any crabs until they succumbed to respondents' pressure. They were always flexing the muscles of their new-found power, not an unusual reaction of those who have previously felt that they were the underdog. These respondents seem to relish most thoroughly the new mastery of the crab fishing industry they believe has become theirs. Even the filing of the Commission's complaint in April 1960 failed to dampen their ardor or stop their unlawful acts as demonstrated by the destruction of Willis' gear off Willapa Bay in December 1960, hereinafter discussed.

#### *The Dungeness Crab Fishing Industry*

The testimony in this case concerns the so-called Dungeness crabs. These are a species of crab which are caught in the coastal waters and along the shores of the Pacific Ocean from the Bay of Alaska down to San Francisco Bay in California. When caught, they are called "fresh" or "green" crabs. Those that are caught in the ocean differ somewhat from those caught in the bays and inlets, in that the latter

are usually smaller, have less meat, and their shells are usually sanded, dirty, and less clean than those that come from the ocean. Crabs caught in the ocean are frequently referred to by the fishing trade as "outside crabs" and those caught in the bays and inlets as "inside crabs."

Commercial fishermen in the Washington-Oregon areas who follow this particular occupation have boats of varying sizes, all of which are propelled by power engines. Each boat is in charge of a captain or "skipper" who is usually the owner of the boat, but he may be one employed on shares of the "catch" by an owner who himself is usually a crab processor. On the larger boats, where an extra crew of one man or more is required, such crewmen are called "boat pullers." They share with the skipper or owner in an agreed portion of the value of the "catch" as compensation for their services.

These commercial fishing boats in the said areas are also equipped with power winches, which are used to bring up the lines attached to the crab pots. These pots are lowered to the bottom of the sea, or bay, as the case may be. Ocean crab are caught off the Washington shore at varying distances some several miles from shore where the Pacific Shelf ranges from about 10 or 11 fathoms to 29 or 30 fathoms deep; that is, the crabs are found about 60 to 180 feet below the surface of the ocean. The crab pots are heavy, strongly built containers which are in the nature of traps. They are usually baited with fresh razor clam meat, which bait attracts the crabs which are able to enter the pot to obtain such food, but are unable to leave it. When each of these pots is cast into the ocean by the boat's crew, the upper end of the line is attached to a buoy which floats, from which floating buoy the fishermen upon returning to the scene after a reasonable passage of time can find their pots, and cause them to be surfaced by means of the motorized winch and the "catch" is then unloaded into the boat. The pots are then rebaited and reset on the bottom in the same manner. Some of the boats are equipped with large vats or "live tanks" into which seawater is more or less frequently pumped and in which the crabs may be kept alive for several days. During the periods when there has been no sale of the crabs for various reasons, the fishermen at the docks "pump on crabs"; that is, they keep supplying new sea water to the "live tank" so that the crabs may live until there is a market for them. Of course not all crabs survive this process until a market becomes available. The ideal market for the fisherman is to have an able and willing buyer for the catch at about the time the boat is docked.

The number of crab pots used by the industry varies with the size of the boat or the fishermen's financial ability to buy such pots or his

physical ability and that of the boat pullers to handle them at sea. Some of the larger boats put out in the ocean many strings which total hundreds of pots and may extend for several miles. The pots are not connected but are strung along some distance apart to avoid their becoming tangled. After periodic visits to the pots, the green or fresh crabs are taken to the docks to be sold and delivered by the pound to the cannery on a whole weight basis, that is, shell and all. In earlier times, such crab sales were based on the dozen in both Washington and Oregon, but in recent years in Washington the uniform practice has been to sell the crabs by weight. Certain official tax computations, however, are still made on a per dozen count basis.

Crabs are subsequently resold by the processors as whole crabs in fresh or frozen form, but the greater part of the catches are first processed to separate the meat from the shell, which is done by workers in the canneries known as "pickers," and the edible portion of the meat so obtained is then either "whole cooked" or cooked and canned, or it may be packed as frozen crabmeat. These crab products are then sold by the processors through commercial channels. The term "crab products" as used in the trade indicates any such processed crabs or crabmeat, while the term, "crab," is always used to indicate the unprocessed crustacean.

The official and substantial commercial crab fishing season along the Pacific Coast varies and arrives later as one goes north from California along the coast to Alaska. For example, the legal season off the Oregon coast starts several weeks earlier than that on the Washington coast which latter season now officially commences December 15, and continues until the following September. In preparation for the season, however, the crab fishermen require several weeks prior thereto in cleaning and preparing their pots and lines and also refurbishing their boats which have usually been used in other activities.

This progressive variance of crab fishing seasons from south to north appears to be mainly one of nature due to weather and the slower development of crabs in more northern waters, although various state statutes and administrative regulations for the protection and perpetuation of the species are also controlling. As a general practice the Washington crabbers do not attain much substantial commercial production until about January first when a large number of crabs have become of sufficient size and quality for the market. After the latter part of the following May, the marketable crabs are not sufficiently prevalent to warrant such extensive fishing, although those who are not otherwise occupied do a little fishing for crab for some weeks thereafter.

Most of the fishermen involved in this proceeding do not confine their activities exclusively to crab fishing. In between the crabbing seasons, some engage in Pacific deep sea fishing for tuna and other fish, while others fish for salmon in the nearby ocean, in the Columbia River area, or off the coast of Alaska. The larger Washington crab processors also maintain substantial establishments in Alaska, and are there in person during the salmon fishing season, which is generally through the summer months. Dungeness crabs are also caught in substantial numbers in Alaskan waters and processed in the ports of that state. Other crab fishermen take parties of sportsmen deep sea fishing during the summer season.

These situations, along with the personal involvements of counsel already referred to, are the reasons why the hearings in this case once begun could not be held continuously to their conclusion without injustice to the various respondents and many other necessary witnesses. The only periods during which there was fairly reasonable assurance that most of the material witnesses for either side could be available to testify were May and October. To have attempted to follow these witnesses to other ports up and down much of the Pacific Coast would have entailed considerable waste of time and effort, and unjustifiable and tremendous expense to all concerned herein, culminating most probably in ineffective and frustrating results. The hearings were therefore held in the cities of Aberdeen and Astoria where most of the witnesses were close at hand and readily available during the said months. Even under such conditions the record shows that certain material witnesses were not present to testify, and the testimony of one important witness, Chris Nelson, was properly stricken from the record on respondent's motion because he was in Alaska and did not appear at the time set for his cross-examination. The testimony of a number of such material missing witnesses who were members of the Association, however, was of such character that counsel were able to agree upon what they would testify to, if present, and their testimony was succinctly stipulated and made of record on July 3, 1962.

#### *Commerce*

The respondent Association admittedly is organized as a fishermen's cooperative which expressly deals with the fishing industry "in interstate and foreign commerce" under the Federal Fishermen's Cooperative Marketing Act. This corporation therefore draws its rights and privileges from the Federal Government. Respondents do not seriously contend that they are not engaged in interstate commerce, and it is

difficult to understand how they could so claim. One cannot deny the mother from whence comes his very breath of life. The corporate respondent, its respondent trustees, officers and other members and its subordinate corporation, the Washington Crab Producers, Inc., are all engaged in doing business in commerce as "commerce" is defined in the Federal Trade Commission Act. The individual member respondents fish for crabs in commercially navigable territorial waters of the United States or in the Pacific Ocean. Through their corporate structures, respondents cause such crabs to be caught, processed, bought, sold and shipped to buyers located in the States of Washington and Oregon, as well as in California and other states. Certain of the crab products of the Pacific Northwest are shipped from the Pacific to the Atlantic seaboard, and the business generally is an interstate business. And the catching, buying, selling, processing, and transportation of crabs or crab products, as respondents transact their business, in substance and effect, constitutes a continuous flow of commerce between the several states of the Union.

*Incidents Relating to Dick Willis—March 1958—Dec. 1960*

In March 1958 an active membership drive was underway in Westport to get all fishermen possible to join the proposed association. Maurice Myers, a former fisherman and cannery worker, who had been with Rydman for about four years, first as a boat puller on the "John Antler" and later briefly Rydman's skipper, had been a charter member of the Association and the first subscribing shareholder in Washington Crab Producers, Inc., but resigned in September 1960. He credibly testified concerning an incident occurring during this membership drive in front of the Sea Chest restaurant in Westport. Some fifteen Westport fishermen, who were interested in organizing and who shortly afterward became charter members of the Association, including respondents Rydman, Myers, Anderson, Fisher, Krigbaum, and Hanson, confronted Richard Willis, a fisherman of Tokeland. Rydman told Willis he was holding up the organization but if he would join, it would work out. Willis apparently was unwilling to cooperate, and, while there was considerable dispute as to what occurred, it was evident that Willis was surrounded by Rydman and his friends. Willis wanted about four hours to make a decision, but Rydman said he had had enough time already. Later, Willis and the other Tokeland fishermen joined. Prior to 1958, Willis and Rydman had had adjacent fishing grounds, Rydman fishing in the ocean north of the Willapa Whistler, a lighthouse at the entrance of Willapa

Harbor; Willis fishing south of the Whistler. Rydman testified that in 1957 they discussed this division of fishing territory and each stayed on his side of the Whistler. For reasons not shown, especially as Willis did not testify, there seemed to be unfriendliness between them, and in the course of this proceeding it developed that Rydman used the Association and its members on several occasions in carrying out his own personal vendetta against Willis.

In connection with the "Tokeland Dock Incident," hereinafter discussed, it was Willis' boat that Rydman prevented from being unloaded in December 1958, and after Willis had resigned his membership a suit was brought against him for the collection of \$1,000 liquidated damages for violating the Association's membership agreement by fishing for Nelson from March 15 to June 30, 1959, because Nelson had never signed a marketing order. Further reference to this matter is hereinafter made in the discussion of "The Fish Marketing Act of the State of Washington."

At a still later time, the Willis boat was among those fishing near the Willapa Whistler in December 1960, when many of the boats from Westport whose crews were then "sitting on the beach" maneuvered around Willis' boat in the ocean near Tokeland. This event is treated later under the heading, "Incident Near the Willapa Whistler."

It is urged by respondents that all their acts involving Willis were lawful, that there was no forcing of Association membership upon Willis, that the subsequent suit against him was legal, and that at best these were merely fishermen's personal quarrels. Counsel supporting the complaint contend, however, that this was part of a concerted plan of action to frighten other fishermen into joining since Willis was a big fisherman, and if he joined, the other Tokeland fishermen would also join.

While some of these events standing alone may be unimportant, taken as a whole, they establish to the examiner's satisfaction that under the direction of Rydman, the Westport members of the Association were willing to pressure and frighten Willis and that they did finally destroy and damage some of the gear and gave him a definite warning against fishing without their permission. His nonappearance as a witness, although subpoenaed in this proceeding, confirms the finding that Willis, however strong and resistant he may have been to the Association's prior threats and pressures, had had by this time his fill of them and was unwilling to testify for fear of further personal harassments by respondents. Respondents have repeatedly taken the law into their own hands and intimidated Willis "by a show of force."

*The Tokeland Dock Incident—December 1958*

This incident occurred sometime in late December 1958, after the crab fishing had begun although none of the witnesses fixed the precise date. Previous thereto, Chris Nelson, sole owner of the Nelson Crab and Oyster Company of Tokeland, had not signed a marketing order with the Association. While Rydman and Maurice Myers, his boat puller, were fishing, Rydman saw Dick Willis, an Association member who was also fishing, heading into the Tokeland port. Myers testified that Rydman said, "Willis was sneaking in some crab \* \* \* and they would stop Willis from unloading it," and that Rydman returned at once to Westport where he quickly spread the word. About thirty Westport Association members went to Tokeland some fifteen miles away, and about twenty actually boarded Willis' boat without his permission. This massive array of respondents included Rydman, Myers, Stedman, Anderson, Fisher, Gordon, and Krigbaum. Nelson was at the dock ready to receive Willis' crabs. Rydman insisted that Nelson sign the Association's marketing order, then and there, rather than the following morning, or he could not obtain the crabs from Willis' boat. There was a substantial argument, and with some profanity Nelson resisted respondents' pressures, but early the following morning he did sign the order and the Willis boat was then unloaded. After this incident, the Association employed one Beck as a spy to report any unloading of crabs that Willis might thereafter do.

During this dock gathering, respondent Krigbaum had told Willis' boat pullers that Nelson had not signed a marketing order, and they stopped unloading the boat. Ernest Lott, a farmer working in Nelson's cannery at the time, also testified that "they [various respondents] were every place on the boat, in the hatch, on the deck, on the bow; some were standing on the dock \* \* \* milling around." He further testified that when Rydman boarded Willis' boat, he told Willis, "You are through unloading, Dick—we have stopped your men from unloading the boat."

The respondents who participated in this incident all stated in substance that they merely wanted to see what was going on, except Anderson, who said he went down to protect Rydman from any possible physical attack by Nelson. The respondents contend that this mass movement on their part to prevent a member from unloading his catch and selling to a processor who did not have a market order was entirely proper. Respondent Gordon testified: "Well, he [the allegedly erring member] should live up to the honor of his obligations—the only thing you can do is go talk with the man and see what is taking

place." This was *not* the only thing they could do, or the thing they should have done. They could have taken legal action. But they took the law into their own hands. While no physical force was used by respondents on this occasion, they certainly did make a very great "show of force" and by their illegal actions secured compliance with their demands. It is only in the movies that one or two badly outnumbered heroes successfully withstand thirty aggressive enemies.

*The Whiz Truck Incident—April 22, 1959*

This affair took place April 22, 1959, on the Point Chehalis dock in Westport. The Point Chehalis Packers was a partnership of Bjarne Nilsen and James Poore. This business was run on a barge next to a public dock. These partners had signed a 16-cent market order with the Association. Wayne Caldwell, who normally purchased fresh crab in Westport for Whiz Fish Company of Seattle, testified that on April 18 he had told Rydman that Caston, the manager of Whiz, only wanted 5,000 pounds of crabs per day, but Rydman had threatened, "If that is all they want, they wouldn't get any crab." On the 21st, Nilsen received an order for 5,000 pounds from the Whiz Fish Company. Nilsen's firm then had a surplus of crab, and agreed to deliver 5,000 pounds to the Whiz truck. Their own boat was waiting to be unloaded when the Whiz truck appeared. The boat of an Association member, Francis Miller, was being unloaded near the cooking end of the barge. As the unloading operation continued, Stedman, Spooner and other Association members appeared and announced that they had had trouble with Whiz Fish over its alleged failure to pay Ed Wickett, one of their members at Blaine, what was coming to him, and inquired if there were a way the Association "could prevent Point Chehalis Packers from selling to Whiz." At that time, Fisher and other men went on, or around, the Whiz truck. Rydman then appeared and talked about the Blaine dispute, and, according to Nilsen, stated, "Anyone who sells crabs should be out of business," and with an oath told Nilsen, "— you are not going to send any crab off this barge to Whiz Fish." Poore then telephoned Caston, the Whiz manager in Seattle, and said they were having trouble with the Association about the sale to Whiz, at which time Rydman took the phone and told Caston with some further profanity, "— you will not get any crabs from us at all." Rydman, while not admitting all of the foregoing facts, did concede that he might have said Whiz would not get any crab from the Association until the Wickett argument was settled; that he told Poore they would be happy if Point Chehalis could not sell to Whiz, and if they could not get together, the Association would



get its own processing plant; and that he then told Caston over the telephone that the Blaine matter would have to be cleared up before Whiz could purchase any crab at Westport. After these occurrences, the truck was ordered by Caston to leave, and it did leave without taking any crab from Point Chehalis Packers.

It is clear in this incident that although Point Chehalis had two boats of their own, had a surplus of their own crabs available, and had signed a marketing order, Rydman and the other Association members present were determined that whatever the source of the Point Chehalis crabs, Whiz would get no crabs until Caston had settled the Blaine matter, and whoever got in the way would have to take the consequences. It must be said that from a careful consideration of the extensive evidence on the dispute between the Association and Whiz Fish over the alleged nonpayment to Wickett, the examiner finds that Whiz was indebted to Wickett, one of respondents' members, and the matter was subsequently settled. Caston was never called as a witness. It is further found, however, that respondents on this occasion took the law into their own hands and forbade and prevented any delivery of crabs by Nilsen and Poore to Whiz, under the clearly implied threat that they would get no further crabs from Association members. These processors, however, had a perfect legal right after catching crabs with their own boats or buying crabs from Association members, to sell them to whom they pleased and undoubtedly would have sold some of their own excess crabs to Whiz had not respondents made a strong show of force, and threats, and prevented them from doing so. While the dock was a public one, respondents with an impressive "show of force" unlawfully interfered in a business deal between others.

*Meetings of Packers in Olympia and Seattle—April 27, 1959*

While these occurrences were not acts of respondents, it is pertinent to give them consideration since they have been urged repeatedly by respondents as justification for their own later acts. They are therefore discussed here in the chronological order of events. There is some testimony concerning a meeting in Olympia on April 27, 1959, and one held later in Seattle, involving some of the Washington crab processors.

Respondents made a strenuous effort from the very beginning to subpoena some of these processors with their records to learn what occurred at these meetings, purporting, in substance, to reveal that such processors among themselves had agreed upon prices they would pay for crab and that they would boycott any crabs from the Association

if its prices exceeded what the processors wished to pay. Deeming such subpoenas premature prior to hearing, the examiner deferred ruling then, and from time to time thereafter until sufficient evidence had been presented to determine their relevance, materiality, and propriety. During the hearing on May 18, 1962, he finally refused to issue such subpoenas, as well as one for Snyder J. King, a Seattle attorney who had taken some part in these processors' meetings. This oral ruling was supplemented and confirmed by a written order on July 3, 1962, based on the established legal doctrine that "resort to practices outlawed by the antitrust laws cannot be justified by the fact that the practices were a defense to illegal activity" on the part of others. The issues here are whether respondents were, and are, engaged in acts in restraint of trade, which acts violate the Federal Trade Commission Act. Any violation of law by others would not excuse respondents, and as was stated in *Local 36 et al. v. United States* (C.A. 9, 1949), 177 F. 2d 320, 332 (*cert. den.* 339 U.S. 947), to receive such type of evidence "would require the court to try an entirely separate case." Upon the holding of that case, and those in *American News Company, et al. v. FTC* (C.A. 2, 1962), 300 F. 2d 104, and *Fashion Originators Guild of America v. FTC* (1941), 312 U.S. 457, this denial of respondents' requests was proper.

Respondents, however, zealously pursued such matters further, filing their applications for subpoenas duces tecum on August 10 and 17, 1962, for such witnesses to testify at respondents' attorney's office in Seattle concerning their sales of crab products. The motion was answered, and the examiner, on August 29, 1962, denied said renewed applications on the same grounds as before, as well as upon other good reasons unnecessary to repeat here. On September 10, 1962, still persistent, respondents appealed from this order, which the Commission, on October 1, 1962, refused to entertain.

