(1) In three of these cases, there is no quorum of the Commission at the present time for rendering adjudicative decisions on the merits and issuing any orders to cease and desist based upon findings of violation of law. Adjudication of these cases would require reargument of the appeals. The specific practices challenged in these cases occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered significantly since then.

(2) The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

Commissioner Dixon not participating and with Commissioner MacIntyre dissenting for the reasons stated by him in the accompanying dissenting opinion.

IN THE MATTER OF

CROWN PUBLISHERS, INC., ET AL.

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

Docket 8593. Complaint, Sept. 5, 1963—Decision, Dec. 28, 1964

Order requiring a New York City corporation, engaged in publishing, selling, and distributing books and other publications to retailers for resale to the public, to cease preticketing deceptively high prices on their reprinted books, including the reprint edition of "High Iron," by such practices as placing on the jacket thereof a price higher than the prevailing retail price with a printed wavy line through it suggesting a hand drawn ink line, thereby conveying the impression that said books were reduced by retailer.

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 Crown Publishers, Inc., a corporation, also doing business as Bonanza Books, and Nathan

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

PARAGRAPH 1. Respondent Crown Publishers, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 419 Park Avenue South, in the city of New York, State of New York.

Respondent Nathan Wartels is the president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices herein set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of publishing, offering for sale, selling and distributing books and other publications to retailers for resale to the general public.

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

PAR. 4. In the course and conduct of their business, respondents are now, and for some time last past have been, engaged in the publishing, offering for sale, selling and distributing of a book titled "High Iron" by Lucius Beebe. Respondents sell this book to retail book stores for $1.79 and recommend that it be sold to the public for $2.98. On the inside flap of the jacket, the price $6.00 appears with a line drawn through it. Respondents thereby are now, and for some time last past have been representing, directly or by implication, that the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has been $6.00, and that members of the general public who purchase said book at retail at a price lower than $6.00 save the difference between said lower price and $6.00.

PAR. 5. In truth and in fact, the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has not been $6.00. Such price is in excess of the

generally prevailing price or prices at which said book has been sold at retail in the recent regular course of business, in some, if not all, of the trade areas where the representations are made; and accordingly, in such trade areas, members of the general public who purchase said book at retail at a price which is lower than $6.00 do not save the difference between such low price and $6.00.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 6. By the aforesaid practices, respondents now place, and for some time last past have placed, in the hands of retailers, the means and instrumentalities by and through which they may mislead the public as to the price at which said book has been usually and customarily sold at retail in the recent regular course of business, and as to the savings afforded in the purchase of said book.

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

PAR. 8. The use by the 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' books by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. George J. Luberda, for the Commission.

Denning & Wohlstetter, by *Mr. Ernest H. Land* of Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

JUNE 15, 1964

The complaint in this proceeding alleges that, in the course of selling their reprint of the 1938 Edition of the book HIGH IRON, by Lucius

Beebe, in interstate commerce, respondents affixed thereto a dust cover or dust jacket on the left inside flap of which there is imprinted a $6.00 price with a line drawn through it, thus ~~$6.00~~.

Respondents thereby [represent] * * * that the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has been $6.00, and that members of the general public who purchase said book at retail at a price lower than $6.00 save the difference between said lower price and $6.00.

The complaint further alleges that $6.00 is not the usual and customary retail price of said book in any trade area, and that respondents' action in affixing such dust covers upon HIGH IRON places in the hands of retail book sellers a means by which said retail book sellers may mislead the public as to the price at which respondents' reprint edition of HIGH IRON has been usually and customarily sold at retail in the recent, regular course of business in the trade areas involved. This is asserted to be a violation of Section 5 of the Federal Trade Commission Act.

Answer to the complaint was filed in the usual manner; prehearing conferences were convened; prehearing orders issued as a result thereof; stipulations of fact resulting from the prehearing procedures have been filed; hearings have been held; oral and documentary evidence has been received; proposed findings, conclusions and briefs have been filed, and the matter is now before the hearing examiner for decision.

The legally operative facts are not disputed for the most part. It is the legal conclusions to be drawn therefrom which are in dispute.

Complaint counsel has not, in this proceeding, sought to try all of the pricing practices of respondents, but has limited himself to the actionable deception, if any, in respondents' practice of affixing to its reprint edition of the book HIGH IRON the dust jacket hereinabove described (CX 2–CX 5).

Complaint counsel has categorized this as a "preticketing" case. If this were a preticketing case, it would fall within the rationale of *Regina Corporation* v. *F.T.C.*, 322 F. 2d 765 (C.A. 3, 1963). However, in his arguments and in the papers which he has filed, complaint counsel relies upon the rationale of the Federal Trade Commission and the Court of Appeals in *Giant Food, Inc.* v. *F.T.C.*, 322 F. 2d 977. The instant case is neither a classic preticketing case within the rationale of *Regina* nor a classic deceptive pricing case within the rationale of *Giant Food*. The case presents to some extent a problem of deceptive packaging. If the left inside flap of the dust jacket of respondents' reprint of HIGH IRON were altered with the addition of a few explana-

tory words, the deception of which complaint counsel complains would not exist.

Effective January 8, 1964, the Federal Trade Commission adopted *Guides Against Deceptive Pricing*, which were accompanied by a special statement by Commissioner Everette MacIntyre.[1] Such *Guides Against Deceptive Pricing*, *inter alia*, state:

GUIDE I—FORMER PRICE COMPARISONS

One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, *bona fide* price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not *bona fide* but fictitious—for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the "reduced" price is, in reality, probably just the seller's regular price.

A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the *recent, regular course of his business*, honestly and in good faith—and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. And the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, "Formerly sold at $ ------"), unless substantial sales at that price were actually made. (Italic supplied.)

* * * * * * *

If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, "Sale," the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to $9.99," when the former price was $10.00, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered.

At the time that these new Guides became effective, Commissioner Everette MacIntyre's separate statement (Appendix A) included the following:

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[1] Commissioner MacIntyre's statement is attached as Appendix A.

The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

On February 17, 1964, in *Clinton Watch Company*, Docket No. 7434 [64 F.T.C. 1443], in acting upon respondents' petition to reopen proceedings, *inter alia*, the Commission stated:

* * * However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing issued on January 8, 1964.

Simultaneously, Commissioner MacIntyre issued the following statement:

I am compelled to issue a separate statement setting forth my views on the Commission's action in modifying the cease and desist order issued against the Clinton Watch Company in this proceeding. The significant provision amending the order reads as follows:

"* * * the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. * * *"

I do not concur with this action for the following reasons. Respect for the businessmen who come before it, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. The wholesale "pro tanto" incorporation of the provisions in the new Guides, adopted in this instance, affords the Clinton Watch Company no guidance for the regulation of its future conduct with respect to its pricing practices. The Guides, of course, cover a multitude of deceptive pricing practices which may or may not be applicable to the Clinton Watch Company and it is doubtful that the "*pro tanto*" qualification will enlighten either the Commission's staff or respondent as to precisely those terms of the Guides applicable to the Clinton Watch Company. This difficulty is, of course, compounded by the fact that the Guides themselves still require considerable adjudicative definition before either the courts, the Commission, or the business community will be fully advised of their legal significance. In violation of the Supreme Court's injunction in *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948), the Commission here is shifting to the courts the burden of determining the factual question of what constitutes unfair conduct. I am surprised that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders, is in this area embarking on a course which can

lead only to administrative and judicial confusion by issuing orders, the terms of which are so imprecise and indefinite that they are likely to be misunderstood.

On April 7, 1964, in *The Regina Corporation*, Docket No. 8323 [65 F.T.C. 246, 250], the Commission amended its final order in *Regina* so as to require respondent to cease and desist from:

Advertising or disseminating any list or pre ticketing price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area.

At the time that the Commission issued its above order in *Regina* on April 7, 1964, Commissioner MacIntyre again issued a separate statement which included the following:

In rejecting respondent's plea that the order be set aside, the Commission employs rather facile generalizations, glossing over the contention that Regina's past activities as documented by the record do not constitute a violation of the law as now construed. Sweeping aside Regina's arguments on this point, the Commission broadly asserts:

"* * * the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluation could be, or how useful would be a process of continuous reexamination of old, and frequently stale, records."

I cannot adopt this rationale, for the simple reason that it does not come to grips with Regina's contention on this point, which, in fact, raises serious questions meriting a responsive and reasoned reply. At the outset, I may state that the assertion that the Guides are intended to be prospective rather than retrospective in their application avoids the realities of the matter. The Commission has only recently dismissed complaints in a number of proceeding brought prior to the issuance of the revised Guides on the ground that the proof in these proceedings did not meet the new standards. *E.g.*, see *Filderman Corporation, Inc., et al.*, Docket No. 7878 (1964). The Commission's assertion that the Guides are prospective, in rebuttal of respondent's request for recision, is particularly inappropriate because the application of cease and desist orders are not retrospective but prospective as far as respondent's obligations thereunder are concerned. Regina and respondents in other cases may well question the effect on their future business decisions if all Commission policy reversals of this nature will be prospectively applied without regard to what has gone before.

The Commission, in this instance, has ignored another fundamental consideration. As I understand Section 5 of the Federal Trade Commission Act, the Commission is empowered to issue cease and desist orders only upon a finding that a violation of law has occurred.[1] Unless the Commission comes to grips with the issue of whether respondent's past actions documented in this proceeding are violative of the Act, I do not see how, in good conscience, it can keep in effect a cease and desist order bearing in respondent's future conduct. The

Footnotes omitted.

justification that a review of the record in this proceeding would be either unduly troublesome or time-consuming does not absolve the Commission from performing its statutory functions. The Commission will have to grapple with this issue, either in this proceeding or in other deceptive pricing cases wherein outstanding orders issued prior to January 8, 1964, are in effect, and the number of cases in this category are, of course, numerous. The Commission may refuse, at this time, to decide the question of whether a respondent's activities leading to an outstanding cease and desist order are in violation of the law as presently interpreted by this agency. We should not, however, be surprised if the courts are asked to fill the vacuum the Commission has left, if we abdicate our functions in this manner.

The Commission's treatment of this issue ignores the further point that a decision on the merits as to whether respondent's past conduct violates the law as now construed is required here so that at least respondent and those on the Commission's staff charged with enforcing this and similar orders will know what the Commission's position is. While the evasion of this question may stave off some admittedly difficult problems in the immediate future, in the long run it can only lead to further disarray in an area of the law already subject to considerable confusion.[2]

Ignoring the issue of whether the respondent should be under order at all, the Commission has modified Regina's order by elaborating on its "*pro tanto*" modification procedure employed in *Clinton Watch Company, et al.*, Docket No. 7434 (Order Denying Petition To Reopen Proceeding, issued February 17, 1964) [64 F.T.C. 1443], with which I was unable to agree at that time.[3] * * *. [Footnotes omitted.]

The Commission recently reversed this hearing examiner and vacated an order against deceptive pricing issued in *Name Brand Distributors*, Docket No. 8533. (See decision of the Commission and order to file report of compliance issued April 24, 1964 [65 F.T.C. 497, 522].) It issued a pricing order in *Continental Products, Inc.*, Docket No. 8517 [65 F.T.C. 361].

Presently pending before the Commission in *Giant Food, Inc.*, Docket No. 7773, a petition to reopen proceedings was filed by the respondent therein pursuant to Section 3.23 of the Commission's Rules of Practice. At the time this decision is being written no action had been taken by the Commission upon Giant's petition to reopen the proceedings. This hearing examiner presided at the hearings in Docket No. 7773 and his order against deceptive pricing practices of *Giant Food, Inc.*, was sustained by the Federal Trade Commission as then constituted and later by the Court of Appeals for the District of Columbia Circuit. See 322 F. 2d 977. At the time this hearing examiner issued his original order in *Giant Food*, the record justified such pricing order. The Federal Trade Commission agreed that such pricing order should be issued, and the Court of Appeals for the District of Columbia sustained the hearing examiner and the Federal Trade Commission.

In *Arnold Constable Corporation*, Docket No. 7657, in its opinion issued January 12, 1961 [58 F.T.C. 49, 62], the Commission made the following statement:

To such extent as the initial decision's reference to violation of guides may suggest or imply their force and effect as substantive law, such statement is patently erroneous. On the other hand, a statement that the advertising practices found violative of the Act also departed from basic criteria in the guides clearly would not imply such substantive force and effect. The initial decision shall be so amended.

In *Gimbel Brothers, Inc.*, Docket No. 7834, in the initial decision issued January 2, 1962 [61 F.T.C. 1051, 1061], the hearing examiner stated:

32. In summary, this case, insofar as the charges of fictitious pricing are concerned, appears to present squarely the question of the legal effect of the Commission's Guides Against Deceptive Pricing. If the Guides can properly be considered as law or as a substitute for evidence the charges have been sustained. If, on the other hand, the Guides cannot properly be so considered, these charges in the complaint must fall for lack of supporting evidence. In the examiner's opinion the latter view is the correct one.

Upon appeal from the hearing examiner's order in *Gimbel Brothers, Inc.*, Docket No. 7834, the Commission, on July 26, 1962 [61 F.T.C. 1051, 1073], which consisted at that time of three of the present Commissioners, stated:

What, then, is the proper status of the "*Guides*" with respect to a Commission proceeding? When viewed as a compilation and summary of the expertise acquired by the Commission from having repeatedly decided cases dealing with identical false claims, the role of the "*Guides*" becomes apparent. They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out. It is our view that words and phrases of the type set out in the "*Guides*" must be consistently dealt with by the Commission or its decisions will have no meaning or value. *Only by consistent interpretation can some order be brought to the semantic jungle of advertising.* * * * (Italic supplied.)*

The parties to this proceeding agree that HIGH IRON was regularly offered for sale at retail for $6.00 in the various trade areas, at the time it was originally published and copyrighted in 1938 by D. Appleton Century Company, Inc. and for four or five years thereafter. There is no record proof of actual retail sales during that period but it is fair to assume that the original edition of HIGH IRON sold at $6.00

*The hearing examiner's dismissal of the pricing charges against *Gimbel Brothers* was reversed and an order was issued by the Commission against *Gimbel Brothers*. Thereafter, on October 17, 1962, the Commission altered its order in Docket No. 7834 (see final order issued October 17, 1962).

retail. The reprint reissue edition of HIGH IRON involved in this proceeding was brought out by respondents 4 or 5 years ago. It is stipulated that this edition has been customarily selling at retail in all book shops at approximately $3.00 per copy ($2.95 or $2.98).

In advertising their reprint edition of HIGH IRON respondents use the words "Orig. Pub." or some variations thereof which seek to inform a prospective purchaser that HIGH IRON was originally published to sell at retail at $6.00.

The expertise of the Federal Trade Commission extends into the area of adjudicating, without consumer testimony, whether a particular pricing practice is deceptive within the purview of the Federal Trade Commission Act. "* * * Actual consumer testimony is in fact not needed to support an inference of deception by the Commission * * *." *Exposition Press, Inc.* v. *F.T.C.*, 295 F. 2d 869, 872 (C.A. 2, 1961). See also *Erickson* v. *F.T.C.*, 272 F. 2d 318 (C.A. 7); *Basic Books, Inc.* v. *F.T.C.*, 276 F. 2d 718; *Wybrant System Products Corporation* v. *F.T.C.*, 266 F. 2d 571 (C.A. 2, 1959). Consumer testimony has been offered and is in this record. Such consumer testimony as is in this record is not necessarily binding upon the hearing examiner in determining whether respondents' pricing practices were and are deceptive within the intent and meaning of the Federal Trade Commission Act. Complaint counsel's consumer testimony included that of the following witnesses, among others, from Philadelphia and surrounding areas:

Leonard Levitt, owner and operator of a card and book shop in the City of Philadelphia;

David Bagelman, a book dealer for 35 years in Philadelphia;

Irving Shusterman, owner for 11 years of The Whitman Book Shop in Philadelphia;

William M. Davidson, a stockbroker and investment banker in Philadelphia;

Merrill G. Berthrong, Librarian at the University of Pennsylvania since 1956;

Harold S. Stine, Professor of English at the University of Pennsylvania;

Ted Petterson, a student at Temple University, in Philadelphia;

Miss Edwina Stuczynski, a student at Temple University who was studying to be a teacher;

Jesse C. Mills, Assistant Director of Libraries at the University of Pennsylvania;

George A. Barnett, operator of a restaurant and bar in Philadelphia;

Miss Elizabeth Maxwell, a secretary-receptionist in the office of the president of the University of Pennsylvania;

Mrs. Barney Johnson, a secretary in the College of Liberal Arts at Temple University;

Lawrence Foster, a student at the University of Pennsylvania, a graduate student in philosophy, and also a teacher in courses in philosophy at the University of Pennsylvania;

Anita Larmann, a student at Temple University who was studying to become a teacher.

On December 16, 1963, a Stipulation of Facts was filed. Nathan Wartels, respondent, and chief executive officer of the publishing complex of which respondents Crown Publishers, Inc., a New York corporation, and Bonanza Books are a part, also testified. Proposed findings of fact, conclusions of law and briefs have been filed. All proposed findings which have not been incorporated herein in the form or substantially the form proposed hereby are rejected. Such motions, if any, which have heretofore been made which have not previously been specifically ruled upon hereby are overruled and denied. The hearing examiner has carefully considered the entire record in this proceeding, including the pleadings, the evidence, the proposed findings and conclusions filed by counsel, and, based upon such evidence makes the following:

FINDINGS OF FACT

The following findings of fact (paragraphs 1–8 inclusive) are adopted verbatim from the stipulation filed December 16, 1963. Other findings dealing with similar or the same subject matter may be supplementary to or in addition to the stipulated findings. If counsel are to be encouraged to stipulate in these matters, such stipulations should, whenever possible, be adopted in *haec verba*. Therefore the hearing examiner hereby finds: (See Commission's opinion in *Purolator Products, Inc.*, Docket 7850, p. 7 [65 F.T.C. 8, 26].)

1. Crown Publishers, Inc. (sometimes hereinafter referred to as Crown) 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 419 Park Avenue South, in the city of New York. Crown was chartered in the State of New York on February 6, 1933, as the Outlet Book Co., Inc., with its name changed by amendment dated October 4, 1952, to Crown Publishers, Inc. In addition to doing business under its corporate name, Crown also trades and does business under the several trade names of Bonanza Books, Arcadia House and Publishers Central Bureau Division.

2. Respondent Nathan Wartels is the president of respondent Crown Publishers, Inc. Mr. Wartels owns 50 percent of the issued authorized capital of 200 shares no par value common stock of Crown Publishers, Inc. The other 50 percent of Crown stock is owned by a single individual. Mr. Wartels takes an active part in the day-to-day management of Crown. In conjunction with the other stockholder, he formulates, directs and controls the policies, acts or practices of Crown, except that

such acts are performed solely in his capacity as one of the managing officers of Crown.

3. Crown engaged in the business of publishing, selling and distributing general fiction and non-fiction illustrated books and other publications to retailers for resale to the general public and is in competition with others in the sale of books and other publications of the same general nature and kind sold by Crown. The majority of respondents' sales are made to over 3,000 department stores and book shops located throughout the United States. Crown's gross annual volume of sales has been over $5,000,000 annually. Crown employs between 100–175 people depending upon business conditions.

4. In the course and conduct of its business, Crown has shipped books and other publications which it has sold from its place of business in the State of New York to retailers located in various States and in the District of Columbia, and has maintained, and does maintain, a substantial course of trade in books and other publications in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of its business, Crown publishes, sells and distributes a book by Lucius Beebe entitled HIGH IRON. For the past three (3) years, Crown has sold over 6,000 copies of HIGH IRON annually. Over 50 percent of Crown's sales of the book HIGH IRON have been made to purchasers located in States other than the State of New York.

6. HIGH IRON was originally published and copyrighted in 1938 by D. Appleton Century Company, Inc. The publisher of the original edition of HIGH IRON recommended that such book be sold at retail for approximately $6.00. The original edition of HIGH IRON has been out of print and generally unavailable in retail stores since approximately 1948.

7. Crown sells HIGH IRON to retail stores for $1.79 and recommends to the retailer that it be sold to the public for $2.98, which is the usual and customary selling price of HIGH IRON, as published by Crown, in Crown's trade areas. To the best of respondents' knowledge, the edition of HIGH IRON published and sold by Crown has never sold at retail for $6.00.

8. On the inside flap of the dust jacket of HIGH IRON, as published by Crown, there is printed in the upper right hand corner where the suggested retail selling price of a book is usually and customarily printed by the publisher the following: "Illustrated, ~~$6.00~~." In the customary place for such information, *viz.*, on the back of the title page, there appears a notice of copyright in 1938 by D. Appleton Century Company, Inc., and a notice that the edition published by

Bonanza Books, a division of Crown, is published by arrangement with Meredith Press. At no place in HIGH IRON, as published by Crown, or on the dust jacket thereof, does the suggested retail price of $2.98 appear.

In addition, the hearing examiner further finds:

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

10. Crown is a publisher and distributor of books for sale in the retail trade, to book stores and to book departments in department stores (Tr. 5). Crown does not have its own manufacturing facilities for printing or binding books (Tr. 6–7) but maintains its own shipping and billing department (Tr. 12–13). Books sold under the Crown name are original publications (Tr. 7, 9–10). Crown's activities are confined entirely to publishing on its own behalf and selling for other publishers (Tr. 19, 22–23). Crown ships books all over the United States and all over the world (Tr. 26).

11. Bonanza Books is a division of Crown and a trade name used by Crown for publication of reprint editions of books originally published either by Crown or by unrelated publishers. Bonanza books are usually sold at prices below the list prices of the original editions (Tr. 8–9, 18).

12. Nathan Wartels is president and secretary of Crown (Tr. 18). He owns 50 percent of the issued capital stock and Robert Simon owns the other 50% of the issued stock (Tr. 6). Wartels is president and secretary of Outlet Book Company, Inc. (Tr. 18) and treasurer of Lothrop, Lee and Shepard Company (Tr. 18) which publishes children's books only (Tr. 16). Outlet Book Company deals in publishers remainders (Tr. 18). A remainder is usually unsold book inventory on the shelves of the original publisher. Usually Crown does not sell remainders (Tr. 21). The overall Wartels-Simon-Crown-Outlet-Bonanza-Lothrop, Lee and Shepard-Arcadia House publishing complex does approximately $5.000,000 per year (Tr. 21) business and employs between 150 and 175 persons. From July 1, 1962, to June 30, 1963, Crown's sale of 9,940 copies of HIGH IRON at $1.79 per copy produced $17,792.60 income. This was about .3 of one percent of the $5,000,000 plus gross revenue of the Crown publishing complex. Mr. Wartels has been in the publishing business since 1933 (Tr. 11–12).

13. By contract entered into October 18, 1961, Crown obtained from Meredith Press the exclusive rights to print and publish English language reprint editions of the book HIGH IRON by Lucius Beebe (CX 26 A–B). The retail selling price of the original edition of HIGH IRON in 1948 was $6.00 (Tr. 63; Cumulative Book Index 1943–48, page 1040).

No proof of actual sales at that price is in this record but it is a fair inference that the original edition was sold for $6.00. When Crown and Outlet secured the reprint rights to HIGH IRON in 1961, the original edition was selling in the out-of-print market for $15.00 and $25.00 (Tr. 62). The contract with Meredith provided that reprint editions published thereunder were to be retailed at not less than $1.98 and not more than $3.98 (CX 26 A). Crown sells its reprint edition of HIGH IRON to retail stores for $1.79 and recommends that it be sold to the public for $2.98 (Stipulation dated December 12, 1963, page 4; CX 6–CX 17).

14. On the inside flap of the dust jacket of HIGH IRON, as published by Crown, there is printed in the upper right corner where the selling price is customarily printed the following: "Illustrated, ~~$6.00~~." (CX 3.) $2.98 was suggested by respondents as a retail price for respondents' reprint edition of HIGH IRON. Such price is within the retail price range prescribed for the reprint edition of HIGH IRON in the Meredith contract (CX 26). The suggested retail price of $2.98 is not printed on the dust jacket (CX 3). The advertisements of HIGH IRON furnished by Crown to retailers carry, *inter alia*, the following price indicia: "Orig. Pub. at $6.00—Only $2.98." (CX 18A–CX 24D.)

15. Crown has department heads for manufacturing (production), editorial, sales, advertising, publicity, and financial matters (Tr. 6, 25). Crown's production department directed the use of the indicia "Illustrated ~~$6.00~~" on the dust jacket of HIGH IRON. This decision was made jointly by Nathan Wartels, Robert Simon (the stockholders) Crown's sales manager, and Crown salesmen (Tr. 6, 28).

16. Crown's edition of HIGH IRON has on the back of the title page:

This edition published by Bonanza Books, a division of Crown Publishers, Inc., by arrangement with Meredith Press.

17. During the period July 1, 1962–June 30, 1963, Crown sold 9940 copies of its edition of HIGH IRON (CX 28–29). Crown's edition of HIGH IRON has usually been sold in book stores for the $2.98 retail price suggested by Crown (Tr. 68, 72, 76). Crown has never received any complaint from any book seller or retail purchaser with respect to the price indicia shown on the dust jacket of HIGH IRON (Tr. 62–63).

During the middle of 1963, Crown discontinued the practice of printing "$6.00" on the dust jacket of HIGH IRON pending conclusion of this proceeding, but wishes to be able to continue to show in this manner that the original selling price no longer applies (Tr. 63).

18. The testimony of the bookstore operators, introduced by complaint counsel, showed that those witnesses operated very small shops which did little or no advertising (Tr. 70, 73, 77) and which handled very few copies of HIGH IRON, *e.g.*, the Charles Bagelman Bookshop had purchased only three copies (Tr. 73).

19. None of complaint counsel's consumer witnesses testified to purchasing either the original or Crown's edition of HIGH IRON. Some of the witnesses did not testify to making any purchases of books (Witnesses Mills, Barnett and Maxwell). Three witnesses (Petterson, Stuczynski and Larmann (Tr. 95, 100, 125, 128)) were students whose book purchases were apparently text books or books related to their studies. The testimony of these witnesses does not support a finding that the college students, Petterson, Stuczynski, or Larmann, had ever purchased the type of book involved here. The witnesses Berthrong and Johnson (Tr. 89, 119) seldom purchased a book in commercial retail stores. The witnesses Stine, Foster, and Larmann (Tr. 93, 125, 128), exhibited some confusion as to whether or not Crown's edition was the original publisher's edition. "If I hadn't been so told, I would have thought this was the original dust cover" (Tr. 93). At page 84 Commission witness William M. Davison testified:

> Q. Mr. Davison, if you saw another copy of High Iron with a similar indication on the dust jacket of $6, with a line also printed through it, is it your opinion that the price of that book, the selling price was $6?
>
> * * * * * * *
>
> The WITNESS. I wouldn't have an opinion as to whether it was selling for less than $6 or not. I would look at the cancellation and probably ask them what the price was. Undoubtedly, a bookstore would have it penciled in there somewhere, and this is canceled.

20. It is not a misrepresentation or deception actionable under the Federal Trade Commission Act for respondents to state to or make known to prospective customers the true price at which the original edition of HIGH IRON was sold at retail.

21. Respondent Nathan Wartels, whose testimony hereinafter set forth is uncontradicted in the record, testified (Tr. 61, *et seq.*):

> * * * There are a number of reasons for this, but the most important ones are first, book sellers look to have customers come in and browse around. They may come in for some particular book and they look around on the shelves. They see a book, and if a book that is marked for $10 or $2, that tells them what the price is. They don't have clerks standing by waiting on them, and they have to have some kind of pricing for the customer.
>
> They also have to have some kind of pricing for the clerks. Clerks in book stores are not the ablest people, and in book stores, a store like Crox [Krochs] in Chicago, they may have 5,000 titles.

Almost any book store will have 500 to 2,500. Nobody knows off the bat what the prices are, so it is the custom almost invariable, to print a price there.

Now, at the time we first produced High Iron, that book was selling in the out of print market for $15 and $25.

Mr. LUBERDA. Objection.

HEARING EXAMINER GROSS. Overruled.

Mr. WARTELS. We did not want anybody to sell it at even $6 or any price higher, because we wanted it sold at the price we suggested of $2.98, or thereabouts. Some stores might have a price line of $3 or some $3.95 or whatever. Yes, we wanted to make sure that the public knew this was a cut price, so we cut the price and drew a line through it, which is the custom of book sellers.

If they have books left over, and they can't sell them, they will put a line through the price and put in pencil, something beneath it. This is what we suggested to book sellers to put the price there, and most book sellers put the price someplace on the book in pencil or otherwise.

This seemed like the fairest way to do it. This seemed to be fair to inform the public that the price of this book was cut. There is the cut, and we ourselves, never had any complaint about this nor even an eyebrow raised by any book seller or by any consumer.

Any consumer knows, he can return a book if he bought a book from a bookstore and he can get the full credit or refund, just as the book seller can get his full credit or refund from us.

We felt in this way, the surest, fairest way to get the public to know that this book was being produced at a reduced price, was to do this. We also have something in the book that says it is an edition printed by arrangements with the original publisher. That seemed to us, to be the fairest and most proper way and I think that is about all there is to say.

Q. How did you get the $6, which you have marked on the book?

A. Meredith Press, told us that the price was $6. We checked it. There are a number of reference books in the book industry. There are a list of books in print, and their authors and their price. We checked that and it is in the record, that this book was priced at $6.

Q. Mr. Wartels, have you discontinued this practice of indicating a price $6, with a line through it?

A. Yes. We discontinued it about six or eight months ago. We discontinued this practice.

Q. Do you have any plans to resume this practice?

A. We wanted to see what we are privileged to do. I hope we are not restricted.

22. The hearing examiner has not made a finding that this proceeding is in the public interest. The institution of adjudicative proceedings before the hearing examiner by the Federal Trade Commission in itself constitutes a *prima facie* finding that the proceeding is in the public interest. Nothing in this record strengthens that *prima facie* finding. The limited number of people interested in purchasing HIGH IRON and the small dollar amount of sales of the book, plus the other facts which are set forth in this decision would ordinarily compel a finding that this proceeding is not in the public interest. However, the dismissal of a proceeding on the grounds that it is not in the public

interest usually must be ordered by the Federal Trade Commission. In very unusual circumstances where very substantial evidence in the hearing record justifies a finding by the hearing examiner of "no public interest," the hearing examiner might be justified in dismissing the proceeding. The hearing examiner is not doing that in this proceeding, but the Commission might well, upon this record, enter an order of dismissal upon such grounds.

* * * It is not in the public interest to kill this gnat with Commission dynamite. See *Exposition Press, supra*, 295 F. 2d 869, at 873.

23. The book HIGH IRON is not a fungible product, as, for example, are clothing, household appliances and food stuffs. A person intent upon purchasing HIGH IRON would rarely, if ever, be tempted by virtue of a price reduction or otherwise to buy, instead of HIGH IRON, a book of poetry, a cook book, or a mystery novel. The book HIGH IRON, in all probability, would be of interest chiefly to railroad "buffs" (see testimony of William M. Davison). Since the book can be purchased at all retail book stores at approximately the same price, this price will not be the decisive factor in determining whether a person buys HIGH IRON at Brentano's Book Store or Krochs Book Store, or any other book store.

24. There is no evidence in this record that respondents' dust cover attached to the book HIGH IRON has injured or would have the capacity to injure competition, either at the wholesale or retail level. No injury to competition has been proven in this record.

25. The Federal Trade Commission Act, originally premised upon a protection of competition, has, by virtue of the Wheeler-Lea Amendments, been extended to preventing "deceptive acts or practices in commerce." What injury or potential injury to consumers is proven in this record? To what extent, if any, does the dust jacket (CX 3) deceive the persons ordinarily interested in purchasing HIGH IRON? The testimony of complaint counsel's witnesses does not prove by "reliable, probative and substantial evidence" (Federal Trade Commission Rules of Practice § 3.21(b)) in the record that there was any deception as set forth in the language of the complaint. Wartel's uncontradicted testimony is to the contrary.

26. The late President John F. Kennedy's PROFILES IN COURAGE was originally published in 1956 by Harper's Publications, Inc., 39 East 35th Street, New York, New York, in a hard cover to retail at $3.50 (see Cumulative Book Index for 1956). It was published in a Cardinal paperback edition by Pocket Book, Inc. in March 1957 to sell for 35¢. A prospective purchaser of PROFILES IN COURAGE would not buy a book different from PROFILES because he or she could get the book cheaper

than PROFILES. Such purchaser might prefer the hard cover edition of PROFILES to the paperback edition of PROFILES for several different reasons, which might include the price savings. However, it would be most unusual for a prospective purchaser who had fully determined to buy a copy of PROFILES IN COURAGE to be induced because of price to buy instead a book of poetry, a cook book or a mystery.

27. The instant complaint confines itself to an attack solely upon the use of the words "Illustrated, ~~$6.00~~" (CX 3) on the inside flap of the dust cover, but the order submitted by complaint counsel seeks a much broader injunction. (See complaint counsel's proposed Findings of Fact, Conclusions of Law and Order filed April 28, 1964, pp. 12 and 13.)

28. There is no assertion in the complaint nor proof in this record that respondents have used false, misleading or deceptive representations to advertise HIGH IRON.

29. Complaint counsel has not asserted nor attempted to prove any deception by any of the respondents other than use of the words, "Illustrated, ~~$6.00~~" on the left inside dust jacket of HIGH IRON. In the absence of any allegation, or any evidence, that respondents have engaged in any other false misleading or deceptive practices with reference to any other book or books which they have published, it would be unfair and unjust to put their entire publishing complex under the restraint of a broad cease and desist order relating to practices which have neither been alleged nor proven.

30. It appears, therefore, that the maximum to which complaint counsel is entitled under the law as applied to the record made in this proceeding is an injunction against respondents' resumption of the use of CX 3 in its objectionable form. The objection can be easily obviated by respondents' printing under the word "6.00" on the dust cover or in immediate juxtaposition thereto a legend such as "Originally published at," or words of similar import.

ORDER

It is, therefore, ordered, That respondents Crown Publishers, Inc., a corporation, and its officers, also doing business as Bonanza Books and Nathan Wartels, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their reprint edition of the book HIGH IRON, by Lucius Beebe, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease

and desist from attaching to said book a dust cover or dust jacket with the former price of $6.00 imprinted thereon without placing in immediate proximity or juxtaposition thereto, words or abbreviations which make it unmistakenly clear that $6.00 was the price at which the original edition of HIGH IRON was offered for sale to the public at retail.

APPENDIX A

STATEMENT OF THE NEW PRICING GUIDES

By MACINTYRE, *Commissioner:*

I am wholly in accord with the professed aim of the Commission to clarify some of the more troublesome problems in the deceptive pricing area. I too believe that we should take a reasonable approach in these matters and that the businessman should know where he stands. However, I fear that these Guides, albeit unintentionally, on balance have raised a number of new and troublesome issues which outweigh any solutions to older dilemmas which they may suggest.

The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

I do not intend at this point to outline my disagreement with the Guides in every detail. If necessary, that can be done as specific problems arise. Suffice it to say for the present, the Guides apparently present us with a new vocabulary in the context of fictitious pricing which will require definition. That process may well be difficult and time consuming. I need only cite one example to make my point. In connection with bargain advertising of retail price comparisons, *i.e.*, the offer of goods at prices purportedly lower than those being charged by others in the same trade area, the Guides state:

> * * * Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be *reasonably certain* that the higher price he advertises does not *appreciably exceed* the price at which *substantial* sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving * * *. (Emphasis supplied.)

The requirement that a retailer should be "reasonably certain" that the higher price does not "appreciably exceed the price at which substantial sales of the article are being made in the area" is open to numerous interpretations. The phrase "reasonably certain" substitutes a subjective for what has hitherto been an objective test. How a businessman is to document the state of his mind in this respect is not pointed out. Possibly the ingenuity of counsel over a period of time may supply some answer to this and other questions. The problem remains, however, whether there is any real advantage in abandoning tested precepts which are now understood by business, the courts and the Commission staff.

To continue, hitherto the standard applied in these cases has been the "usual and customary" retail price in a given area, a term given content and meaning by numerous previous decisions. The proper interpretation of the requirement that the advertised higher price may not "* * * *appreciably* exceed the price at which *substantial* sales of the article are being made in the area * * *" is at best conjectural. A considerable number of cases will have to be brought and considered by the courts and the Commission before either our staff or the business community can be expected to operate with any confidence under the new standard.

A very important reversal of policy is, of course, contained in Guide III, which deals with advertising of retail prices suggested or established by manufacturers or other nonretail distributors. In effect, manufacturers or other nonretailers are invited to suggest list prices or preticket their items with only the vaguest standards to determine their responsibility for taking such measures. Whether the Commission will, in the future, be able to take effective steps against fictitious pricing on a regional or national scale under the new dispensation remains to be seen.

Opinion of the Commission

DECEMBER 28, 1964

By Reilly, *Commissioner:*

The complaint herein charges respondents with deceptive preticketing of books in violation of Section 5 of the Federal Trade Commission Act and the matter is now before the Commission on the appeal of counsel supporting the complaint from the hearing examiner's initial decision. The examiner did not specifically find that the challenged

practice was unlawful but nevertheless concluded that an order to cease and desist should issue. Counsel supporting the complaint contends that the findings upon which this order is based are deficient and, in part, erroneous and that the order is inadequate.

Respondents are engaged in the business of publishing, selling and distributing general fiction and non-fiction illustrated books and other publications to retailers for resale to the general public. A part of this business, which is conducted by corporate respondent through its Bonanza division, consists of the publication of books originally published by corporate respondent or by other publishers and which have gone out of print. These reprint editions are always sold at a reduction from the suggested or list prices of the original editions, individual respondent having testified in this connection that out-of-print books could not profitably be printed and sold at their original prices.

This case involves the alleged deceptive preticketing of one of these reprints, a book by Lucius Beebe entitled "High Iron," originally published in 1938 by D. Appleton Century Company, Inc. The publisher's recommended retail price for the original edition of this book was $6.00. By 1948 this edition was out of print and was generally unavailable in retail stores.[1] In 1961 respondents acquired from Meredith Press (the successor to the original publisher) the exclusive rights to print and publish a reprint edition of this book. The contract between respondents and Meredith provided that the reprint edition published thereunder was to be retailed at not less than $1.98 and not more than $3.98. This reprint edition has been sold by respondents to retail stores for $1.79 and respondents have recommended that it be sold to the public for $2.98. This recommended retail price does not appear anywhere on the book, but on the inside flap of the dust jacket, the price $6.00 appears with a line drawn through it.

The complaint alleges in effect that by preticketing the book in the aforesaid manner respondents have represented, and have placed in the hands of retailers the means of representing, that the customary price of the reprint is $6.00 and that members of the public who purchase the book at retail at a lower price save the difference between such lower price and $6.00. It further alleges that these representations are misleading and deceptive since the generally prevailing retail price of the book is $2.98.

Although the principal issue before the hearing examiner was whether the practice challenged by the complaint had the capacity or tendency to mislead or deceive the public, he made no specific find-

[1] The record shows that the original edition of "High Iron" was selling at this time in the out-of-print market for $15.00 to $25.00.

ing on this point but ruled instead that there was no proof that the practice was calculated to deceive, or that it caused actual deception or injury to competition. Aside from the question of whether or not these conclusions are factually correct, they are wholly unnecessary. "A deliberate effort to deceive is not necessary nor must the Commission find actual deception or that any competitor of petitioner has been damaged * * *," *Pep Boys-Manny, Moe & Jack, Inc.* v. *Federal Trade Commission*, 122 F. 2d 158 (3d Cir. 1941). We can only surmise that the examiner found some likelihood of deception in the practice since he included in his initial decision the order to cease and desist.

Practices of the type involved in this proceeding are discussed in Guide III of the Commission's Guides Against Deceptive Pricing. The first two paragraphs of this Guide read as follows:

> Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.
>
> There are many methods by which manufacturers' suggested retail or list prices are advertised: large scale (often nation-wide) mass-media advertising by the manufacturer himself; preticketing by the manufacturer; direct mail advertising; distribution of promotional material or price lists designed for display to the public. The mechanics used are not of the essence. These Guides are concerned with *any* means employed for placing such prices before the consuming public.

In this case respondents have two "list" prices for the same article. The one, $2.98, is the retail price suggested to the dealer, and the other, $6.00, is the price placed on the dust jacket to be seen by the prospective purchaser. Consequently, when the book is offered for sale at any price less than $6.00, the prospective purchaser may well believe that the book is being offered at a reduction from the higher price.

Respondents argue, however, that by drawing a line through the $6.00 they have given notice to the customer that the prevailing price of the book is not $6.00. But even if the prospective purchaser would realize, as respondents contend, that the publisher, and not the dealer, had placed the line through the "$6.00," thus indicating that this price was no longer in effect, he would have no reason to believe that the price referred to by the publisher was that of the original edition and

had not been used for almost 15 years.[2] In the absence of some disclosure to the contrary, the consumer could reasonably believe that the book was being offered at a reduction from the price at which it had recently sold and that he was therefore receiving a genuine bargain.

It is also apparent from our observation of the pricing claim in question, as well as from the testimony of the public witnesses called in support of the complaint, that the purchaser cannot easily discern whether the line was printed through the "$6.00" by the publisher or whether it was made in ink by the retailer. In this connection, the line is not straight but slightly curved and tapered, closely resembling a line drawn by a pen.[3] Consequently, we think there is no basis for respondents contention that the purchaser would necessarily know that $6.00 is not the prevailing price of the book. Believing that the line through the "$6.00" had been made by the retailer, he would be under the impression that the book was being offered by the retailer at a reduction from the list or prevailing price.[4]

Another assignment of error in complaint counsel's brief concerns the examiner's apparent rejection of the testimony of the various consumer witnesses. We cannot be certain from reading the initial decision whether or not the examiner completely disregarded this evidence, but it is clear that he considered it to be of little value because most of the witnesses had either not purchased "High Iron" or a similar book or because they had not frequently purchased books in commercial retail stores. It is obvious that the examiner did not understand the purpose of this testimony, apparently believing that it was intended to show actual deception resulting from the pricing claim in question. These witnesses, however, were called solely for the pur-

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[2] Guide I of the above-mentioned Guides Against Deceptive Pricing gives the following illustrations of fictitious price comparisons: "An advertiser might use a price at which he never offered the article at all; he might feature a price which was not used in the regular course of business, *or which was not used in the recent past but at some remote period in the past, without making disclosure of that fact;* he might use a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced." (Emphasis added.)

[3] One of the witnesses who had been informed that the line was printed testified "It's hard for me to tell just looking at it right now, that it has not been crossed out by hand." Another was asked on cross examination whether "it does not appear to you that the line is printed across the $6 in the same kind of printing as the $6 itself?" His answer was "No. I confess it does not look like that to me."

[4] The following testimony was given on cross examination by a consumer witness:

"Q. You have seen books in stores, have you not, with a price printed on there, but marked out with a pencil?

A. Yes, definitely.

Q. Can you see any difference between that sort of marking and where the price is such as we have here, the $6 with the line printed through it at the same time?

A. Well, I would assume one case—if the pencil line had been drawn, if the line was a pencil or pen, I would assume that the dealer had drawn the line and was selling it for less. The book store owner or retailer was selling it for less, that's what I would assume * * *."

pose of testifying as to their understanding of respondents' pricing claim and the fact that they had not purchased respondents' book or a similar book or were not inveterate book buyers has no bearing on their competence to so testify. *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission*, 208 F. 2d 382 (7th Cir. 1953), *Gulf Oil Corp.* v. *Federal Trade Commission*, 150 F. 2d 106 (5th Cir. 1945), *Stanley Laboratories, Inc.* v. *Federal Trade Commission*, 138 F. 2d 388 (9th Cir. 1943).

The examiner also pointed out in his initial decision that the consumer testimony was contrary to the "uncontradicted" testimony of individual respondent Nathan Wartels. Mr. Wartels testified in effect that the sole purpose of the preticketing was to prevent retailers from selling the book at $6.00 or some higher price and to inform the public that the book was being sold at a reduction from the price of the original edition. This testimony however relates only to respondents' reason for preticketing the book and, even if given full weight, would not rebut the testimony of the public witnesses nor indicate that the practice did not have the capacity to deceive. "A deliberate effort to deceive is not a necessary element in unfair competition," *Federal Trade Commission* v. *Balme*, 23 F. 2d 615 (2d Cir. 1928). "Decision whether material facts have been misrepresented does not depend upon the good or bad faith of the advertiser," *Koch, et al.* v. *Federal Trade Commission*, 206 F. 2d 311 (6th Cir. 1953); *Feil* v. *Federal Trade Commission*, 285 F. 2d 879 (9th Cir. 1960); *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941). Moreover, we are of the opinion, contrary to the testimony of respondent Wartels, that the challenged practice was calculated to deceive the public into believing that the retailer was selling the book in question at a reduction from the generally prevailing price. Aside from the fact that respondents did not disclose that the preticketed amount was a 1938–1948 price and the fact that the cancellation of the "$6.00" appears to have been made by the retailer, there is in the record advertising copy furnished by respondents to retailers which conveys the impression that the usual or prevailing price of the book, $2.98, is a special sale price offered by the individual book store. The following are examples of such advertisements:

ANNUAL BOOK SALE!

* * * * * * *

1172. HIGH IRON: A Book of Trains. By Lucius Beebe. Nearly 200 photographs in this cavalcade of railroading from the woodburners to the streamliners. Orig. Pub. at $6.00—only $2.98.

* * * * * * *

⅓, ½ AND MORE OFF FORMER PRICES.

MID-YEAR SALE!

Fascinating books, on all subjects, from presses and publishers all over the world are being offered in this spectacular book sale at truly amazing savings * * *

* * * * * * *

1172. HIGH IRON: A Book of Trains. By Lucius Beebe. Nearly 200 photographs in this cavalcade of railroading from the woodburners to the streamliners. Orig. Pub. at $6.00—only $2.98

* * * * * * *

CHINOOK BOOK SHOP
208½ NORTH TEJON STREET
COLORADO SPRINGS, COLORADO
SUPER
BOOK SALE!
⅓ to ½ off AND MORE!

Even though the $6.00 price is preceded by the words "Orig. Pub. at," we think it clear that a person reading the above advertisements would believe that the retailer, in whose name the ad appears, was offering a reduction from the price at which he and other retailers generally sold the book "High Iron." Certainly, the representations that the dealer is conducting an "Annual" or "Mid-year Sale" at "⅓, ½ And More Off Former Prices" or "⅓ to ½ Off and More" convey this erroneous impression, and the reader is not informed by the words "Orig. Pub." that the higher price, $6.00, was not the prevailing price at the time of the "sale." It would appear therefore that respondents placed this means of deception into the hands of its dealers as part of an over-all plan to misrepresent the existing price of the book and to mislead the consumer into believing that he would save the difference between the preticketed price and the price at which the book was generally sold.

We are also unimpressed with the examiner's conclusion that there is no public interest in this proceeding. In view of his findings of no intent to deceive, no actual deception and no injury to competition it would have been difficult for him to come to any other conclusion. Nor does the fact that only 16,000 copies of the book "High Iron" were sold indicate that the matter is so trivial as to require dismissal. Contrary to the examiner's holding, the evidence adduced in this proceeding confirms our initial determination of public interest.[5]

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[5] "It is in the interest of the public to prevent the sale of commodities by the use of false and misleading statements and representations," *L & C Mayers Co., Inc.* v. *Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938); *Parke, Austin & Lipscomb, Inc., et al.* v. *Federal Trade Commission*, 142 F. 2d 437 (2d Cir. 1944).

The record shows in this connection that a substantial part of respondents' business consists of publishing books which have been out of print for a period of years and that these reprint editions are invariably sold for substantially less than the original editions. In the circumstances shown to exist, we think it quite probable that respondents may as a general practice preticket these reprints with the list prices of the original editions. The record shows in this connection that a considerable number of them were at least advertised in the same manner as "High Iron." Consequently, we think this proceeding will serve to deter respondents and any of their competitors who may be engaged in similar practices [6] from using a discontinued list price of an original edition of a book to mislead or deceive the public as to the prevailing price of a reprint edition, or to place in the hands of others the means of so doing.

Accordingly, we wish to make our position clear with respect to the practice of preticketing or advertising a reprint edition of a book with the discontinued or obsolete price of an original edition when the latter amount is in excess of the prevailing price of the reprint. This practice has the capacity and tendency to deceive since the prospective purchaser who sees the original or higher price in advertising or on the book itself is unaware that such price is not the price at which the reprint is generally sold. Consequently, he may be led to believe that the article is being offered at a reduction from this price and that he is receiving a genuine bargain. This is not to say however that respondents may not refer to the price at which an original edition of a book was sold if they consider this information to be relevant in connection with the sale of a reprint edition. But if they do so, they should clearly disclose that this price is not the prevailing price of the reprint.

We also wish to emphasize with respect to the use of advertising copy of the type prepared by respondents that whether or not reference is made therein to an original price or to a specific former price, any representation that the publisher's list price of the reprint, or the price at which such reprint is customarily sold at retail, is a "special" or "sale" price is misleading and deceptive, and the practice of furnishing to dealers advertising containing such representations constitutes a violation of Section 5 of the Federal Trade Commission Act. Advertising claims that a reprint or other book is "on sale" or is being sold at a special price may of course be used, or furnished to dealers, in those instances where such book is being offered at a bona fide reduc-

[6] We have been advised by respondents' counsel that there is a widespread practice among book publishers of using advertising of the type shown in this record.

tion from the price at which it had been generally sold in the recent past.

Complaint counsel's final contention concerns the scope of the order to cease and desist contained in the initial decision. This order relates only to the preticketing of the book "High Iron" and would do no more than prohibit respondents from using the $6.00 price claim without disclosing that this amount "was the price at which the original edition * * * was offered for sale to the public at retail." We agree that this order is inadequate from the standpoint of product coverage and even counsel for respondents has stated that an order which would include other reprints sold by respondents would not be objectionable.

We are also of the opinion that the disclosure required by the hearing examiner's order is not sufficiently informative to prevent deception. Consequently, the order will be modified to prevent reference to the price of an original edition in any manner which may create the impression that such amount is the prevailing price of the reprint, when such is not the fact.

We do not believe however that the order should encompass respondents' advertising practices as recommended by complaint counsel. The complaint did not specifically challenge respondents' advertising and we are now informed that advertising claims of the type employed by respondents are in general use throughout the industry. We have determined therefore that, in the circumstances disclosed, respondents should not be placed on a different footing from their competitors insofar as their advertising is concerned. We will, however, maintain a close scrutiny of respondents' advertising practices as well as those of other publishers of reprints. In the event the practices found in this proceeding are utilized by respondents or their competitors in the future we will take such remedial action as may be necessary.

The appeal of counsel supporting the complaint is granted. The initial decision of the hearing examiner is hereby vacated, and in lieu thereof the Commission is issuing its own findings as to the facts, conclusions, and order in accordance with this opinion.

Commissioner Jones did not participate for the reason that oral argument was heard prior to her taking the oath of office.

Findings as to the Facts, Conclusions and Order

The Federal Trade Commission issued its complaint against the above-named respondents on September 5, 1963, charging them with violation of the Federal Trade Commission Act in connection with the offering for sale, selling and distributing of a reprint edition of a cer-

tain book. A hearing was held before a duly designated hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. The initial decision of the hearing examiner was filed on June 16, 1964.