The only evidence adduced relating to these processors' meetings is that given by some of them on respondents' cross-examination, which evidence was to the effect that there had been no illegal agreements made at such meetings. There are no material facts established by this evidence which legally justify any of respondents' acts in question.

*Columbia River Organization—Chinook Dock Incident—January 1960*

In the latter part of December 1959, Joe Nichols, a fisherman of Gearhart, Oregon, desired an increase in the price of crabs from the processors along the Columbia River. Back as early as October 26, 1958, representatives of Oregon and California fishermen had attended

Association meetings (Commission Exhibit 36, p. 5), pursuant to a letter invitation to fishermen in "every port up and down the coast" (Commission Exhibits 4 and 37a). Nichols was one of the moving spirits in bringing the Association to the River and became one of its most aggressive leaders. At a membership campaign meeting in Warrenton, Oregon, on January 3, 1960, attended by Rydman, Stedman and other Westport members, Rydman stated that all fishermen should belong to one Association in order to "bring up" the prices, that the Association's cannery would help them hold their crab if they couldn't sell to the Columbia River processors, and that if they could get an Association cannery on the River and another further south on the Oregon coast at Newport, they would have leverage to raise all prices in that area.

Rydman also told them that in order to increase the membership in the River area they were not to use picketing or force, but that a "show of force" on the docks would get results. A number of the Oregon fishermen attending the meeting did not join and only some of the producers in that area executed Association marketing agreements. These did so reluctantly and seemingly only because Nichols said if they did not, that the Association's Westport cannery would buy the crabs from the Columbia River area fishermen. Processors who did not sign the orders were deprived of the service of some of their usual boats, and the crabs were sold to nonsigning competitors, including respondent Association.

Nichols was a very active but indiscreet organizer at this time, threatening to sink or block the boat of at least one fisherman who refused to join and advising several of these processors that if they signed the orders they could get all the crab they wanted.

The new Association members who had joined on January 3 did not let any grass grow under their feet but acted promptly on Rydman's instruction to demonstrate "a show of force" to intimidate other fishermen as well as processors. The Chinook Packing Corporation, a crab and salmon processor and canner located at Chinook, Washington, was picketed on January 5, 1960, by a large group of such new members. Its properties and dock are located on a country road some distance back from the main highway. This incident occurred in the darkness of this early winter morning. Melvin Leback, assistant manager of the packing company, testified that upon driving to the company dock about 5:30 a.m., by his car lights he saw some eight or nine men standing across the road with their arms folded, and shortly thereafter saw them surrounding a fisherman, Arleigh Couch. These men were Association members from Chinook and Ilwaco headed by

Malchow and Bergman. They had formerly fished for the Chinook Packing Corporation but had ceased doing so when that company did not sign the Association's 14-cent per pound market order. Malchow later told Leback that "he would not be in business next year." Also at that time Malchow and 6 or 7 others "hopped on" a nonmember fisherman, Lee Timmens, Sr., and accused him of taking their crabs by fishing when the members were not fishing. Timmens' boat puller, at the behest of these Association members, walked off his boat, and Timmens was unable to fish for a week thereafter. Another nonmember fisherman, Arleigh Couch, testified that as he came between Malchow and Bergman on the road at a narrow place, they told him, "You are not going to fish," and another fisherman, Guanari, also told him he was not going to fish until he proved he was getting the 14-cent price for his crab that the Association's current orders demanded. A few days later, Couch, while bringing his crab to the dock, was called a scab by Malchow.

On this same morning at the Chinook dock, Lee Timmens, Jr., another nonmember fisherman who was coming in the darkness to the dock, also saw a substantial number of fishermen gathered. There were among them Malchow, the two Bergmans, Haavisto, Guanari, Prest and Peterson, all Association members. After some discussion as to whether he should fish, Timmens courageously told them that he was going to fish for crab anyway, whereupon Malchow threatened to follow him out to his boat, and Guanari told him he could fish only if he could show he was getting the 14-cent-per-pound price. As a result of these threats, Timmens did not fish again until January 10.

Malchow admitted in his testimony that his group were present at the time in question, and staying pretty close together in their conversations with the other fishermen in questioning their right to fish. He also admitted threatening Couch by stating he could stall his boat in front of Couch or those of any others who wanted to fish, and "make it hard for them running their gear." He further told Couch he might not have any friends if he did not go along with them and that the conversation was heated. Subsequent to his testimony, Malchow became an Association director. He further admitted that the two Timmens, Couch and Olsen, all Chinook fishermen, did not go crab fishing for some time after this incident.

There is no question but that this was unlawful threatening conduct on the part of Malchow and his companions as against the Chinook Packing Corporation and those fishermen who had not joined the Association. Respondents contend, however, that Malchow and the others were not yet officially Association members and, therefore, none

of their acts could bind respondents. This contention is wholly untenable. While the meeting at Warrenton, Oregon, had occurred only two days prior thereto, and the memberships had not yet been formalized by certificates, nevertheless, the respondent corporation on January 4, 1960, had promptly written official letters to the processors in the Columbia River area that such fishermen were members of the Association and tendered its market orders to such processors (CX 64). In this conspiracy case, the technicalities of membership are immaterial. Malchow and the others were members in fact and were acting in accordance with Rydman's general directive of January 3 that they should make a "show of force."

*Incident Near the Willapa Whistler—December 21, 1960*

The issuance of the complaint herein on April 7, 1960, and the service thereof on respondents brought no end to the unlawful activities of respondents. Lawrence Cowles, a Westport fisherman, testified that while the Association members were "sitting on the beach" at Westport in December 1960, former members from Tokeland were crab fishing for Nelson Crab and Oyster Company, and that the Association members were mad about it. About this time, he said, Rydman told a group of Association members, including Cowles, who like others present was there in apparent agreement, "[w]e should go down with the boats and scare them in." The record shows that on respondents' cross-examination, Cowles admitted he had been convicted of a misdemeanor, third degree assault, and that he had not yet paid his fine of \$150. This admission was received as **impeaching** evidence under the Washington State law. But it does not destroy the gist of Cowles' evidence that there was an angry informal meeting of respondents over their Tokeland rivals fishing since such matters are substantiated by other evidence.

Clarence Bushnell, who had previously resigned as an Association member, credibly testified, in substance, that on December 21, 1960, he was crab fishing in the ocean near Tokeland when he saw a group of Association members' boats from Westport cut through his fishing gear, and that one of these boats, skippered by Bill Nelson, cut twenty feet in front of Bushnell's boat so that Bushnell had to come to a full stop to avoid collision, although he, Bushnell, had the traditional right of way because he was fishing and the other boat was not so engaged. Bushnell thereupon returned to the dock for fear of his crew's safety as well as that of himself and his boat.

Dick Willis, no longer an Association member, was fishing in the same general area that day. John Mullin, who was then Willis' boat

puller, credibly testified that three of the Association boats, one Rydman's "John Antler," came toward Willis' boat and gear and that Willis stopped fishing and turned to meet them. He identified Leif Anderson, Association President and "skipper" from his voice over the boat's radio, and further testified that the "John Antler" circled Willis' boat, took aboard some of Willis' gear and went to the south end of Willis' string of pots. Mullin further testified that Willis tried to get close enough to talk to those on another Westport boat, the "Marillee Ann," but it moved away; that Willis thereupon resumed fishing but discovered his lines were knotted, and that the triggers of about a dozen of his crab pots had been jammed making them nonoperational. They spent the rest of the day trying to straighten out the scattered pots.

The following day, December 22, Willis and Mullen returned to their fishing grounds and Mullen testified that they found one of Willis' buoys had the word "WARNING" cut into it in large capital letters and that they continued to straighten out the scattered pots, knotted lines, and the pots that were in clusters. Maurice Myers testified that at the Association meeting a year earlier, December 23, 1959, Rydman had suggested, but not ordered, the practice of "flower potting pots" belonging to fishermen out crabbing against Association policy, that is, "to hook a boat on to one buoy and run up to the next one and hook it on, and so on, until you had about twenty-five pots dragging behind the boat and then turn them loose. \* \* \* You couldn't get the pots back again; they would all be tangled together. It would be the same as destroying the pots. \* \* \*" It is inferred that Rydman's suggestion had the enduring potency of an order to his skipper Leif Anderson and other respondents even a year later.

Maurice Myers testified that Rydman stated to him, when Myers was Anderson's predecessor as skipper on Rydman's boat, that there was an informal agreement between Willis and Rydman, whereby Rydman fished to the north of the Willapa Whistler and Willis to the south thereof. He further testified that the Westport Association boats generally fished to the north of this point, and the Tokeland boats to the south of the Whistler during the winter crab fishing season. Nevertheless, Anderson, in command of Rydman's boat, and other Association members all went far beyond the usual Westport fishing area and into the area south of the Willapa Whistler where Willis and the other Tokeland men normally fished and were actually so fishing on December 21, 1960.

Rydman admitted that Anderson took the "John Antler" without any objection from him that day, and, accompanied by several other

member's boats, went to the Tokeland area. It was undisputed by Anderson and the other respondents who testified on the point that a substantial number of their boats went down to the ocean to fishing areas near Tokeland. The evidence shows that at least ten members' boats made the trip that Sunday. The boats and owners or skippers were identified chiefly by the owners themselves, and a number of other members also were on some, if not all, of the boats. Those clearly identified as to skippers and their boats, in addition to Anderson on Rydman's boat, the "John Antler," were the following: William C. Nelson, the "Adeline"; Allen "Bud" Fisher, the "Betty Joe"; Donald Stedman, the "Dream"; Gilbert Dietrich, the "Marillee Ann"; Charles Fisher, the "Dorothy Rose"; and Gilbert Krigbaum, the "Deutz." Others were Virgil L. Gordon, Dick Branshaw, and Ron Cowles, who also had boats on this expedition, but the names of the boats they skippered that day were not named.

It was stated by a number of respondents that they had been "sitting on the beach" at Westport and their purpose in going down to the Tokeland area was to see how the fishing was, but they denied that they had threatened damage to the fishing equipment of any Tokeland fishermen. They also denied seriatim having any knowledge of Willis' buoy having had the word "WARNING" carved thereon.

There is a great deal of evidence and much dispute concerning this Willis buoy (Commission Exhibit 51). On application of respondents' counsel, this buoy was delivered to them and they employed one J. W. Owens, an experienced Seattle chemist, to perform chemical tests on it, as well as upon another of the same "Spongex" type of buoy (Respondents' Exhibit 31). These buoys are composed of a plastic material and consist of four cylindrical sections roped together. This latter buoy previously had been submerged for three weeks by Virgil Wilcox, a Tokeland fisherman and Association member who fished out of Westport. He said he submerged the buoy in July 1961, but he was not sure and evidently he was mistaken as Owens testified that he tested it during June 1961 after Wilcox had delivered it to the crab producers' office. Owens testified, in substance, that his chemical analyses and comparison of both buoys demonstrated that the Willis buoy showed far less signs of having been in the water by reasons of moss, salt water penetration, and other substances present than the other buoy which was in the water for three weeks. He found the latter to contain approximately four times as much dissolved solids or salts as the Willis buoy and concluded that it had been in the water for a longer period than the Willis buoy. His testimony was not contradicted.

It was urged by respondents that the evidence on this point does not warrant a finding that the carving on the Willis buoy was the work of any of respondents. They argue, in substance, that the Pacific is a big ocean, that anyone could have so carved the buoy, and to find that any respondent had carved the word, "WARNING" upon it would be speculative and conjectural. There is no evidence, however, that anyone other than respondents and Tokeland fishermen were in this fishing area that fine Sunday. In view of the credible evidence concerning the various depredations by Anderson and others during this time, including the taking of some of Willis' gear aboard the "John Antler," the only reasonable inference is that this "WARNING" was cut into Willis' buoy by Anderson or someone on his boat, and it is so found. Anderson and the other Association members were voluntary idlers that day, exceedingly restless and jealous of the activity of other fishermen, and bent on stopping them at least, by any means short of physical attack upon their persons. Their excuses that they were just seeing how the fishing was and the like is not believable as many of them went without lift equipment, allegedly to check fishing pots. Most certainly they were in the Tokeland fishermen's areas in a massed flotilla for no good purpose and while there wantonly injured and destroyed Willis' property and caused peril and fear to him and others lawfully fishing in the area. While the examiner finds this expedition was planned in advance, whether it was planned or was upon sudden impulse, as claimed by respondents, is immaterial. Respondents acted wantonly and in utter disregard for the rights of others.

There is no specific evidence as to the length of time Willis' buoy was in the ocean, but it was early in the fishing season after the Tokeland fishermen had been at sea but a short time, and there is considerable evidence that crab fishing gear needs frequent replacement, particularly at the beginning of the season, and that this is a constantly recurring cost of the business. The examiner further finds that the expert testimony of Owens relating to both buoys and Wilcox' testimony concerning the one he planted in the ocean for testing purposes are not substantially sufficient to destroy the strong and natural inference that the "WARNING" on the Willis buoy was deliberately cut by Anderson or his boat puller that day as an act of malicious mischief to put Willis and his boat puller, as well as other fishermen, in fear. The examiner is unable to infer rationally that Willis or any other Tokeland fisherman deliberately "planted" this marked buoy just to make trouble for respondents. They were too busy fishing or mending broken gear for that.

The whole Sunday parade of this Armada from Westport down the



coast to Tokeland waters was not mere boys' play. This was another case of respondents taking the law into their own hands and another "show of force," which certainly no one believes or suggests was done upon the advice of counsel. Respondents' counsel, well aware that this incident occurred long after the Commission's complaint had been issued and served and after respondents had become his clients, while insisting that no prohibitive order is legally warranted by such conduct, fairly concedes that this "trip by many boats on the same day might, in retrospect, appear to have been unwise or even unfair." (Respondents' Proposed Findings, p. 13.) It is found that this incident of intentional malicious mischief is one of the many "unfair" practices by which respondents have violated the Federal Trade Commission Act.

These acts of the Westport respondents on December 15, 1960, occurred some eight months after the complaint herein had been filed. These acts are clearly indicative that respondents were brazenly and arrogantly contemptuous of the law and of this Commission and its pending proceeding. Following these incidents and only several weeks later some of the respondents in the Columbia River area also flaunted the law by seeking assistance from the Alaska Fishermen's Union as hereinafter found. These several acts which occurred *pendente lite* display the respondents' utter disregard for anything but their own opinion as to what was right and proper for them to do. This is confirmed by the Association's five-page newsletter of May 11, 1960 (CX-37 j-m), issued under Rydman's name as a member of the Board of Directors, rather than under the name of its then president. Rydman had issued the Association's prior newsletters as president, but he continued to control, prepare and sign these informational and advisory sheets after he left that office. This long newsletter relates almost entirely to the pendency of the instant proceeding and was certainly issued under respondents' constitutional right of free speech. When any one is sued he exercises such right vociferously and Rydman was no exception to the general rule. Nevertheless, it is not a privileged document and is in evidence generally without objection (Tr. 83, 84, 88). Among its numerous statements are some which are definitely relevant to respondents' position with reference to all their acts in question. The newsletter is too long to quote fully but among other things it states that the complaint

\* \* \* is all a surprise to our members. since the trade commission has been investigating quite extensively since we formed in the spring of 1958 and up to this time they had not indicated to any of our members that we were doing anything illegally \* \* \* After [various communications from us to and from mem-

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bers of Congress] \* \* \* the Federal Trade Commission has been investigating our Association continually. We have had investigators here by the droves \* \* \* You and I who do not have any money are fighting great odds when defending our Association against Federal agencies, who have at hand a bottomless barrel of taxpayer money to use to twist the laws to their own advantage. \* \* \* Don't let these Federal Trade Commission charges mar your judgement into thinking what we are doing is wrong as you know what we are doing is morally right. The fact the misinformed taxpayer leeches are trying to stuff us down the drain only makes this writer more determined than ever that we are going to succeed. \* \* \*

From this letter it is unmistakably manifest that respondents believe they can make their own law and could carry it out, the law of the United States notwithstanding.

*Request for Union Assistance—January 1961*

Members of the Association, Lawrence Peterson, Bert Bergman, Al Malchow, and Lawrence Prest, living on the Columbia River, were dissatisfied with the fact that a number of the members of the Alaska Fishermen's Union, who were not members of respondent Association, were fishing for crab when Association members were not fishing because processors had not signed the Association's marketing orders, and planned a trip to Seattle to see George Johansen, the general secretary of the said Union. Three of them, Bergman, Malchow, and Prest, did go to Seattle early in January 1961, on this mission. They visited with Johansen in his office, represented themselves to him as Association members, who were very unhappy with the conduct of Union members, saying that if the Union's members in the Columbia River area would not continue to fish for crab while the Association members were not fishing due to a tieup of boats, the price of crabs would take care of itself. There is no evidence that they represented themselves to be there in any official capacity for the Association, whatever Johansen may have inferred. They also asked Johansen to do what he could with the Union members on the Columbia River and agreed to give him a list of them. Thereupon, Johansen, on January 11, 1961, sent an official letter to each of the Union's Columbia River members which letter, while disclaiming any official restriction to be intended, most critically and emphatically urged them to stop fishing when their brother fishermen were not doing so (Commission's Exhibit 62). Some of the Union's Oregon members did not like these letters, which, among other things, inferentially referred to scabbing when the Association group out of Westport was fighting for better prices. These Union members complained to Lawrence Peterson, who was one of their members as well as at that time a member of the respondent

Association, although he later resigned from the Association along with others from Astoria and other Oregon fishing ports. They were angry with him because they thought he had undoubtedly furnished their names to Johansen to write them. The Union was not on any strike at this time and its members generally were fishing for crabs. Upon getting rumors of Union trouble in the Columbia River area resulting from this letter, Johansen felt he had acted too hastily and arranged to hold a meeting in Astoria on January 13, 1961, to straighten out the matter. Johansen testified that the meeting attended by about fifteen Union and Association members was "pretty hot"; that the Association people felt Union members were hurting the Association's position by fishing; and the Union members did not want to be represented by the Association and felt that on the basis of supply and demand they were getting a realistic price and would not be fishing if they asked for a higher price for crabs. The majority of them therefore wanted to fish.

In view of what he ascertained at this meeting, after careful thought, Johansen on February 17, 1961, issued a letter of retraction to these Union members who had received his former letter. (Respondents' Exhibit 6.) Johansen was an excellent witness. He was very frank, fair and objective. He realized that he had been misled by Bergman and the other Association members who had visited him, but had acted as promptly and discreetly as possible in order to avoid involving his fishermen's union further in any controversies between members of the Washington Crab Association and other persons.

While the Union promptly and wisely retreated from any activity which might have linked them into an illegal conspiracy with respondents, the evidence clearly shows that respondents were always willing to do anything they could to advance their cause in any way by adding pressures to other fishermen and processors. It is urged by respondents, however, that these people in the Columbia River area had no authority to represent the Association. But the evidence shows that Peterson who had been handling other Association business in Astoria advised President Leif Anderson in advance as to what they were going to do and he apparently did not object to the proposed mission to see the Union officials. Peterson was personally unable to go on the trip that Malchow, Prest, and Bergman made to see Johansen in Seattle. Enroute home this group stopped at Westport to attend an Association meeting which Peterson came from Astoria to attend. Rydman was informed of what the group had done at Seattle. He soft-pedaled the matter, however, and would not let them discuss it in the general Association meeting. He is credited with saying, in substance, the

Association might be in trouble if it became involved with the Union. It is of great significance, however, that neither at that meeting nor at any subsequent time, did the Association take any action of disclaimer. Anderson and Rydman, who knew all about it, took no official action to discipline these members, or to advise Johansen they had never been authorized to represent the Association or otherwise to retract the activities they had engaged in with the Union. Had they done so no letter would have been sent out by Johansen. If the attempt to obtain Union pressure on its members had been successful, the Association would have benefitted. But respondents now contend that Malchow, Bergman and Prest had no authority to deal with the Union. While they did not hold any official formal documented authority in dealing with Johansen, by President Anderson's authorization, they were acting in the Association's behalf. Since this is a conspiracy case in which they and all other Association members are jointly charged, their attempt to get Union assistance is relevant and binding upon respondents. It is immaterial that the pressure of the Union upon its members proved to be erroneous and ineffectual and that it was so quickly withdrawn. Nothing that Rydman, Anderson, or any other respondent did contributed to the prompt cessation of this new type of pressure to further the general program in which respondents were engaged.

*Sudden Price Raises Without Negotiation*

Respondents repeatedly raised the price of crab and forced upon the processors the Association's marketing orders without adequate foundation in fact or reasonable notice to such processors. The record is entirely barren of evidence to show any reason for the various price raises based on financial need or economic justification. The membership met and voted these increases of price from time to time, and, whatever their discussions may have been, the only reason that can be gathered for such action was an arbitrary determination of respondents to get more money for the crab. There are some loose statements to the effect that the fishermen needed more money and the like, but there is no evidence that respondents ever employed cost accountants or investigated the market at large to determine at what prices the processors could sell processed crab products. At first the notices of increased price, usually evidenced only by a new market order, were sent by mail to the various processors in respondents' areas, which in the ordinary course of mail usually reached the processors within one day, or at least on one occasion about two days prior the effective date

of the decreed price raise. The price went successively from twelve cents to fourteen and then sixteen cents per pound. While the processors did refuse to buy on one or two occasions, the shortage of crabs soon compelled many of them to agree to these arbitrary price raises. It was the continued attitude of respondents that they did not care whether the processors remained in business or not. They could take the price or do without crab, and, after respondents had purchased the cannery and organized the Crab Producers, they became more defiant and arrogant than ever. Rydman refused as early as April 14, 1959, to advise Robert Anderson of the West Haven Seafoods, a small and exclusively crab processor only organized in March 1958, as to if and when there would be a price raise. Anderson was obliged to turn down an order for 10,000 pounds of processed crab because he heard there were rumors of a price raise for green crab, and it was in this dilemma that he sought Rydman's advice. Rydman told him, "It was irrelevant to him whether \* \* \* [West Haven Seafoods] stayed in business, or went out of business." Rydman also refused to negotiate in any way with Anderson on the price of green crab, telling him that respondents, "would do as they saw fit, when they saw fit." He further said with respect to both Anderson and James Dart of King Salmon, Incorporated, another processor, "that he would just as soon see us both out of business." This price was suddenly raised on April 20 to 16 cents per pound. As a matter of fact, unable to meet these constant practically unannounced and absolutely nonnegotiated changes in the price of crab, Anderson was soon out of business and in bankruptcy. Dart testified that when this 16-cent price raise took place his firm tried to operate under this price for a few days and "couldn't sell our product \* \* \* so we closed down" for some time.

Bjarne Nilsen, who is the mayor of Westport, a village with a normal population of 1,000 people, testified also on this issue. He is one of the owners of Point Chehalis Packers. His testimony was that his firm could only fill small orders and turned down one for 70,000 pounds of crab when the 16-cent price was announced because they could make no money at that price for green crabs. He further said that at the meeting of packers in Olympia, they discussed market conditions as one of the main topics. He said,

\* \* \* [T]he markets didn't warrant at that time the raise of crabs, we hadn't had long enough notice to go out and give \* \* \* [our buyers] the two or three weeks' notice that there was going to be a raise of crabs at such and such a price, then your markets were dead on you \* \* \*. I said that our buyers that we sell to were reluctant to take any orders of any size. You can sell small orders of meat or small orders of whole cooks but you couldn't sell any large orders of these at that time.

He further testified that the April 20th marketing order was the first notice he had received of the price increase from 14 cents to 16 cents for green crab.

Without further detailing other transactions, the law is plain that the very life of competition is open, free and unobstructed markets. It was held in *Local 36, etc. v. United States* (C.A. 9, 1949), 177 F. 2d 320, 328, in language appropriate to the instant case, that in addition to picketing, boycotting, and unconcealed threats of violence and pressure by defendants there,

The written agreement in the form in which the dealers were required to sign was drafted so as to appear innocuous upon its face and to be couched in self-serving language indicating beneficent design upon the part of the organization. The proof gave ground to belief that the combination and conspiracy had a broader purpose of domination in the territorial area and at the fishing ports and the fixing of arbitrary prices and the exclusion of non-cooperative dealers and independent fishermen. The evidence supported every charging phrase of the indictment. \* \* \* The evidence shows, that, so long as the efforts of the members and the Local were confined to an agreement among themselves and the dealers, arrived at by negotiation and setting of certain price levels for fish to be caught, but having no coercive force behind it, no action was taken by the Government. \* \* \*

Respondents arbitrarily without adequate reason, negotiation or notice repeatedly set higher prices on green crabs. They did not even pretend to give fair notice to the buyers but, in substance, now take the position that with their substantial monopoly of fishing craft and fishermen, together with their ownership of a competing cannery to the other processors, they could summarily dictate, and did so dictate, the price of crab wholly without respect to the status of the market or other economic conditions. This constitutes a most virulent violation of the Federal Trade Commission Act. Respondents have most definitely shown that they have been and still are defiant of the antitrust laws of the United States and believe themselves to be untouchables.

The respondents have contended throughout this litigation that since they are organized under the Fishermen's Cooperative Marketing Act, 15 U.S.C.A. §§ 521 and 522, that they are entitled to do everything they have done because they are exempted by said Act from the Federal antitrust laws. This Act<sup>4</sup> contains no language

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<sup>4</sup>"Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

"The term 'aquatic products' includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the

which either directly or by inference authorizes respondents to commit the acts hereinbefore found to be violative of the Federal Trade Commission Act.

Respondents insist, however, that under the holding in *Maryland and Virginia Milk Producers Assn., Inc. v. United States* (1960), 362 U.S. 458, that they are entitled to equal privileges with any ordinary business corporation and likewise can carry on their business without being in violation of the antitrust laws. The fallacy in this

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several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

"Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum, and in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

"§ 522. If the Secretary of the Interior shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of the Interior may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of the Interior shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of the Interior shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceedings, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

"The facts found by the Secretary of the Interior and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein, the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court shall, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer, or agent thereof, engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association and such service shall be binding upon such association, the officers and members thereof."

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contention is that no other business not organized on a cooperative basis has ever been authorized either judicially or quasi-judicially to threaten injury to persons or to threaten and do damage to property as respondents herein have repeatedly done. The exemption from the antitrust laws respondents contended for here has been repeatedly denied. See *Hinton, et al. v. Columbia River Packers Association* (C.C.A. 9, 1942), 131 F. 2d 88, 89 (on remand from the Supreme Court (1942) 315 U.S. 143); *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's, etc. Union* (U.S.D.C. Hawaii, 1947), 72 F. Supp. 562; *Local 36 etc., et al.* (C.A. 9, 1949), 177 F. 2d 320, 334; *Atlantic Fishermen's Union, etc., et al. v. United States* (C.A. 1, 1952), 197 F. 2d 519; *McHugh v. United States* (C.A. 1, 1956), 230 F. 2d 252, 255, cert. den. 351 U.S. 966; *Gulf Coast Shrimpers and Oystermen's Association, et al. v. United States* (C.A. 5, 1956), 236 F. 2d 658, 664-665, cert. den. 352 U.S. 921, reh. den., id. 1019; and *United States v. Maine Lobstermen's Association, et al.* (U.S.D.C., Me. 1957), 160 F. Supp. 562, consent decree entered (1958), 1958 Trade Cases, ¶ 69,114. As so aptly stated by the Court in the *Gulf Coast Shrimpers* case,

\* \* \* Unless we are to elevate form above substance, the controlling consideration is whether the proof reveals the activity complained of as violative of the [Sherman] Act, not whether a particular group's asserted privileged status forbids its prosecution. (236 F. 2d at p. 662) \* \* \* In its price fixing, the Association exceeded any possible privilege or exemption granted by the Fishermen's \* \* \* Act [15 U.S.C.A. §§ 521, 522] when it undertook not simply to fix the prices demanded by its members, but to exclude from the market all persons not buying and selling in accordance with its fixed price. \* \* \* (*id.*, at p. 665)

The foregoing decisions are dispositive of respondents' third defense that the Association and its members under the said Fishermen's Cooperative Marketing Act are immune from civil proceedings based on the antitrust laws in the absence of any allegation or contention that they have entered into transactions with persons not accorded immunity thereunder. Some of the foregoing cases are not criminal cases and the courts have made no distinction between civil cases and criminal cases under the Sherman Act. Respondents have demonstrated no reason for any such distinction. It may be further stated at this point that there is no merit to the position taken by respondents that in the complaint herein it was necessary to charge respondents with acting in cooperation with outsiders in order to state a cause of action. It is elementary that any offense under the other antitrust laws is also an offense under the Federal Trade Commission Act although the latter Act is much broader in its comprehension of unfair



practices and unfair competition. In *Maryland and Virginia Milk Producers, supra*, at page 468, it was held error for a trial court to dismiss the monopolization charge, which, among other things, included improper leverages by way of boycott and pressures. Although no other party than the respondent Milk Producers Association in that case was charged, the language of Section 2 of the Sherman Act was held sufficient to warrant trial upon the indictment. That language is that, "Every person who shall monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states \* \* \* shall be deemed guilty of a misdemeanor. \* \* \*"

*Evidence of Inaction By The Department of The Interior Is Irrelevant*

Considerable confusion has existed in the minds of respondents' counsel during this proceeding, to the effect that this is a price-fixing case, either under the Federal Trade Commission Act or under the Clayton Act, as amended by the Robinson-Patman Act. Frequent declarations of counsel supporting the complaint have made it clear that this is not a Robinson-Patman case and it is not so pleaded. Of course, references to various prices appear throughout the record in connection with the several incidents hereinbefore recited. This is particularly true with respect to the arbitrary fixing of prices in the Association's market orders. But there is no contention that respondents, by their various raises in the price of green crab, have even attempted to join in a price-fixing conspiracy with any third persons or corporations. This is a case quite to the contrary. Respondents have even refused to bargain on price fairly and legally, deeming themselves fully capable of carrying out their plans minus any outside help. The basic elements here are threats and other acts which create or tend to create a monopoly such as to warrant the Commission's action and restraint.

In support of their defense that exclusive jurisdiction lies with the Secretary of the Interior under the Fishermen's Cooperative Marketing Act, respondents presented their exhibits for identification, Nos. 30-A and B, to which counsel supporting the complaint objected. Such offer was rejected as a part of a more extensive offer of proof. Said exhibits consisted merely of a letter from the Associate Solicitor of Interior's Territorial Parks Division to counsel for respondents, advising that after investigation (a copy of which report was attached to said letter), the Department had determined to take no action

under the second section of said Act. This inaction on the part of the Department, which is given certain jurisdiction over such cooperatives in cases where there is undue enhancement of prices, does not bar the Federal Trade Commission from proceeding under its own jurisdiction. There is, therefore, no merit to respondents' second defense.

*Respondents' Policy of Rotating Boats*

On several occasions when the crab buyers failed or refused to execute the Association's market orders, its management invoked the policy of rotating the members' boats. When the market was so limited either by Association resolution or executive determination, they permitted each of the members to fish only for a limited amount of crab for a limited time, the other members meanwhile having to "sit on the beach." Respondents contend that this is a reasonable policy since it provides a living for each member and his family during the period of such self-imposed condition and serves to keep the membership happy with the operations of their Association. In this rotational activity, the boats were assigned in certain order by management, and Rydman approved those whom they should fish for, and the members were not permitted by him to fish for any other processors or out of the order prescribed, nor for the particular processor to whom any such member was indebted.

These occasions naturally precipitated a substantial decrease in the total available supply of crab and the processors were unable to obtain what they needed. Even as to those processors who signed the Association's market order agreeing to purchase crab from Association members at the prices fixed in such order, this arbitrary policy of rotating boats were forced upon them. As already found, Rydman repeatedly had stated, in substance, that the processors should be out of business anyway. He certainly had no sympathy with the payment of any outstanding obligations of Association members to the processors who had advanced money to them for the purchase of their boats and equipment. This is exemplified by the occasion early in 1959 when he told Stedman, who owed money to Whiz Fish, that Stedman should not fish for that processor but could pay off his debt to Whiz in cash. Rydman, self-admittedly at least one of the most successful fishermen in the Westport area, did not care whether Stedman could raise the cash to pay his debt or whether Stedman felt he had a moral as well as a financial obligation to Whiz Fish—a debt was only money according to Rydman, and any delay in the payment thereof was wholly immaterial as long as the Association could force the proces-

sors to yield to respondents' rotation of boats. This resulted in a number of processors not being able to obtain crabs from their own boats which were manned by Association members as well as delaying payments owed to them by Association members for loans on such boats and equipment.

The Association members went along with this program of rotation, and therefore many of them either disregarded or delayed the payment of their just debts to their processor-creditors and fished for others. There is substantial evidence of such situations although it is unnecessary to tell the details of each. In brief, at least the following Washington processors were injuriously affected by respondents' rotational program: The Crab Pot, a very small, one-boat concern located between Bay Center and Westport; Harbor Fish Company of Aberdeen, another small concern; Whiz Fish Company of Seattle; Steven Eide of Ilwaco; and San Juan Packing Company of Seattle also operating in Warrenton, Oregon.

This policy of rotating boats was an unfair practice in that it substantially reduced the amount of crab for the market during the periods in question. While financial disputes between the crab fishermen and the processors to whom they were indebted are primarily private matters with which the Commission has no concern, nevertheless it not only prevents the free flow of interstate commerce but also is illustrative of the indifference of the Association's management, as well as the indebted fishermen, to the proper liquidation of such debts in order to carry out the major objective of the Association to establish a monopoly in the crab fishing business. This disregard of such private debts has strong adverse bearing on the credibility of the testimony of any respondents regarding the "show of force" incidents at sea and on the docks as hereinbefore found and determined.

*The Association's Policies of Membership Termination and Liquidated Damages—Washington's Fish Marketing Act*

The Association's membership agreement provided that no member could terminate his fifteen-year membership except by written notice served by registered mail during the period each year starting with September 15 and ending September 30, to be effective October 31 of that year (Commission's Exhibit 2, p. 5, par. 4). Counsel supporting the complaint contend that this is an unfair practice, keeping any member tied up for extended periods each year after he might wish to sever his membership. Respondents argue that due to the extent and nature of the fishing season the Association cannot plan properly unless

its membership is fairly stable throughout the season and the service charges (*id.* p. 8, par. 14) upon his catch are paid. Respondents' position in this regard seems reasonable and within the authorized objectives of the Association and its membership agreement to which each member accedes upon joining. There is no evidence that this provision insofar as the time of membership withdrawal has been used arbitrarily and harshly by the Association except in the case of Willis, hence, it is found not to be an unlawful practice. It does seem to the examiner that there is extreme unreasonableness in requiring a member upon joining to pledge allegiance to the Association for fifteen years, which is an exceedingly long time out of a fisherman's active life. This point, however, has not been urged nor briefed herein.

Respondent Association also has a "liquidated damages" provision in its by-laws (Commission Exhibit 8, pp. 16-17, Par. 10) upon which proceedings against several allegedly defaulting members have been instituted or threatened including the case against Willis. This case was premised upon Willis' alleged failure to pay a two percent service charge due the Association upon crabs he sold to Nelson Crab and Oyster Company, based on the estimated value of Willis' catch during the 1959 season while he was still a member. This action hereinbefore has been found to be a part of his general persecution by respondents, but the actions against other members seem either to have been brought in regular course of justice or proposed to be so brought, and there is no direct evidence, or reasonable inference, that these members were individually selected for harassment by such suits.

Respondents' counsel have cited many authorities upholding these "liquidated damages" provisions in the by-laws of various cooperative enterprises. They cite, among others, the leading case in the state of the Association's incorporation, *Washington Cranberry Growers Assn. v. Moore* (1921), 117 Wash. 430, 201 P. 773, 204 P. 811. There are numerous other cases in that jurisdiction upholding this type of provision in cooperative associations; for example, see *Pierce County Dairymen's Assn. v. Templin* (1923), 124 Wash. 567, 215 P. 352, and *Beaulaurier v. Washington State Hop Producers Assn.* (1941), 8 Wash. 2d 79, which at page 91 cites numerous preceding marketing agreement cases in Washington which have upheld such "liquidated damages" provision. Such provision of the Association's by-laws is clearly legal and enforceable, absent other illegal or inequitable circumstances.

Respondent Association was actually incorporated under the general cooperative statute of Washington, RCW 23.28.010 to 23.86.190, inclusive. It was so incorporated a year prior to the passage of the Washington "Fish Marketing Act" in 1959, now codified as RCW Chap.

24.36. This latter Act was first called to the examiner's attention during final argument. There has been no evidence that the Association's charter has ever been so amended as to reincorporate it under this 1959 Act. Such Act has been carefully considered, however, as it is the most recent expression of the legislative will of the State of Washington, setting forth the State's public policy in respect to cooperative fishing organizations. This statute gives broad and explicit authority to such corporations in framing their by-laws with respect to "the method, time and manner of permitting" the withdrawal of persons therefrom and expressly legalizes by-laws providing for liquidated damages.