The Commission has considered the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and the entire record in this proceeding and has determined that the appeal of counsel supporting the complaint should be granted and that the initial decision should be vacated and set aside. The Commission further finds that this proceeding is in the interest of the public and now makes this its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Crown Publishers, Inc. (sometimes hereinafter referred to as Crown), 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 419 Park Avenue South, in the city of New York, State of New York. Crown was chartered in the State of New York on February 6, 1933, as the Outlet Book Co., Inc., with its name changed by amendment dated October 4, 1952, to Crown Publishers, Inc. In addition to doing business under its corporate name, Crown also trades and does business under the several trade names of Bonanza Books, Arcadia House and Publishers Central Bureau Division.

2. Respondent Nathan Wartels is the president of respondent Crown Publishers, Inc. Mr. Wartels owns 50 percent of the issued authorized capital of 200 shares no par value common stock of Crown Publishers, Inc. The other 50 percent of Crown stock is owned by a single individual. Mr. Wartels takes an active part in the day-to-day management of Crown. In conjunction with the other stockholder, he formulates, directs and controls the policies, acts or practices of Crown, except that such acts are performed solely in his capacity as one of the managing officers of Crown.

3. Crown engages in the business of publishing, selling and distributing general fiction and non-fiction illustrated books and other publications to retailers for resale to the general public and is in competition with others in the sale of books and other publications of the same general nature and kind sold by Crown. The majority of

respondents' sales are made to over 3,000 department stores and book shops located throughout the United States. Crown's gross annual volume of sales has been over $3,000,000 annually. Crown employs between 100–175 people depending upon business conditions.

4. In the course and conduct of its business, Crown has shipped books and other publications which it has sold from its place of business in the State of New York to retailers located in various States and in the District of Columbia, and has maintained, and does maintain, a substantial course of trade in books and other publications in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of its business, Crown publishes, sells and distributes a book by Lucius Beebe entitled "High Iron." During a three year period, Crown sold over 6,000 copies of "High Iron" annually. Over 50 percent of Crown's sales of the book "High Iron" have been made to purchasers located in States other than the State of New York.

6. "High Iron" was originally published and copyrighted in 1938 by D. Appleton Century Company, Inc. The publisher of the original edition of "High Iron" recommended that such book be sold at retail for approximately $6.00. The original edition of "High Iron" has been out of print and generally unavailable in retail stores since approximately 1948.

7. Crown sells "High Iron" to retail stores for $1.79 and recommends to the retailer that it be sold to the public for $2.98, which is the usual and customary selling price of "High Iron," as published by Crown, in Crown's trade areas. To the best of respondents' knowledge, the edition of "High Iron" published and sold by Crown has never sold at retail for $6.00.

8. On the inside flap of the dust jacket of "High Iron," as published by Crown, there is printed in the upper right hand corner where the suggested retail selling price of a book is usually and customarily printed by the publisher the following: "Illustrated, ~~$6.00~~". In the customary place for such information, *viz.*, on the back of the title page, there appears a notice of copyright in 1938 by D. Appleton Century Company, Inc., and a notice that the edition published by Bonanza Books, a division of Crown, is published by arrangement with Meredith Press. At no place in "High Iron," as published by Crown, or on the dust jacket thereof, does the suggested retail price of $2.98 appear.

9. Two retail book store operators called in support of the complaint testified that it is their practice to mark the actual retail selling price of a book in pen or pencil on the front inside flap of the dust jacket

immediately below the retail selling price suggested by the publisher. A third dealer testified that it is his practice to mark the actual selling price of a book in the upper right hand corner of the front inside flap of the dust jacket or next to the title on the jacket of the book.

10. Eleven public witnesses were called in support of the complaint to testify concerning the impression conveyed to them by the price claim appearing on the dust jacket of the reprint edition of the book "High Iron." Some witnesses testified that they were unable to determine whether the line through the $6.00 claim had been printed or whether it was a mark made by a pen. The testimony of these witnesses was that they were led to believe by the claim in question that the prevailing price of the reprint was $6.00 or that it had been generally sold at this price in the recent past. They further testified that if they were informed that the actual retail price of the reprint was $2.98 they would be under the impression that it was on sale and had been marked down from $6.00.

11. On the basis of the foregoing evidence, the Commission finds that respondents, by preticketing the book "High Iron" in the aforesaid manner, have represented, and have placed in the hands of retailers the means of representing, that the price at which the book is generally sold, or has been sold in the recent past, is $6.00, whereas, in truth and in fact, the prevailing retail price of the book is and has been $2.98.

12. The practice of respondents, as hereinabove found, has had and now has the tendency and capacity to mislead and deceive members of the public into believing that by purchasing the book "High Iron" at $2.98 or at any price less than $6.00, they are saving the difference between the lower price and $6.00.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, were all to the prejudice and injury of the public and of respondents' competitiors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Crown Publishers, Inc., a corporation, also doing business as Bonanza Books, and its officers, and Nathan Wartels, individually and as an officer of said corporation, and re-

spondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the reprint edition of the book "High Iron" or the reprint edition of any other book, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease an desist from marking the reprint edition of a book with a price and in a manner conveying the false impression to the consuming public that the book is being offered for sale at a reduction from the suggested or regular retail price of such reprint edition.

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 to cease and desist.

Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

TRI-VALLEY PACKING ASSOCIATION

Dockets 7225, 7496. Order, July 6, 1964

Order reopening case and remanding it to hearing examiner for further proceedings in conformity with the judgment of the Ninth Circuit Court of Appeals.

ORDER REOPENING PROCEEDING AND REMANDING CASE TO HEARING EXAMINER

The order to cease and desist in these consolidated proceedings having been reversed and set aside by the United States Court of Appeals for the Ninth Circuit by its judgment entered on March 18, 1964 [7 S.&D. 859], and the Court having by the said judgment remanded the cause for the further proceedings directed in its opinion of the same date:

It is ordered, That the matter be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Edgar A. Buttle for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court.

It is further ordered, That the hearing examiner, upon completion of the further proceedings, shall file a revised initial decision based upon the record made prior to the remand and any additional evidence that may be received.

Commissioner Elman dissenting.

IN THE MATTER OF

DELAWARE WATCH COMPANY, INC., ET AL.

Docket 8411. Order, July 9, 1964

Order denying respondent's request to reopen proceeding and modify paragraph 3 of an order of August 15, 1963 (63 F.T.C. 491), relative to the disclosure of foreign origin of watches.

ORDER DENYING MOTION TO REOPEN PROCEEDING AND SET ASIDE PORTION OF THE ORDER

Respondents by motion filed June 3, 1964, have requested the Commission to reopen this proceeding and set aside paragraph 3 of the order to cease and desist which issued on August 15, 1963 [63 F.T.C. 491]. That paragraph of the order requires respondents to cease offering for sale or selling watches, the cases of which are in whole or in part of foreign origin, without affirmatively disclosing the country of origin thereof in a clear and conspicuous manner.

The Commission has duly considered said motion and has concluded that respondents have failed to make the showing required by § 3.28 (b) (2) of the Commission's Rules of Practice that changed conditions of fact or law require that said paragraph 3 of the order be set aside or that the public interest so requires. Accordingly,

It is ordered, That respondents' motion filed June 3, 1964, be, and it hereby is, denied.

IN THE MATTER OF

SINKRAM INCORPORATED, ET AL.

Docket 8490. Order, July 9, 1964

Order denying respondents' request that they be permitted to use certain scientific writings as the basis for further examination of certain expert witnesses.

ORDER DENYING RESPONDENTS' REQUEST FOR REOPENING OF PROCEEDING

Counsel for the respondents, by letter dated June 19, 1964, having requested the Commission to reopen this proceeding and modify its order issued February 28, 1964 [64 F.T.C. 1243], so as to permit the respondents to use certain scientific writings as a basis for the further cross-examination of a number of expert witnesses who testified in support of the complaint; and

The Commission having treated said letter as a petition to reopen the proceeding filed pursuant to § 3.28 of the current Rules of Practice, and having noted that the facts and circumstances mentioned by counsel for the respondents were all previously considered and disposed of in the opinion accompanying the Commission's order of February 28, 1964 [64 F.T.C. 1243, 1270]:

It is ordered, That the request contained in the aforesaid letter be, and it hereby is, denied.

Commissioner MacIntyre not concurring.

IN THE MATTER OF

CHAS. PFIZER & CO., INC.

Docket 7780. Order, July 10, 1964

Order directing reargument of case on the single question of whether the 1962 amendments to the Federal Food, Drug, and Cosmetic Act cover the practices alleged in the complaint.

ORDER DIRECTING REARGUMENT

The Commission has determined that the appeal in this case should be reargued, such reargument to be limited, however, to the following single question: whether the Drug Amendments of 1962 (76 Stat. 780) to the Federal Food, Drug, and Cosmetic Act, and/or any regulations issued under such amendments by the Secretary of Health, Education, and Welfare cover the acts and practices alleged in the complaint. Accordingly,

It is ordered, That (1) complaint counsel and respondent shall each file within forty-five (45) days of receipt of this order a supplemental brief; (2) the Secretary of the Commission shall set the matter down for oral argument; and (3) the General Counsel of the Department of Health, Education, and Welfare is invited to submit a brief setting forth the Department's views on the question presented and, if he desires, to participate in the oral argument.

IN THE MATTER OF

FRITO-LAY, INC.

Docket 8606. Order, July 13, 1964

Order remanding to hearing examiner the issue of the admission of the truth of statements in certain documents submitted by respondent.

ORDER REMANDING PROCEEDINGS TO THE HEARING EXAMINER FOR FURTHER CONSIDERATION

The Commission has before it an application by respondent for leave to file an interlocutory appeal from a ruling of the hearing examiner. During the course of the pretrial proceedings, complaint counsel served upon respondent a request for the admission of the authenticity of a large number of documents and in addition a request for the admission of the truth of all statements contained in certain of them. Respondent filed an objection to the requests in their entirety, contending that they are unreasonable, unduly burdensome, harassing, and inconsistent with the purpose and spirit of Section 3.13 of the

Commission's Rules of Practice. The hearing examiner held lengthy oral argument upon respondent's objections, and he subsequently denied all the objections, without indicating the grounds for his ruling. Subsequently the examiner declined to postpone respondent's answers to the requests until the Commission shall have acted upon its application for an interlocutory appeal. Since respondent then promptly sought a stay from the Commission itself, the Commission will regard this application, not heretofore acted upon, as having effectively stayed respondent's duty to answer the request for admissions. Accordingly, respondent's submittal of the affidavit of John D. Williamson, Jr., on June 19, 1964, in response to the request for admissions has not mooted respondent's objections.

The Commission has considered the application for leave to file an interlocutory appeal, complaint counsel's answer in opposition, and respondent's reply, and has concluded that this matter should be remanded to the hearing examiner for his further consideration. The Commission has not had the benefit of a statement by the examiner of the reasons that led him to overrule respondent's objections in their entirety, but upon examination of the transcript of the prehearing conferences, it appears that both the examiner and the parties may have misapprehended the purpose and scope of the procedure set forth in Section 3.13 of the Commission's Rules. If the request for admissions and the objections thereto are reevaluated in the light of a clearer understanding of the purpose of the pretrial discovery procedures, it should be possible to arrive at a solution that satisfactorily accommodates the legitimate interests of both parties. Thus, we need only set forth certain considerations that ought to guide the examiner's decision.

The admissions device provided by Section 3.13 is primarily designed to spare a party the burden and expense of proving elements of his case which his opponent does not intend to controvert and which indeed may be incontrovertible. Admissions serve the further and subsidiary purpose of clarifying the issues between the parties, revealing the areas of agreement and thereby exposing the matters of genuine controversy.

Since the revised Rules of Practice emphasize the goals of expeditious and continuous hearings, with a full identification of the relevant issues at the outset and with a minimum of surprises during the trial, the Commission encourages an effective and proper use of Section 3.13. Moreover, pretrial discovery ought ordinarily to proceed with a minimum of intervention by the examiner or the Commission. In this instance, however, complaint counsel's request for admission encompasses an unusually large number of documents, and it would

appear that if respondent is to have reasonable opportunity to give conscientious consideration to each of the items for which an admission is requested, serious delays in commencement of the hearings might be required.

Respondent's most vigorous objections center upon the complaint counsel's requests for the admission of the truth of all statements contained in 827 documents, selected from the much larger list of documents with respect to which requests for the admission of authenticity are made. Respondent states that these 827 documents contain literally tens of thousands of statements, many of which have no apparent relevance at this point to any issue in the case.

The Commission has noted that, in large measure, these documents constitute the statements of respondent itself or its agents. Thus, for example, 167 of the documents are respondent's answers to specific questions asked by the Commission staff during the course of its investigation. There are many company press releases, notices to stockholders, annual reports, house publications, etc. Some 267 of the documents represent market surveys that were prepared by respondent's employees.

It is a familiar rule of evidence, even in judicial proceedings where perhaps more rigid rules prevail, that any relevant and nonprivileged statement of an opposing party or his agent may be received in evidence under the "admissions" exception to the hearsay rule. See McCormick, Evidence, p. 502 (1954). Thus the party who bears the burden of proof in a proceeding may establish his *prima facie* case simply by introducing into evidence, for the truth of the matters contained therein, the out-of-court statement of his opponents, whether it appear in a document or in the testimony of a third party. It is therefore unnecessary ordinarily to seek the opponent's admission of the truthfulness of his own document in order to accomplish the primary purpose of Section 3.13 of the rule—the document is already admissible to prove the point. In these circumstances, the only function that would be accomplished by extracting an admission of truthfulness is to limit the possibility of the opponent's introducing rebuttal evidence to detract from the force of its own admission. For example, the opponent might be able to show, by testimony or some other document, that the author of the statement received in evidence against it was mistaken; but an admission of truthfulness under Section 3.13 would ordinarily preclude the possibility of such rebuttal (even then a party may be relieved of an improvident admission of truthfulness upon an adequate showing of justification).[1]

[1] See 4 Moore, Federal Practice ¶ 36.08 (2d ed. 1963)

A party undoubtedly has a legitimate and understandable interest in knowing before trial the approximate nature and extent of his opponent's defense. Thus, we do not rule that it is in all circumstances unnecessary or improper to seek admissions of truthfulness with respect to a party's own documents. But in this instance we are mindful of the great volume of the documents included within complaint counsel's request.[2] We believe that the examiner, who has a greater familiarity with the matters that are likely to be at issue in the proceeding, should consider whether the additional clarification that might be expected to result from responses to the requests for admission of truthfulness in their entirety is sufficient to justify the expenditure of time and effort that would be required of respondent.

Somewhat different considerations are applicable to complaint counsel's requests for the admission of authenticity of the documents. Regardless of whether a document appears on its face to be respondent's own or that of some third person, complaint counsel would be obliged, in the absence of an admission or waiver of objection to genuineness, to stand ready to prove that the document is authentic. Since challenges to the authenticity of documents are quite rare in Commission proceedings, there is all the more reason to have the question settled at the outset and avoid the uncertainty that may hang over a party who proposes to introduce documentary evidence. Such a consideration is especially pertinent in this case, for all of the documents listed by complaint counsel in its request were supplied by respondent from its own files in response to staff requests during the course of an investigation. While the number of documents is very large, there is little reason to anticipate that respondent would be unable to determine readily whether each of them is in fact what it purports to be. The authenticity of most of them ought to be immediately apparent on their face.

As we understand respondent's present application, their principal objection to the scope of complaint counsel's requests for admission of genuineness is not primarily to the number of documents or the time required to accomplish the task, but rather to the effect that the examiner intends to give an admission of genuineness. Referring to a portion of the transcript of prehearing conference,[3] respondent ex-

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[2] It is pertinent to observe here that requests for admissions of truthfulness demand more than a perfunctory searching of present knowledge—a party is obliged to resort to sources of information reasonably available to him in order to determine whether he is in a position to make the admission. See 4 Moore, Federal Practice ¶ 36.04.

[3] "MR. HOWREY: Now, you are suggesting as I understand it, if we concede authenticity to those documents, which I think is a normal request, then you suggest we put them in a book and offer them in evidence and they'll be admitted if you think they are relevant.

"HEARING EXAMINER BENNETT: Yes.

"MR. HOWREY: Now, then I come along. I suppose in my own case, and subpoena

presses its understanding of the examiner's position as follows: that respondent must indicate at the time it responds to the requests for admission of genuineness whether it intends to introduce any testimony to rebut the inferences that would normally be drawn from any of the documents and that, if it does not do so then, it will be regarded as having waived the right of rebuttal. Although it is not altogether clear that this was the purport of the examiner's ruling, we think it appropriate, in order to facilitate the proceedings on remand, to indicate that respondent will not risk any such waiver of right of rebuttal by responding to the requests for admission of genuineness. An admission of genuineness of a letter concedes that the signer in fact sent this letter to the named addressee, but it would still be open to respondent to show that the signer was mistaken in what he said, did not intend to be taken seriously, etc. To attribute any greater significance to an admission of genuineness blurs the distinction between it and an admission of truthfulness. Accordingly,

It is ordered, That the proceeding be, and it hereby is, remanded to the examiner for the further consideration, in the light of this order, of respondent's objections to the requests for admissions.

PACIFIC MOLASSES COMPANY ET AL.

Docket 7462. Order and Opinion, July 20, 1964

Order denying request for reopening of Sec. 2(a) Clayton Act proceeding, modification of the desist order not being warranted by reason of "changed conditions."

Opinion on Respondents' Request for Reopening

On May 21, 1964 [65 F.T.C. 675], the Commission issued its opinion and order in this proceeding, modifying and adopting the hearing examiner's initial decision that respondents had discriminated in favor

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the authors of a few of them that I want to explore and cross examine them. That cross examination isn't a part of our case. We have that right—

"HEARING EXAMINER BENNETT: That of course, is not what I am saying, sir. What I am saying is that if you have such a document, I will understand and approve your saying as to that document that we cannot concede the authenticity of this document, because we believe that the statements made on the face of the document are not correct. And we will insist that a witness be called. But I want you to do that at the time these documents come before you for authentication. I don't want you to wait until the day when counsel hands you a list of documents that he proposes to offer and then say, oh no, you can't have that document, because it's going to throw off his entire order of proof and I'm never going to be able to understand him. So the time to do that is at the time when this document is given to you for you to authenticate it. And you say, I cannot admit it for the reasons that John Jones who wrote this document has told me—I'm not suggesting that you need to go all through this—that he didn't mean what he said, or it was a joke, or something of that nature, and that I am going to insist upon his being put on the stand." (Tr. 422–23.)

of certain of their customers and against certain others in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13. Respondents Pacific Molasses Company and James M. Ferguson [1] now request a reopening of the proceeding for consideration of their contentions that the order was made applicable to James M. Ferguson, as an individual, on the basis of an erroneous "finding" that he was "guilty" of a "crime"; that our order prohibiting future price discrimination by respondents should be set aside because Pacific's principal competitor, Southwestern Sugar & Molasses Company, which is under a somewhat similar Commission order, has now left the business and has been replaced by another company, National Molasses Company, "against whom there is no cease and desist order"; and that the Commission erred in its earlier opinion in concluding that there was no denial of due process in the examiner's failure to follow a pretrial order requiring counsel supporting the complaint to give respondents a list of his witnesses and exhibits 15 days in advance of the hearing.

I

First, we note that respondents have been less than diligent in exhausting their administrative rights. Under § 3.25 of the Federal Trade Commission's Rules of Practice, any party may file, within 20 days after service upon it of any Commission decision, a "petition for reconsideration" of that decision. Respondents filed no such petition. (Their present request was filed on June 30, 1964, 30 days after service upon them (June 1, 1964) of the Commission's decision and order to cease and desist, and thus not within the 20 days provided for the filing of such a petition for reconsideration.)

Having failed to request reconsideration under § 3.25, respondents now ask for a reopening of the matter under § 3.27. Here, interestingly enough, they are premature. That section provides for a reopening "either on the Commission's own initiative or on the request of any party to the proceeding," but § 3.28 provides that it is only upon the Commission's own initiative that a matter may be reopened prior to the expiration of the statutory 60-day period allowed for the filing of a petition for review in the appropriate court of appeals; reopening at the request of a party is provided for only after a Commission decision has become "final," either by court affirmance or by expiration of the statutory period for seeking review. Here, that statutory 60-day period would not be up until August 1, 1964, 30 days after respondents filed the instant request for reopening under § 3.27.

[1] No request is made on behalf of Bascom Doyle, the other officer against whom the order was directed.

II

But putting aside the question of timeliness, there is no merit in respondents' request, whether we treat it as a petition for reconsideration under § 3.25 or for reopening under §§ 3.27 and 3.28. Under the first, there must be some showing of error in the Commission's prior decision. Under the second, it must appear that a modification or setting aside of the order is warranted by reason of "changed conditions of fact or law or the public interest." None of these tests are met here. Respondents' contention with regard to the examiner's failure to follow the pretrial order was considered fully in our prior decision. As we said there, these respondents never had a constitutional "right" to a list of complaint counsel's witnesses and exhibits; certainly there is nothing in the authorities pointed to by respondents that converts every agency rule of practice into a "right" of constitutional proportions. The question in such cases is whether there has been a loss of a substantial right, one that genuinely prejudices the party's cause. Here, there could have been no such prejudice to respondents in view of the 40-day continuance they were given to investigate and prepare their case, together with the right to recall and cross-examine as adverse witnesses any of the witnesses previously called by the Commission's attorney. We do not understand how respondents could now benefit by a remand of the case to the hearing examiner for a second presentation of the same evidence.

Respondents' argument with regard to our inclusion in the cease-and-desist order of respondent James M. Ferguson, president of respondent Pacific Molasses Company, is even more difficult to follow. The Commission's hearing examiner, in his initial decision, had found that Mr. Ferguson personally participated in and directed the discriminatory pricing found unlawful. This was, of course, a factual "finding." However, the examiner was of the opinion that, as a matter of law, such personal participation in the offense was not sufficient basis for including him, as an individual, in the order to cease-and-desist. In our earlier opinion, we disagreed with this legal conclusion, explaining our reasons and referring to, among other cases, *United States* v. *Wise*, 370 U.S. 405, 409, 416 (1962). Respondents challenge this ruling, quoting the following from our prior opinion, and characterizing these three sentences as "findings":

> James M. Ferguson, President of respondent Pacific Molasses testified that he personally ordered the discriminatory pricing.
>
> The Clayton Act, like the Sherman Act, should be construed "in its commonsense meaning to apply to all officers who have a responsible share in the proscribed transaction," including the officer who "*authorizes, orders,* or *helps perpetrate* the crime—regardless of whether he is acting in a representative capacity." *United States v. Wise*, 370 U.S. 405, 409, 416 (1962).

We see no reason why these two corporate officers, having once been found guilty of deliberate and purposeful price discrimination that seriously injured others in the industry, should be left free to give and execute the same kind of unlawful orders on behalf of some other molasses company.

Respondents then go on to "assume" that "all three findings are necessary to support the opinion."

The first of these quoted statements, that respondent Ferguson "personally ordered the discriminatory pricing," is not challenged here, as indeed it could not be.[2] But they contend that the second one wrongfully accuses Ferguson of a "crime," and that the third one is unfounded.

The second of those sentences was not a "finding," as is plainly apparent on its face. We do not understand how a quotation of a proposition of law from an opinion of the Supreme Court of the United States could be construed as a "finding" of fact by an administrative agency. Since the Sherman, Clayton, and Federal Trade Commission Acts are in *pari materia*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 688–693 (1948), the Court's declaration in the *Wise* case[3] that individual criminal punishment is appropriate for the cor-

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[2] Mr. Ferguson testified as follows:

Q. * * * What authority did Mr. Doyle have in the Gulf area with respect to Pacific Molasses' pricing policies?

A. Well, Mr. Doyle's authority was such authority as I might have granted to him. His responsibility was to execute the policies, prices, sales procedures that I established. I would provide him, after discussing with him the general molasses situation, I would provide him with a sales price * * *.

We maintained at that time a very close working relationship by correspondence and also by telephone. He would keep me informed of demands and competitors' activities and I would then make the determinations as to what action Pacific should take. I would say that he had no authority other than the authority that I personally gave to him regarding prices or sales policies.

HEARING EXAMINER LEWIS: Are you saying that he never established any price without first discussing it with you, a particular price?

THE WITNESS: Yes, sir.

HEARING EXAMINER LEWIS: There never was a price change without discussing it with you?

THE WITNESS: Right, Tr. 946–947.

The negotiation and granting of the discriminatory price concessions of some $24,487.70 to Pacific's largest and most favored customer, Fort Worth Molasses Company, was described by Ferguson as follows:

* * * I was in New Orleans in early January of 1955 and Mr. Doyle and I discussed the Fort Worth Molasses Company account, and it was agreed that on my return to San Francisco I would visit with Mr. Hill [of Fort Worth Molasses] at Amon Carter Field which is the Fort Worth Air Field. And we telephoned Mr. Hill and he agreed to come out to the airport and see me for the 45 minutes or hour between our connecting planes * * *.

* * * We were admittedly interested in trying to arrange a long-term contract with Fort Worth Molasses Company, and we were trying to present Fort Worth with the best possible offering that we could make. And, in discussing this with Mr. Hill, I did present to him in the way that it is shown here * * *.

So when I returned to San Francisco, I prepared this letter agreement of January 13 [CX 17], and sent it to him. Tr. 971, 973.

[3] See also *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963), holding that the indictment's charge of discriminatory and unreasonably low prices for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13(a), was not unconstitutionally vague and indefinite. On remand, a jury found

porate officer who "authorizes, orders, or helps perpetrate" a violation of a criminal provision of the antitrust laws makes it, we believe, an *a fortiori* proposition that an individual cease-and-desist order is not inappropriate for the officer who "authorizes, orders, or helps perpetrate" a violation of one of those related statutes. As the court said in *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F. 2d 103, 105 (4th Cir. 1963), "it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices."