Similar statutory provisions had previously existed in at least one other state for many years. Mississippi had a fish marketing act which was an almost precise duplicate of that enacted more than 20 years later by Washington. See *Laws of Mississippi, 1938*, Chapter 185, which was in effect at the time of the decision in *Gulf Coast Shrimpers and Oystermen's Assn., supra*, in 1956. In that case the U.S. Court of Appeals, in sustaining a Sherman Act verdict against defendants, referred to the many coercive methods and practices of the cooperative and other defendants therein, holding that among other unlawful acts the conspiracies charged were "implemented through fines against non-conforming association members" (236 F. 2d at page 665). The said Mississippi statute at that time expressly authorized "liquidated damages" provisions. But the decision refers to "fines," and it is not clear therefrom whether defendants' by-laws provided for fines or for liquidated damages. In any event, for reasons not appearing of record, the Mississippi legislature, after the *Gulf Coast Shrimpers* decision, first amended its Fish Marketing Act of 1958 and eventually repealed it by Chapter 173, *Laws of 1960*. Extended research has not revealed any other case referring even inferentially to any unlawful application of the liquidated damages provisions of cooperatives engaged in the fishing industry, and counsel supporting the complaint have cited only cases involving "fines" and not "liquidated damages."

On due consideration of this entire problem, the examiner does not find that the respondents unlawfully used such provision of the Association's by-laws except in the case of Willis where the suit brought was clearly coupled with threats and acts of violence. It would be inconsistent to hold respondents to have engaged in unlawful acts by lawfully seeking redress in the courts for alleged violations of the membership agreement and by-laws, absent more facts of oppression in each individual case under consideration. These suits against its members for liquidated damages seem to be the only times when the Association has had resort to law, although the statutes and decisions

of Washington definitely authorize the Association to institute injunction suits coupled with actions for liquidated damages against any defaulting members instead of resorting to threats of violence and "shows of force." Respondents cannot be condemned for pursuing their remedies in the courts as they should have done on *all* occasions when they believed their members were defaulting in their membership obligations.

*Other Acts of Respondents*

The facts as hereinbefore found are definitely sufficient to establish respondents' conspiracy and attempt to monopolize the crab industry as broadly alleged in the complaint. The business of fishing for crabs is a very hazardous one, evidenced by the fact that four such fishermen were lost in sudden gales at sea during the pendency of this proceeding. The threats of violence to persons and property in this case involving the safety of men and boats in the perilous Pacific quite naturally have far greater potency than they might in many other occupations.

In organizing a fishermen's cooperative, respondents were engaged in a very worthy and lawful business. They have acquired a substantial and well-arranged cannery for the processing of crab, which, by agreement of counsel, the examiner was privileged to view. Some excellent pictures of the plant and its operations are Respondents' Exhibits 11-A—G, inclusive, which include a very interesting discussion of the business and which appeared in the roto section of the *Seattle Times* on April 15, 1962. Respondents are to be praised for this plant and the excellence of its products. Cooperative ventures of various kinds are now recognized as legal businesses not only in Washington State but in all other states. Respondents' organization, their acquisition of the cannery, and their entry into the competitive business of processing crabs has not only furnished employment to many people but has added another successful competitive enterprise to the State of Washington. The examiner regrets that the current success of this fine enterprise has been accomplished in large part by unlawful acts that have hereinbefore been determined and found.

But not everything that respondents did was unlawful. For some unknown cause only one of the counsel supporting the complaint submitted proposed findings and supporting brief although the record still discloses that associated counsel who had taken active parts have not been relieved therefrom. From prior arguments and statements made throughout, the examiner believes that all of the counsel supporting the complaint were in accord as to the findings hereinbefore made concerning respondents' alleged unlawful acts. Many other contentions

are made by said counsel calling for the drawing of unwarranted inferences or requiring findings contrary to the facts. A few of such contentions briefly stated will suffice.

The Association's charter and the controlling federal and state cooperative laws clearly authorized it to acquire the Kaakinen cannery, and while, as already suggested, it did add to respondents' economic power, any contention that the acquisition of the cannery *per se* was illegal is untenable.

It is argued that the processors were forced to pay the same price for inside crab as for outside crab. They had previously accepted both classes without discrimination although a less valuable end product is obtained from inside than from outside crab. This is because their external uncleanness and their lesser meat content require more labor per pound to process. Actual commercial discrimination between the two arose primarily in connection with the processors' refusal to sign the market orders. The evidence is insufficient to sustain a finding against respondents on this particular issue.

It is further argued that respondents sought to force fishermen to take "guest memberships" whereby they paid the Association two percent of their gross "catch" but were not permitted to vote. The Association was privileged to accept such members as it chose and under such reasonable conditions as it might impose. It is not demonstrated that there was anything unlawful in offering these "guest memberships." Bjarne Nilsen is urged as an illustration in support of this contention. The evidence shows he had petitioned previously to join but after becoming part owner of Point Chehalis Packers he could not participate as a voting member and refused to continue his membership. Most certainly no cooperative could be required to have its commercial competitors control its lawful policies and operations. There is no evidence that any threat was made by respondents to Nilsen or any other person to force "guest membership" upon them. Similarly, it is contended that packers were unlawfully prevented from receiving the same credit accommodations that such fishermen extended to their Association during its formative days. What these fishermen did was to permit their Association to withhold one-half of the value of their "catch" until such time as the Association could pay in full. There was nothing unreasonable nor illegal in refusing to let outsiders have the same credit arrangements.

It is urged that respondents sought to secure a uniform coast-wise price by eliminating the traditional "California differential," thereby bettering respondents' competition with the California crab processors. Rydman is credited with an outright refusal to discuss the matter

at an Association meeting in Warrenton. There is, of course, abundant evidence that the original ambitious dreams of respondents envisioned their power extending up and down the entire Pacific Coast, as illustrated by Rydman's trips to various Oregon ports below the Columbia River and the glowing statements in the Association's newsletters. Even the few Oregon members the Association obtained were given a special dispensation and permitted to become inactive. Counsel supporting the complaint concede this by their contention that the relevant market area in which respondents have attained or threatened to attain monopolistic power is only the State of Washington. Any vision on respondents' part that Westport, a small fishing village, might become to the Dungeness crab industry what Rochester, Minnesota, became to the medical profession, and that Westport would grow to be a greater commercial center than Seattle, Portland, or San Francisco, goes far beyond the realm of reason.

*Economic Evidence as to Monopoly and Relevant Market*

The economic evidence in this case, while somewhat extensive, can be summarized. Ray Heinke, the general manager of the Port of Grays Harbor, and Dale Ward, the supervisor of statistics of the Washington State Fisheries Department, testified in support of the complaint. Respondents called two witnesses, Peter A. Formuzius, a fisheries marketing specialist for the Department of the Interior's Fish and Wildlife Service, and James A. Crutchfield, Associate Professor of Economics at the University of Washington, the latter's testimony being taken by deposition. There were also two stipulations filed July 3 (pp. 6-10) and August 3, 1962, respectively, containing certain statistics, and a number of exhibits that are statistical reports and summaries.

This evidence discloses that there are four major crab fishing areas in the State of Washington: Puget Sound, Grays Harbor, Willapa Harbor, and the Columbia River. According to Commission's Exhibit 74, there was a total of 7,108,500 pounds of crab caught in 1961 from these four areas or landing districts as they are officially called, the total value of which was estimated to be \$1,071,123. Due to a poor season, this production was substantially less than the total of all Washington ports in each of the preceding years, which were as follows:

	<i>Pounds</i>
1957.....	11, 089, 630
1958.....	11, 932, 561
1959.....	8, 257, 079
1960.....	7, 250, 814



## Initial Decision

From Commission's Exhibits 70, 71 and 72, the official Annual Reports of the Washington Department of Fisheries for 1958, 1959, and 1960, respectively, and the statistics in the enclosures which are a part of Commission's Exhibit 63, an official letter from the Department, the following figures pertaining to the crab production by fishing districts in that State for the years 1956 to 1961, inclusive, have been computed:

	Crab landings in lbs.				
	All districts	Puget Sound	Grays Harbor	Willapa Harbor	Columbia River
1956	8,842,231	597,067	3,832,842	4,082,936	329,386
1957	11,089,650	331,061	7,174,757	3,196,881	286,921
1958	11,932,561	466,826	7,473,607	3,309,403	691,925
1959	8,257,079	568,376	4,900,608	2,446,493	341,602
1960	7,250,814	1,141,861	3,286,508	2,222,101	600,344
1961	7,108,500	1,638,436	3,211,354	1,912,222	346,488
	Estimated percentages of landings by districts				
1956		7	42	45	6
1957		3	65	29	3
1958		4	62	27	7
1959		5	61	30	4
1960		15	46	31	8
1961		23	46	27	4

It is evident from the foregoing figures that with the exception of 1956 the production of crab in the Grays Harbor district far exceeds that of any of the other three districts. While there is substantial increase in the percentage of inside crab produced in Puget Sound in 1961 over prior years and some decline in the other three districts, this is probably attributable to the generally poor season for fishing ocean crab which occurred in 1961 as compared to prior years. In any event, Grays Harbor is by far the most productive district, and there respondents have a substantial monopoly of the fishing craft. They also have a large part of the crab production under control in Willapa Harbor and in Puget Sound.

In respondents' memorandum of authorities in support of their proposed findings, on page 20, are an excellent summarization chart of crab landings on the Pacific Coast and another of crab purchases by the largest processors in Washington. The former covers the alleged market area in all areas of crab production from Alaska to California, inclusive, for 1957 through 1961. It naturally discloses no Association "catch" prior to 1959 when the Association was first organized. In 1959 the Association's "catch" is shown to be 14.8% of that for the total Pacific Coast, but this is 74% of the Washington "catch," being 6,136,686 pounds of the State's total of 8,257,079. In 1960 the Association "catch" was 5,219,363 pounds which is 12.7%

of that for the total Pacific Coast, or 62% of the Washington "catch." In 1961, however, the Association "catch" had fallen to 2,673,178 pounds, which was only 7.3% of the total Pacific "catch," or 38% of that of Washington State. While this was a poor year generally in the crab industry, it is inferred from other statistics and evidence in the record that the Association's reduced "catch" in poundage and percentage has been caused by a drop-off of its membership after these hearings had begun. In 1960 and early in 1961, even after the complaint had issued, respondents had kept up their previous pressures against other fishermen and the processors, but evidently under the guidance of counsel these measures were tapered off or terminated later in 1961. Of course, other reasons no doubt have some bearing on this situation, such as resistance of the processors to respondents' unfair competition and the decision of many fishermen to end their membership in the Association because of its dictatorial and unfair practices. Nevertheless, it is clearly demonstrated that the respondents have had such power that they were able to perform the remarkable feat of attaining in 1959 and 1960, respectively, 74% and 62% of the total "catch" in the whole State of Washington. Prior to 1959 they had not yet become the owners of a cannery.

In the second chart on page 20 of respondents' memorandum, they have chosen to select the purchase of crabs by the four major Washington processors for comparative purposes. These are Nelson Crab and Oyster Company of Tokeland; Point Chehalis Packers of Westport; Whiz Fish Products Co., Inc.; and the Crab Producers. The figures cover the years 1959 through 1961, and are based upon the poundage of crabs purchased. The growth of the Crab Producers' share of total purchases is amazing. Although it only operated about eight months in 1959, it purchased 8.8% of the total of these four major processors, ranking a rather poor fourth. In 1960, however, it had attained third place with 12.1%, and in 1961 its purchases of 24.0% had moved it up to a very strong second place. Of course, as respondents urge, these figures do not include all of the crab purchases made in the State of Washington, but they do illustrate the growing economic power of the respondents. They were purchasing half as much crab as Point Chehalis Packers in 1961, which latter organization was preeminently first among the four major processors, whereas in 1959 respondents had purchased only about 25% of that of Point Chehalis. In the meantime Whiz Fish Products had slipped considerably from a production in 1959 of three times that of respondents to approximately one-third of theirs in 1961. More astounding is the drop in purchases of Nelson Crab and Oyster Company, which was

first in 1959, but had slipped to fourth place in 1961 with only slightly more than half of respondents' purchases.

Smaller processors lost business even more markedly. San Juan Packing Company in 1959 had processed 1,200,000 pounds, which fell in 1960 to 800,000. Chinook Packing Company processed 308,000 pounds in 1959, but, after the Chinook Dock incident, its production dropped in 1960 to only 195,000. Seaside Clam Company in 1959 processed 100,000 pounds and dropped to about 80,000 in 1960. Point Adams Packing Company in 1959 processed over 676,000 pounds and dropped to 267,000 in 1960.

In the meantime the testimony and statistics show that a number of other small processors had ceased to do business. Robert Anderson of West Haven Seafoods was forced out of business. Harbor Seafoods Company, Inc., of Seattle, buying its crab at Bay Center, was a partnership of Steve Sarich and Jim Anderson which had been in business since 1953. Their purchases were 1,622,000 pounds in 1957, 1,353,000 pounds in 1958, 644,000 pounds in 1959, and 532,000 in 1960 and 489,000 in 1961. According to respondents' witness Formuzius, they were no longer in this business in 1962.

The case of Steven Eide of Ilwaco, who had been a crab and fish buyer for many years, is a startling example of the inability of a new business to even get started after respondents began its vigorous campaign. In 1960, he entered into negotiations with Malchow and other fishermen who were members of the Association with respect to his starting a crab cannery. Some of them were indebted to him for money advanced for fishing equipment. They agreed with him that this cannery would be a fine thing for the Ilwaco community and that they would deliver their crabs to him. He did not know at that time that they were Association members. He thereupon spent two months' time and invested between \$20,000 and \$25,000 of his own money in reconstructing an old plant as a modern crab cannery which would employ 33 shakers to handle the crab and other fish which these fishermen would sell to him. But he was never able to process a single crab through his plant in the two seasons of its existence preceding his testimony given May 11, 1962. This was because after he learned they were Association members and had signed a marketing order with the Association for 16 cents per pound, his immediate competitors in the Columbia River area were paying less for crab and he could not compete at that price. Respondents refused to negotiate with him for a lesser price and he was substantially out of business except for handling crabs over his dock for the respondent fishermen for the Crab Producers cannery at Westport at a service price which at the time he

testified was still the subject of dispute. The merits of that dispute are of no concern here, but Eide's experience is another illustration of how little worth is the word of these respondent members. The evidence discloses that some of them had been financed by Eide and were still indebted to him when as a part of the Association's plan they refused to fish for him any longer. And one of them had failed, neglected, and refused to pay him a large indebtedness for his equipment up to the time Eide testified herein. As already stated in essence, the record is full of such broken promises. That it is not also full of broken heads is due to the justifiable fears of those who dealt with respondents and not to the latter's good judgment and high purposes.

Congress, from time to time, has passed special legislation enabling various cooperative groups to engage in business. The Fishermen's Cooperative Marketing Act was modeled on the prior Act authorizing agricultural cooperatives. Although special privileges are granted by such Acts, Congress has never authorized them to violate the antitrust laws. But many such organizations have employed unfair practices and methods of competition, and in the fishing industry the cases hereinbefore cited fully illustrate the greed and grasp of such special interest organizations for unauthorized power. There can be no temporizing with such flagrant abuses as threats of violence to persons or property or other pressure methods so flagrantly displayed by respondents herein.

The economic evidence adduced by respondents is in support of their contention that the market area to be considered as relevant here is the entire Pacific Coast from Alaska to California. In substance, it is contended that within this area respondents are far too small to have any substantial effect sufficient to warrant a finding that they have any incipient or existing monopoly of the Dungeness crab industry. They also urged that the chief market for the sale of Dungeness crab is California which is essentially the fact, although considerable amounts are sold to other places in the Pacific Coast states and elsewhere. In this case the relevant area to be considered is that of production, not of sale. Counsel supporting the complaint insist that while there are still a few members of the Association on so-called "withdrawals" or inactive membership in the Oregon-Columbia River area, that this is now a case wherein the production in the State of Washington is of paramount importance and that State's productive area is the relevant market. This is true. Section 2 of the Sherman Act makes unlawful the monopolization of "any part of the trade or commerce among the several states." This principle is determinative here. In order to avoid the *de minimis* rule, of course, there must be more than a very slight

effect on commerce, but there are numerous authorities to the effect that if a substantial amount of commerce is restrained it is sufficient:

\* \* \* [I]t is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. *United States v. Yellow Cab Co., et al.* (1947), 332 U.S. 218, 225-226. And \* \* \* [R]estraints to be effective, do not have to be applied all along the line of movement of interstate commerce \* \* \* if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze \* \* \*, *United States v. Women's Sportswear Mfg. Assn.* (1949), 336 U.S. 460, 464.

Respondents urge further that since their membership has dwindled and the boats under their control are now substantially less than they were in the beginning (Respondents' Exhibit 10), there is no possibility of their effectuating any monopolistic control of the crab industry even in the State of Washington. This exhibit shows that the membership has dropped from a high of 140 in 1960 to 77 in 1962, and the Association boats, which numbered 78 in 1958 and 76 in 1960, now are only 36. These figures are meaningless unless the background of what has occurred is considered. This decrease in membership and boats has taken place since the trial of this proceeding commenced and there have been no new coercive efforts by respondents. In view of the expressed attitude of respondents toward law enforcement, should this case be dismissed without a cease and desist order the illegal measures employed by respondents undoubtedly would again recur. There is no plea of abandonment of practices or any promise of reform. The success of the cannery business of respondents has now become an accomplished fact, and the record shows that it is purchasing crab from as far away as Alaska in addition to that fished for in the Washington areas.

Respondents have obtained control of a substantial part of the production of Dungeness crab in the coastal and ocean waters within and adjacent to the State of Washington which constitutes one of the most important sources of that product. They likewise have control of a substantial part of the processing of Dungeness crabs which of necessity must be carried on at or near the source of their production. This control has been gained by reason of the conspiracy, acts, policies and practices hereinbefore found which unlawfully restrain, hinder and destroy competition in the fishing for, processing, shipping and marketing of crabs. Such control constitutes a monopoly and respondents have the capacity and intent to extend such monopoly further if not restrained therefrom. By reason of the fact that many of respondents fish for other aquatic products than crabs and have the capacity to at least attempt to create a monopoly in such products the cease and

Initial Decision

66 F.T.C.

desist order issued herewith is not confined solely to the Dungeness crab fishing and processing industries.

Upon all the facts hereinabove found, the hearing examiner draws the following:

## CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of all the respondents herein.
2. The respondents have engaged in unfair practices and unfair competition in violation of the Federal Trade Commission Act.
3. There is public interest in this proceeding which is specific and substantial.