Respondents misread our comment that Ferguson and Doyle had engaged in "deliberate and purposeful price discrimination that seriously injured others in the industry." This was to make it clear that the discrimination was practiced knowingly, not inadvertently, and that its effects were serious, not minimal. While an "intent" to injure competitors is certainly relevant in any price discrimination case, *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960), *Forster Mfg. Co.*, Dkt. 7207, at 7 (January 3, 1963) [62 F.T.C. 852, 893], it is not a necessary element in a finding of unlawful price discrimination under the statutory provision involved here and is thus not a necessary predicate of an order requiring both corporate and individual offenders to cease their unlawful conduct. In other words, we found only that respondent Ferguson was a knowing participant in the unlawful acts; whether he also "intended" the consequences [4] that did in fact flow from them makes no difference to our determination that he should be individually prohibited from repeating those violations of the statute.

III

Respondents' contention that the Commission should reopen this proceeding to "consider the advisability and public interest of an order in this case" because of the fact that a competitor against whom a cease-and-desist order had also been entered by this Commission has apparently gone out of business and been replaced by a new company

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both National Dairy and Mr. Wise guilty of violating both the Sherman and Robinson-Patman Acts. On June 22, 1964, the company was fined $380,000 and Mr. Wise was fined $52,500 and given a 3-month suspended jail sentence. 5 CCH Trade Regulation Reporter Par. 45,059 (Case 1479).

[4] Under Section 2(a) of the Clayton Act, the provision involved here, it is enough that the act is done and that its results have in fact been, or will probably be, injurious to competition; it is not necessary that the discriminator intend either the act itself or the harmful results. Section 3 of the Robinson-Patman Act, on the other hand, in making sales at discriminatory or unreasonably low prices "for the purpose of destroying competition or eliminating a competitor" a *criminal* offense, requires a showing of an "intent" both to do the act and to "achieve a *result*—destruction of competition * * *," all "in furtherance of that design or purpose." *National Dairy, supra* at 35 (emphasis by the Court).

"against whom there is no cease and desist order" is patently unsound. First of all, no determination has been made as to whether the new competitor, as a "successor" to a corporation with an order outstanding against it at the time of the acquisition, is also bound by that order. Secondly, however, respondents' contention is erroneous as a matter of law. It is true, of course, that the Commission, as a matter of policy and discretion, attempts to deal with industrywide violations on an industrywide basis. Respondents, however, have not alleged industrywide violations of Section 2(a), or even that the one new competitor they mention is engaged in such violations. Obviously, the public interest in preventing members of an industry already found to have violated the law from repeating those offenses would not be served by setting aside outstanding orders the moment a new competitor appears. See *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958).

Respondents have made no showing that warrants either a reconsideration of our prior decision and order, or a reopening of the matter. Their request will be denied.

Commissioner Elman did not participate.

ORDER DENYING REQUEST FOR REOPENING

Respondents Pacific Molasses Company and James M. Ferguson having filed, on June 30, 1964, a request for a reopening of this proceeding, and counsel supporting the complaint having filed an answer in opposition thereto; and

The Commission, having considered respondents' request as a petition for reconsideration of the Commission's decision and order of May 21, 1964 [65 F.T.C. 675], and as a petition for reopening, and having determined that the same should be denied:

It is ordered, That respondents' request be, and it hereby is, denied.

Commissioner Elman not participating.

IN THE MATTER OF

FALSTAFF BREWING CORPORATION ET AL.

Docket 8618. Order, July 20, 1964

Order denying respondents' request that this proceeding be settled by the consent order procedure.

ORDER DENYING MOTION TO REOPEN CONSENT ORDER PROCEDURE

This matter has come on to be heard by the Commission upon respondents' motion filed July 6, 1964, requesting that they be permitted

to dispose of this proceeding through consent order procedure, and upon complaint counsel's answer joining in said motion.

The Commission has considered respondents' motion and the answer and has determined that no grounds have been advanced by respondents which would support a conclusion that the consent order procedure should now be made available for disposition of this matter. Moreover, respondents have failed to show wherein the filing of an amended admission answer or submission of the case to the hearing examiner on a stipulation of facts and agreed order as expressly provided by § 2.4(d) of the Rules of Practice, would not constitute an appropriate disposition of this proceeding. Accordingly,

It is ordered, That respondents' motion, filed July 6, 1964, be, and it hereby is, denied.

IN THE MATTER OF

JANTZEN, INC.

Docket 7247. Resolution and Order, July 22, 1964

Resolution and order that a nonpublic investigational hearing be conducted to determine whether or not respondent has violated provisions of cease and desist order.

RESOLUTION AND ORDER DIRECTING AN INVESTIGATION AS TO WHETHER JANTZEN, INC., HAS COMPLIED WITH ORDER TO CEASE AND DESIST

Whereas, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13, the Federal Trade Commission on January 16, 1959 [55 F.T.C. 1065], after due process and proceedings of record herein and in accordance therewith, issued and served upon the respondent named in the caption hereof, an order to cease and desist under subsection (d) of Section 2, thereof; and

Whereas, by the said order to cease and desist the respondents Jantzen, Inc., and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from—

[P]aying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products; and

Whereas, the said order to cease and desist, as modified on March 26, 1959, has not at any time thereafter been modified or set aside and is now, and has at all times since March 26, 1959, been in full force and effect; and

Whereas, the Commission has reason to believe that respondent, its officers, representatives, agents and employees, while engaged in the sale and distribution of clothing in commerce, may have violated the provisions of the said order to cease and desist; and

Whereas, it is deemed by the Commission to be in the public interest to ascertain whether or not and the extent to which respondent, while engaged in commerce, may have violated the provisions of the said order to cease and desist;

Now, therefore, it is resolved and ordered, That a nonpublic investigational hearing be conducted for that purpose pursuant to Section 1.35 and related sections of the Commission's Rules of Practice.

It is further resolved and ordered, That the Chief Hearing Examiner hereby appoint and designate a hearing examiner to preside at such hearing with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice, except that of making and filing an initial decision; and upon completion of the hearing, that the hearing examiner shall certify the record to the Commission with his report on the investigation; and that respondent shall have the right of due notice, of cross-examination, of production of evidence in rebuttal, and that the hearing shall be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

It is further resolved and ordered, That the hearings shall be held at such time and at such places as may be necessary, the initial hearing to be held at a place to be fixed by the said hearing examiner on a day occurring at least thirty (30) days after the service of notice thereof upon respondent.

It is further resolved and ordered, That the Secretary shall cause service of this resolution and order to be made on respondent.

IN THE MATTER OF

FRITO-LAY, INC.

Docket 8606. Order, July 30, 1964

Order denying respondent's application to have a special survey by the Commission of the "snack food" industry.

ORDER DENYING RESPONDENT'S APPLICATION TO HAVE THE COMMISSION CONDUCT A SPECIAL SURVEY

By motion filed July 8, 1964, respondent seeks to have the Commission issue orders for the filing of special reports, pursuant to Section 6(b) of the Federal Trade Commission Act, upon the manufacturers and sellers of a large number of food products that respondent categorizes as "snack foods". Respondent contends that the information that such a special survey would yield is necessary to its defense and cannot practically be obtained in any other manner. Complaint counsel on July 17, 1964, filed an answer in opposition to respondent's motion. Acting pursuant to Section 3.6(a) of the Commission's Procedures and Rules of Practice, the examiner has certified respondent's motion to the Commission with the recommendation that it be denied. The examiner offers the following reasons for his recommendation:

1. Similar requests have been denied by the Commission. *Union Bag-Camp Paper Corporation*, Docket 7946. (Order of Certification, February 23, 1962, Commission Order denying application dated July 30, 1962, Order dated March 6, 1963, and Commission Order dated April 5, 1963 denying appeal.)

2. This motion is untimely. The case has been set for hearing August 18, 1964 since February 28, 1964. Respondent, asserting the Commission's decision in *Campbell Taggart*, Docket 7938, required the Commission to reissue its survey because of a technical defect—failure to secure prior approval of the Bureau of the Budget before its original survey was conducted. Respondent should not be permitted to wait until after a second survey was conducted and then seek a third survey from the same concerns. Respondent was presumably cognizant, at the time of the first prehearing conference, of its desire for additional information and it could very well have sought the inclusion by the Commission of questions designed to elicit the information now sought at that time. It made no motion to do so. A further survey by the Commission of the several hundred small businessmen involved seems hardly consistent with the public interest.

3. Respondent's motion is defective in form in that it is based on unsupported conclusions and fails to set forth facts concerning its ability or lack of ability to secure such information as it desires. Respondent, with its own personnel, has apparently conducted surveys

of the field but has failed to indicate any reason why expert testimony based on such surveys will not be adequate for proof of its defense; or why testimony of persons expert in the business cannot supply evidence concerning respondent's defense. In addition, no information has been supplied concerning the practicality of conducting a survey through independent research organizations skilled in the art.

The Commission agrees with the examiner, substantially for the reasons stated by him in paragraphs 2 and 3 quoted above, that no persuasive showing of the appropriateness of, or need for, the requested action has been made by respondent here. Accordingly,

It is ordered by the Commission, That respondent's motion be, and it hereby is, denied.

IN THE MATTER OF

PROSPECT BRACELET COMPANY, INC., ET AL.

Docket 8611. Order, July 30, 1964

Order denying respondents' motion that complaint against them be dismissed on the ground that the Commission made certain changes in policy relating to so-called foreign origin matters.

ORDER DENYING MOTION TO DISMISS

On July 17, 1964, the hearing examiner, acting pursuant to Section 3.6(a) of the Commission's Procedures and Rules of Practice, certified to the Commission a motion by respondents to dismiss the complaint. Respondents' motion, filed while the proceeding is still before the hearing examiner who has not yet rendered an initial decision, alleges that subsequent to the issuance of this complaint the Commission made certain changes in policy relating to so-called foreign origin matters, and that "the entry of an order here would be arbitrary and capricious." Complaint counsel has filed an answer in opposition to the motion.

Upon consideration of the foregoing, and it appearing that the policy matters alleged in respondents' motion do not provide justification for the extraordinary action now requested,

It is ordered, That respondents' motion be, and it hereby is, denied.

BENRUS WATCH COMPANY, INC., ET AL.

Docket 7352. Order, July 31, 1964

Order denying without prejudice respondents' request for modification of desist order of Feb. 28, 1964, 64 F.T.C. 1018, on the conclusion that the public interest and competition in the watchcase industry would best be served

by a determination on an industrywide basis whether a revision in the trade practice rule involved is required.

ORDER DENYING RESPONDENTS' PETITION

This matter has come on to be heard by the Commission upon a petition filed July 1, 1964, on behalf of all respondents except three individuals, requesting that this proceeding be reopened for the purpose of reconsidering paragraph 5 of the final order and for modification of that paragraph; and upon answer in opposition to said motion.

Paragraph 5 of the final order requires respondents to cease and desist from:

> 5. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing or coating of precious metal of less than 1–1/2/1000 of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing on such cases or parts that they are base metal which have been flashed or coated with a thin and unsubstantial coating.

In substance, respondents contend that paragraph 5 should be modified so as to permit the sale of watch cases bearing only the designation "20 Micron Gold Electroplate," which coating is less than the thickness specified in the order. In support of their motion, respondents state that there have been substantial improvements in the electroplating art since 1948, the year in which the Commission promulgated its Trade Practice Rules for the Watch Case Industry which set forth the standards embodied in paragraph 5 of the order. [16 CFR 174.2 (9)] Respondents further state that the electroplating process they now use results in a quality of gold covering equal or superior to coverings which meet the standards expressed in said Trade Practice Rules.

The Commission in considering this motion takes note of the fact that other watch companies are the subjects of orders containing prohibitions consistent with the requirements of the applicable trade practice rule. In view thereof and in light of the asserted changes in the electroplating processes in the industry since the date of said rules, the Commission has concluded that the public interest and competition in the watch case industry would best be served by a determination on an industrywide basis as to the propriety of the present application of the standards expressed in the aforesaid trade practice rule.

Accordingly, the Commission will immediately direct its Bureau of Industry Guidance to institute a proceeding for the purpose of determining whether a revision in the specific trade practice rule

here involved [16 CFR 174.2(9)] is required. If, as a result of said proceeding, the rule is revised, respondents may then request modification of the pertinent paragraph of the order in any respect which they deem appropriate by reason of that revision.

On the basis of the foregoing,

It is ordered, That respondents' petition filed July 1, 1964, be, and it hereby is, denied without prejudice, however, to respondents' right to renew their request if and when the applicable trade practice rule is revised.

IN THE MATTER OF

ATD CATALOGS, INC., ET AL.

Docket 8100. Order, July 31, 1964

Order setting aside the consent order of April 3, 1964, and dismissing the complaint as to James V. Cariddi on the ground that he was not a stockholder of ATD Catalogs, Inc.

ORDER SETTING ASIDE CONSENT ORDER AND DISMISSING COMPLAINT AS TO JAMES V. CARIDDI

On June 5, 1964, respondent James V. Cariddi filed a motion to set aside the consent order and dismiss the complaint as to him on the ground that he was not a stockholder of ATD Catalogs, Inc., and that none of his firm's officers, directors or representatives held stock in ATD. Respondent further alleged that he had no representative acting as director, officer or employee of ATD. The Commission's order of June 29, 1964 [65 F.T.C. 71, 129], suspended enforcement of the consent order as to respondent Cariddi and gave him the opportunity to file a properly sworn affidavit to substantiate the factual statements in his motion of June 5, 1964.

On July 15, 1964, two affidavits were filed in support of the motion to dismiss, one by Cariddi, the second by Sylvia Kahn, Secretary of ATD Catalogs, Inc. Complaint counsel has stated he has no reason to question the factual statements contained therein. Therefore, the complaint will be dismissed and the consent order set aside as to respondent James V. Cariddi. Accordingly,

It is ordered, That the consent order of respondent James V. Cariddi be, and it hereby is, set aside and that the complaint as to the aforesaid respondent be, and it hereby is, dismissed.

Commissioner Reilly not participating.

IN THE MATTER OF

STATE PAINT MANUFACTURING COMPANY ET AL.

Docket 8367. Order, July 31, 1964

Order denying petition to reopen, without prejudice to respondents' right to renew same if and when the decision of the Court of Appeals in Docket No. 8290 is affirmed by the Supreme Court.

ORDER DENYING RESPONDENTS' PETITION TO REOPEN

This matter having come before the Commission upon respondents' petition filed July 15, 1964, requesting that this proceeding, Docket No. 8367, be reopened and the order to cease and desist entered February 7, 1964 [64 F.T.C. 660], be vacated; and

The respondents having alleged in support of their petition that the Commission's decision herein, including its order to cease and desist, was based on its decision and order in *Mary Carter Paint Co. et al.*, Docket No. 8290, entered June 28, 1962 [60 F.T.C. 1827]; that on June 19, 1964, the United States Court of Appeals for the Fifth Circuit rendered its decision in *Mary Carter Paint Co. et al.* v. *Federal Trade Commission*, Case No. 19982, in which the court directed the Commission to enter an order dismissing the complaint in said Docket No. 8290; and that as a result of this ruling by the Court of Appeals conditions of law have so changed since issuance of the order in Docket No. 8367 as to require the relief requested; and

It appearing that the aforesaid decision of the Court of Appeals is subject to review by the Supreme Court of the United States by writ of certiorari if granted upon petition therefor filed within ninety (90) days after entry of judgment by the Court of Appeals implementing its decision, or within such further period of time, not exceeding sixty (60) days, as may be allowed by a justice of the Supreme Court; and

It further appearing that the time within which such petition may be filed in Docket No. 8290 has not yet expired and, thus, that respondents' request in Docket No. 8367 is premature:

It is ordered, That respondents' petition filed July 15, 1964, be, and it hereby is, denied, without prejudice, however, to respondents' right to renew the same if and when the decision of the Court of Appeals in Docket No. 8290 is affirmed by the Supreme Court, or after expiration of the time within which a petition for a writ of certiorari may be filed in that case if no such petition is filed within such time.

Commissioner Elman dissenting.

IN THE MATTER OF

UNIVERSAL-RUNDLE CORPORATION

Docket 8070. Order, Aug. 4, 1964

Order denying respondent's petition for withdrawal of cease and desist order and for entry of order staying its effective date.

ORDER DENYING RESPONDENT'S PETITION

This matter has come before the Commission on a petition filed by respondent on July 20, 1964, requesting that we withdraw the order to cease and desist issued in this proceeding on June 12, 1964 [65 F.T.C. 924], and stay the re-entry of said order and further requesting that we grant a hearing on the petition and stay the order to cease and desist pending decision on the petition. An answer in opposition to this petition has been filed by complaint counsel.

Respondent contends in support of its request for withdrawal of the order to cease and desist that there is an industrywide practice by plumbing supply manufacturers of granting discounts on truckload shipments and that inasmuch as it is prohibited by the order from granting such discounts it will be placed in an adverse competitive position. Respondent has also submitted information to the effect that it has incurred losses in the operation of its business since 1961 and that certain of its competitors have realized profits during that period. It requests therefore that the order be withdrawn until the Commission has taken the necessary steps to correct the practice complained of.

The principal basis for respondent's petition seems to be that the granting of truckload discounts by its competitors is illegal per se under Section 2(a) of the amended Clayton Act. There is nothing in our decision to support this contention, however, nor does the order to cease and desist entered against respondent absolutely prohibit it from granting truckload discounts. While the practice of granting such discounts may under certain circumstances, such as those shown in the record of this proceeding, result in price discriminations having proscribed competitive effects, the practice is not necessarily illegal as indicated in respondent's petition. In this connection, it must be determined in each case whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anti-competitive effects. Moreover, even if a prima facie violation of Section

2(a) is established, the seller may in each case interpose the statutory defenses to justify the discrimination.

Consequently, the general allegation by respondent that its competitors are granting truckload discounts is not a sufficient basis for instituting industrywide proceedings to condemn this practice nor is it a valid reason for withholding enforcement of the order entered against respondent in this matter. Moreover, the fact that respondent may have incurred losses prior to the issuance of the order does not support the contention that enforcement of the order will cause it financial hardship.

For the foregoing reasons the Commission is of the opinion that respondent has failed to make a showing which would warrant granting the relief requested:

It is ordered, That respondent's petition for withdrawal of the order to cease and desist and request for entry of an order staying the effective date of the cease and desist order be, and it hereby is, denied.

IN THE MATTER OF

HUMBLE OIL & REFINING COMPANY

Docket 8544. Order, Aug. 14, 1964

Order denying respondent's request to examine certain memoranda prepared by a Commission statistician.

ORDER DENYING RESPONDENT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

On July 29, 1964, the hearing examiner certified to the Commission an oral motion made by respondent during the course of hearings in this matter. Respondent sought an order compelling complaint counsel to furnish copies of certain memoranda written by one of his rebuttal witnesses, a Commission statistician, or in the alternative, an order striking the witness' testimony. Respondent alleged that examination of the memoranda was necessary in order to test the witness' qualifications and the validity of the expert opinion expressed in his testimony. The examiner regarded this motion as being in effect one to compel the production of confidential information from the files of the Commission, which could only be granted by the Commission itself under Section 1.134 of the Commission's procedures and Rules of Practice. Therefore, he expressed his intention to certify the motion to the Commission. Although respondent stated that it did not desire the examiner to delay the proceedings by certifying the motion to

the Commission, it did not withdraw the motion. Thus the motion remains to be acted upon.

Some of the documents sought by respondent, such as the transcript of the statistician's testimony in a prior Commission proceeding, were plainly proper material for use in challenging the qualification of the witness to express an expert judgment or in attempting to impeach his testimony. These materials were readily available to respondent by resort to the Commission's normal channels of public information. However, respondent has made no showing whatever that it attempted and failed to gain access to the materials by these means. Since these materials are plainly not confidential information within the meaning of Section 1.134, the examiner's certification cannot be construed as covering respondent's motion to compel production of them; the examiner had the authority to rule upon respondent's motion at least to this extent and, as we read in the record, did so rule.

Respondent also sought the production of certain internal memoranda that the staff statistician sometime in the past has prepared in the normal course of his staff duties, not related to his testimony in this or any other adjudicatory proceeding. While it is conceivable that examination of these might shed some light on the witness' qualification to comment on respondent's survey or might reveal a view about surveys that is inconsistent with the one expressed in his testimony, this possibility does not establish respondent's right to have access to them. The thrust of respondent's position is that there is a right to examine all of the undisclosed writings of an expert witness which in any way involve or reflect the use of his expert skills. Entirely apart from the obvious questions of privileged communication which arise in this case, it is apparent that this is a novel and wholly untenable view of the scope of impeachment. Almost any statement made by an expert witness, even one contained in a personal letter, conceivably could be relevant in evaluating the worth of his expert opinion. But it has been universally recognized that the line must be drawn somewhere—that a proceeding cannot be permitted to become a series of collateral and complex trials of the opinion of the expert witness, with the opponent of such testimony having an unfettered right of discovery with respect to everything the witness has said or written previously. In this instance, the Commission has no doubt that the attempt to impeach the opinion of a professional member of the Commission's staff by examining the internal memoranda prepared by him in the normal course of his duties falls well outside the bounds of permissible voir dire or cross-examination. Accordingly,

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

IN THE MATTER OF

FLOTILL PRODUCTS, INC., ET AL.

Docket 7226. Order, Sept. 3, 1964

Order denying respondents' petition for reconsideration, three participating Commissioners constituted a quorum.

ORDER DENYING RESPONDENTS' PETITION FOR RECONSIDERATION

This matter has come on to be heard by the Commission upon respondents' petition, filed August 5, 1964, for reconsideration of that portion of the Commission's final order issued herein on June 26, 1964 [65 F.T.C. 1099], which prohibits violations of Section 2(c) of the amended Clayton Act, and upon the answer of counsel supporting the complaint in opposition thereto.

In support of their petition, respondents assert that all members of the Commission should participate in the consideration of this case and that since the Section 2(c) provision of the order is supported by only two members of the Commission rather than a majority thereof, the order is not lawful.

The fact that a vacancy existed in the Commission at the time of the issuance of this final order does not render the order invalid.[1] Of the four Commissioners serving at that time, three participated in the decision. These three participating Commissioners constituted a quorum for the transaction of business in accordance with the Commission's rules and in the absence of a statutory provision relating thereto. *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917. A majority of a quorum is sufficient to sustain the validity of a final order of an administrative body. *Frischer* v. *Bakelite Corp.*, C.C.P.A. (Patents), 39 F. 2d 247 (1930), *cert. denied*, 282 U.S. 852. Since two of the three participating Commissioners concurred in the issuance of the final order, respondents' argument on this point must be denied.

In further support of their petition, respondents contend, in effect, that a new question has been raised by the opinion for the reason that the evidence relied upon does not sustain the Section 2(c) provision of the final order. Respondents have submitted certain affidavits in support of this argument.

The Commission has carefully considered respondents' argument and concludes that respondents have made no showing of any new

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[1] Section 1 of the Federal Trade Commission Act provides, in part, that "A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission."

questions upon which they had no opportunity to argue before the Commission, as provided in § 3.25 of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondents' petition for reconsideration of the Commission's decision and final order be, and it hereby is, denied.

Commissioner Elman not concurring.

IN THE MATTER OF

HUMBLE OIL & REFINING COMPANY

Docket 8544. Order, Sept. 3, 1964

Order denying respondent's request to quash two subpoenas duces tecum for production of certain of respondent's records.

ORDER DENYING ENTERTAINMENT OF RESPONDENT'S INTERLOCUTORY APPEAL

Upon consideration of respondent's appeal, filed August 14, 1964, from rulings of the hearing examiner issued August 5, 1964, denying respondent's motion to quash two subpoenas duces tecum requiring respondent to produce certain records from its New York, New York, and Charlotte, North Carolina, offices,

The Commission has determined that respondent has not made the showing required by § 3.17(f) of the Rules of Practice for entertainment of said appeal. Therefore,

It is ordered, That respondent's appeal, not being entertained by the Commission, be, and it hereby is, denied.

IN THE MATTER OF

UNION BAG-CAMP PAPER CORPORATION

Docket 7946. Order, Sept. 23, 1964

Order ruling that captioned-case be conducted in conformity with Rules of Practice in effect prior to July 21, 1961.

ORDER RULING ON CERTIFIED QUESTION

By certificate filed on September 8, 1964, the hearing examiner in the above-captioned proceeding has requested the Commission to rule on the question whether this proceeding, which was commenced prior to July 21, 1961, and in which reception of evidence has not yet been

completed, is governed by the Commission's Rules of Practice for Adjudicative Proceedings in effect prior to July 21, 1961, or by the Procedures and Rules of Practice (effective August 1, 1963) currently in effect.

There are a few cases which, because of their size and complexity, are still in the hearing stage even though they were commenced prior to the major revision of the Rules of Practice in 1961. As to them, it would be productive of confusion and still further delay if the rules of practice governing such proceedings were changed in the course of the evidentiary hearings. The Commission has therefore determined that all proceedings commenced prior to July 21, 1961, shall be governed by the Rules of Practice in effect immediately prior to that date, to the extent stated in the Commission's statement of July 14, 1961, defining the application of the revised Rules of Practice to pending proceedings. See also *Crowell-Collier Publishing Co.*, F.T.C. Docket 7751 (Order of June 17, 1963). In general, the former rules will govern the conduct of the evidentiary hearings in such proceedings, while the current rules will govern post-hearing procedures, including initial decision by the examiner and appeal to the Commission. Accordingly,

It is ordered, That the above-captioned proceeding shall be conducted in conformity with the Rules of Practice in effect immediately prior to July 21, 1961, to the extent indicated in the Commission's statement of July 14, 1961.

IN THE MATTER OF

MONTGOMERY WARD & CO., INC.

Docket 8617. Order, Sept. 24, 1964

Order striking paragraph (h) of subpoena of July 23, 1964, to Mr. Charles W. Wood, remanding matter to hearing examiner, and dismissing appeal in all other respects.