Upon the foregoing findings and conclusions which warrant a broad order, the following is herewith issued:

## ORDER

*It is ordered.* That the respondents Washington Crab Association, its officers, trustees, and members Richard E. Rydman, Ernest H. Hanson, Floyd Furford, Donald Stedman, Guy Spooner, Leif M. Anderson, Dick Strong, Fritz Bold, G. F. Damon, Charles Fisher, and Gilbert Krigbaum, individually, as trustees, or officers, or both as the case may be, and as representatives of the entire membership of Washington Crab Association, and the successors, assigns, agents, representatives and employees of any of said respondents, directly or indirectly, or through any corporate or other device, in connection with the fishing for, processing, purchase or sale, or offering to purchase or sell, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any aquatic product, including, but not limited to Dungeness crabs, crab meat, and any other crab products, whether fresh, raw, cooked, frozen, canned, or otherwise preserved or prepared for consumption, shall forthwith cease and desist from entering into, continuing, cooperating in, or carrying out, any planned common and concerted course of action, conspiracy, undertaking or agreement, between any two or more of said respondents or between any one or more respondents and others not parties hereto:

1. To reduce, curtail, limit, or prevent the "catch" or supply of any aquatic product including Dungeness crabs by coercion, threats or intimidation, by any means or method, directly or indirectly, including but not limited to the use or threat of use of physical force or reprisal against persons or property;
2. To compel any fisherman or other person to become a voting or non-voting or otherwise limited member of respondent Washington

Crab Association by coercion, threats or intimidation, by any means or method, directly or indirectly, including but not limited to the use or threat of use of physical force or reprisal against persons or property;

3. To reduce, curtail, limit, or prevent any person from processing, purchasing or selling or offering to purchase or sell in commerce, as "commerce" is defined in the Federal Trade Commission Act, any aquatic product, including, but not limited to Dungeness crabs, crab meat, and any other crab products, whether fresh, raw, cooked, frozen, canned, or otherwise preserved or prepared for consumption.

#### OPINION OF THE COMMISSION

JULY 10, 1964

By DIXON, *Commissioner*:

The complaint in this case charged that respondents, a group of crab fishermen in Washington and Oregon, have conspired to use, and have used, threats of physical violence and other "unfair" business practices to (1) compel crab fishermen to join their fishermen's cooperative association, and (2) prevent the sale of crabs to buyer-processors (canners) except at the prices and on the other terms demanded by the respondent association, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.<sup>1</sup> The complaint also alleged that this unfairly-acquired control of the crab fishing fleet (and thus of the supply of crabs), together with respondent fishermen's operation of their own crab processing plant, constituted an attempt to monopolize the industry in that area in violation of Section 5 of the Federal Trade Commission Act.

The hearing examiner found that both charges in the complaint were sustained by the evidence. Numerous instances of coercion were found. For example, one reluctant fisherman was persuaded to join the association by a group of about 15 association fishermen-organizers who surrounded him outside a restaurant. Another fisherman was told by an association organizer that, if he didn't join the association, it "might be hard on" his fishing equipment. A fisherman who tried to defy the association and undersell its asking price for crabs was prevented from unloading his catch at the docks by a group of some 30 association members who swarmed over his boat and around the unloading dock. Another fisherman was told that, if he

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<sup>1</sup> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

insisted on underselling the association's price, he might find his boat sunk. Two other fishermen who persisted in fishing and selling at less than the price being demanded by the association for its members were "buzzed" at sea by several boats owned by association members; the lines and fishing equipment of one of them were fouled and physically damaged, and the word "Warning" was cut into one of his "buoys." Respondents even sent a group of their fishermen members onto the dock of one buyer-processor to prevent it from making an accommodation sale to a fellow processor.

The hearing examiner also found that respondents have monopolized the production and processing of crabs in the State of Washington. While the association's approximately 140 members operated somewhat less than half of the State's total crab boats in 1959-61 out of 145—they caught 74% of the crabs landed in the entire State in that year<sup>2</sup> and apparently almost 100% of the crabs landed in the most important of the State's four major crab port areas, Grays Harbor.

In the processing phase of the crab industry, a cannery acquired by the association's members in 1959 processed some 45% of the total volume handled by the seven processors located in that important Grays Harbor district in 1960. Processing nearly 20% of the total volume of crabs landed in Washington, it is now the second largest processor in the State. The business of the other processors has declined accordingly. For example, the total volume of two of the largest of those processors fell from more than 3 million pounds each in 1958 to less than 1 million in 1961, and a large part of the crabs they processed in 1961 was bought not in Washington, but in Alaska. Several of the smaller Washington processors have gone out of business entirely, complaining that they can't pay the prices demanded by the association fishermen and stay in business.

The hearing examiner also found that respondents used a number of supplementary "unfair" practices to further their coercive monopolization of the market. One was their failure to give their buyer-processors adequate notice of increases in the price of raw crabs. As we understand it, the examiner thought this was "unfair" in that a short notice—e.g., 24 hours—handicapped the processor in making future commitments for the sale of the processed crab product. The

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<sup>2</sup> Respondents point out that their membership subsequently dropped to 77 in 1962, their boats to only 36, and their production to only 38% of the Washington catch. We agree with the hearing examiner that this decline, having commenced only after the trial of this case began, has little probative value in assessing respondents' intent and capacity to monopolize the local crab market.



examiner also found that respondents engaged in an unfair practice when they secured, although for a very brief period only, the aid of a labor union official in coercing local fishermen to adhere to the association's prices. Still another practice found unlawful by the examiner was respondents' "boat rotation." This was a device used when less than all of the local processors were buying at the association's asking price; rather than letting a few of its members supply the full requirements of the cooperating processors while the other members sat idle, the association divided up that available business among all of its members by directing each of them to produce, or catch, only a predetermined, limited volume of crabs. The hearing examiner apparently condemned this practice on the ground that it was unfair to processors who wanted to buy solely from fishermen of their own choice and a conspiratorial "limitation on production," a classical antitrust violation of the *per se* variety.

The hearing examiner issued an order requiring respondents to cease and desist conspiring (1) to prevent the catching, or limit the supply, of aquatic products "by coercion, threats or intimidation," including "the use or threat of use of physical force or reprisal against persons or property"; (2) to force any fisherman to become a member of the respondent association by such coercive means; and (3) to prevent any person from selling, and to prevent any person from buying or processing, such products, whether by coercion or otherwise.

Respondents' principal contentions on this appeal are that the hearing examiner's decision and order is contrary to law in that it prohibits practices made lawful by Section 1 of the Fishermen's Collective Marketing Act, 15 U.S.C. 521; that, in effect, the Federal Trade Commission is without jurisdiction to proceed because the Secretary of the Interior was given "primary jurisdiction" over the matters involved by Section 2 of the Fishermen's Collective Marketing Act, 15 U.S.C. 522; that the evidence does not support the findings of coercion; that the finding of monopolization is erroneous in that the "relevant market" is not the production of crabs in Washington, where respondents had 74% of the market in 1959, but the marketing of crabs in the entire Pacific Coast fishery,<sup>3</sup> a market in which respondents' share was only 14.8% in 1959; that the case involves only a "private controversy" between the crab fishermen on the one hand and the buyer-processors on the other, and thus is lacking in the "public interest" required by the Federal Trade Commission Act; that the examiner erred in rejecting certain of respondents' evidence; and that the

<sup>3</sup> This includes the coastal waters extending from San Francisco Bay northward to Seward, Alaska.

examiner's order is unduly broad in both its product and geographical coverage in that it extends to "any aquatic product," rather than being limited to "crabs," and extends to a repetition of the offenses at any place, rather than being limited to a repetition of them in the State of Washington.

## I

Dungeness crabs, the product involved in this proceeding, are caught along the Pacific Coast from San Francisco, California, northward to Seward, Alaska. In 1959, the total "catch" was slightly over 41 million pounds, having a market value, to the fishermen, of about \$6 million. Washington and Oregon each accounted for about 20% of that total, or over \$1 million worth each. Together, these two states thus produced nearly 40% of the total Pacific Coast "catch." California, the largest single crab producing state, accounted for another 40% of the total. The remaining 20% was produced by Alaska and British Columbia, with about 4 million pounds, or about 10%, each.

The crab fishing "season" lasts for about five months out of each year, beginning about December and ending usually sometime in May. The crabs are caught in "pots" or traps lowered to the ocean floor and brought up by power-winches. The pots, "baited" with clam meat, are so designed that crabs seeking the bait can enter but cannot get out. The ocean variety of crab is caught several miles off the shore, where the Pacific Shelf ranges from 10 to 30 fathoms (60 to 180 feet) below the surface. Each pot sitting on the ocean floor is marked on the surface by a "buoy," the latter floating on the end of a line attached to the pot below. Each fisherman uses many pots, placing them about one city block apart in parallel rows (the rows about one-half mile apart) that may extend for many miles. In one instance here, a fisherman had some 650 pots in the water at one time, these lined up in four parallel rows extending some 18 miles in length.

The crabs, once caught, must be sold promptly; they can be kept alive for only a few days, and then only by placing them in "live tanks," or vats, and pumping seawater on them. The crab fisherman generally does not fish, therefore, unless and until he has an order from a buyer-processor in one of the nearby ports. In other words, the crab fisherman has a highly perishable product, and is thus completely dependent upon the processor for an immediate outlet to the market. The crab fisherman is also dependent upon the processor in another way. The boats used in crab fishing are power driven and quite expensive, costing as much as \$30,000. The fisherman's gear (including, for example, the steel pots costing about \$40 to \$50 apiece) can

cost, we are told, as much as \$15,000 to \$20,000 a season. The fisherman needs financing, therefore, and for this, too, he turns to the processor who buys his crabs. Loans are generally repaid by having the borrower fish exclusively for the lending processor, and having the latter deduct, from each catch delivered to him by the borrower, 25% of the purchase price until the loan has been repaid. Since a processing plant can handle more crabs than one fisherman can catch, the processor generally has a number of boats fishing for him on a generally exclusive basis (it being understood, however, that the fisherman can take his catch elsewhere if another processor is paying a higher price). This practice assures each processor of a full supply of crabs, and assures each fisherman of an immediate market for his catch when he returns to port.

The processor buys the crabs "raw," that is, shell and all, for so much a pound. Some are resold by the cannery whole, either in fresh or frozen form. Most of them, however, are first processed to separate the meat from the shell, and the separated meat is then either cooked and canned or packed as frozen crab meat and then resold in commercial channels. The crab product "is quite a high-priced specialty item," with the demand "concentrated in large urban areas where incomes are relatively high."<sup>4</sup> The large cities of California are the principal areas of consumption, with other metropolitan areas, including the cities in the east, acquiring smaller quantities.

Respondents contend that, prior to the organization of their cooperative association in 1958, the fishermen were virtually at the mercy of the buyer-processors. First, they were indebted to the processors. Secondly, a fisherman with a boatload of crabs he couldn't hold for more than a few days had to take whatever price the processors offered. For example, respondents contend that a fisherman would often put to sea when the price was 12¢ a pound only to find that, when he returned to port and delivered to his processor, the latter had lowered the price to 10¢. And, since all of the other processors had already contracted to secure their full requirements from other fishermen, there were no other buyers to whom the disappointed fisherman could turn, and he thus had no choice but to accept the lowered price. Further, respondents contend that the processors often made unjust "deductions" from the price of their catch, claiming that some of the crabs delivered were "defective." Since the catch in question would have already been commingled with that of others, there was no way for a fisherman to challenge the "deduction."

<sup>4</sup> Deposition of James A. Crutchfield, Professor of Economics, University of Washington, at p. 9.

The Washington Crab Association was organized, respondents contend, to correct these alleged injustices and to even the balance of power between the crab fishermen on the one hand and the processors on the other. While the price of crabs had been as high as 20¢ a pound in the past, during the three-year period preceding the organization of the association in 1958 the price had been only 8¢ a pound. The association was organized under the Fishermen's Collective Marketing Act, 15 U.S.C. 521, 522, and the heart of its bylaws was the provision that each "member hereby designates and constitutes the association his sole and exclusive agent for the purpose of handling or marketing" his catch, "together with the fish or fish products delivered by other members signing this or similar agreements," and that "the association hereby agrees to market all of said fish in such way as it shall deem in the best interests of all persons signing this or similar agreements."<sup>5</sup> The by-laws further provided that the association "shall have the exclusive right to make its own choice as to what dealer [processor] or dealers it sells the fish of the members. The member agrees to abide by such selection as the association may make and the association has full power to contract for such sales or to make such sales without contract. \* \* \* All deliveries of fish produced by the member shall be made to the dealer or dealers as directed by the association from time to time."<sup>6</sup>

Acting as the sole and exclusive marketing agent of its member fishermen, the association promptly devised what it called a "market order." This was a purchase contract between the association, as seller, and each of the several processors, as buyer. It was sent by the association to each of the processors for their respective signatures. If they signed, they were thereby bound by its terms, including (1) an agreement to pay the price demanded by the association<sup>7</sup> for the crabs of its members, (2) a provision for cancellation by either the processor or the association upon not less than 24 hours' notice, and (3) a provision that any "defective" crabs delivered by a member must be rejected by the processor at the time of delivery, and the association itself must have an opportunity to inspect the crabs claimed to be defective.

Thus, the market order is a direct approach to the crab fishermen's alleged problems. The requirement that the processor agree to buy at a price agreed upon in advance, with a provision for at least 24

<sup>5</sup> CX 2, p. 5, par. 5 (Membership Agreement of Washington Crab Association).

<sup>6</sup> *Id.*, at p. 6, pars. 7, 9.

<sup>7</sup> CX 14, a market order dated December 5, 1958, reads in part: "This market order, made and entered into on this 5 day of Dec., 1958, by and between the Washington Crab Association, and the Whiz Fish Company. \* \* \* Price 12¢ (twelve) per pound for crab."

hours' notice, is intended to assure the fisherman leaving port that the price will not decline while he is gone. The agreement for handling disputes over allegedly "defective" crabs is a means of protecting the fisherman's rights on that score.

As previously noted, the price of crabs at the docks had been 8¢ a pound for some three years prior to the organization of the association in 1958. The association promptly demanded, and got, an increase to 12¢ in 1958, and to 14¢ in February of 1959. But trouble arose over its demand for 16¢ two months later, in April 1959. While some of the processors started buying at that price, some did not; and, on April 27, 1959, a group of processors held a meeting of their own in Olympia, Washington. The next day those processors who had previously been paying the 16¢ price stopped buying, demanding a return of the price to 14¢. (Respondents contend that an unlawful, conspiratorial agreement to boycott the association fishermen was reached by the processors at that meeting.) A stalemate resulted, with the association fishermen "sitting on the beach"—refusing to fish for crabs to be sold for less than 16¢—for nearly a month.

It was at this point that the association made its big move: It bought its own processing plant. The day they got it into operation—May 18, 1959—the processors gave up and agreed to pay the 16¢ price, continuing to do so throughout the 1959 season.<sup>5</sup>

## II

If this were the whole story, there would be nothing here to concern the Federal Trade Commission. The members of the association have fixed prices, of course, but this they are expressly permitted to do under Section 1 of the Fishermen's Collective Marketing Act, 15 U.S.C. 521. That section provides that:

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products \* \* \* *may act together* in associations, corporate or otherwise, with or without capital stock, in *collectively* catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

\* \* \* \* \*

Such associations *may have marketing agencies in common*, and such associations and their members *may make the necessary contracts and agreements to effect such purposes*. \* \* \* (Emphasis added.)

<sup>5</sup> At the beginning of the next season, the winter of 1959, the price went back to 14¢; in March of 1960 it went up to 16¢ again and remained there the rest of that season and until well into the next season, January 30, 1961. At that point it dropped to 15¢. Toward the end of March 1961, the price was again raised to 16¢.

This provision is virtually identical with Section 1 of the Capper-Volstead Act, 7 U.S.C. 291. It does for the fisherman precisely what Capper-Volstead did for the farmer. And as was said of the latter statute in *United States v. Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151, 155 (D.D.C. 1956), "the use of a common agent is expressly permitted although, of necessity, the use of a common agent may inevitably lead to a fixing of prices." The court accordingly entered an order of acquittal on charges that two dairymen's associations, one located in Baltimore and the other in Washington, D.C., had conspired to fix the price of milk sold to a government installation. As the Supreme Court said in *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960), "the general philosophy of [Capper-Volstead] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." The single corporation can, of course, "fix" the prices of its various "divisions," with no duty to require them to compete with each other. Similarly, these 140 crab fishermen can create a single marketing agent—Washington Crab Association—to "fix" a single price to be charged by all of its fishermen members, thus eliminating by agreement all competition between them.

But this so-called "exemption" of such cooperatives from the anti-trust laws is clearly not absolute. The language of the statute sets out the boundaries of permissible cooperative conduct in regard to both the "ends" that may be achieved and the "means" by which those ends may be reached. The ends—the "legitimate objectives" of such cooperative association and its members—are the collective catching, processing, and marketing of its members' product. To reach these ends, the members may "act together," "have marketing agencies in common," and "make the necessary contracts and agreements to effect such purposes. \* \* \*" We think it plain that cooperatives are outside the scope of this exemption and in violation of law if they (a) reach the permitted objectives by unauthorized means, or (b) use the approved means to reach unsanctioned ends. Price fixing is an approved objective, but it cannot be pursued by techniques that go beyond those provided by the statute. For example, it has long been settled that the "right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States v.*

*Borden Co.*, 308 U.S. 188, 204-205 (1939) (emphasis added). In that case it was charged that a dairymen's cooperative had conspired with several outside groups (distributors, labor officials, municipal officials, and others) to fix prices at both the producer and distributor levels, and to limit the supply of milk entering Chicago.

Similarly, we think the members of a cooperative are outside the protection of the statute and thus liable for their trade-restraining conspiracies when, instead of bringing into it an outside party (as in *Borden*), they conspire among themselves to club other producers into adherence to their prices by threats of physical violence and actual physical damage to property.

Nor are cooperatives exempt from monopolization charges. In *Maryland & Virginia Milk Producers Ass'n v. United States*, *supra*, an agricultural cooperative with some 2,000 Maryland and Virginia dairy farmer members supplying some 86% of the milk purchased by milk dealers (processors) in the Washington, D.C., metropolitan area, was charged with attempted monopolization of the local milk market in violation of Section 2 of the Sherman Act; with acquiring a milk processing plant in violation of Section 7 of the Celler-Kefauver Anti-merger Act; and with conspiring to eliminate all future competition from that acquired processor, in violation of Section 3 of the Sherman Act, by exacting from it an agreement that it would not "compete with the Association in the milk business in the Washington area for 10 years," and that it would "attempt to have all former Embassy [the acquired company] producers either join the Association or ship their milk to the Baltimore market." The lower court sustained the conspiracy and acquisition charges (ordering divestiture of the processing plant), but dismissed the monopolization charge on the ground that "an agricultural cooperative is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities." 167 F. Supp. 45, 52 (1958). In reversing this holding, the Supreme Court said:

[W]e do not believe that Congress intended to immunize cooperatives engaged in competition-stifling practices from prosecution under the antimonopolization provisions of § 2 of the Sherman Act, while making them responsible for such practices as violations of the antitrust-restraint provisions of §§ 1 and 3 of that Act. These sections closely overlap, and the same kind of *predatory practices* may show violations of all. 362 U.S. at 463 (emphasis added).

The kind of "predatory practices" that subjected those dairymen to a charge of law violation were much the same as those present in this

case. There the complaint's monopolization charge "alleged that the Association has '[t]hreatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant [Association] \* \* \* It also alleged that the Association '[e]xcluded, eliminated, and attempted to eliminate others \* \* \* not affiliated with defendant, from supplying milk to dealers.' Supporting this charge, the statement of particulars listed a number of instances in which the Association attempted to *interfere with truck shipments* of nonmembers' milk, and an attempt during 1939-1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The statement of particulars also included charges that the Association engaged in a *boycott* of a feed and farm supply store to compel its owner, who also owned an Alexandria dairy, to purchase milk from the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association." 362 U.S. at 468 (emphasis added). In its decision, the Court observed that cooperatives have not been given "freedom to engage in predatory practices at will," that there was no "congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by *preying on independent producers, processors or dealers intent on carrying on their businesses in their own legitimate way*," and that Congress "did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." The Court concluded that the complaint charged "anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act by this Association. \* \* \* It was error for the District Court to dismiss the § 2 charge." 362 U.S. at 465-468 (emphasis added). See also *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 30, *rehearing denied*, 370 U.S. 965 (1962).

For similar reasons, producer cooperatives enjoy no absolute right to acquire processing facilities. In *Maryland & Virginia Milk Producers Ass'n, supra*, the Court noted the finding that "the motive for and result of the Embassy acquisition was to: eliminate the largest purchaser of non-Association milk in the area: force former Embassy non-Association producers either to *join the Association* or to ship to Baltimore, thus both bringing more milk to the Association and diverting competing milk to another market: eliminate the Association's prime competitive dealer in government contract milk bidding: and increase the Association's control of the Washington market." 362 U.S. at 469 (emphasis added). The Court affirmed the finding of a



violation of Section 7 of the amended Clayton Act, and the order of divestiture.

Several other cases mark out the limits of permissible conduct for producer cooperatives. In *Manaka v. Monterey Sardine Industries, Inc.*, 41 F. Supp. 531 (D.C. Cal. 1941), a treble damage action brought by a fisherman under the Sherman Act, it was charged that a fishermen's cooperative organized under the Fishermen's Act had conspired to restrain the plaintiff from fishing and marketing his catch in Monterey. There the association had gained control of the entire Monterey market, exacting from the local canners an agreement that the canners would buy all their sardines from the association. As the court said: "The avowed purpose of the association is to limit the right to fish as far as possible to local boat owners, to assure each of them a profit and to maintain the price of fish." 41 F. Supp. at 534. The plaintiff fisherman did not get association approval and was accordingly unable to sell his catch in Monterey. Rejecting the association's claim of immunity from the antitrust laws by reason of the provisions of the Fishermen's Act, the Court found for the plaintiff. And in *Hawaiian Tuna Packers Ltd. v. International Longshoremen's and Warehousemen's Union*, 72 F. Supp. 562 (D.C. Haw. 1947), a treble damage action brought by a processor, it was held that the Fishermen's Collective Marketing Act was no "protection" to the defendant fishermen who had threatened physical violence against other fishermen and their crew members to prevent them from fishing "if the fish caught was to be delivered to the plaintiff." 72 F. Supp. at 564. See also *Columbia River Packers Ass'n v. Hintcn*, 315 U.S. 143, after remand, 131 F. 2d 88 (1942).

In *Local 36 of International Fishermen & Allied Workers of America v. United States*, 177 F. 2d 320 (9th Cir. 1949), the court sustained a jury verdict of guilty in a criminal action charging a "union" of fishermen with restraining trade in fish from the waters off the coast of Southern California and Mexico. Some 75% of the fishermen in those areas had agreed to fix prices and boycott dealers (processors) who wouldn't pay the price demanded. In addition, the defendants used coercion to prevent non-member fishermen from selling to the boycotted processors. "A charge which indicates that 75% of the fishermen \* \* \* agreed not to let any fishermen fish in the high seas and in the territorial waters of Southern California and Mexico or to deliver fish to any other than a cooperating dealer except on the specified conditions, whether by their consent or not, is a charge of conspiracy in direct and illegal restraint" of trade. 177 F. 2d at 326. Fishermen not belonging to the association were prevented from

fishing at all; their boats were deemed "unfair" and they were "warned to conform"; deliveries to non-cooperating dealers were "stopped by pressure and threats of violence" to carriers; and some fishermen were even forced to dump their catch back in the sea. The court found that this restraint of the market by such means as "unconcealed threats of violence" was outside the protection of the Fishermen's Act, and a clear violation of the Sherman Act.

In *Gulf Coast Shrimpers and Oystermans Ass'n v. United States* 236 F. 2d 658 (5th Cir. 1956), a fishermen's association had signed up as members almost all of the fishermen and their crew members operating out of five ports along the Mississippi coast. A "rule" of the association required that canner-customers buy only from fishermen belonging to the association, and that those customers purchase all the fish tendered to them by association members. "[A]ll Association fishermen were prohibited from selling shrimp or oysters below the prices set" by the association: "neither the fishermen-members nor the dealers were permitted to buy shrimp or oysters from any fisherman who was not a member in good standing with the Association"; and "any member who sold his catch below Association prices was subject to a fine, suspension from membership, and forfeiture of the proceeds from the sale of his catch. Other Government proof shows that, to insure dealer compliance with its pricing policies, the appellant Association either authorized or ratified mass member picketing, designed to prevent nonmember or out-of-state fishermen from fishing in Mississippi waters or selling to Mississippi coast packers: boycotting of nonconforming dealers by Association members; and coercion of nonmember fishermen to join the Association and comply with its price schedules." *Id.*, at 661. The court affirmed the judgment of conviction entered on a verdict of the jury finding the fishermen guilty of conspiring to restrain trade in violation of Section 1 of the Sherman Act. Among other things, the court said:

In its price-fixing, the Association exceeded any possible privilege or exemption granted by the Fishermen's Collective Marketing Act when it undertook not simply to fix the prices demanded by its members, but to *exclude from the market all persons not buying and selling in accordance with its fixed prices.* 236 F. 2d at 665 (emphasis added).

Respondents in this case have similarly gone beyond the bounds of the exemptions provided in the Fishermen's Collective Marketing Act. As detailed in the initial decision, one reluctant fisherman was "recruited" by a group of about 15 association organizers. They "circled around" him outside a restaurant, while their leader, respondent Rydman, told that lone fisherman "he was the main man to hold up the

whole thing; and if he would get on the beam and come with us, the whole thing would be straightened out nicely, and he apparently called him some name or something, because Willis bristled up, like he was going to fight, or something. \* \* \*"<sup>9</sup> The group "circled around" to "protect them if we had to. You have a leader, you want to protect them, you know what I mean." The beleaguered fisherman said: "'How's about 4 hours to decide what I am going to do?' And Ryman [the Association organizer] says, 'It seems to me like you had enough time already.'"<sup>10</sup> The fisherman signed up shortly thereafter. However, that fisherman persisted in attempting to run his own business. In December of 1958, a number of association fishermen spotted him on his way toward port with a load of crabs. Knowing he had contracted to fish for and sell his catch to a processor who had refused to pay the price fixed by the association, they summoned approximately 30 association members to the dock to "stop Willis from unloading his crabs."<sup>11</sup> When they arrived, the unloading had already started, and the non-cooperating processor was there to buy and receive the catch. About 20 association members swarmed over the boat, while the other 10 stayed on the dock. "They were every place on the boat, in the hatch, on the deck, on the bow; \* \* \* just milling around on the boat \* \* \* all friendly."<sup>12</sup> Rydman, their leader, told the boat's owner: "You are through unloading, Dick. We have stopped your men from unloading the boat."<sup>13</sup> The processor tried to convince the group that, if they would let him have the crabs, he would sign an agreement the next morning to pay the association's price. The group wouldn't agree to that; they didn't let the boat unload until he actually signed up the following morning.<sup>14</sup>

In another such incident,<sup>15</sup> two non-member fishermen going to their boats at the Chinook dock to commence fishing for a processor who had refused to pay the association price were separately stopped in the darkness of the early morning hours by groups of fishermen members. One of them testified: "I went down to the dock to get on my boat. As I walked between the two buildings, it was dark, and it was eleven fellows stepped out there and asked me where I was going. And I told them that I was going fishing and they informed me right away that I

<sup>9</sup> Tr. 697. See the initial decision of the hearing examiner, p. 65, for a description of this "Sea Chest Incident."

<sup>10</sup> Tr. 699.

<sup>11</sup> Tr. 708.

<sup>12</sup> Tr. 612.

<sup>13</sup> Tr. 608.

<sup>14</sup> Tr. 713.

<sup>15</sup> "The Chinook Dock Incident," described by the hearing examiner on pp. 70-73 of the initial decision.

wasn't." <sup>16</sup> The other testified: "Well, I came out to the boat just getting daylight. I walked through the side door of the cannery and I met" a group of fishermen. "I started to leave after fifteen or twenty minutes' discussion. Al Malchow [a local organizer for the association] asked me where I was going. I said I was going fishing and he said, 'I'll get in my boat and go out with you or follow you out.' \* \* \* Roy Gunnari told me that I could go fishing when he saw fourteen cents on the pink slip \* \* \*." <sup>17</sup> Malchow, the association organizer, admitted that he told these non-association fishermen "that perhaps I could stall my boat in front of theirs and make it hard for them running their gear, yes." <sup>18</sup> The two coerced fishermen didn't fish for about a week thereafter. Another fisherman was told by an association organizer that, if he sold his crabs for 12¢ (rather than the 14¢ then being demanded by the association), he might "come up some morning and [find his] boat sunk." <sup>19</sup>

In another of the incidents discussed by the hearing examiner, the "Incident Near the Willapa Whistler," <sup>20</sup> association fishermen "buzzed" the boat of a former member who was selling below the association price. He was fishing in the area out of Willapa Harbor when about a dozen boats belonging to association members approached him from the north. "All of the boats came down through our gear and one boat in particular cut right across in front of our bow where I was fishing and I had to come to a full stop to keep from hitting him." The other boats "were milling around through the crab gear \* \* \* zig-zagging down through the gear." <sup>21</sup> After they left, he returned to port "because I didn't know just what all these boats were going to do out there. I thought maybe it would be best to go in for the safety of my crew and my boat and myself." <sup>22</sup>

Another fisherman's boat was similarly "buzzed" that same day. A group of association boats approached; three came up close "and we saw more boats in the background." One of the association boats, the "John Antler," owned by association organizer Rydman, "hovered over the pots there for quite a while. He had some pots aboard." <sup>23</sup> When the association boats left and the non-association fisherman went back to his fishing, "we found knots in our lines and triggers were jammed" on about a dozen pots. Some of the pots were scattered. It

<sup>16</sup> Tr. 949.

<sup>17</sup> Tr. 965-967.

<sup>18</sup> Tr. 788.

<sup>19</sup> Tr. 898.

<sup>20</sup> Initial decision, p. 73.

<sup>21</sup> Tr. 463, 466.

<sup>22</sup> Tr. 470.

<sup>23</sup> Tr. 415-417.

took him about half a day to get his gear straightened out. He found that one of his buoys had carved in it, apparently with a knife, the word "Warning."<sup>24</sup> He also found that some of his pots had been tied in clusters.

Nor did respondents limit their coercion to recalcitrant fishermen; on one occasion they used a show of force to prevent an "accommodation" sale by one canner to another. Point Chehalis Packers, in Westport, was about to sell 5,000 pounds of its surplus crabs to Whiz Fish Company, another packer. At that time, the association was boycotting Whiz because of its refusal to pay a member fisherman some \$46.35 alleged to have been due him for crabs delivered, the differential between the price the association was demanding and the price actually paid to the member. When Whiz's truck showed up at Chehalis' dock to take delivery it was spotted by association fishermen, who apparently called their leader, Rydman. He promptly appeared in Chehalis' office and said: "By God, you are not going to send any crabs off of this barge, to Whiz Fish."<sup>25</sup> One of the owners of Chehalis called the owner of Whiz and explained to him that "we were having trouble with the association members." Rydman, the association leader, seized the phone and "all of a sudden blew up and started cussing and swearing, . . . he says, 'You s.o.b., you will not get any crabs from us at all!'"<sup>26</sup> The Whiz truck went away empty.

The record makes it clear that these acts of coercion and intimidation were not the isolated acts of a few zealots, but a deliberate policy of the association, its leaders, and its members. At the association's meetings, there were discussions as to what should be done about nonmember fishermen who were selling at less than the price demanded by the association. Several remedies were suggested. "Mention was made, not as an order-like, but that, if you would line boats across the entrance to the Basin, at Westport, that is where the boats park, that nobody could go through. There was no order or anything like that, it was just mentioned."<sup>27</sup> Mr. Rydman, the association's leader, had another suggestion: "There was a statement made, this way: that of flower potting pots; he said it would be a good idea in the case of guys fishing when they weren't supposed to be fishing, to hook a boat onto one buoy and run up to the next one and hook it on, until you had about 25 pots dragging behind the boat, and then turn them loose. Meanwhile they would all—you couldn't get the pots back again; they

<sup>24</sup> CX 51: tr. 420-422.

<sup>25</sup> Tr. 1279.

<sup>26</sup> Tr. 1281.

<sup>27</sup> Tr. 726.

would be all tangled together. It would be the same as destroying the pots. However, he never ordered anything like that.<sup>28</sup> He merely said it "would be a good idea."<sup>29</sup> On another occasion, during a group discussion at the association office as to what should be done about certain nonmember fishermen who were known to be fishing for a noncooperating processor, Rydman "said we should do something about it, we should go down there with the boats and *scare them in*."<sup>30</sup> That suggestion is apparently reflected in the incident, discussed above, involving the armada of association boats that "buzzed" the two recalcitrant fishermen.

A more conservative statement of association policy was given by its leader, Rydman, at an organizational meeting on January 3, 1960, at Warrenton, Oregon, when the association was trying to expand into that State. Rydman told the Oregon association members "that they weren't allowed to picket or use force, but a *show of force by a group of men* on the dock would do a lot to persuade other fishermen."<sup>31</sup>

In view of these policy statements by the association's leadership and the execution of those policies by the members in using the recommended "shows of force"—for example, the confrontation of a single fisherman with 11, 15, even as many as 30 men—we think it plain that every member of this association has either participated in its unlawful use of coercion or may be held to have knowingly approved of it.<sup>32</sup>

The examiner's findings of unlawful conspiracy and coercion are fully supported by the evidence.

<sup>28</sup> Tr. 729.

<sup>29</sup> Note 23, *supra*, and accompanying text.

<sup>30</sup> Tr. 1937 (emphasis added).

<sup>31</sup> Tr. 962 (emphasis added).

<sup>32</sup> The hearing examiner found that the following 18 men, plus two others that are now deceased, were participants in one or more of the unlawful overt acts: Leif M. Anderson; Richard Braushaw; Ronnie Cowles; Gilbert Dietrich; Charles Fisher; Virgil L. Gordon; Roy Guanari; William Haavisto; Ernest H. Hanson; Gilbert Krigbaum; Allen J. Malchow; Joe Nichols; William C. Nelson; Lawrence Peterson; Lawrence Prest; Guy Spooner; Richard E. Rydman; and Donald Stedman. As to the other members, including those that were present but unidentified at these various incidents and the rest that could not have failed to know about them, "the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put." *Phelps Dodge Refining Corp. v. Federal Trade Commission*, 139 F. 2d 393, 396 (2d Cir. 1943).

## III

The examiner's finding of actual monopolization of the production of crabs in the State of Washington, while not without some support in the record, is unnecessary to a full disposition of the issues and to the relief we think the public interest requires. Paragraph Eight of the complaint alleges that respondents' unlawfully acquired control of the crab fishing fleet, together with the use of their crab processing plant, constitutes an "attempt" at monopolization. The record is clear that respondents have in fact made such an attempt. The record is also clear that their success in this effort has been considerable.

We agree with the examiner that the "relevant market" to be considered here is the production of crabs in the State of Washington, rather than the production and marketing of crabs in the entire Pacific Coast fishery, the area from San Francisco Bay, California, to Seward, Alaska.<sup>33</sup>

As previously noted, slightly more than 41 million pounds of fresh crabs were caught in the entire Pacific Coast fishery in 1959. California accounted for some 40% of this total (17 million pounds), Alaska and British Columbia about 10% (roughly 4 million pounds) each, and Washington and Oregon some 20% (approximately 8 million pounds) each. Fishermen belonging to the respondent Washington Crab Association landed 6,137,000 pounds—14.8% of the 41,340,000 pounds landed on the entire Pacific Coast, but 74% of the 8,257,000 pounds landed in the State of Washington.<sup>34</sup>

Washington has four crab-producing areas, or "districts." These are the State's four large "bay" areas—(1) Puget Sound, on the north, whose principal crab port is the town of Blaine, located some five miles from the Canadian border; (2) Grays Harbor, some 150 air miles to the south, whose principal crab port is Westport, the home of the respondent association and of respondents' cannery; (3) Willapa Harbor, some 15 miles further south, whose principal crab ports are Tokeland, Bay Center, and South Bend; and (4) the Washington side of

<sup>33</sup> Section 2 of the Sherman Act, 15 U.S.C. 2, makes it unlawful to monopolize or attempt to monopolize "any part" of interstate or foreign commerce, and, of course, a violation of that provision of the Sherman Act is also a violation of the Federal Trade Commission Act, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 695 (1948).

<sup>34</sup> These figures are tabulated in "respondents' Exceptions to Initial Decision and Brief in Support Thereof," filed October 16, 1963 (hereafter "respondents' brief"), p. 23a. As previously noted, we agree with the examiner that the decline of respondents' market share from 74% of the Washington catch in 1959 to 38% in 1961, having occurred after the commencement of this proceeding, is not controlling on the question of their intent and capacity to monopolize that market.

the Columbia River (the border between Washington and Oregon), another 30 miles or so to the south, whose principal crab ports are Ilwaco and Chinook.