ORDER RULING ON APPEAL FROM EXAMINER'S DENIAL OF MOTION TO LIMIT SUBPOENA

On September 1, 1964, respondent in the above-captioned proceeding filed with the Commission an appeal, pursuant to Section 3.17(f) of the Commission's Procedures and Rules of Practice (effective August 1, 1963), from the hearing examiner's denial of its motion to limit a subpoena duces tecum issued on July 23, 1964, to Mr. Charles W. Wood, vice president of respondent. Answer was filed by complaint counsel on September 9, 1964.

356-438—70——98

Section 3.17(f) provides that such an appeal "will be entertained by the Commission only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice." Respondent does not contend that compliance with the subpoena, as issued, would be unduly burdensome, but only that the documents sought are not relevant to the issues in this proceeding as framed by the complaint. Ordinarily, such a question can more adequately be determined after the issues have been fully developed in the evidentiary hearing before the examiner, rather than at a preliminary stage of the proceeding. In the present case, however, the subpoena in question evidences an attempt to broaden the proceeding beyond the original intentions of the Commission in issuing the complaint. Accordingly, the Commission has determined that paragraph (h) of the subpoena should be stricken, and that the hearing examiner should be directed to re-examine the remaining paragraphs of the subpoena in light of the Commission's desire that this proceeding be expedited and kept within manageable proportions.

Respondent also contends in this appeal that the objectives of this proceeding have already been fulfilled, that the entry of a cease and desist order would not serve the public interest, and that further prosecution of the case would serve no useful purpose. The Commission, in dismissing this appeal, does not pass on the merits of such contention, since we do not believe that it is properly presented. An appeal from a ruling of the hearing examiner on a motion to limit a subpoena is not an appropriate vehicle for presenting such considerations, "addressed to the Commission in its administrative capacity, as the complainant in this proceeding." *Drug Research Corp.*, F.T.C. Docket 7179 (October 3, 1963) [63 F.T.C. 998]. Accordingly,

It is ordered, That paragraph (h) of the subpoena duces tecum issued on July 23, 1964, to Mr. Charles W. Wood be, and it hereby is, stricken.

It is further ordered, That, in all other respects, the appeal is dismissed, and the matter remanded to the hearing examiner for further consideration in light of this order.

Commissioner MacIntyre not concurring.

IN THE MATTER OF

STANDARD MOTOR PRODUCTS, INC.

Docket 5721. Order, Oct. 5, 1964

Order granting permission to file briefs and answers on question of respondent's compliance with an outstanding order.

ORDER GRANTING PERMISSION TO FILE BRIEFS

On September 17, 1964, the hearing examiner certified to the Commission the record in the investigational hearings conducted herein to determine whether respondent Standard Motor Products, Inc., is in compliance with an outstanding order to cease and desist. By motion filed September 23, 1964, respondent requests that certain testimony and exhibits in the aforesaid record be stricken. Subsequent thereto, by letter filed September 28, 1964, respondent requests permission to file briefs and for oral argument upon the entire record of this investigational proceeding.

The Commission has considered respondent's requests and has concluded that although not provided for in its Rules of Practice, the submission of briefs by the parties is warranted. The Commission has further determined to hold in abeyance respondent's motion to strike certain testimony and exhibits and its request for oral argument until the briefs have been filed and reviewed. Accordingly,

It is ordered, That on or before November 3, 1964, respondent and Commission counsel each may file with the Secretary of the Commission a brief upon the record of this investigational proceeding, each brief not to exceed sixty (60) pages, including any appendix.

It is further ordered, That within twenty (20) days after service of the respective briefs, respondent and Commission counsel each may file an answering brief not to exceed sixty (60) pages, including any appendix.

IN THE MATTER OF

CROWELL-COLLIER PUBLISHING COMPANY ET AL.

Docket 7751. Order, Oct. 5, 1964

Order denying complaint counsel's motion to overrule hearing examiner's quashing of a subpoena duces tecum and striking other testimony.

ORDER DENYING PETITION

This matter has come on to be heard by the Commission upon a petition designated as a "Request for Interlocutory Appeal From Rulings of Hearing Examiner," filed September 25, 1964, by counsel supporting the complaint.

In part I of said petition, complaint counsel contends that the hearing examiner erred in his ruling sustaining respondents' motion to quash a subpoena ad testificandum directed to David H. Kidd. Complaint counsel's petition in this respect is improperly filed since an objection to a hearing examiner's ruling granting a motion to quash

a subpoena should have been in the form of an appeal to the Commission rather than the subject of a request for permission to file an interlocutory appeal. Nevertheless, the Commission has considered complaint counsel's argument on this point and has concluded that there has been no showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice.

In part II of his petition, complaint counsel requests permission to file an interlocutory appeal from the hearing examiner's ruling striking the testimony of one of complaint counsel's witnesses. It appears that the hearing examiner ordered this testimony stricken while at the same time denying respondents' alternative request for enforcement of a subpoena to obtain the deposition of the witness' husband who was present at the transaction concerning which the witness testified. In substance, it is complaint counsel's contention that respondents did not exercise due diligence to obtain the deposition.

The hearing examiner's ruling on this point was issued on July 15, 1964, and complaint counsel's request is not timely filed. Moreover, the Commission concludes that to permit an interlocutory appeal on this point would result in unnecessary delay and is not warranted in the public interest.

In part III of his request, complaint counsel objects to an order of the hearing examiner which allegedly requires him to produce certain letters for respondents' inspection at a date and place specified. A review of the examiner's order discloses that complaint counsel's objection is premature since the examiner's order is premised on certain conditions which have not been fulfilled. Accordingly,

It is ordered, That complaint counsel's petition, filed September 25, 1964, be, and it hereby is, denied in all particulars.

IN THE MATTER OF

SHREVEPORT MACARONI MANUFACTURING COMPANY, INC.

Docket 7719. Order, Oct. 8, 1964

Order denying respondent's motion to reopen proceeding for purpose of vacating the cease and desist order against it.

ORDER DENYING MOTION TO REOPEN PROCEEDING

Respondent in the above-captioned proceeding filed with the Commission on August 18, 1964, a motion pursuant to Section 3.28(b)(2) of the Commission's Procedures and Rules of Practice (effective Au-

gust 1, 1963) to reopen the proceeding for the purpose of vacating the cease and desist order entered therein [60 F.T.C. 196]. An answer in opposition to this motion was filed by the Director of the Commission's Bureau of Restraint of Trade on September 14, 1964.

A threshold question is whether the Commission is empowered to modify or vacate a cease and desist order issued by it under the Clayton Act where, as here, that order has been affirmed on review by the Court of Appeals, without first seeking leave from the court. The parties agree that Section 3.28(b)(2) of the Commission's Procedures and Rules of Practice so empower the Commission and that this provision is proper under Section 11 of the Clayton Act. It is established that the Commission may modify orders issued under the Federal Trade Commission Act, even after affirmance by a court of appeals, without seeking leave of the court. *American Chain & Cable Co.* v. *F.T.C.*, 142 F. 2d 909 (4th Cir. 1944). The language of Section 11 of the Clayton Act was amended in 1959 to conform with the parallel provisions of the Federal Trade Commission Act, and the legislative history confirms that orders under the Clayton Act are now to be treated the same as orders under the Federal Trade Commission Act for purposes of modification.

Section 3.28(b)(2) provides that the Commission will reopen a proceeding and vacate the cease and desist order where "changed conditions of fact or law . . . or . . . the public interest" so require. Respondent predicates the present motion upon the Commission's decisions in *Max Factor & Co.*, F.T.C. Docket 7717 (July 22, 1964), and *Shulton, Inc.*, F.T.C. Docket 7721 (July 22, 1964) [66 F.T.C. 184], wherein the Commission, without adjudicating the question whether the respondents had violated Section 2(d) of the Clayton Act, ordered dismissal of the complaints on the ground that "entry of cease-and-desist orders against these particular respondents . . . would not be an equitable and fully effective method of eliminating the discriminatory practices in which respondents engaged." The Commission stated that, with respect to the problem of large or chain retailers who sponsor special promotional events and solicit discriminatory payments from competing suppliers for participation in such events, the enforcement policy best calculated to achieve the ends contemplated by Congress is one based on Section 5 of the Federal Trade Commission Act and directed primarily at the buyer. The present respondent is among the competing suppliers who participated in the special promotional events involved in the *Max Factor* and *Shulton* matters and against whom the Commission proceeded under Section 2(d) and obtained an order to cease and desist.

The Commission has determined that, in the particular circumstances presented here, vacation of the cease and desist order against the present respondent is not justified by changed conditions of fact

or law or the public interest. *Cf. Moog Industries* v. *F.T.C.*, 355 U.S. 411. The considerations bearing on whether to enter a cease and desist order, which was the question for determination by the Commission in *Shulton* and *Max Factor*, are crucially different from those bearing on whether the Commission shall vacate a cease and desist order that has become final, here after protracted litigation. The present respondent, unlike the respondents in *Max Factor* and *Shulton*, has been found by the Commission and the courts to have violated the law. This finding was predicated not only on participation in the special promotional events involved in those cases, but also, as respondent concedes, on discriminatory and unlawful promotional payments to another buyer in different circumstances. While the Commission will vacate a cease and desist order where it appears that the order is no longer necessary to prevent recurrence of the unlawful conduct, we cannot, on the basis of respondent's motion, conclude that such is the case here. With respect to respondent's contention that it will suffer a competitive detriment by remaining under order while its competitors are not, it should be pointed out that the good-faith meeting-of-competition defense is applicable to Section 2(d) and is read into every order entered under that statute.

It is ordered, That respondent's motion to reopen the proceeding be, and it hereby is, denied.

Commissioner MacIntyre concurring in the result.

IN THE MATTER OF

GRABER MANUFACTURING COMPANY, INC., ET AL.

Docket 8038. Order, Oct. 15, 1964

Order that the proceeding in this case be suspended is herewith denied.

ORDER DENYING MOTION TO SUSPEND PROCEEDING

On August 4, 1964, respondents in the above-captioned proceeding made a motion to the hearing examiner that this proceeding be suspended. Two grounds were offered in support of the motion. The first is that the decision in a case now pending before a Federal Court of Appeals will, when rendered, cast great light on the issues of the present case. The second is, in effect, that the Commission should, concurrently with or alternatively to the continued prosecution of the present case, proceed against the buyer named in the complaint as a recipient of alleged discriminatory reductions in price.

The hearing examiner, pursuant to Section 3.6(a) of the Commission's Procedures and Rules of Practice (effective August 1, 1963), ruled that respondents' motion was one upon which he had no authority to rule, and accordingly, by order of August 27, 1964, he certified the motion to the Commission with his recommendation. Since respondents' motion to suspend is avowedly addressed to the Commission's administrative discretion and does not raise questions that are within the "adjudicative factfinding functions" (Section 8 of the Commission's Statement of Organization (effective August 1, 1963)) which have been delegated to the hearing examiners, the examiner's determination to certify was correct. *O. K. Rubber Welders, Inc.*, F.T.C. Docket 8571 (Order of October 17, 1963) [63 F.T.C. 2213]; *Drug Research Corp.*, F.T.C. Docket 7179 (Order of October 3, 1963) [63 F.T.C. 998]. The motion is therefore properly before the Commission for decision.

The complaint in this proceeding was issued on July 12, 1960, and completion of the evidentiary hearings before the hearing examiner has been delayed for several years due to a protracted collateral litigation which terminated only recently. It is the Commission's determination that at this time the public interest would be better served by expeditious completion of the hearings, rather than by such further delay as would be created by indefinitely suspending the proceeding. Accordingly,

It is ordered, That respondents' motion to suspend the proceeding be, and it hereby is, denied.

IN THE MATTER OF

MONTGOMERY WARD & CO., INC.

Docket 8617. Order, Oct. 15, 1964

Order denying permission to file an interlocutory appeal from hearing examiner's denial of offering additional documents in evidence.

ORDER DENYING PERMISSION TO FILE INTERLOCUTORY APPEAL

On July 20, 1964, the hearing examiner in the above-captioned proceeding directed complaint counsel to furnish counsel for respondent, by July 24, 1964, copies of all documents to be proffered in evidence. On September 18, 1964, complaint counsel moved that they be allowed to furnish additional documents, not embraced in the order of July 20, to be proffered in evidence. The examiner, by order of September 29, 1964, denied complaint counsel's motion, stating that, "[i]f granted

it would result, we think, in undue delay and contradict the express desire of the Commission '. . . that this proceeding be expedited and kept within manageable proportions.'" On October 5, 1964, complaint counsel, pursuant to Section 3.20 of the Commission's Procedures and Rules of Practice (effective August 1, 1963), filed with the Commission a request for permission to file an interlocutory appeal from the examiner's order of September 29. On October 7, 1964, respondent filed a statement in opposition to complaint counsel's request.

Section 3.20 provides that permission to file an interlocutory appeal "will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest." Section 3.15(c) of the Rules directs the hearing examiner "[t]o regulate the course of the hearings and the conduct of the parties and their counsel therein," and Section 3.8(c) provides that the examiner's order based on the prehearing conference "shall control the subsequent course of the proceeding, unless modified at the hearing to prevent manifest injustice." Thus, such a question as whether to modify the terms of the prehearing order in order to admit further evidence is essentially within the sound discretion of the hearing examiner. In the interest of orderly and expeditious procedure, his determination of such a question will not often give rise to the "extraordinary circumstances" which must be shown before the Commission will entertain an interlocutory appeal.

In its Order Ruling on Appeal From Examiner's Denial of Motion to Limit Subpoena, issued September 24, 1964 [p. 1543 herein], in this matter, the Commission expressed its "desire that this proceeding be expedited and kept within manageable proportions." Since the duty of expediting the proceeding and keeping it within the bounds of the complaint is, at the hearing stage, primarily the hearing examiner's and in the absence of good cause shown, the Commission has determined that it will not entertain an interlocutory appeal from the examiner's ruling denying complaint counsel's motion. Accordingly,

It is ordered, That permission to file an interlocutory appeal be, and it hereby is, denied.

Commissioner MacIntyre not concurring.

IN THE MATTER OF

VINCENT RUILOVA TRADING AS VINCENT CIGAR COMPANY ET AL.

Docket C-802. Order, Oct. 15, 1964

Order reopening case, striking prohibitions numbered 2, 3 and 4 and granting respondents thirty (30) days in which to file objection.

ORDER REOPENING CASE AND GRANTING LEAVE TO FILE MEMORANDUM

The Commission having issued its decision and order on August 3, 1964 [p. 416 herein], in disposition of this proceeding, and it now appearing that the order in such decision contains three prohibitions, to wit, those numbered 2, 3 and 4, which are not contained in the orders entered in four related similar matters, and the Commission having determined that the public interest will be better served if the order in this matter is in conformity with the orders in the said four related similar matters, and that this proceeding accordingly should be reopened for the purpose of modifying such order solely by striking the aforementioned prohibitions numbered 2, 3 and 4:

Wherefore, it is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the respondents herein be, and they hereby are, granted leave, within thirty (30) days after service upon them of this order, to file memorandum stating any objections they may have to the aforesaid modification.

IN THE MATTER OF

BAKERS OF WASHINGTON, INC., ET AL.

Docket 8309. Order, Nov. 28, 1964

Order granting leave to respondent and complaint counsel to file briefs on additional testimony taken by hearing examiner.

ORDER GRANTING LEAVE TO FILE

Additional testimony having been received in this matter for the purpose of permitting respondent Continental Baking Company an opportunity to show the contrary of the facts officially noticed in the Commission's decision of February 28, 1964 [64 F.T.C. 1079, 1118]; and

That additional testimony having been certified to the Commission, together with the examiner's recommendation that the Commission affirm its earlier decision; and

Respondent Continental Baking Company having moved on October 19, 1964, for leave to file proposed findings, conclusions, and exceptions to the recommendation of the examiner, together with reasons therefor; and

The Commission having determined that respondent and complaint counsel should be permitted to file, for the consideration of the

Commission, proposed findings, conclusions, exceptions, and reasons on that additional testimony:

It is ordered, That respondent and Commission counsel may, within fifteen (15) days after service upon them of this order, file with the Commission proposed findings, conclusions, exceptions, and reasons, based on the testimony certified to the Commission on September 24, 1964, and limited to the question of whether such testimony shows the contrary of the facts heretofore noticed by the Commission.

It is further ordered, That, within ten (10) days after service of the respective proposed findings, conclusions, exceptions, and reasons respondent and Commission counsel may each file a reply thereto.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

THE PURE OIL COMPANY, NO. 6640

SUN OIL COMPANY, NO. 6641

TEXACO, INC.,* NO. 6898

STANDARD OIL COMPANY (INDIANA), NO. 7567

SHELL OIL COMPANY, NO. 8537

Memorandum, Oct. 29, 1964

Memorandum of chairman explaining the reasons why he is withdrawing from the above cited proceedings.

MEMORANDUM OF CHAIRMAN DIXON

For the reasons set forth below, I am withdrawing from participation in each of these five proceedings.

On July 25, 1961, I made a speech in Denver, Colorado, before the National Congress of Petroleum Retailers, a trade association composed largely of service station owners or operators. This important segment of the small business community [1] had long been deeply concerned with a number of supplier-practices alleged to be widespread in the industry, particularly price discrimination, resale price fixing, and TBA "commission" arrangements, all of which are said to pose a threat to the continued existence of the "independent" wholesalers,

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*During the pendency of this proceeding respondent changed its name from The Texas Company to Texaco, Inc.

[1] The 1958 Census reported 187,875 service stations in the United States.

jobbers, and retailers. Complaints from this sector of the industry [2] had prompted the Federal Trade Commission to commence a number of investigations and formal, adjudicatory proceedings—including the five involved here. Since that business group was the particular sector of the public that had the most immediate and direct interest in these proceedings, I thought it appropriate—if not my duty—to report to its members on the Commission's efforts in their industry. In that speech, therefore, I mentioned a number of cases, including some that had already been decided by the Commission, and others that were still pending before it.

One of the pending cases was *Texas Co.*, Dkt. 6485 [62 F.T.C. 1172], involving a charge that Texaco, through its power over its dealers' leases and supplies, and for the purpose of securing a "commission" from B. F. Goodrich, had compelled them to handle B. F. Goodrich tires, batteries, and accessories (TBA) rather than permitting them to deal in TBA of their own choice, in violation of Section 5 of the Federal Trade Commission Act. The Commission found this practice established by the record and issued its final administrative order to cease and desist on April 15, 1963.[3]

Texaco appealed this decision. On July 30, 1964, the Court of Appeals for the District of Columbia handed down its ruling, setting aside the order and directing dismissal of the complaint. *Texaco, Inc.* v. *Federal Trade Commission, and B. F. Goodrich Co.* v. *Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964). The court held that (1) the Commission's decision was not supported by the record, and that (2) certain of the words used by me in the 1961 Denver speech indicated that I "had in some measure decided in advance that Texaco had violated the Act."

Since Standard, Pure, Shell, and Sun were mentioned in the same sentence [4] and thus in the same context as Texaco, the court's finding that I was thereby disqualified to hear the earlier Texaco case is directly applicable to each of these cases in which disqualification was requested. Accordingly, I shall not participate in the Commission's deliberations in or disposition of *Pure Oil Co.*, Dkt. 6640; *Sun Oil Co.*, Dkt. 6641; *Texas Co.*, Dkt. 6898; *Standard Oil Co. (Ind.)*, Dkt. 7567; and *Shell Oil Co.*, Dkt. 8537.

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[2] "A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so." He may, however, "bring the matter to the Commission's attention and request it to file a complaint." *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25 (1929). See also the Commission's Rules of Practice, Sec. 1.12.

[3] Reported in CCH Trade Reg. Rep. (1961–1963 Transfer Binder), Par. 16,378.

[4] "You know the practices—price fixing, price discrimination, and overriding commissions on TBA. You know the companies—Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone. . . ."

A further word of explanation is necessary, however. On April 24, 1964, a few months prior to the decision in *Texaco*, the Court of Appeals for the Seventh Circuit considered the problem of TBA "commission" arrangements and concluded, on the basis of a substantially similar record, that the law had been violated. *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, and *Atlantic Refining Co.* v. *Federal Trade Commission*, 331 F. 2d 394 (7th Cir. 1964). Although Atlantic was one of the firms I had mentioned in the speech in question,[5] that company raised no question of prejudice either before the Commission or the court of appeals. Therefore, on the substantive question of the legality of these TBA "commission" arrangements, there now exists an apparent split in the circuit courts of appeals. The Commission, in an effort to secure a prompt and final resolution of this important issue, has joined Atlantic and Goodyear in requesting the United States Supreme Court to review that case. In addition, the Commission has requested the Solicitor General, and he has agreed, to ask the Supreme Court to review the *Texaco* case as well.

The Supreme Court will not be asked, however, to review in *Texaco* the subsidiary question of whether the court of appeals was correct in concluding that the speech in question established prejudgment on my part and thus required my disqualification. While the decision on that point has the effect of restricting somewhat public discussions between administrators and those affected by their public proceedings, this is a far less compelling consideration than the substantive issue raised in these two highly significant cases. It is the conviction of the Solicitor General—and I fully agree with him—that a question freighted with a public interest as large as this should be presented separately and clearly, uncomplicated by lengthy arguments addressed to the problem of discovering, from a three-year-old speech of mine, the openness, or lack of it, of my mind at that time.[6]

Two further observations must be made here, in view of the fact that the *Texaco* decision has prompted a flurry of disqualification motions in wholly different factual situations. First, that decision on the question of administrative disqualification was necessarily a very narrow one. The only issue before the court was the meaning of the

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[5] N. 4, *supra*.

[6] This is not to say, however, that there is no substantial public interest in the question. As one commentator has noted, "every adjudicator has a positive duty to fulfill his adjudicative functions unless actually disqualified, and both the individual parties to a controversy and the public at large have a vested interested in such administrator's participation in the case involved. Consequently, while an administrator should scrupulously search his conscience to test his impartiality, it is almost as great a fault to employ self-disqualification too readily as too sparingly." Comment, "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216, 233–234 (May–June 1964).

precise words used in that single speech, and there will of course be no occasion, much less a practical necessity, for their repetition in the future. Thus the decision can have no relevance to the factual situations involved in the various other cases in which disqualification has been or may be sought.

Secondly, however, and with the profoundest deference to the court, I believe it my duty to note that, even with regard to the particularly narrow factual situation involved in *Texaco*, I think the court has been persuaded to accept what I can only regard as an unworkable concept of administrative "prejudgment." This view, if literally applied, would be a stringent one even for the judiciary itself to adhere to. *Eisler* v. *United States*, 170 F. 2d 273, 277–278 (D.C. Cir. 1948), removed from docket, 338 U.S. 189 (1949).[7] For an administrator such as a member of the Federal Trade Commission, it would be—if literally construed—virtually impossible to follow.[8] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948), *affirming Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945). It apparently overrules the court's own earlier ruling in *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (D.C. Cir. 1955), *cert. denied*, 351 U. S. 927 (1956).[9]

In *Marquette*, *supra*, the court of appeals had said: "It has been held that the bias or prejudice alleged must be 'personal,' and that *a mere prejudgment of the case is not sufficient.*" 147 F. 2d 592 (emphasis added). Affirming, the Supreme Court declared that the test of administrative disqualification is whether "the minds of its [the Federal Trade Commission's] members were *irrevocably closed* on

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[7] See discussion of this case in *Campbell Taggart Associated Bakeries*, Dkt. 7938 (Memorandum of Chairman Dixon in Regard to Respondent's Motion that He be Disqualified) [62 F.T.C. 1494, 1498], CCH Trade Reg. Rep. (1961–1963 Transfer Binder), Par. 16,399, May 2, 1963.

[8] See, *e.g.*, *Campbell Taggart, supra; Lloyd A. Fry Roofing Co.*, Dkt. 7908 (Memorandum of Chairman Dixon) [65 F.T.C. 1317], 3 CCH Trade Reg. Rep., Par. 16,968, June 30, 1964; Law, "Disqualification of SEC Commissioners Appointed from the Staff: *Amos Treat, R. A. Holman,* and the Threat to Expertise," 49 *Cornell L.Q.* 257 (Winter 1964); Comment, "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216 (May–June 1964); Davis, 2 *Administrative Law Treatise* 130 (1958).

[9] In that case, the United States Attorney General, contemporaneously with the service on a national bar association of an order to show cause why it should not be designated a "subversive" organization, made the following statement in a public speech:

> "It is because *the evidence shows* that the National Lawyers Guild is *at present* a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations." [Emphasis added.]

The court, in response to a charge of prejudgment, first noted the Attorney General's affidavit "denying his prejudgment and explaining that the only determination thus far made by him is that the evidence warranted his proposal to designate, a preliminary and *ex parte* determination. He reaffirms under oath his intention 'to make an impartial final determination on the basis of the administrative record before me.'" 225 F. 2d at 555. See *Campbell Taggart, supra*, n. 18 [62 F.T.C. 1498, 1507].

the subject of the respondents' basing point practices." 333 U.S. at 701 (emphasis added). This is but recognition of the nature of the administrator's duties, and of the very purpose for which Congress, in creating the administrative agency, shaped its functions differently from those of a constitutional court. No member of the Federal Trade Commission goes into the agency's hearing room with a mind that is wholly "open" or blank on the subject before it. Section 5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(6), provides that: "The Commission is hereby empowered and *directed* to prevent" various parties "from using unfair methods of competition in commerce. . . ." (Emphasis added.) Section 5(b) provides that: "Whenever the Commission shall have *reason to believe* that any such [party] has been or is using any unfair method of competition . . . and if it shall *appear to the Commission* that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve . . . a complaint stating its charges in that respect. . . . If upon such hearing the Commission shall be *of the opinion* that the method of competition . . . is prohibited by this Act, it shall . . . issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." (Emphasis added.) Thereafter, the party has an absolute statutory right of review in the appropriate court of appeals.[10]

This statutory scheme thus not only contemplates but affirmatively commands the administrator to have, before lodging formal charges of law violation, a certain degree of conviction on the issues raised; he must already have, if he is to comply with Congress' command, "reason to believe" the party charged has violated the statute and that the violation is of sufficient gravity to raise a public interest in the proceeding. How does a member of the Federal Trade Commission acquire such a pre-complaint "reason to believe"? He reviews investigative materials gathered by the agency's investigators under its various statutory powers. These investigative files generally include reports of interviews with prospective witnesses, together with documents and other materials collected in the investigation. If these files are found sufficiently persuasive by the individual commissioner—persuasive enough to produce in his mind a "reasonable belief" that the law has been violated and that the public interest requires a proceeding to stop it—he joins with his fellow commissioners in causing a formal complaint to be issued and adjudicatory hearings to be held. When these and other steps are completed by the staff, the matter comes back before the commissioner and his colleagues. This time,

[10] On appeal, the "findings of the Commission as to the facts, if supported by evidence, shall be conclusive." Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c).

of course, he sits as an adjudicator. Now all of the evidence is in; the party charged has had a full opportunity to tell his side of the story, "to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *Cement Institute*, *supra*, 333 U.S. at 701.