Grays Harbor, respondents' headquarters, is the largest of these four Washington crab-producing ports. For example, of the 8,257,079 pounds of crabs landed in the entire State of Washington in 1959, Grays Harbor accounted for 61%, Willapa Harbor for 30%, Puget Sound for 5%, and the Washington side of the Columbia River for 4%.<sup>35</sup> In that year, 59 boats were fishing out of Grays Harbor (nearly half of the State's total of 139); apparently all of them were owned or controlled by members of the respondent association.<sup>36</sup>

Respondents contend, however, that the landing ports of the State of Washington cannot be considered the "relevant market" because there is "elasticity of demand" between the ports of that State and the others of the Pacific Coast fishery, particularly Alaska. They point, for example, to the fact that Washington's largest processors are now procuring large quantities of fresh crabs from Alaskan ports. Thus, in 1961, Nelson Crab & Oyster Company and Whiz Fish Products Company bought approximately one-third of their requirements in Alaska, and the remaining two-thirds in Washington. Another large processor, Point Chehalis Packers, purchased even more heavily in Alaska; about four-fifths of the crabs it processed in 1961 came from Alaska, only about one-fifth from Washington.<sup>37</sup> This data, however, also suggests that respondents are driving these processors out of the State of Washington. In 1957, two of them, Nelson and Whiz, had processed approximately 3 million pounds of crabs each, or together more than 50% of the 11 million pounds processed in the entire State of Washington. By 1961 they had *lost some two-thirds of their entire processing business*, processing roughly 1 million pounds each.<sup>38</sup> The third of those large processors, Point Chehalis, had continued to grow in total volume of business—from less than 2 million pounds in 1959 to over 3 million pounds in 1961—but, as noted, it bought four-fifths of its fresh crab requirements in Alaska in 1961 (all but 655,170 of the 3,228,865 pounds it processed in that year).

In the meantime, respondents' own cannery, Washington Crab Producers' Association, had moved into second place among the State's

<sup>35</sup> Initial decision, p. 93; CX 67.

<sup>36</sup> An officer of the association was able to name only one Westport crab boat that was not owned by an association member, and that boat was "skipped" by a man who belonged to the association. Tr. 240.

<sup>37</sup> Respondents' brief, p. 20.

<sup>38</sup> *Ibid.*



processors. The processing plant they bought<sup>39</sup> in May 1959—then Kaakinen Fish Company—had processed only about ½ million of the approximately 7 million pounds landed at Grays Harbor in 1957, or less than 5% of the more than 11 million pounds landed that year in the State of Washington. In 1958 Kaakinen's share had been even less. By 1961, however, after two years of ownership and operation by respondents, that processing plant was buying about 1½ million of the approximately 3½ million pounds landed in Grays Harbor, or about 20% of the slightly over 7 million pounds landed that year in the entire State of Washington.<sup>40</sup>

While respondents' processing of 1½ million pounds of crabs in 1961 makes it only the second largest processor in the State of Washington (Point Chehalis Packers processed more than 3 million pounds in 1961), respondents appear to be the largest single processor of *Washington* crabs. In 1961, Point Chehalis bought 655,170 pounds of crabs from Washington fishermen; Whiz Fish, 769,013; and Nelson 696,504.<sup>41</sup> (The rest of their requirements were procured in Alaska, as noted.) So the four largest processors of Washington crabs are (1) respondents, (2) Whiz, (3) Nelson, and (4) Point Chehalis. Together they processed at least 3½ million pounds in 1961, or about 50% of the slightly over 7 million pounds landed in the State of Washington. A few smaller processors handle the remainder of the State's production.<sup>42</sup>

These smaller processors have lost business sharply,<sup>43</sup> and several have gone out of business entirely. One, a new entrant in 1960, was never able to get started, apparently because it was unable to get crabs except from members of the association, and allegedly couldn't make

<sup>39</sup> The purchase price was apparently \$125,000. CX 37f. Some 60 of the association's members subscribed to \$1,000 worth of stock each, to be paid for by assessments of 1¢ per pound (about 6¼%) from their future crab sales, whether sold to their own processor or to its competitors. (This was in addition to the 2% they were already paying as "dues" to the association.)

<sup>40</sup> CX 66 gives a tabulation of the Grays Harbor landings and volume of sales to the seven processors that bought them. (The figures are given in dozens, rather than pounds. The conversion factor is 28, that is, a dozen fresh crabs is approximately 28 pounds.)

<sup>41</sup> Respondents' brief, p. 20.

<sup>42</sup> King Salmon, Inc., purchased 465,024 pounds at Grays Harbor in 1961; Fishermen's Coop Assn., 542,388 pounds; and Pacific Pearl 212,336. CX 66. The rest of the 1961 Washington production presumably went to the other small processors, including San Juan Packing (800,000 pounds in 1960); Chinook Packing (195,000 pounds in 1960); Seaside Clam (80,000 pounds in 1960); Point Adams Packing (267,000 pounds in 1960); Harbor Seafoods (489,000 pounds in 1961) (out of business in 1962); and West Haven Seafoods, also out of business now. See initial decision, p. 95.

<sup>43</sup> One's volume of purchases dropped from 1,200,000 pounds in 1959 to 800,000 in 1960; another, from 308,000 in 1959 to 195,000 in 1960; another, from 100,000 in 1959 to 80,000 in 1960; and still another from 676,000 pounds in 1959 to 267,000 pounds in 1960. See initial decision, p. 95.

a profit paying the prices they demanded. Of the two others that went out of business, one's volume dropped from over 1½ million pounds in 1957 to less than ½ million in 1961.<sup>44</sup>

It is apparent, therefore, that respondents' control of the Washington crab fishing fleet and their direct access to the consuming market through their ownership of a processing plant have had profound effects on the Washington crab processors. Crabs can apparently be purchased in Alaska and elsewhere and shipped to processing plants located in the ports of Washington, but there are obviously additional costs involved. While we have not been told the cost of making such shipments, it appears that it costs 1¢ per pound, or over 6% of the fisherman's total selling price, to ship fresh crabs from Blaine, Washington, to Seattle, a distance of some 100 miles.<sup>45</sup> The cost of transporting such whole crabs, shell and all, from Alaska to Grays Harbor, Washington, must be considerably greater. This extra expense, when added to the price paid for the crabs themselves at the Alaska ports, presumably equals or exceeds the increased prices demanded by the association fishermen at the Washington ports. Otherwise, the Washington processors could ignore respondents' price demands and turn for their full requirements to Alaskan fishermen. The fact that only the largest of the Washington processors have in fact turned to Alaska for a substantial part of their crab requirements, and that the smaller Washington processors go out of business instead of doing so, suggests that Alaskan crabs are not an adequate "substitute," as far as Washington processors are concerned, for Washington crabs.

But the most convincing evidence that respondents have attempted to monopolize a meaningfully separate and distinct "market" here is the fact that they have succeeded in *doubling* the price they are able to command for their crabs. As noted, they were getting 8¢ per pound at the Washington ports when the association was formed in 1958, and had raised it to 16¢ by 1959.<sup>46</sup> If Alaskan crabs were "competitive" with Washington crabs *in the Washington ports* where the Wash-

<sup>44</sup> Initial decision, pp. 95-96.

<sup>45</sup> CX 18a. During oral argument before the Commission, respondents' counsel indicated that the association's efforts in Blaine "hadn't worked out" because of Blaine's "distance from Westport" and implied that there was some burden involved in trucking members' catches "from Warrenton, Oregon, all the way up to Westport, Washington," a distance of some 50 miles. Transcript of oral argument, p. 20.

Even the cost of shipping the processed crab product from Washington to the central market in San Francisco is apparently sufficient to create a differential of 2% in price between those two markets, that is, the Washington processor, after paying the freight to San Francisco, realizes a net price of 2% less than the San Francisco processor. Tr. 231. See also tr. 1511.

<sup>46</sup> An association newsletter of January 16, 1961, noted that "we are receiving up to 100% more for our crabs today than we were three years ago when we formed. \* \* \*"  
CX 37q.

ington processing plants are located, this increase in prices would have been impossible without the cooperation of the Alaskan fishermen. It is plain, therefore, that the geographical distance between these Washington processors and the Alaskan fishing ports constitutes a barrier that makes the two separate and distinct "markets" for crabs. The successful exercise of the power to exclude competitors and control prices in some geographic area is itself a persuasive indication that the area selected is, as a practical matter, a distinct market. As a text writer has put it, "the courts will take as the market, for the purposes of deciding cases, just that market which the concern itself takes for its field of activity; if a firm shows an intent to exclude competition from that field, it will be assumed that the field sufficiently describes a market, for otherwise what would be the point of the effort to exclude?"<sup>47</sup> Here, respondents have excluded competitive fishermen from the coastal waters of Washington by threats and violence, and have "controlled" prices in that market to the extent of doubling them in less than two years. Their leader stated that his purposes were "to raise the price of crabs," to "process all of the crabs that came to Westport," and "to eliminate Jack Caston [Whiz Fish Company, one of Washington's largest processors], if it was possible, from the crab industry."<sup>48</sup>

Respondents' use of their newly acquired processing plant played a significant role in this attempted monopolization of the market. First, it was the lever with which they broke the resistance of the local processors to the association's price demands. Prior to respondents' acquisition of their own cannery, the independent processors could hope that, if they simply refused to meet a new price demand, the association fishermen would weary of "sitting on the beach" and give up or compromise on the demand. After the acquisition of the processing plant, however, respondents had their own outlet to the San Francisco market for processed crab products and could simply by-pass the local Washington processors altogether. The latter obviously cannot let their plants remain idle while the association cannery is operating at full capacity.

Further, when the processors yielded and resumed buying from the association fishermen, they were in fact subsidizing their own competitor. As previously noted, the association fishermen financed the purchase and operation of their own canning company by stock subscriptions of \$1,000 each, payment for the stock to be made by turning over to the cannery, out of each sale of their crab catch, 1¢

<sup>47</sup> Neale, *The Antitrust Laws of the USA*, 125 (1960).

<sup>48</sup> Tr. 700, 701, 705.

for each pound sold, *whether the sale was to the association cannery itself or to a third-party processor.* (This 1¢ per pound figures to some 6¼% of the member's gross sales when the crabs are selling at 16¢.) The net effect of this arrangement, therefore, is that every time an independent Washington processor buys \$1 worth of fresh crabs from a member of the association, 6¼¢ of the dollar he pays goes directly into the coffers of the association cannery, a competitor of his.

Even assuming this to be fair competition ordinarily, it certainly becomes unfair when coupled, as here, with a substantial degree of monopoly power over the supply of the source product. Here, these respondents, using first their unlawfully acquired control of the crab fishing fleet, and then a combination of that power with their control of a substantial share of the processed product, levered the price of fresh crabs up from 14¢ (at the time the cannery was acquired) to 16¢ a pound. Having thus acquired an additional 2¢ in profits, the association fishermen then applied half of that gain—1¢—to the financing and strengthening of their own cannery. Hence, the cannery itself was financed not out of the lawful profits of the association fishermen, but out of funds extracted from the pockets of the independent processors by the use of coercively acquired monopoly power. This is what the association leader, Mr. Rydman, apparently had in mind when he wrote the membership that "we have this deal figured out where it actually isn't going to cost the individual member anything, in other words we are going to end up getting the cannery practically as a gift."<sup>49</sup> Respondents' processing plant, therefore, has been both a creature and an instrument of unlawfully-acquired, and unlawfully-used, monopoly power.

## IV

We see no error in the examiner's rejection of respondents' proffered evidence as to an alleged investigation and exoneration of them by the Department of the Interior, nor in his refusal to issue subpoenas aimed at securing proof of respondents' contentions that (1) the processors were in fact making money despite the increased prices they were having to pay the association fishermen, and (2) that the processors had in fact entered into an unlawful conspiracy among themselves to destroy the respondent association. The underlying theory of the latter argument—that the association's activities were undertaken in self defense—has been expressly rejected by the Supreme Court. In *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941), manufacturers of

<sup>49</sup> CX 37g.

textiles and garments contended that their concerted boycotts of non-cooperating retailers were aimed only at protecting themselves from ruin at the hands of "style pirates," competitors who were allegedly copying their designs and marketing them at cut-rate prices. The Court declared that, "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 312 U.S. at 468. Respondents' second contention is likewise defective. Even if they had established that the processors in question were prospering under the prices exacted by the association for its members' crabs, and thus demonstrated the "reasonableness" of those price exactions, this would be no defense to the charges involved here. Such evidence is not relevant even in a price fixing case.<sup>50</sup> Certainly such a showing is not relevant where there has been an attempted monopolization—exclusion of competitors and control of prices—by threats of physical violence and deprivations against property. As was said in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 427 (2d Cir. 1945), "it is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit."

Respondents' contention that the hearing examiner erred in refusing to let them prove that the association and its activities had been investigated and exonerated by the Department of the Interior under Section 2 of the Fishermen's Collective Marketing Act, 15 U.S.C. 522, is, in effect, a contention that the Secretary of the Interior has "primary jurisdiction" over the subject matter involved and that this Commission is thus powerless to act. This argument has been squarely rejected by the Supreme Court at least twice. *United States v. Borden Co.*, *supra*; *Maryland & Virginia Milk Producers Ass'n v. United States*, *supra*. Section 2 of the Fishermen's Collective Marketing Act provides that, if the Secretary of the Interior "shall have reason to believe that any such association monopolizes or restrains trade \* \* \* to such an extent that the price of any aquatic product is unduly enhanced by reason thereof," he shall, after an appropriate administrative proceeding, issue an order "directing it to cease and desist from monopolization or restraint of trade." 15 U.S.C. 522.

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<sup>50</sup> As the Supreme Court held in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 213 (1940), it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute "merely because the prices themselves are reasonable. \* \* \* The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. \* \* \* Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable. \* \* \*"

Provision is further made in this section for review and enforcement of such cease-and-desist orders in the federal district courts.<sup>51</sup> This section is similar to a provision in the Capper-Volstead Act, 7 U.S.C. 292, which gives the Secretary of Agriculture comparable authority to proceed against agricultural cooperatives that abuse the privileges granted them by that statute. In *United States v. Borden Co.*, *supra*, the Supreme Court held that this provision in Capper-Volstead was not "designed to take the place of, or to postpone or prevent, prosecution" under the Sherman Act:

We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. \* \* \* And § 2 of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a *qualification of the authorization given* to cooperative agricultural producers by § 1. \* \* \* But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies. 308 U.S. at 206.

And in *Maryland & Virginia Milk Producers Ass'n*, *supra*, the Court rejected the "primary jurisdiction" contention again:

The Association's chief argument for antitrust exemption is based on § 2 of the Capper-Volstead Act, which authorizes the Secretary of Agriculture to issue a cease-and-desist order upon a finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been "unduly enhanced." [Footnote omitted.] The contention is that this provision was intended to give the Secretary of Agriculture primary jurisdiction, and thereby exclude any prosecutions at all under the Sherman Act. This Court unequivocally rejected the same contention in *United States v. Borden Co.*, 308 U.S. 188, 206, after full consideration of the same legislative history that we are now asked to review again. We adhere to the reasoning and holding of the *Borden* opinion on this point. 362 U.S. at 462-463.

In short, proceedings by the Secretaries of Agriculture and Interior under Capper-Volstead and the Fishermen's Collecting Marketing Act against cooperative abuses are, along with the proceedings authorized under the general trade regulation laws, cumulative and not exclusive remedies. As the Supreme Court said in *Federal Trade Commission v. Cement Institutes*, 333 U.S. 683, 694 (1948): "We find nothing to justify a holding that the filing of a Sherman Act suit by the Attorney General requires a termination of these Federal Trade Com-

<sup>51</sup> See initial decision, pp. S2-S3, n. 4, for full text of this act.

mission proceedings. In the first place, although all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations. \* \* \* In the second place, the fact that the same conduct may constitute a violation of both acts in nowise requires us to dismiss this Commission proceeding. Just as the Sherman Act itself permits the Attorney General to bring simultaneous civil and criminal suits against a defendant based on the same misconduct, so the Sherman Act and the Trade Commission Act provide the Government with cumulative remedies against activity detrimental to competition." Congress did not intend to confine each within "mutually exclusive limits, but rather to permit the simultaneous use of both types of proceedings." Here, therefore, an investigation by the Department of the Interior, even if it had in fact been closed on a finding that respondents had not violated Section 2 of the Fishermen's Collective Marketing Act, would not have precluded this Commission from making an independent termination as to whether respondents had violated the Federal Trade Commission Act.<sup>52</sup> Certainly there is nothing in that section of the Fishermen's Collective Marketing Act to suggest that Congress intended to empower the Secretary of the Interior to endorse monopolization by coercion, threats of violence, and injury to property. That provision—which the Supreme Court has characterized as "merely \* \* \* a qualification" of the first section's authorization of common marketing agencies, *Borden Co., supra*—simply makes it clear that monopolization resulting in undue enhancement of prices is not sanctioned even if, unlike the situation here, it is achieved by the kind of voluntary agreements expressly permitted by the first section of the statute.

## V

Respondents' contention that nothing more is involved here than a "private controversy" between crab fishermen on the one hand and crab processors on the other, and that there is accordingly no "public interest" in the proceeding, is patently without merit. It may be true, as respondents contend, that they do not yet have sufficient power over the entire Pacific Coast crab industry to raise the price paid by the

<sup>52</sup> For a somewhat analogous situation, see *Baldwin Bracelet Corp. v. Federal Trade Commission*, 325 F. 2d 1012 (D.C. Cir. 1963). *cert. denied*, May 4, 1964, where the court rejected the contention that an alleged investigation and "finding" by Customs (Treasury Department) ousted the Commission of jurisdiction to find that imported watch bracelets had been deceptively and unlawfully marked as to country of origin.

consuming public for processed crab products in the central crab market in San Francisco. It may be true that, up to this point, all of respondents' increases in the price of fresh crabs have been wrung from the profits of the local Washington processors with no corresponding increase in the latter's resale prices in the consuming markets. But it is not true, as respondents' argument implies, that consumer prices are the only criteria of the public interest. Consumer prices are of signal importance, to be sure, but the "public" includes others besides "consumers." One of the primary purposes of the trade regulation laws, including the Federal Trade Commission Act, is to keep open the doors of economic opportunity, to permit any man to enter any trade or business he sees fit and succeed or fail on his own merits. When any group arrogates to itself the "right" to determine who shall be permitted to enter a given business and on what terms, it has unlawfully closed a door our laws have declared must remain open. Thus the coercion and approach to monopolization found here plainly injures the public interest, regardless of whether it affects consumer prices in markets distant from the production and processing of the product. *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, *supra*, 312 U.S. at 465-467. The businessmen engaged in catching and processing crabs are no less members of the public than consumers in San Francisco, and their right to "[carry] on their own businesses in their own legitimate way," free from respondents' "predatory practices," *Maryland & Virginia Milk Producers Ass'n*, *supra*, is entitled to at least as much protection.