At this point, of course, the individual commissioner is required to consider only the adjudicative record before him and decide, as the statute commands, whether he is then "of the opinion" that the law has in fact been violated. This deliberation is obviously broader and deeper than the one that preceded his earlier persuasion that there was "reason to believe" a violation had occurred. Whereas the first was an *ex parte* determination based solely upon the material reported to him by the agency's own staff, this final adjudication is enlightened by every consideration an adversary system can bring before him. Judicial review assures that, whatever may have been the basis for his initial "reason to believe" a violation of law had occurred, the final "opinion" thereon is fully supported—in the judgment of an impartial court—by the evidence formally received into the adjudicative record.

The point here is that, by the very nature of the administrative process, the administrator, unlike the judge in a constitutional court, can never come to his adjudicative task with a mind wholly devoid of factual information about the subject before him. The statutory scheme, as described above, positively *requires* him to entertain a provisional conviction on the subject before the charges are even lodged. Conviction or persuasion is obviously a matter of degree, progressing along a continuum from the lowest to the highest state. Investigative files, like formal adjudicative records, vary in strength and persuasiveness. The file in one case may be just sufficient to cause the individual commissioner to say to himself, "There's enough here to give me reason to believe this party has violated the law, but its persuasiveness doesn't go much beyond the minimum statutory requirement." Another file, on the other hand, might prompt the commissioner to say to himself, "This is one of the strongest cases of this type I've ever seen." Could it then be said that, while the commissioner was qualified to hear and participate in the final adjudication of the case in which he had started with a "weak" conviction, he had "prejudged" and was thus disqualified in the second case, the one that had more forcibly impressed him at the time the administrative complaint was issued?

Such a rule would surely be unworkable. Members of the Federal Trade Commission, by the very nature of their work, are intimately familiar with the most detailed features of many industries, of the

individual companies belonging to those industries, and even with the individual men that direct those particular industries and companies. Even when a firm comes before us for the first time, it is usually no stranger to us. An antitrust probe of Company A almost invariably gives us a great deal of information about what Company B and other competing firms in that industry are doing. And facts learned in one industry cannot help but influence the way one evaluates similar or related facts in a second industry.

Congress understood all of this when it fashioned its creature, the administrative agency. It was not in spite of this familiarity with the workings of industry, but because of it, that the legislature assigned the tasks involved here to this Commission rather than to an already overburdened judiciary believed to have neither the time nor the facilities for acquiring that special experience. "The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry," with terms of service "long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." [11] The Supreme Court recognized and gave full effect to this congressional objective when it held that the administrator is disqualified for "bias" only when his mind is "irrevocably closed" on a subject before it reaches him for adjudication. *Cement Institute*, *supra*, 333 U.S. at 702.[12]

In the *Texaco* case, therefore, there is no question but that the five commissioners [13] that reviewed the *ex parte*, "extra-record" investigational files, and acquired from those files a pre-complaint conviction of sufficient firmness to satisfy the statutory "reason to believe" there had in fact been a violation of law, would have been immune to a challenge of "bias" or prejudgment. To say that the remarks quoted from my 1961 speech evidenced "prejudgment" of a higher degree

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[11] Sen. Rep. No. 597, 63d Cong., 2d Sess. (1914), 10–11.

[12] See also *Lumber Mut. Casualty Ins. Co. of New York* v. *Locke*, 60 F. 2d 35 (2d Cir. 1932), where an administrator had written a letter stating, in substance, that, having investigated the matter in question to his full satisfaction, the formal hearing was a mere formality. The court said: "However tactless or undesirable such remarks may have been, they *fell short of a statement that nothing that might be shown at such a hearing would change his mind*. The Commissioner had already a great familiarity with the claimant's case, both by reason of his personal physical examination of Truppi and from records in his office. He doubtless regarded his investigation as full and sufficient. We think his remarks amounted to no more than saying that he felt confident that he was right. They did *not indicate that his mind was not open to any proof*, but only that when so full an examination had been made no matters affecting the result were likely to be developed." 60 F. 2d at 38 (emphasis added).

[13] I was not one of those commissioners. The complaint in that proceeding was issued January 11, 1956, and I took office in 1961, some five years later.

than that *required* by statute of the five commissioners that issued the formal charges against Texaco is, in my view, to confuse form with substance. I knew far less about the case than those earlier commissioners. I had no convictions of any kind as to whether Texaco had in fact engaged in the conduct alleged in the complaint filed by my predecessors. The reference in my speech to the three business practices, seven oil companies, and three tire manufacturers was qualified by the statement that "Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal." I thought it would be taken for granted that, insofar as my other remarks suggested the actual existence and illegality of the named practices, the references were to the already-decided cases, not to those still pending before the agency. The reference to the other proceedings—those still pending before the agency—was intended merely as a statement of the allegations in the complaints, not as a prejudgment of their merits.

Litigants before this and, apparently, other administrative agencies [14] are now reading this and other recent decisions on this point as establishing a rule of strict "neutrality"—in the firmest judicial sense of that word—for administrators with adjudicative functions. While these arguments are ostensibly addressed to alleged prejudgments of factual issues, it is clear that their contentions go perilously close to a demand for administrators that are "neutral" toward the laws themselves. Not even judges are expected to carry their objectivity to the point of actual indifference toward the policies of the laws they administer. "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." [15] The administrator, being under a duty not merely to adjudicate matters brought before him by a third-party prosecutor but to affirmatively seek out and halt infringements of particular laws,[16] must necessarily be one "whose

[14] See, *e.g.*, Law, n. 8, *supra*, at 258.

[15] Jaffe, "The Reform of Administrative Procedure," 2 *Pub. Ad. Rev.* 141, 149 (1942), quoted in Davis, 2 *Administrative Law Treatise* at 138, n. 28.

[16] "In a sense, of course, a court represents the public interest in administering a statute, but it has no continuing duty to see that the law is enforced. It is the court's duty to decide cases as they come before it, but if no indictments or civil actions are brought, and the law becomes a dead letter, the court cannot be blamed. An administrative body, on the other hand, has a continuing responsibility for results. It must ferret out violations, initiate proceedings, and adopt whatever proper methods are necessary to enforce compliance with the law." Henderson, *The Federal Trade Commission* 91 (1924). See Section 5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(6), providing that the Commission "is hereby empowered and *directed*" [emphasis added] to "prevent" unfair methods of competition.

sincere ideas of policy conform to the broad legislative intent" [17] if those laws are not to become a "dead letter" by sheer inertia.[18]

Thus no broad generalities can be read into the *Texaco* decision. To read it as meaning that administrators must be indifferent to the legislative policies they are charged with effectuating—that is, as judicial disapproval of the fact that the speech in question reflected concern over the violations of law already found in the industry and resolution in attempting to correct them—would be inconsistent with Congress' express mandate "directing" this Commission to go forward and affirmatively "prevent" unfair competition. To interpret the decision as meaning that administrators must come to their adjudicative tasks with minds devoid of any factual information bearing on the question of whether the charges in their complaints are true, or as meaning that administrators must have no preconceived notions or opinions as to whether those charges are well founded, would be at odds with our statutory duty to issue such complaints only when we have "reason to believe" the law has been violated as alleged, a duty that necessarily assumes some degree of pre-complaint persuasion in the matter. Such an interpretation would also be contrary to the Supreme Court's holding in *Cement Institute*, *supra*, that the test in such cases is not whether the administrator has made any "prejudgments"—it is taken for granted that he has—but whether that prejudgment has gone beyond the provisional stage to a point where it can be said that his mind is "irrevocably closed" on the questions before him.

The *Texaco* ruling on this point, therefore, is simply that the particular words quoted from my speech indicated to the court that my mind was, for some unspecified "personal" reason or reasons,[19] "irrevocably closed" on the subject of Texaco's business practices when the speech was delivered in April 1961 and remained in that state during the briefing and arguing of the case before us two years later, in April 1963.

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[17] Davis, n. 15, *supra*, at 137. See also Justice Frankfurter's comment in *United States v. Morgan*, 313 U.S. 409, 421 (1941), in regard to a charge of bias against the Secretary of Agriculture: "That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. . . . Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption."

[18] Henderson, n. 16, *supra*.

[19] Section 7(a) of the Administrative Procedure Act, like the comparable provision governing the disqualification of federal judges, 28 U.S.C. 25; 36 Stat. 1090 (1911), speaks only of "personal" bias or prejudice. See also Davis, n. 15, *supra*, at 167.

The Solicitor General of the United States has authorized me to say that, while he wishes to present the *Texaco* and *Atlantic* cases to the Supreme Court on the substantive questions alone, without the encumbrance of the subsidiary, disqualification issue, he is of the opinion, as his petition for *certiorari* in the *Texaco* case notes, that the court of appeals erred in finding disqualifying bias in the speech in question.

IN THE MATTER OF

MONTGOMERY WARD & CO., INC.

Docket 8617. Order, Nov. 6, 1964

Order denying complaint counsel's request for issuance of amended complaint, and dismissing request to file an interlocutory appeal.

ORDER DENYING MOTION TO AMEND COMPLAINT AND DISMISSING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

By order of September 24, 1964 [p. 1543 herein], the Commission ordered stricken that part of a subpoena duces tecum procured by complaint counsel relating to respondent's advertising representation, "Satisfaction Guaranteed or Your Money Back", as being "beyond the original intentions of the Commission in issuing the complaint." On October 5, 1964, complaint counsel moved before the hearing examiner that the complaint be amended to include a specific challenge to that representation. The examiner, by order of October 7, 1964, denied this motion and refused to certify it to the Commission. On October 13, 1964, complaint counsel filed a "Request for Permission to File Interlocutory Appeal or for Issuance of Amended Complaint". On October 18, respondent filed a statement in opposition to complaint counsel's request.

Section 3.7(a)(1) of the Commission's Procedures and Rules of Practice (effective August 1, 1963) provides that a motion to amend the complaint shall be certified to the Commission by the hearing examiner "if the amendment is [not] reasonably within the scope of the proceeding initiated by the original complaint," and that is the procedure that should have been followed here. However, the Commission has considered complaint counsel's motion to amend the complaint as if it had been properly certified to the Commission, and has determined that the public interest does not, in the circumstances, warrant amending the complaint as requested by complaint counsel. As the Commission stated in its Order Ruling on Appeal from Examiner's Denial of Motion to Limit Subpoena (September 24, 1964)

[p. 1543 herein], and again in its Order Denying Permission to File Interlocutory Appeal (October 15, 1964) [p. 1549 herein], it is the Commission's desire that this proceeding be expedited and kept within manageable proportions. Complaint counsel's request to broaden the complaint by adding a charge unrelated to those contained in the original complaint is inconsistent with the Commission's previous rulings limiting the scope of this proceeding and with its continuing desire that this proceeding not be unduly broadened and protracted. Accordingly,

It is ordered, That complaint counsel's request for issuance of an amended complaint be, and it hereby is, denied; and that complaint counsel's request for permission to file an interlocutory appeal be, and it hereby is, dismissed.

Commissioner MacIntyre not concurring.

IN THE MATTER OF

BAKERS OF WASHINGTON, INC., ET AL.

Docket 8309. Order and Memorandum, Nov. 12, 1964

Order denying respondent's motion that chairman be disqualified from participation in this proceeding.

MEMORANDUM OF CHAIRMAN DIXON IN REGARD TO RESPONDENT'S MOTION THAT HE BE DISQUALIFIED

NOVEMBER 4, 1964

Respondent Continental Baking Company has moved that I withdraw from this proceeding or that, in the alternative, the Commission as a body "determine Chairman Dixon to be disqualified, from any consideration or participation in this proceeding."

Respondent alleges, in substance, that by reason of my prior position and duties as Counsel and Staff Director of the Senate Antitrust and Monopoly Subcommittee, my further participation in the instant proceeding would raise the "appearance" of a lack of "objectivity, impartiality, and fairness." Respondent points out that, as Counsel for the Subcommittee when it conducted the "Study of Administered Prices in the Bread Industry" in 1959, I interrogated a number of bread company officials, including R. Newton Laughlin, president of respondent Continental. It is said that my "interrogation concerned the manner in which Continental's business was conducted in Seattle, including the manner in which Continental effected price changes in

that market. The strongly implied conclusion of the interrogation was that Continental's prices in Seattle were directed by, and controlled from, out-of-state." Respondent also argues that the transcript of the Subcommittee's hearings [1] and its report [2] "strongly suggest that Chairman Dixon and his staff had concluded that agreements affecting price did exist in the Seattle market."

The first difficulty with respondent's motion is that it is not timely. The events that allegedly disqualify me occurred in 1959. This proceeding was decided on the merits—that is, Continental and the other respondents were found to have fixed bread prices—by our hearing examiner on July 20, 1962. Thereafter, the matter was fully briefed and argued before the Commission itself. On February 28, 1964, the Commission [3]—including myself—affirmed the examiner's decision on the merits, finding that respondents had in fact conspired to fix the price of their breads. Then, on April 27, 1964, respondent Continental moved that the matter be reopened so as to permit respondent, in accordance with Section 7(d) of the Administrative Procedure Act, to "show the contrary" of certain facts officially noticed in our decision in support of the finding that Continental's pricing activities in Seattle had occurred "in" interstate commerce. This was granted on May 21, 1964, and the proceeding was reopened and remanded to our hearing examiner for the sole purpose of giving respondent its opportunity to show the contrary of those noticed jurisdictional facts. No further evidence was to be received on the price fixing question; that was already settled as far as this Commission was concerned.

At no time between the issuance of the examiner's decision in 1962—the point at which the matter became ripe for Commission review—and our own decision on the merits in 1964 did respondent Continental express any dissatisfaction with my "objectivity, impartiality, and fairness," or with the possibility that my 1959 interrogation of its president might have raised doubts about the "appearance" of my fairness. No such question was raised when the matter was briefed and argued to the Commission on the merits in 1963. Respondent was silent on this point when it petitioned us, in April 1964 (nearly two months after our decision on the merits), for an opportunity to challenge the noticed jurisdictional facts. Now, however, more than two (2) years after the examiner's initial decision, and nearly nine (9) months after our own decision on the merits, respondent moves that I disqualify myself because of matters that occurred in 1959.

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[1] "Study of Administered Prices in the Bread Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 (Part 12, 1959).

[2] S. Rep. No. 1923, 86th Cong., 2d Sess. (1960).

[3] One member of the Commission dissented.

Respondent explains its sudden doubts about the "appearances" of the matter by implying that the issue only arose during the hearings on remand, that is, during or after July 1964. In our remand order, we had noted that the Commission's own attorney, if he desired to present evidence explaining or rebutting that offered by Continental on remand, should be permitted to do so. At the remand hearing in Seattle in July 1964, Continental offered testimony by its San Francisco regional manager in an apparent effort to show that, contrary to the facts noticed by the Commission in its earlier decision on the merits, the manager of its Seattle bread plant sets the company's prices in that market without any direction or control by the regional office in San Francisco. This testimony went, therefore, to the question of whether the price fixing already found by the Commission in its February 1964 decision had occurred in interstate commerce.

In rebuttal, the Commission's attorney introduced into the remand record, pursuant to a stipulation with Continental's attorney, some seven (7) pages of testimony excerpted from the Subcommittee's 1959 bread hearings.[4] The witness testifying there was Mr. Laughlin, president of Continental. Some of the questions were asked by Senator Kefauver, others by the Subcommittee's staff members, including myself. The part that interested the Commission's attorney was Mr. Laughlin's testimony before the Subcommittee that he had personally approved, from his Rye, New York, headquarters office, a particular price increase in 1958 by his Seattle bread plant.

Now, on the basis of the fact that this borrowed testimony was not introduced into this record until July 1964, respondent seeks to imply, I gather, that the "appearance" of unfairness has just now entered the case, thus explaining its failure to make timely objection to my participation in the proceeding.

As I read this record, however, that testimony borrowed from the Subcommittee's transcript is merely repetitious of evidence already received in the original hearings.[5] In my view, therefore, that testimony adds nothing to this record and I would vote to strike it as cumulative if respondent so desires.

We come back, therefore, to the fact that Continental now considers me disqualified to participate in the adjudication of a narrow, jurisdictional aspect of the case whereas, when the matter was before me and the other commissioners on the merits many months ago, respond-

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[4] N. 1, *supra*.

[5] For example, the manager of Continental's Seattle bread plant had testified as follows:

"Q. Now, I show that Exhibit 23E to the witness and I would like to ask the witness whether that indicates that the president of the company [in New York] gave approval to the 1958 suggested price raise [in Seattle]?

"THE WITNESS: Yes, it does." [Tr. 426–427]

ent expressed no dissatisfaction with my fairness and my qualification to hear and decide that larger question. It is in the anomalous position of arguing that, while it had not doubts about my "impartiality" on February 28, 1964, when I participated in the decision that it had in fact fixed prices, I am disqualified to hear the rest of the case nine months later, not because of intervening events, but because of something that happened in 1959.

Respondent did not ask for my disqualification when the case was argued before us in 1963, and decided by us in 1964, for the simple reason that I had displayed no disqualifying bias or prejudice against Continental in the Subcommittee's 1959 hearings, and respondent's president and attorneys [6] knew it. Indeed, while respondent first says the Subcommittee transcript "strongly suggests" I had already—in 1959—"concluded that agreements affecting price did exist in the Seattle market," it does not seriously press this contention that I am in fact biased and prejudiced against Continental. "To state legal and compelling grounds for the present motion it is not necessary to claim that Chairman Dixon has, in fact, prejudged the issues—including the precise jurisdictional issue now presented. It is enough to show, as a comparison of the present pending issue with Chairman Dixon's interrogation of Mr. Laughlin on that issue does show, that the *appearance* [respondent's emphasis] of objectivity, impartiality, and fairness would be lost unless there were disqualification. . . . Certainly a movant in such a situation as this is not required to prove that, as a subjective matter, the administrator has in fact 'prejudged' the issue, nor that his 'fairness' has been destroyed, nor that he is 'biased,' nor even need the movant prove as a matter of fact that continued participation by the administrator would be 'prejudicial' to the movant's rights . . . . All that need be shown are objective facts which might lead an impartial observer to question whether there was some measure of adjudgment of the facts or law prior to consideration of the particular case. The motion should be granted if the appearance of complete fairness would be compromised by continued participation." [7]

This "appearances" argument pushes a generally salutary principle of administration to a wholly unwarranted extreme. Appearances are indeed a factor to be considered, as I noted in my memorandum opinion

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[6] When the company's president, Mr. Laughlin, appeared before the Subcommittee on June 18, 1959, he was accompanied by three other officers of the company, including its then assistant general counsel, Mr. Roy M. Anderson. Mr. Anderson, now the company's vice president and general counsel, has participated in the instant proceeding continuously. For example, he appeared "of counsel" on Continental's petition of August 22, 1962, asking the Commission—including myself—to review the examiner's initial decision in this case. He appeared in the same capacity on Continental's exceptions to that initial decision and brief to the Commission—filed November 9, 1962. Neither document makes any mention of the 1959 Subcommittee hearings or of any alleged bias or prejudice on my part.

[7] Memorandum in Support of Motion to Disqualify (October 21, 1964).

in *Lloyd A. Fry Roofing Co.*, Dkt. 7908 (June 30, 1964) [65 F.T.C. 1317], 3 CCH Trade Reg. Rep. Par. 16,968. It is but one of the relevant factors, however, and must be weighed against competing considerations, including the important principle that administrators, in the absence of affirmative proof to the contrary, "are assumed," in the words of Mr. Justice Frankfurter, "to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States* v. *Morgan*, 313 U.S. 409, 421 (1941). This presumption of fairness is so basic that the courts will decide a charge of administrative bias or prejudice only after the accused administrator has made his final decision on the merits, thus permitting a resolution not only of the bias question itself, but an evaluation of the complaining party's "proof of effect" of that alleged bias on the administrative decision. *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552, 555 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956).

The "appearances" principle, in other words, is not a rigid command of the law, compelling disqualification for trifling causes, but a consideration addressed to the discretion and sound judgment of the administrator himself in determining whether, irrespective of the law's requirements, he should disqualify himself. Thus "[i]t has been held that the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945), *aff'd Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948).[8] In its opinion in that case, the Supreme Court held squarely that members of the Federal Trade Commission are disqualified to hear a case only where their minds are "irrevocably closed" on the matter before them.[9] 333 U.S. at 701. This judicial refusal to infer administrative bias or prejudice except upon proof of "irrevocably closed" minds stems not merely from the so-called "rule of necessity" but from the obvious fact that the administrator's performance of his

[8] See *Eisler* v. *United States*, 170 F. 2d 273, 277–278 (D.C. Cir. 1948), *removed from docket*, 338 U.S. 189 (1949), a case involving the charge that Judge Holtzoff, having investigated "aliens and Communists, including appellant," in his former post as Special Assistant to the Attorney General, was biased and prejudiced. The Court of Appeals for the District of Columbia Circuit held: "Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the personal sense contemplated by the statute, assuming truth in all the facts stated. Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute." 170 F. 2d at 278. See also *O'Malley* v. *United States*, 128 F. 2d 676 (8th Cir. 1942), *rev'd on other grounds*, 317 U.S. 412 (1943).

[9] See also *National Lawyers Guild, supra*, 225 F. 2d at 555, and *Lumber Mut. Casualty Ins. Co. of New York* v. *Locke*, 60 F. 2d 35 (2d Cir. 1932). In the latter case, an administrator had written a letter indicating, in substance, that, having investigated the matter in question to his full satisfaction, the formal hearing was a mere formality. In response to a charge of prejudice, the court said: "However tactless or undesirable such remarks may have been, they *fell short of a statement that nothing that might be shown at such a hearing would change his mind. . . . They did not indicate that his mind was not open*

statutory duties is presumed, in the absence of clear proof to the contrary, to be not only regular in all respects but affirmatively in the public interest. As one recent commentator has summed it up, "every adjudicator has a positive duty to fulfill his adjudicative functions unless *actually* disqualified, and both the individual parties to a controversy and the public at large have a vested interest in such administrator's participation in the case involved. Consequently, while an administrator should scrupulously search his conscience to test his impartiality, it is almost as great a fault to employ self-disqualification too readily as too sparingly." [10]

The real difficulty with respondent's argument in the instant case is that even the "appearance" of bias and prejudice is lacking. Nothing in the 1959 Subcommittee proceedings pointed to by respondent meets its own test of whether "objective facts" have been shown that would suggest such bias or prejudice to the "impartial observer." Respondent itself noticed nothing of the sort when it brought the case before me and the other commissioners in 1963, and I see no reason to believe it would be less sensitive on the question than an "impartial observer."

Respondent's further suggestion that administrators must be disqualified from hearing a case if there is some evidence that they have made "some measure of adjudgment of the . . . *law* prior to consideration of the particular case" [11] would have, if accepted, the singular disadvantage of disqualifying any administrator or judge the second time a particular legal question came before him. As the Supreme Court has said: "Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact." *Cement Institute*, *supra*, 333 U.S. at 703. And added the Court, "the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Ibid.* "If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States*, 313 U.S. 409,

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to any proof, but only that when so full an examination had been made no matters affecting the result were likely to be developed." 60 F. 2d at 38 (emphasis added).

[10] Comment, "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216, 233–234 (emphasis added) (May–June 1964). See also Law, "Disqualification of SEC Commissioners Appointed From the Staff: *Amos Treat, R. A. Holman,* and the Threat to Expertise," 49 *Cornell L. Q.* 257 (Winter 1964), for a particularly penetrating discussion of the problems posed by the too-ready disqualification of administrators.

[11] Continental's "Memorandum in Support of Motion to Disqualify," October 21, 1964 (emphasis added).

421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. . . ." *Id.*, at 702. Indeed, it is hornbook law that the kind of "personal" bias that disqualifies, *Marquette Cement*, *supra; Eisler*, *supra*, refers to an "irrevocably closed" view of the particular parties or facts involved in a specific case, not to the adjudicator's preconceptions about the *law*. "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." [12]

Our *Lloyd A. Fry* matter [13] and *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964), have no bearing on the instant question. *Fry* involved, as my Memorandum was at pains to emphasize, "peculiar facts" that are clearly not present here, particularly the fact that its size and conduct had been such that I had, in truth, retained some personal recollection of its business practices. While my mind was certainly not "irrevocably closed" on the issues posed, and I was thus not compelled by law to disqualify myself, *Cement Institute*, *supra*, 333 U.S. at 701, I thought the circumstances there unique enough that, on balance, my withdrawal would not be inappropriate. The *Texaco* case is even less applicable here. Nothing was involved there but the precise words of a particular speech, words that the court construed as indicating that I had prejudged in 1961 a case not heard until two years later, in 1963. The words found disqualifying there are not, needless to say, present in the instant case. See *Pure Oil Co., et al.*, Dkts. 6640, 6641, 6898, 7567, and 8537 (Memorandum of Chairman Dixon), October 29, 1964 [p. 1552 herein].

I have previously discussed in considerable detail my view of the various considerations involved in cases of this sort. *Campbell Taggart*, *supra; Lloyd A. Fry*, *supra;* and *Pure Oil Co.*, *supra.* Rather than repeat them here, I refer respondent to my discussion in those cases and the authorities cited there.

Finally, I want to say here that I have "scrupulously searched my conscience" and hereby assure this respondent that, insofar as any man can know his own mind, I have made absolutely no prejudgments of any kind in this case, and harbor no biases of any sort against Continental.[14] I think it my duty to continue my participation here,

[12] Davis, 2 *Administrative Law Treatise* 130, 131 (1958). "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." *Id.*, at 138, n. 28, quoting Jaffe, "The Reform of Administrative Procedure," 2 *Pub. Ad. Rev.* 141, 149 (1942).

[13] Dkt. 7908 (June 30, 1964) (Memorandum of Chairman Dixon), 3 CCH Trade Reg. Rep. Par. 16,968 [65 F.T.C. 1317].

[14] Respondent assures me that "it is no answer to the motion for the administrator to say he does not labor under any of these infirmities." Memorandum in Support of Motion to Disqualify (October 21, 1964). In *National Lawyers Guild, supra,* however, the Court of Appeals for the District of Columbia Circuit noted the charged administrator's affidavit "denying his prejudgment and explaining that the only determination thus far made by him is that the evidence warranted his proposal to designate, a preliminary and *ex parte* determination. *He reaffirms under oath* his intention 'to make an impartial final de-

particularly in view of the fact, as noted, that not even Continental questioned my fairness until many months after the Commission's decision, with my participation, on the substantive price fixing question involved in the matter. If Continental did not consider me biased on that crucial question—and, indeed, does not allege I am biased now—I can see no reason why I should now withdraw from participation in the Commission's decision on the much narrower jurisdictional question remaining before it.

ORDER DENYING MOTION TO DISQUALIFY

Respondent Continental Baking Company, by motion filed October 21, 1964, has requested that Chairman Dixon withdraw from participation in this proceeding or, in the alternative, that the Commission determine that he be disqualified from any consideration or participation in this proceeding. On November 4, 1964, Chairman Dixon filed with the Commission a memorandum denying existence of any grounds for his disqualification from participation in this proceeding. As was stated in *American Cyanamid Company, et al.*, F.T.C. Docket No. 7211, Order Denying Motions to Disqualify, December 20, 1961:

> Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law.

In this case, as in *American Cyanamid*, no basis for departing from the normal practice has been shown. Accordingly,

It is ordered, That the motion to disqualify Chairman Dixon from participation in this proceeding be, and it hereby is, denied.

Commissioner Dixon not participating.

IN THE MATTER OF

SUN OIL COMPANY

Docket 6641. Order and Opinion, Nov. 16, 1964

Order denying respondent's motion that Commissioner MacIntyre be disqualified from participation in this proceeding.

RESPONSE TO MOTION

By MACINTYRE, *Commissioner:*

This is in response to respondent's motion filed herein November 10, 1964, that I declare myself ineligible to participate in this proceeding.

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termination on the basis of the administrative record before me.'" 225 F. 2d at 555 (emphasis added). See also *United States* v. *Morgan, supra,* where Justice Frankfurter, finding no bias in a letter written by the Secretary of Agriculture, referred to the Secretary's "patently sincere . . . [and] dignified denial of bias." 313 U.S. at 420, 421.

This response is based in part upon the consideration of the following items:

1. I have made no judgment in this matter and I hold no personal bias respecting any party involved in this matter.

2. The things cited by counsel for respondent as reasons why respondent thinks I should withdraw from this proceeding have been carefully reviewed and considered by me.

3. The only incident cited by respondent in its motion as showing any personal act or utterance on my part upon which the motion is based is my action in calling to the attention of responsible Members of Congress the record of a decision by a United States District Court interpreting the law to be applicable to a situation found by the Court to exist in that case. The case in question is that of *Enterprise Industries, Inc.*, plaintiff, v. *The Texas Company*, defendant, Civil Action No. 4076 in the United States District Court for the District of Connecticut, decided September 30, 1955. It is referred to on page 7 of respondent's motion and in that connection respondent in its motion referred to page 449 of hearings held November 3, 1955, in Washington, D.C., before the Select Committee on Small Business, House of Representatives, 84th Congress, pursuant to H. Res. 114, Part I, page 449. There I asked that a report on that case be included in the record of those hearings. Respondent was not a party, and therefore not involved in that case. It is difficult for me to understand why respondent cites that instance and other related instances in support of its motion here. Indeed, I am perplexed about it.

4. I would like to remind respondent that it is and has been my policy to act in such manner as to avoid "even the appearance of impropriety." It is my intention to apply that policy here.

5. I do not consider that if I should fail to accede to the request made by respondent that I withdraw from this case, I would be acting contrary to the policy to which I have just referred.

6. I do consider that the proper discharge of the responsibilities of my office and of my duties and obligations under my oath of office call for me to decline the request of the respondent that I withdraw from this case.

Therefore, I have decided to disagree with the motion of respondent that I withdraw from participation in the decisional function of the Federal Trade Commission in F.T.C. Docket No. 6641, *In the Matter of Sun Oil Company*.

Order Denying Motion To Disqualify

Respondent, by motion filed November 10, 1964, has requested that Commissioner MacIntyre withdraw from participation in this pro-

ceeding or, in the alternative, that the Commission determine that he be disqualified from any consideration or participation in this proceeding. On November 12, 1964, Commissioner MacIntyre filed with the Commission a response denying existence of any grounds for his disqualification from participation in this proceeding. As was stated in *American Cyanamid Company, et al.*, F.T.C. Docket No. 7211, Order Denying Motions to Disqualify, December 20, 1961 [59 F.T.C. 1488]:

> Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law.

In this case, as in *American Cyanamid*, no basis for departing from the normal practice has been shown. Accordingly,

It is ordered, That the motion to disqualify Commissioner MacIntyre from participation in this proceeding be, and it hereby is, denied.

Commissioners Dixon and MacIntyre not participating.

IN THE MATTER OF

CARVEL CORPORATION ET AL.

Docket 8574. Order and Memorandum, Nov. 18, 1964

Order dismissing respondents' motion that chairman be disqualified because the chairman *sua sponte* had disqualified himself.

MEMORANDUM OF CHAIRMAN DIXON

NOVEMBER 17, 1964

Respondents have moved that I withdraw from participation in this proceeding, alleging that I have displayed "bias" and "prejudice" against them in two particulars. First, they quote from an October 1964 deposition of a New York attorney engaged in private practice, a Mr. Louis G. Greenfield, in which he purports to relate a conversation he says he had with me in 1960 when I was Counsel and Staff Director of the Senate Antitrust and Monopoly Subcommittee. In this deposition, Mr. Greenfield says that, as counsel for certain of respondents' franchised dealers, he visited the Subcommittee in 1960 to complain of Carvel's business practices. He says he showed me certain documents and that, after reading them, I expressed the view that Carvel's practices were unlawful under the antitrust laws.

Respondents' second contention is somewhat difficult to follow. As I read their moving papers, they are contending that the investigation by the Federal Trade Commission that culminated in the instant

proceeding had been abandoned prior to my taking office as Chairman in March of 1961, and that I caused it to be revived, presumably out of the same bias and prejudice I am alleged to have expressed in the 1960 conversation referred to above. Reference is also made to the fact that the Commission, including myself, rejected a proffered consent settlement in this proceeding, against the recommendation of the staff, in March 1963. I gather I am supposed to have caused this rejection, again out of bias and prejudice. Finally, respondents' affidavit recites that the private attorney who has made all these complaints against them, and who is now representing a number of Carvel's franchised dealers in an antitrust, treble damage action now pending in the United States Supreme Court,[1] is a former employee of the Federal Trade Commission, having worked as an attorney investigator in the Commission's New York Field Office from 1948 to 1956; that this attorney conferred with the Commission's attorneys that conducted the investigation of this matter in our New York office; and that our trial attorney, in replying to Mr. Greenfield's various letters of complaint to me and the Commission, thanked him for his "cooperation." Respondents also think it "interesting" that the Commission "chose," as the day on which to notify respondents of its intention to issue the complaint in this proceeding, "the first trial day" in the treble damage action against respondents mentioned above. Further, respondents recite that, at the hearing in the instant matter, they requested that certain of their documents received in evidence by our hearing examiner be held *in camera* lest it "become available" to Mr. Greenfield and his associates; that "it was respondents' belief that Messrs. Greenfield and Rothstein had participated in a conspiracy the purpose of which was to destroy respondents' business; and that there was a danger that information in the material produced by respondents would be utilized in furtherance of said conspiracy." [2] Respondents add that they have sued Mr. Greenfield and others in the New York Supreme Court [3] for this alleged "conspiracy."

The inference sought from all this, I gather, is that I am in some way connected with this alleged effort to oppress respondents. If so, it is preposterous. As respondents' own moving papers make quite clear, the letters of complaint Mr. Greenfield wrote to me received no special attention; instead, they were referred to the staff and answered in routine fashion. The phrase in the staff's letters that respondents found particularly sinister—"thank you for your cooperation"—

[1] *Susser* v. *Carvel Corp.*, 206 F. Supp. 636 (S.D.N.Y. 1962), *aff'd*, 332 F. 2d 505 (2d Cir. 1964), *cert. granted* October 28, 1964.

[2] Affidavit in Support of Motion 16–17 (November 10, 1964).

[3] *Franchised Stores of New York, Inc. et al.* v. *Louis G. Greenfield et al.*, N.Y. Sup. Ct., Westchester County.

is routine in our correspondence with complaining parties and members of the public in general. Any citizen has a right to complain about what he conceives to be a violation of the laws administered by this agency. "A person who deems himself aggrieved by the use of an unfair method of competition . . . may of course bring the matter to the Commission's attention and request it to file a complaint." *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25 (1929).[4] The fact that a complaining party has also filed a private antitrust action in the federal courts has no bearing on our proceedings. The private action is available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." It has been granted by Congress for the vindication of private rights. The Federal Trade Commission, on the other hand, may bring an action "only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public' . . . . Public interest may exist although the practice deemed unfair does not violate any private right." *Klesner*, *supra* at 27.

Such private actions, however, because they incidentally serve the public interest in promoting observance of the law, have been given every encouragement by Congress. In *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329 (1955), the Supreme Court expressly noted "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." This was reaffirmed even more recently in *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725, 727–728 (3d Cir. 1962), where the court observed: "Private actions are an important means of enforcing the antitrust laws of the United States. Such actions are a vehicle for serving not only the immediate interests of the litigants, but the continuing interest of the public in a smoothly functioning and unobstructed system of commerce. Congress voiced its recognition of the importance of private actions by enacting special provisions for treble damages and attorneys' fees." See also Loevinger, "Private Action—The Strongest Pillar of Antitrust," 3 *Antitrust Bulletin* 167, 168 (March–April 1958), noting that the "private action automatically puts a host of interested and well informed persons in the enforcement force. It would take a vast bureaucratic army of government agents to begin to equal the effectiveness of interested private parties in policing the antitrust laws."

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[4] Section 1.12 of our Rules of Practice provide that: "(a) Any individual, partnership, corporation, association or organization may request the Commission to institute a proceeding in respect to any matter over which the Commission has jurisdiction. (b) Such request should be in the form of a signed statement setting forth the alleged violation of law and the name and address of the person or persons complained of. No forms or formal procedures are required."

Like all other citizens, treble damage litigants have a right to examine the public records, including the testimony and exhibits received in publicly held adjudicative proceedings, of the Federal Trade Commission.[6] For us to hold such materials *in camera* for the purpose of concealing them from actual or potential private litigants would thus be squarely contrary to the expressed will of Congress. As we said in *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, "we firmly believe the best interests of the public are served when all interested persons may, if they so desire, familiarize themselves with all aspects of an adjudicative proceeding. And it matters not whether that person's interest is motivated by an intention to intervene in the matter, to prepare for other litigation, to write an article or by mere curiosity. . . . Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute 'good cause' for secreting this evidence. Placing documents '*in camera*' for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress. . . . Congress intended that such private suits would supplement and bolster the antitrust enforcement efforts of government prosecution. . . . Our efforts should be directed to aiding, not hindering, private enforcement of the antitrust laws." 58 F.T.C. at 1186–1187, 1189–1190.

Respondents' charge here that the Commission's staff was aided in its investigation of this matter by persons who later brought a private antitrust action, and that those persons, in turn, have attempted to avail themselves of the adjudicative record amassed by the Commission's staff attorneys in this proceeding, is merely an assertion that the Commission's attorneys have been performing their duty.

As for respondents' implied argument that I have been personally directing the staff's investigation and prosecution of this matter, suffice it to say that, while I was a member of the Commission when the complaint issued in 1962, I was unable to recall even the nature of the charges in that complaint when the instant motion was brought to my attention. It was only after refreshing my recollection that I was able to remember a visit to my office at the Federal Trade Commission by the complainants' attorney, Mr. Greenfield. As I recall the matter now, his complaint was referred to the staff like all other complaints that come to my office. I know nothing about the subsequent progress of the case, except that I joined with the other members of the Commission in voting for the issuance of the complaint more than a year ago, and that it is now on my calendar for oral argument before the full Commission in the next few days. I have not contacted

[6] Rules of Practice, § 1.132(5).

our investigative or trial attorneys about the case or otherwise intervened in its routine handling in any shape, form, or fashion.

I am even more in the dark about the conversation I am supposed to have had with Mr. Greenfield in the Senate Subcommittee's offices in 1960. As mentioned above, Mr. Greenfield has stated under oath that he did talk to me then, that he showed me certain documents he considered proof of Carvel's unlawful business practices, and that, after reading them, I expressed the view that they did in fact evidence a violation of law. While I have no independent recollection that the conversation took place, much less of what was said—and thus have no recollection of the charges he might have made or the materials he might have shown me to support them—I have no reason to doubt that it did in fact occur or that I did express a view as to whether the practices he described amounted to a violation of the antitrust laws. As counsel for the Subcommittee, it was my duty to receive such complaints from aggrieved members of the public and evaluate their relevance to the Subcommittee's studies of the effectiveness of existing antitrust laws and the possible need for additional legislation.

Such a conversation, however, would not disqualify me to hear the instant case. As I mentioned above, I don't remember the conversation, and I certainly don't remember any "prejudices" or "prejudgments" I might have entertained then. If I was shown something by Mr. Greenfield in 1960 that led me to believe then that Carvel had violated the antitrust laws, the intervening four years have erased it from my mind. Hence I hold no present "prejudgments" about the instant case.

But even if I had total recall both of the materials Mr. Greenfield is said to have shown me in 1960 and the conviction I am supposed to have expressed then, this would not, as a matter of law, disqualify me here. In *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945), the court passed on this issue squarely. The Federal Trade Commission had conducted a thorough investigation of the "basing point system" as it was used in the cement industry. Then, pursuant to statute, the Commission "reported" its findings and conclusions to Congress and to the President. Its principal conclusion was that the industry's basing point system was a price fixing device and thus unlawful under the Sherman and Federal Trade Commission Acts. Thereafter the Commission filed a formal complaint against virtually all of the country's cement producers, basing its charges on the earlier "basing point" investigation. Marquette, alleging that the Commission as a body had "prejudged" the issues in its reports to Congress and the President, demanded disqualification of the entire Commission. The court of appeals said: "It has been held that

356-438—70——100

the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." 147 F. 2d at 592. The Supreme Court affirmed, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948), declaring that the test in such cases is whether "the minds of its [the Federal Trade Commission's] members were *irrevocably closed* on the subject of the respondent's basing point practices." 333 U.S. at 701 (emphasis added). The Court pointed out that, while the members of the Commission had thus started the formal adjudication with a provisional belief that the charges in the complaint were in fact true, the parties charged had had every opportunity to change the Commissioners' minds: "Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *Ibid.* See also *Lumber Mut. Casualty Ins. Co. of New York* v. *Locke*, 60 F. 2d 35, 38 (2d Cir. 1932), where the court held that certain statements made by an administrator did not require disqualification because "they fell short of a statement that nothing that might be shown at such a hearing would change his mind. . . . They did not indicate that his mind was not open to any proof. . . ."

In fact, as I pointed out only a few days ago in *Pure Oil Co. et al.*, Dkt. 6640 et al. (Memorandum of Chairman Dixon, October 29, 1964), 3 CCH Trade Reg. Rep. Par. 17,113 [p. 1552 herein], every member of this agency, being required by statute to have "reason to believe" the law has been violated prior to joining in the issuance of a formal complaint, Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), "can never come to his adjudicative task with a mind wholly devoid of factual information about the subject before him. The statutory scheme . . . positively *requires* him to entertain a provisional conviction on the subject before the charges are even lodged." See also my memoranda in *Campbell Taggart Associated Bakeries*, Dkt. 7938 (May 2, 1963), Trade Reg. Rep. Par. 16,399 (1961–1963 Transfer Binder) [62 F.T.C. 1494, 1498]; *Lloyd A. Fry Roofing Co.*, Dkt. 7908 (June 30, 1964), 3 CCH Trade Reg. Rep. Par. 16,968 [65 F.T.C. 1317]; and *Bakers of Washington*, Dkt. 8309 (November 4, 1964) [p. 1562 herein]. Since I have no personal recollection of the 1960 conversation referred to above, know virtually nothing about the instant case, and thus know for a fact that I have no convictions of any sort as to whether respondents have violated the law—much less an "irrevocably closed" mind on the subject—I am plainly not required to disqualify myself here. *Cement Institute*, *supra*.

However, as I have pointed out in the *Campbell Taggart* and *Fry* proceedings, *supra*, one of the factors to be weighed by the adjudicator whose fairness has been challenged is the matter of "appearances." It is indeed important not only that justice should be done, but that it should "manifestly and undoubtedly be seen to be done." *Rex* v. *Sussex Justices*, 93 L.J.K.B. 129, 131 (1924). It seems to me that, in the unique circumstances of this case, particularly the fact that I cannot recall the conversation in question and hence am powerless to explain or deny the statements attributed to me, the only way I can completely and conclusively prove the baselessness of these "bias" and "conspiracy" charges against both myself and the staff is to withdraw.

I shall not participate in the Commission's deliberations or decision in this proceeding.

ORDER DISMISSING MOTION TO DISQUALIFY

Respondents having filed on November 12, 1964, a motion that the Commission disqualify Chairman Paul Rand Dixon from participation in the adjudication of this proceeding; and

Chairman Dixon having determined *sua sponte* to disqualify himself therefrom:

It is ordered, That respondents' motion be, and it hereby is, dismissed as moot.

Commissioner Dixon not participating.

IN THE MATTER OF

KNOLL ASSOCIATES, INC.

Docket 8549. Order, Nov. 19, 1964

Order reopening the proceeding for the reception of testimony of Bernard Turiel and Ernest Brod and such other evidence as the examiner deems pertinent.

ORDER DIRECTING THE REOPENING OF PROCEEDING FOR THE RECEPTION OF FURTHER EVIDENCE

On March 31, 1964, respondent in the above-captioned proceeding, pursuant to Section 3.20 of the Commission's Procedures and Rules of practice (effective August 1, 1964), requested permission to file an interlocutory appeal from an order of the hearing examiner of March 24, 1964, denying respondent's motions to exclude certain documentary evidence on the ground that it had been illegally obtained. The Commission declined to permit the filing of the interlocutory appeal on the ground that "respondent here has not presented sufficient grounds

to justify an immediate decision as to the correctness of the hearing examiner's rulings." The Commission has now determined to reconsider respondent's request to file an interlocutory appeal; to entertain the appeal; to vacate the hearing examiner's order of March 24, 1964; and to direct further proceedings before the hearing examiner with respect to the subject matter of the appeal. Accordingly,

It is ordered. That the hearing examiner shall, pursuant to Section 3.21(d)(I) of the Commission's Procedures and Rules of Practice, reopen the above-captioned proceeding for the reception of the testimony of Bernard Turiel, Esq., and Ernest Brod, Esq., and such other evidence as the examiner deems pertinent to resolve the issues raised by the motions of respondent denied by the order of the hearing examiner of March 24, 1964.

Commissioner MacIntyre not participating.

IN THE MATTER OF

FRITO-LAY, INC.

Docket 8606. Order and Opinion, Nov. 23, 1964

Order denying respondent's motion for a mistrial and dismissal of complaint.

OPINION OF THE COMMISSION

BY MACINTYRE, *Commissioner:*

This matter is before the Commission on respondent's interlocutory appeal from the hearing examiner's order, entered July 29, 1964, denying respondent's motion for a mistrial and to dismiss the complaint.

The facts of the controversy are simple and few: On February 28, 1964, the hearing examiner issued a pretrial order which required complaint counsel to disclose to respondent's counsel the names and addresses of all witnesses which complaint counsel expected to call in the course of the proceeding. On June 22, 1964, the names of approximately 200 prospective witnesses were turned over to respondent's counsel and on about June 25, 1964, complaint counsel dispatched a letter to each of the prospective witnesses, which read in part:

> It will be necessary to call a number of witnesses to establish facts concerning the manufacture and sale of potato chips, corn chips and pretzels. It is anticipated that you will be called as a witness in this case. Hearings will probably begin in the fall and your name, with other witnesses in your area, has been submitted to the respondent, Frito-Lay, and its attorneys, pursuant to the Commission Rules of Procedure.
>
> You may be contacted by Frito-Lay or its attorneys in connection with this matter and you are advised that you may take the following courses of action:
>
> 1. Discussing the case with Frito-Lay or its attorneys.

2. Discussing the case with Frito-Lay or its attorneys with a Commission counsel in support of the complaint present during the discussion.

3. Refusing to discuss the case with Frito-Lay or its attorneys.

In the event that you choose alternative number two above, please contact one of the undersigned.

It is respondent's contention before the hearing examiner and here that this letter has deprived it of an opportunity for a fair trial and constitutes "improper tampering with respondent's right to free and complete access to the truth and to the evidence." The letter is alleged to constitute a breach of the Canons of Professional Ethics of the American Bar Association and a violation of § 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c) (1946)). Because of the very serious nature of these charges we granted respondent's request to file this appeal and directed the parties to file briefs in support of their views.

The solution to the question here raised must be found within the four corners of complaint counsel's letter itself, for respondent alludes to no additional facts in support of its appeal. It does not claim, for example, that any of the prospective witnesses have either withheld information or refused to talk to respondent's counsel. Respondent's allegations of prejudice are based upon fears of future occurrences and not upon a pragmatic showing of injury. This is a real distinction in this matter, for it may well be that respondent's appeal is premature. However, we prefer not to put off resolution of this issue to a later date, for such postponement would require the parties to conduct the hearings under a cloud of uncertainty.

In their answer to respondent's appeal brief, complaint counsel aver that the purpose of the letter was ". . . to inform the prospective third party witnesses of the Commission's Rules of Practice, and to dispel any misapprehension on the part of prospective witnesses that the disclosure of witnesses to respondent's counsel was improper." Complaint counsel argue that if they had wished to deny respondent's counsel access to their prospective witnesses they would have opposed disclosure of the names of witnesses. They urge that the letter should be read in its entirety and when so read, patently does not constitute an attempt to interfere in any way with respondent's right to interrogate and elicit full information from the witnesses. As we see it, there are two facets to the problem. The first concerns complaint counsel's intent or purpose in writing the letter and the second is the likely effect upon the actions of the recipients, whether intended by the authors or not.

As for the first question, it is apparent that whether read cursorily or thoroughly studied the letter contains no overt invitation to refuse to discuss the facts with respondent's counsel or to withhold part of the

facts during such a discussion. But respondent claims that the invitation is "subtle" in that implicit in the letter is an "overtone of governmental coercion"; that it was designed to "plant in the witnesses' minds the seed of qualification as well as refusal." We are not unaware that it is possible to shape men's minds with cleverly disguised nuances of meaning. As a matter of fact, the science (if it can be called such) of propaganda is primarily based upon this technique. Moreover, we have frequently issued cease and desist orders against respondents who utilized advertising which was literally truthful but nonetheless deceptive. However, in this instance we can find no basis for a conclusion that the drafters of this letter had any evil intent. Respondent's entire complaint stems from the fact that the prospective witnesses were correctly advised that they need not discuss the case with respondent's counsel or could have complaint counsel present if such a discussion was held. If these two alternatives were offered alone, we might have a different question, but they were not alone and were presented as second and third choices behind the choice of "Discussing the case with Frito-Lay or its attorneys." Thus, respondent's charges of unethical conduct on the part of complaint counsel are rejected.

We turn now to the question of the effect of the letter upon the recipients. As respondent sees it, the letter "[c]oming from the Federal Trade Commission, in a franked envelope and by registered mail . . ." impresses the witness with the importance of the matter and establishes a "nexus between the Commission and the witness, a relationship of mutual interest and concern." In this connection respondent suggests that witnesses called to testify on behalf of the government are not trustworthy "even when not reinforced by suggestions such as those contained in the instant letter" and quotes the separate opinion of a former Commissioner to the effect that being called as a government witness ". . . does funny things to people. It expands their virtue out of all proportion. They become parties to a game and they are out to have their side win, especially if their side is the all-powerful Uncle Sam." *Manhattan Brewing Company*, 42 F.T.C. 226, 241 (1946). It seems to us that this argument not only denigrates the character of the average American citizen called as a witness for his government but when carried to its logical conclusion questions the foundations of our legal system. Respondent is saying that under the best of circumstances it is impossible to have a fair trial when sued by the government, for improbity is the consistent hallmark of the government witness. As we see it, the average government witness is as likely to be prejudiced against the government case as for it. Every lawyer knows of the difficulty in getting disinterested witnesses to inconvenience themselves and appear in court. Very few citizens, and especially those

gainfully occupied in making their livelihood, welcome the prospect of being subpoenaed to spend a day or two in a courtroom, offering testimony in a cause with which they have no immediate concern. This is a merger case, brought under Section 7 of the amended Clayton Act, and in all probability almost all of the 200 prospective witnesses are businessmen connected in some way with the manufacture, sale or distribution of goods similar to those offered by respondent and the corporations it has allegedly unlawfully acquired. Such witnesses are not likely to be impressed by a government letter.