## VI

We see no error in the product coverage or geographical scope of the examiner's order. "As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices in all areas in which it was doing business." *Maryland Baking Co. v. Federal Trade Commission*, 243 F. 2d 716, 718 (4th Cir. 1957). Or, as we said in *Bakers of Washington, Inc.*, Dkt. 8309 (February 28, 1964) [64 F.T.C. 1079], at 48 [64 F.T.C. at 1141]: "The general rule is that a violation of law, whether practiced in one area or in many, warrants an order covering the whole of the violator's business. There being no reason to suppose that an entity showing no reluctance to [violate the law] in Seattle, Washington, would act differently in another city or another state, the public interest in the cessation of such unlawful conduct requires an order that protects the public in all of the states, not merely in Washington." In view of the fact that these respondents have already gained



at least a temporary beachhead in the adjoining State of Oregon,<sup>53</sup> a cease-and-desist order limited to the State of Washington would be wholly inadequate.

As to the product coverage of the order, it has long been settled that a violation of law in connection with the sale of only one product is sufficient basis for the entry of an order prohibiting that type of conduct in connection with the sale of all of the offender's products. *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir. 1960); *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968, 971 (3d Cir. 1941). To be sure, our orders must be framed with as much precision as possible, *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360, 367-368 (1962), but "the number of products to be covered by the order raises no issue of 'precision.' It could hardly be claimed, for example, that an order embracing 'all' of a respondent's products was less precise than one covering three named products." *Forster Mfg. Co., Inc.*, Dkt. 7207 (January 3, 1963) [62 F.T.C. 852], at 41 [62 F.T.C. at 919]. The rule here is the same as the one governing the geographical coverage of such orders. In the absence of some showing that a respondent who has violated the law in connection with the producing or marketing of one of its products could be expected to act differently in its dealings in other products, the public interest in the stopping of the unfair practice once and for all requires an order that protects not just those parts of the public that are affected by the one product, but those that are affected by the others as well. Here, the association's members spend some five months out of each year fishing for crabs, the remaining months fishing for other "aquatic products."<sup>54</sup> The association's charter and

<sup>53</sup> Respondents succeeded in signing up, in 1960, a number of fishermen on the Oregon side of the Columbia River. (In that year, 14 of the 75 crab boats owned by members of the association operated out of Oregon. They caught 764,720 of the 9,075,150 pounds landed by all Oregon fishermen in that year. CX 67.) Ultimately, however, the association was not able to make its "marketing orders" stick in Oregon, and had to let its Oregon members go on the "inactive" list. They continue, however, to pay their 2% dues and contribute 1¢ per pound (about 6¼%) to support the association cannery. The association assures them that there "is no doubt in our mind that some day our association will be much stronger and in a position to overcome our opposing forces \* \* \*." CX 37q.

<sup>54</sup> See, for example, CX 37h, a newsletter to the members: "Hope you are all catching full loads of tuna, salmon or crab, whichever you are fishing."

In support of a motion for continuance of a scheduled hearing in this case from June until October or November, counsel for respondents filed an affidavit (May 3, 1960), stating that a June hearing would make it "impossible for most of them to fish for tuna or salmon later in the season \* \* \*." He pointed out that "commencing on or about the first of June of each year the members of the respondent Association begin to follow other occupations also in the fishing industry and travel to Oregon or to Alaska and California in pursuit of other aquatic products. It is impossible for the members of the respondent Association to earn enough to feed their families from the crab fishing season alone, which ordinarily is a fishing occupation for the members of the respondent Association during the winter months only." This affidavit alleged, for example, that, beginning about the first of June Rydman fishes for tuna off the coast of Oregon and California; Hanson fishes for salmon off the coast of Washington and Oregon; etc. It is only after the closing of the salmon season (late September or early October) that a "large portion of respondents' members are back in the Grays Harbor area preparing for the crab fishing season \* \* \*."

by-laws authorize it to deal in all "aquatic products," not just crabs.<sup>55</sup> That the kind of coercion used by these crab fishermen to exclude other fishermen from the markets is readily adaptable to the catching and marketing of other kinds of fish is eloquently attested by the several cases referred to above, *Manaka v. Monterey Sardine Industries, Inc., supra*; *Columbia River Packers Ass'n v. Hinton, supra*; *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's & Warehousemen's Union, supra*; *Local 36 of International Fishermen & Allied Workers of America v. United States, supra*; *Gulf Coast Shrimpers & Oystermans Ass'n v. United States, supra*. The order's coverage of all "aquatic products" is fully warranted in these circumstances.

## VII

We believe the examiner's order is too broad, however, in one respect, and we are not fully persuaded of the illegality of two practices—"boat rotation" and "sudden price raises without negotiation"—that he would condemn under one or more of the order's provisions. First, we think these activities must be evaluated not as separate and distinct practices to be held fair or unfair in themselves, but as integral parts of respondents' whole attempt at coercive monopolization. However, even considering these two practices in that light, we are unable to say they should be prohibited.

Paragraph 3 of the examiner's order prohibits respondents from conspiring "3. To reduce, curtail, limit, or prevent any person from processing, purchasing or selling or offering to purchase or sell" any aquatic product. Here, unlike the first two prohibitions of the order, there is no requirement that the forbidden result be accomplished "by coercion, threats or intimidation." This provision would therefore be violated if these respondents agreed among themselves to reduce their catch, whether by "sitting on the beach" until the processors agreed to pay the price they were demanding, or by "rotating their boats" so as to divide equally among the members the business of supplying the first few processors that do accept their price demands. To be sure, this is a "limitation on production" and, except for the exemption afforded to these respondents by the Fishermen's Collective Marketing Act, 15 U.S.C. 521, would be a *per se* violation of the Sherman Act and the Federal Trade Commission Act. But the Supreme Court has held, as noted above, that "the general philosophy of [Capper-Volstead] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified

<sup>55</sup> CX 1a; CX 2, p. 3.

competitive advantage—and responsibility—available to businessmen acting through corporations as entities.” *Maryland & Virginia Milk Producers Ass’n, supra*, 362 U.S. at 466. Thus, so long as the members of a cooperative are acting pursuant to an agreement *voluntarily* entered into among themselves, they are to be considered as a single entity for antitrust purposes, the same as an ordinary business corporation with a number of “divisions.” There is no obligation on the single corporation to produce at capacity; it may produce in any volume that it likes, and allocate production among its several “divisions” in such proportions as it sees fit. It may not use coercion, however, to bring others into its fold or to compel others to limit their production or otherwise adhere to its policies. We see nothing unlawful in their limiting production by agreement among themselves, or in their “boat rotation.” While the latter may upset prior arrangements between lending processors and borrowing fishermen, and even delay the payment of just debts, this is a matter of contract between the parties to be settled, if necessary, by private litigation. Paragraph 3 of the order will be qualified to apply only where the interference with production, buying, or selling is accomplished by coercion. (Paragraph 1 is already so limited and therefore cannot be construed, as respondents contend, to prohibit any voluntary agreements authorized by the Fishermen’s Collective Marketing Act.)

We think the same principle is applicable to what the examiner calls the “sudden price raises without negotiation.”<sup>56</sup> It seems that the association, at least in a few instances, deliberately withheld from the processors the fact that it was going to raise prices, giving them as little as 24 hours’ notice. This short notice was apparently intended to harass the processors by preventing them from making future commitments to sell the processed product at a firm price. For example, it is said that one processor was required to turn down a large order from one of his customers because the association would not tell him whether the price of fresh crabs was going to be raised, a refusal that apparently made it impossible for the processor to tell whether the order from his customer would yield him a profit. The examiner speaks of price raises without evidence of “financial need or economic justification”; of “an arbitrary determination of respondents to get more money for the crab”; and of price raises “without adequate reason, negotiation or notice.” We appreciate his concern over the somewhat cavalier manner in which the association delivered its price ultimatums, but we are unable to see a threat to competition in this practice. As we understand the situation, it was not really the shortness of the associ-

<sup>56</sup> Initial decision, p. 80.

ation's price notices that caused the difficulty, but the shortage of crabs from other sources. Otherwise, when the association refused to commit itself on price, the processor would have reacted like any other businessman and found himself another supplier. We think this practice, in other words, is only a symptom, not a disease. Assuming that our order will be obeyed and that nonassociation fishermen, including boats owned by the processors themselves, will once more be able to ply Washington's coastal waters free from intimidation, these processors will then have alternative sources of supply to which they can turn if respondents persist in giving their customers unreasonably short notices of price changes. Insolence will then be impractical, and will be handled much more effectively by the customers themselves than by any order we could enter.

We agree with the examiner's finding that the association acted unfairly in procuring the assistance, even for only a very short time, of the Alaska Fishermen's Union (AFU) in pressuring recalcitrant Washington fishermen to adhere to the association's price policies.<sup>57</sup> *Borden Co., supra*. The examiner's order here, in prohibiting conspiracies "between any one or more respondents and others not parties hereto" to accomplish the prohibited coercion by "any means or method," *Federal Trade Commission v. Cement Institute, supra*, 333 U.S. at 729, effectively precludes any further attempts at securing such outside coercive aid.

We see no necessity for divestiture of respondents' processing plant. While divestiture would be an appropriate remedy if there was no other effective means of dissipating the effects of their attempted monopolization, *Maryland & Virginia Milk Producers Ass'n, supra*, such is not the case here. The monopolization attempt found here was accomplished by coercion and could only continue, we believe, by continued coercion. Deprived of that unlawful weapon, respondents will be restrained by competition from other crab fishermen, including the processors themselves. This, we think, will strike an even balance of power between the two segments of the industry, and protect the public interest in the survival and prosperity of both.

Respondents' exceptions are granted to the extent indicated in this opinion and are otherwise denied. The initial decision and order, modified to conform to the views expressed herein, will be adopted as the decision and order of the Commission.

Commissioner Elman concurred in the result.

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<sup>57</sup> Initial decision, pp. 78-80.

## FINAL ORDER

This matter having been heard by the Commission upon respondents' exceptions to the hearing examiner's initial decision and upon briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that respondents' exceptions should be denied in part and granted in part and that the initial decision should be modified in accordance with the views expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

*It is ordered.* That respondents' exceptions to the initial decision be, and they hereby are, granted to the extent indicated in accompanying opinion and otherwise denied.

*It is further ordered.* That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission to the extent that the findings and conclusions made therein are consistent with the accompanying opinion, and is otherwise not adopted by the Commission.

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

*It is ordered.* That respondents, Washington Crab Association, an incorporated association, its officers, trustees, and members, Richard E. Rydman, Ernest H. Hanson, Floyd Furford, Donald Stedman, Guy Spooner, Leif M. Anderson, Dick Strong, Fritz Bold, G. F. Damon, Charles Fisher, and Gilbert Krigbaum, individually and as officers or trustees and as representatives of the entire membership of respondent Washington Crab Association, and respondent members Richard Branshaw, Ronnie Cowles, Gilbert Dietrich, Virgil L. Gordon, Roy Guanari, William Haavisto, Allen J. Malchow, Joe Nichols, William C. Nelson, Lawrence Peterson, and Lawrence Prest, individually and as members of respondent Washington Crab Association, and all other members of respondent Washington Crab Association, and respondents' representatives, agents and employees, directly or indirectly, or through any corporate or other device in or in connection with the fishing for, purchase or sale, or offering to purchase or sell, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any aquatic product, including, but not limited to Dungeness crabs, crab meat, and any other crab products, whether fresh, raw, cooked, frozen, canned, or otherwise preserved or prepared for consumption, shall forthwith cease and desist

from entering into, continuing, cooperating in, or carrying out, any planned common course of action, conspiracy, understanding or agreement, between any two or more of said respondents or between any one or more respondents and others not parties hereto:

1. To reduce, curtail, limit, or prevent the "catch" or supply of any aquatic product including Dungeness crabs by coercion, threats or intimidation, by any means or method, directly or indirectly, including but not limited to the use or threat of use of physical force or reprisal against persons or property;

2. To compel any fisherman or other person to become a voting or non-voting or otherwise limited member of respondent Washington Crab Association by coercion, threats or intimidation, by any means or method directly or indirectly, including but not limited to the use or threat of use of physical force or reprisal against persons or property;

3. To reduce, curtail, limit, or prevent any person from processing, purchasing or selling or offering to purchase or sell in commerce, as "commerce" is defined in the Federal Trade Commission Act, any aquatic product, including, but not limited to Dungeness crabs, crab meat, and any other crab products, whether fresh, raw, cooked, frozen, canned, or otherwise preserved or prepared for consumption, by coercion, threats or intimidation, by any means or method, directly or indirectly, including but not limited to the use or threat of use of physical force or reprisal against persons or property.

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

Commissioner Elman concurring in the result.

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IN THE MATTER OF

VEAUMONT SPECIALTY CO., INC., ET AL.

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

*Docket C-786. Complaint, July 13, 1964—Decision, July 13, 1964*

Consent order requiring New York City manufacturers of wool products to cease violating the Wool Products Labeling Act by such practices as labeling hats as containing 100% wool when the hats contained substantially different

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## Complaint

fibers and amounts of fibers than thus represented, and failing to disclose on hat labels the percentage of the total fiber weight.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Veumont Specialty Co., Inc., a corporation, and Abraham Baumann, Hazel Baumann and Paul Brooks, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Veumont Specialty Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Abraham Baumann, Hazel Baumann and Paul Brooks are officers of said corporation and cooperate in formulating, directing and controlling the acts, policies and practices of corporate respondent, including the acts and practices hereinafter referred to.

Respondents are manufacturers of wool hats with their office and principal place of business located at 42 West 38th Street, New York, New York.

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

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were hats, stamped, tagged, or labeled as containing 100% wool, whereas in truth and in fact said hats contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool hats, but not limited thereto, were certain hats with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; (3) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order: and

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

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

1. Respondent Veumont Specialty Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 42 West 38th Street, in the city of New York, State of New York.



Respondents Abraham Baumann, Hazel Baumann and Paul Brooks are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

*It is ordered*, That respondents Veumont Specialty Co., Inc., a corporation, and Abraham Baumann, Hazel Baumann and Paul Brooks, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment in commerce, of wool hats or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.
2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

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

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IN THE MATTER OF

SEEMAN BROTHERS, INC.

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

*Docket C-787. Complaint, July 13, 1964—Decision, July 13, 1964*

Consent order requiring a Carlstadt, N.J., processor of frozen fruits and vegetables and wholesaler of groceries through its various divisions and subsidiaries, with sales in the year ending Mar. 3, 1962, in excess of \$134,000,000,

Complaint

66 F.T.C.

to cease inducing and receiving payments for institutional promotions from its suppliers when it knew, or should have known, that such payments were not offered or made available on proportionally equal terms to its competitors purchasing from the same suppliers.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent, Seeman Brothers, Inc., 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 interest of the public, issues its complaint charging as follows:

PARAGRAPH 1. Respondent, Seeman Brothers, Inc., hereinafter sometimes referred to as Seeman, is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 600 Washington Avenue, Carlstadt, New Jersey. Respondent through its various divisions and wholly owned subsidiaries is now and for many years last past has been engaged in processing frozen fruits and vegetables and in selling groceries at wholesale to retail grocery stores. Respondent's sales are substantial, totaling more than \$134,600,000 for the fiscal year ending March 3, 1962.

PAR. 2. In the course and conduct of its business respondent has engaged in, and is presently engaged in, commerce, as "commerce" is defined in the Federal Trade Commission Act. It purchases grocery products from suppliers throughout the United States and causes such products to be transported from various States to other States for distribution and resale to retailers throughout the United States.

PAR. 3. In the course and conduct of its business, respondent has been for many years, and is now in substantial competition in the production, sale and distribution of food products, in commerce between and among the various States of the United States, with other corporations, persons, firms and partnerships.

PAR. 4. In the course and conduct of its business as aforesaid, respondent has induced and received from its seller-suppliers so engaged in commerce, payments of value which accrued to respondent's benefit, for services or facilities furnished by or through respondent

in connection with the handling, sale and offering for sale of the said products of such seller suppliers. Respondent knows or had reason to know, that such payments of value were not offered or made available on proportionally equal terms to respondent's competitors also purchasing from such same seller-suppliers and that such same seller-suppliers were in violation of subsection (d) of Section 2 of the Clayton Act, as amended.

PAR. 5. In the course and conduct of its business in commerce, respondent on June 7, 1961, commemorated its seventy-fifth year in business by holding a dinner dance which was attended by 1,432 persons. Each of respondent's seller-suppliers was sent an invitation to attend the dinner dance, together with from one to ten tickets which cost \$100 apiece. Over 400 suppliers purchased tickets: thirty-six purchased \$400 worth, ten purchased \$600 worth, and twenty-two purchased \$1,000 worth. The receipts from the sale of tickets totaled \$105,800.

PAR. 6. The \$105,800 gross receipts from the sale of tickets to the respondent's seller-suppliers benefited respondent in the following manner:

1. \$16,930.82 of the gross receipts was expended on the publication of 12,000 copies of a booklet entitled "TOWARD NEW HORIZONS—The Story of Seeman Brothers on the Move" and 5,000 copies of a booklet entitled "THE FORCE BEHIND THE PROGRESS" in both of which respondent's growth is depicted together with a lengthy exposition praising respondent's food growing and processing techniques, and respondent's facilities and personnel.

2. \$6,281.40 of the gross receipts was expended upon public relations, publicity and promotional services.

3. \$32,335.90 of the gross receipts was expended on the dinner, the dance, and the entertainment and on providing these without charge to several hundred employees and other guests of the respondent.

4. The remainder, or \$36,280.20, became part of respondent's income for the fiscal year ending March 3, 1962.

PAR. 7. The acts and practices, as alleged above, are all to the prejudice of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the respondent having

been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Seeman Brothers, Inc., is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 600 Washington Avenue, Carlstadt, New Jersey.

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

#### ORDER

*It is ordered.* That respondent, Seeman Brothers, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the purchase of food products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Receiving, or soliciting and receiving, payment from any vendor for institutional promotions when respondent knows, or should know, that such payment is not affirmatively offered or otherwise made available by such vendor on proportionally equal terms to all of its other customers competing with respondent in the sale and distribution of the vendor's products.

2. The term "institutional promotions" as used in this order means promotions primarily designed for, or primarily resulting in, the enhancement of the reputation, name, good will or prestige of the respondent.

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