Respondent, in a separate but somewhat related argument, claims that the letter, appearing as it does upon the Commission's stationery, has "compromised the impartiality of the Commission." It is argued that the power and prestige of the Commission make its slightest action of great weight with the prospective witness and that "[a]ny action of the Commission, the adjudicator in this case, which would tolerate the use of its name or that of its counsel to influence prospective witnesses to withhold information essential to the preparation of respondent's defense would . . . violate all pre-existing notions of fair play and a fair trial." While it is, of course, perfectly true that the Commission occupies the dual position of complainant and adjudicator, this circumstance is inherent in the theory and practice of administrative law and there is no reason to suspect that the recipients of the letters will confuse the statements of Commission attorneys whose signatures appear over the title "Counsel Supporting the Complaint" with adjudicatory action of the Commission.

There is much more which could be said on the questions raised by this appeal, but additional discussion might well serve to obscure rather than enhance our basic holding, which is that complaint counsel's letter was not calculated to and is not likely to induce prospective witnesses to withhold information from respondent's counsel. While the letter might well have affirmatively urged the prospective witnesses to frankly discuss the case with respondent's counsel, the fact that the prerogative of free discussion was offered was sufficient to dispel any unreasonable suspicion that the "government" would prefer the witness to remain silent to respondent's request for information. Moreover, if any of these prospective witnesses, for any reason, refuses to confer with respondent's counsel, there are ample means available to remedy such a situation upon proper application and showing to the hearing examiner.

The respondent's right to a fair trial has not been harmed in any way and its appeal must, and will be, denied.

Commissioner Elman concurred in the result.

Commissioner Jones did not participate.

ORDER DENYING INTERLOCUTORY APPEAL

This matter having come on to be heard upon respondent's appeal from the hearing examiner's order entered July 29, 1964, denying respondent's motion for mistrial and to dismiss the complaint; and

It appearing to the Commission, for the reasons stated in the accompanying opinion, that the hearing examiner's order appealed from has not been shown to be erroneous in any particular; therefore:

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

Commissioner Elman concurring in the result, and Commissioner Jones not participating.

IN THE MATTER OF

RODALE PRESS, INC., ET AL.

Docket 8619. Order and Opinion, Dec. 3, 1964

Order denying respondents request to dismiss complaint on grounds the book objected to is no longer in general circulation.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

The complaint in this matter charges respondents with having made false statements and representations in advertising pertaining to a book and various pamphlets concerning diet, disease, and the health of mankind. On November 9, 1964, respondents filed with the hearing examiner a motion to dismiss the complaint or, in the alternative, to certify to the Commission the questions therein presented. After considering complaint counsel's reply to said motion, the examiner, by order dated November 19, 1964, denied the motion. On November 25, 1964, respondents filed with each Commissioner a letter, which will be treated as a request for permission to file an interlocutory appeal from the ruling of a hearing examiner, under Section 3.20 of the Commission's Rules of Practice, in which they reiterate two of the issues raised in the motion. On November 30, 1964, respondents filed a memorandum in support of the above-mentioned letter. It is their position that the two issues mentioned will become moot after the trial of the case and they thus request that the Commission consider and rule upon such issues at this time.

Respondents first contend that any order issued in this case will serve no useful purpose and thus will be a waste of the Commission's time and finances, because the book named in the complaint is no longer in general circulation and is no longer being advertised, and

because the pamphlets specifically named in the complaint are out of date and out of print. In its deliberations prior to issuance of the complaint, the Commission was aware of the alleged discontinuance of the challenged advertising. At that time, it was the Commission's belief that respondents' present advertising probably suffered from the same basic deceptive themes as did the earlier advertising. As a result, the allegations of the complaint were not limited to deception emanating from advertising of the particular publications named, but included deception arising out of advertising of other pamphlets and books published and distributed by respondents. The request for permission to file an interlocutory appeal does not clearly allege that the type of advertising which is the subject of the complaint is no longer being used, but instead alleges only that the particular examples of their advertising set forth in the complaint have been discontinued. Since the allegations of deception in the complaint encompass more than the examples of advertising therein set forth, respondents have not shown a probability that public interest in this proceeding no longer exists, and, as a result, have not shown circumstances requiring the Commission to reconsider the issuance of its complaint.

Respondents next allege that their medical experts who will testify at the hearing will endorse both the book named in the complaint and the advertising of the book, and that such proposed testimony renders trial of this issue unnecessary. However, even assuming that respondents' medical witnesses would testify that the ideas contained in the book are sound from a medical standpoint, such testimony would not compel dismissal of the charge that the advertising of the book is deceptive. It should be emphasized that the complaint does not allege that the ideas and suggestions set forth in the book are false or of no medical value. Instead, the complaint alleges that the advertising creates the impression that the book contains ideas and suggestions which, if followed systematically, will, *inter alia*, add years to the readers' lives, effectively prevent many diseases, and effectuate savings on medical and dental expenses, when in fact these ends will not be accomplished by a faithful adherence to the suggestions set forth in the book. Thus, the endorsement by medical experts of the statements and ideas contained in the book is not dispositive of the issue. Moreover, the ultimate conclusion on whether or not respondents' advertising of the book is deceptive, the question put in issue by the complaint, is one for the Commission to decide after a full hearing and is not one which may be delegated to experts called by either side. As a result, a hearing on the questions raised by the complaint is mandatory.

For the aforementioned reasons, it is the conclusion of the Commission that respondents have not demonstrated the extraordinary circumstances required under our Rules of Practice for permission to file an

interlocutory appeal from the examiner's denial of their motion to dismiss. Accordingly,

It is ordered, That the request to file an interlocutory appeal be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner Jones concurs in the result.

DISSENTING OPINION

By ELMAN, *Commissioner:*

The complaint in this matter alleges that a book published by the Rodale Press, entitled *The Health Finder*, contains erroneous and dangerous ideas about health, and that in repeating these ideas in its advertising for the book Rodale is engaged in false and deceptive advertising in violation of the Federal Trade Commission Act.

If a seller of a patent medicine misrepresents its effectiveness in treating a disease, he violates the law. Nothing of that sort is involved here. Respondents do not sell any product claimed to have therapeutic properties; all they sell is a book containing ideas about health. The complaint does not charge that their advertisements misrepresent the contents of the book; they simply tell, and tell truthfully, what the book is about. Thus, what is challenged here, essentially, is the book and the ideas in it.[1] These ideas may be silly or senseless; but Rodale has a constitutional right to disseminate them. The Commission is saying, in substance, that Rodale may have a constitutional right to publish *The Health Finder*, but it has no right to advertise the book,

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[1] Paragraph Seven of the complaint alleges:

"PARAGRAPH SEVEN: In truth and in fact:

1. The ideas and suggestions contained in 'The Health Finder' will not assure readers:
(a) An increased life span.
(b) More energy.
(c) Savings on medical and dental expenditures.
(d) That they will feel better than ever before.
(e) That they will gain and maintain health.

2. 'The Health Finder' does not contain the answer to all health problems and will not enable the reader to:
(a) Free himself of common colds.
(b) Prevent or cure all types of constipation.
(c) Prevent ulcers.
(d) Prevent fatigue.
(e) Prevent goiter.
(f) Prevent high blood pressure.

3. The ideas and suggestions contained in 'The Health Finder' are not effective in the prevention, relief or treatment of cancer, tuberculosis, infantile paralysis, heart disease, arthritis, or mental illness. Moreover, reliance on the advertising statements and representations resulting in purchase of the aforesaid book and the attendant delay in receiving adequate treatment promptly, may result in relentless progression of these serious diseases, irreparable injury to health, crippling, and loss of life.

Therefore, the statements and representations [in respondents' advertising] as set forth and referred to in Paragraphs Five and Six were and are false, misleading and deceptive."

even truthfully, because "the ideas and suggestions" contained in the book are not "effective." [2]

Suppose someone were to write a book advancing the theory that the ills of our body politic would be cured if only the United States Senate were abolished. Could this Commission enjoin advertising for the book by finding that abolishing the Senate is not an "effective" cure for such ills? Surely not. Congress did not create this Commission to act as a censor of unorthodox ideas and theories in books, whether they deal with politics or health. We should not forget that, in both fields, today's heresy may become tomorrow's dogma.

I would dismiss the complaint as an unwarranted intrusion by this Commission into an area from which it is excluded by the Constitution and the statute.

IN THE MATTER OF

KNOLL ASSOCIATES, INC.

Docket 8549. Order, Dec. 15, 1964

Order denying respondent's request that initial decision be filed; complaint counsel shall produce for inspection of respondent's counsel all documents furnished by Herbert Prosser; and hearings shall be heard at the time and place specified by examiner on November 30, 1964.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

By order of November 19, 1964 [p. 1577 herein], the Commission directed the hearing examiner to "reopen the above-captioned proceeding for the reception of the testimony of Bernard Turiel, Esq., and Ernest Brod, Esq., and such other evidence as the examiner deems pertinent to resolve the issues raised by the motions of respondent denied by the order of the hearing examiner of March 24, 1964." Thereafter, respondent made certain motions to the examiner which he has certified to the Commission for decision. We shall take up, seriatim, the recommendations made by the examiner in his certification.

"(1) That he [the examiner] be permitted to file his initial decision instanter." The hearing examiner's initial decision should be filed "after completion of the reception of evidence in a proceeding." Section 3.21(a), Rules of Practice (effective August 1, 1963). Reception of evidence has not yet been completed in this proceeding, and no use-

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[2] I am mystified by the Commission's present assertion that "the complaint does not allege that the ideas and suggestions set forth in the book are false or of no medical value." Is the Commission now amending the compaint? If so, it would be well to advise the examiner and counsel, who are now engaged in the trial of the case.

ful purpose would be served by the premature filing of an initial decision on the basis of an incomplete record.

"(2) That counsel supporting the complaint be directed by the Federal Trade Commission to return to counsel for respondent all documents which were turned over to said counsel by Herbert Prosser under the circumstances related in the hearing examiner's Ruling of March 24, 1964." It would be premature to direct that these documents be returned to respondent until it has been determined whether they came into the possession of complaint counsel lawfully. Moreover, respondent in the motions before us has made no request that any such documents be returned to it.

"(3) That the Federal Trade Commission order all other papers and documents in its possession relating to the circumstances under which the documents were turned over to counsel supporting the complaint by Herbert Prosser produced at a fixed time and place for inspection and copying by respondent's counsel." Where request pursuant to Section 3.11 of the Rules of Practice is made for production of documents in the confidential files of the Commission, the proper procedure is for the hearing examiner to certify the request to the Commission with his recommendation, *L. G. Balfour Co.*, F.T.C. Docket 8435 (Order of May 10, 1963), pp. 6–7 [62 F.T.C. 1541, 1545], and that procedure was followed here. It was the Commission's expressed intention, in directing further proceedings in this matter, that respondent be given an adequate opportunity to obtain and present evidence pertinent to the issues involved in these further proceedings. The Commission approves this recommendation of the examiner.

"(4) That the hearings directed in the Commission's Order of November 19, 1964, be authorized for January 5, 1965, in Detroit, Michigan." This provision for the time and place of the reception of evidence directed in the Commission's order of November 19 is reasonable. Accordingly,

It is ordered, That:

(1) Permission to file initial decision at this time is denied; the examiner shall file his initial decision after completion of the reception of evidence, in accordance with Section 3.21(a) of the Rules of Practice.

(2) Complaint counsel shall produce for inspection and copying by respondent's counsel all documents relating to the circumstances under which any documents were turned over to complaint counsel by Herbert Prosser, under such reasonable terms and conditions as the hearing examiner may, in accordance with Section 3.11 of the Rules of Practice, prescribe.

(3) Hearings shall be held at the time and place specified in the hearing examiner's certification of November 30, 1964.

Commissioner MacIntyre not concurring.

IN THE MATTER OF

KNOLL ASSOCIATES, INC.

Docket 8549. Order, Dec. 16, 1964

Order clarifying an earlier order requiring that certain documents obtained from Herbert Prosser be made available to respondent's counsel.

ORDER CLARIFYING AND AMENDING ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

For the purpose of clarifying and avoiding possible ambiguity in the interpretation of its order, issued December 15, 1964 [p. 1585 herein], ruling on the hearing examiner's certification, the Commission has determined to amend such order in the following respect:

It is ordered, That Paragraph (2) of the order of December 15, 1964, be amended to provide as follows:

"(2) Complaint counsel shall produce for inspection and copying by respondent's counsel (1) all documents which were turned over to complaint counsel by Herbert Prosser, and (2) all papers, memoranda, or other documents relating to the circumstances under which the documents were turned over to complaint counsel by Herbert Prosser, under such reasonable terms and conditions as the hearing examiner may, in accordance with Section 3.11 of the Rules of Practice, prescribe."

Commissioner MacIntyre not participating.

IN THE MATTER OF

PERMANENTE CEMENT COMPANY ET AL.

Docket 7939. Order, Dec. 17, 1964

Order denying hearing examiner's request for recessed hearings and respondent's motions to set oral argument and to disqualify hearing examiner.

ORDER RULING ON CERTIFICATE OF NECESSITY AND DENYING MOTION TO DISQUALIFY AND REMOVE HEARING EXAMINER AND TO SET ORAL ARGUMENT

On November 20, 1964, the hearing examiner in the above-captioned proceeding, pursuant to Section 3.16(d) of the Commission's Rules

of Practice (effective August 1, 1963), filed with the Commission a certificate of necessity in which he stated "that it is necessary and in the public interest that the hearings in the above-entitled case be recessed until November 30, 1964, and for such further period as may be required for the Commission to pass upon an application by respondent pursuant to Rule 3.15(g)(2)." The certificate states that while hearings in the above-captioned proceeding were being conducted before the examiner, and before they were completed, counsel for respondents requested a recess to permit him to make, on or before November 30, 1964, a motion, pursuant to Section 3.15(g)(2) of the Commission's Rules of Practice, to disqualify and remove the examiner from continuing to preside. The examiner, while stating that he knew of no basis for disqualification, granted respondents' motion for a recess.

On November 30, 1964, respondents filed with the Commission a motion pursuant to Section 3.15(g)(2) to disqualify and remove the hearing examiner, along with an affidavit of respondents' counsel and a memorandum of points and authorities in support of the motion. On December 9, 1964, the examiner filed a reply with supporting papers and on December 10 complaint counsel filed a memorandum of legal authorities on the standards for disqualification. On December 14, 1964, respondents filed a supplemental affidavit in support of their motion and a motion requesting oral argument before the Commission be scheduled.

Section 3.15(g)(2) of the Procedures and Rules of Practice provides as follows:

> Whenever any party shall deem the hearing examiner for any reason to be disqualified to preside, or to continue to preside, in the particular proceeding, such party may file with the Commission a motion to disqualify and remove the hearing examiner, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. Copy of the motion shall be served by the Commission on the hearing examiner whose removal is sought, and the hearing examiner shall have ten (10) days from such service within which to reply. If the hearing examiner does not disqualify himself within ten (10) days, then the Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another hearing examiner appointed to conduct a hearing for that purpose.

This provision establishes an expeditious procedure for handling motions to disqualify the hearing examiner. It is not necessary for the examiner to recess hearings that have already commenced until and unless he disqualifies himself pursuant to this procedure. For the examiner to interrupt the hearings automatically whenever counsel stated that he intended to file a motion to disqualify him would be productive of delay and inconsistent with the Commission's announced policy that "all hearings . . . shall continue without suspension until

concluded." Section 3.16(d), Rules of Practice. While there may be circumstances where recessing the hearings pending determination of a motion to disqualify may advance rather than retard the fair, expeditious, and orderly completion of the proceeding, that is a matter to be determined by the examiner in his sound discretion. In any event, since the requested recess here was only for the period necessary for the Commission to dispose of respondents' motion to disqualify, which the present order disposes of, the examiner's request is moot.

In their motion to disqualify the examiner, respondents, to support their contention that the examiner is biased against them, first note that this matter is now before the examiner on remand from the Commission, the Commission having vacated an initial decision by the same examiner which was adverse to respondents on the issues involved in the remand. This circumstance is not grounds for disqualification of the examiner. There is "no warrant for imposing upon administrative agencies a . . . rule . . . whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 236–37 (1947).

Respondents' principal argument is that the examiner in the conduct of the remand hearings has "abandoned his role as an impartial adjudicator of the facts and has assumed management and direction of complaint counsel's case and has aided, assisted and guided complaint counsel in the presentation of their case." It is evident from the portions of the transcript relied on by respondents that they misconceive the function of the hearing examiner in an administrative proceeding. "It is the function of an examiner, just as it is the recognized function of a trial judge, to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made." *Bethlehem Steel Co.* v. *N.L.R.B.*, 120 F. 2d 641, 652 (D.C. Cir. 1941). The Commission has repeatedly enjoined that it is "the examiner's duty to exercise firm direction over adjudicative proceedings to insure that the Commission's policy of orderly, expeditious, and continuous proceedings is not thwarted by either deliberate or inadvertent actions of the parties." *Topps Chewing Gum, Inc.*, F.T.C. Docket 8463 (Order of July 2, 1963) [63 F.T.C. 2196]. The examiner, by exercising firm direction of this proceeding, has not thereby abandoned his role as impartial adjudicator; and he has not assumed the management of complaint counsel's case.

Because of the seriousness of an allegation that a hearing examiner is not discharging his function in an impartial and unbiased manner, the Commission has carefully and thoroughly considered the argument and allegations of respondents' motion and affidavits, and the transcript of hearings before the examiner, and we find that the hearings

have been "conducted in an impartial manner" as required by Section 7(a) of the Administrative Procedure Act and that no grounds for disqualification or removal of the examiner have been shown. No useful purpose would, in the Commission's judgment, be served by oral argument of respondents' motion before the Commission. Accordingly,

It is ordered, That the hearing examiner's request for recessed hearings, contained in his certificate of necessity filed November 20, 1964, be, and it hereby is, dismissed as moot.

It is further ordered, That respondents' motion to set oral argument be, and it hereby is, denied.

It is further ordered, That respondents' motion to disqualify and remove the examiner be, and it hereby is, denied.

IN THE MATTER OF

ELECTRA SPARK COMPANY ET AL.

* *Docket 8274. Order, Dec. 30, 1964*

Order granting respondent ten day extension of time to advise whether or not it wishes to withdraw stipulation and proceed to trial.

ORDER RULING ON RESPONDENTS' MOTION TO REOPEN PROCEEDING [1]

This matter is before the Commission upon motion of respondents, Electra Spark Company, Lectra Sales Corporation, Fred P. Dollenberg, and Bernard L. Silver, filed October 23, 1964, requesting that this proceeding be reopened for the purpose of setting aside or modifying the final order issued herein on June 5, 1964 [65 F.T.C. 877]. Respondents further request that the time for the filing of their report of compliance with the order be stayed pending a determination of their motion.

The entire evidentiary record in this case consists of a document entitled "Stipulation as to Facts and Proposed Order" executed by counsel. Upon motion of complaint counsel which was unopposed by respondents, this document was accepted by the hearing examiner by order filed February 27, 1964. In his initial decision, the hearing examiner concluded that on the basis of the facts as stipulated, paragraph A.2. of the proposed order was not appropriate, and accordingly, he modified this paragraph of the proposed order. The initial decision was filed on March 31, 1964, and service thereof on the respondents was completed on April 30, 1964. Respondents did not appeal from the examiner's decision and by order issued June 5, 1964,

[1] The correct name of this respondent corporation is Electra Spark Company [Captioned as The Lectra Spark Company, et al.].

the Commission adopted the initial decision as the decision of the Commission. The Commission's order to cease and desist became final on August 12, 1964, as to respondents, Electra Spark Company and Fred P. Dollenberg, and on August 13, 1964, as to respondents Lectra Sales Corporation and Bernard L. Silver.

As grounds for their request, respondents contend that their failure to appeal from the initial decision was the result of a mistake in fact and in law, that the hearing examiner did not have authority to modify the proposed order, and that the modified order is unduly burdensome and is inconsistent with the findings of fact and conclusions set forth in the initial decision.

The Commission has fully considered respondents' motion and has determined that under the circumstances, alternate methods of disposing of respondents' request are justified and that respondents should be afforded the opportunity to indicate their preference. Accordingly,

It is ordered, That respondents be, and they hereby are, granted ten (10) days after service upon them of this order within which they may advise the Commission whether they desire to withdraw the document entitled "Stipulation as to Facts and Proposed Order" received by the hearing examiner's order of February 27, 1964, and proceed to trial of this case, or, in the alternative, whether they agree that the facts as stipulated in the aforesaid document shall constitute the entire evidentiary record in this proceeding, with the understanding that the Commission may enter any order which it deems warranted.

It is further ordered, That in the event of the latter, respondents and counsel for the Commission may, within thirty (30) days after service upon them of this order, file with the Commission a brief in support of the order which they deem appropriate.

It is further ordered, That the time for filing of a report of compliance with the outstanding order be, and it hereby is, suspended until further order of the Commission.

ADVISORY OPINION DIGESTS*

No. 1. Use of the word "chamois."

The Commission was requested to express an opinion concerning the legality of describing unsplit sheepskin as "Chamois-like Sheepskin" or "Chamois-type Sheepskin" on the basis, it is claimed, that the product looks and feels like chamois leather, and possesses the same qualities as the genuine product.

This problem has been before the Commission in different forms on several occasions. In each instance the Commission has taken the position that it will prohibit the branding or labeling of leather products as "Chamois," "Chamois Type" or "Chamois Like" unless such products are made (a) from the skin of the Alpine antelope, commonly known and referred to as Chamois, or (b) from sheepskin fleshers which have been oil-tanned after removal of the grain layer.

The word "chamois" has its origin in the common name of a small goat-like Alpine antelope whose skin was made into a soft, pliable leather used in the manufacture of gloves, and for polishing such articles as glass, jewelry, fine metals and wood. It possessed the additional feature of absorbing water readily and returning, when dry, to its original state of softness and pliability. The animal became virtually extinct for commercial purposes about 1890 and since that time the word acquired a secondary meaning after being widely used commercially to designate certain leathers produced from split sheepskin fleshers.

The necessity for splitting sheepskin is to remove the impervious grain layer so as to make the underside more receptive to tanning. Since the two layers do not react at the same rate, should an amount of the grain layer remain the skin will not stretch uniformly and will eventually rip and crumble. In any event, irrespective of the relative merits of the many processes which may be employed to produce the leather, the fact remains that the grain layer must be separated from the sheepskin flesher in order that an acceptable chamois will result. This requirement the requesting party's product does not fulfill.

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

The claim that the subject product is equal in all respects to genuine chamois is not true, since the grain layer has not been removed. The genuine product has become firmly established in industry and elsewhere as herein defined, and such product is what the public is entitled to get when it purchases chamois even though the choice may be dictated by caprice or fashion, or perhaps by ignorance. The fact that the product is equal or will serve substantially the same purpose is wholly immaterial. *F.T.C.* v. *Algoma Lumber Co.*, 291 U.S. 67, 78. To the same effect see *Benton Announcements, Inc.* v. *F.T.C.*, 130 F. 2d 254.

The question posed herein is whether the word chamois might be a permissible designation for the subject product if qualifying terms as "like" or "type" were added. Use of the word in any manner is a representation that the product is that which has traditionally been sold as chamois and so accepted by the public after years of buying experience. Although the ordinary purchaser may not know how chamois is made, he is entitled to believe that the particular product sold under that name is in fact a chamois as it is understood in the industry, and such implication cannnot be offset by qualifying words. After reading both, an ordinary consumer would still not know the truth about the product without resort to specialized information. In other words, the capacity and tendency to deceive through any other application of the word chamois would continue to exist.

The requesting party was advised that the definition of chamois has become firmly established in law, in industry, and in the public's mind to mean nothing less than those leather products made from the skin of the Alpine antelope or from the fleshers of sheepskin which have been oil-tanned after removal of the grain layer and that any other use of the word, whether or not modified by qualifying language, to describe leather made by other or incomplete processes would serve only to dilute its accepted meaning and would not be in the general public interest. Consequently, to label the subject product in the manner contemplated would be a deceptive practice and subject the requesting party to a charge of violation of Section 5, Federal Trade Commission Act. (File No. 643 7018, released Aug. 7, 1964.)

No. 2. Toy catalog advertising payments.

The Commission was asked to express an opinion with respect to the legality of payments by toy manufacturers for advertising in toy catalogs published by a firm which, assertedly, (1) is strictly a publisher and has no connection whatever with any toy manufacturer or toy jobber, and (2) affirmatively offered the catalogs for sale to all jobbers.

Previous Commission actions in this area have been concerned with

catalogs which were at least in part owned by jobbers engaged in the sale of the toys advertised in the catalogs. With respect to the instant request, the Commission advised as follows:

Payments for advertising in a catalog published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission notes that the catalogs projected are available at low cost to all toy jobbers and are apparently not designed to be usable only by particular jobbers, or classes or groups of jobbers; that you make every effort to distribute your catalogs as broadly as possible among toy jobbers; and that you do not limit distribution to any particular jobbers or group or class of jobbers. The Commission is of the opinion that if your catalogs are available, in a practical business sense, to all of the jobber customers of a manufacturer, then no objection could be raised to payments by that manufacturer for advertising in the catalogs. (File No. 643 7014, released Oct. 30, 1964.)

TABLE OF COMMODITIES [1]

DECISIONS AND ORDERS

[1] Commodities involved in dismissing or vacating orders are indicated by *italicized* page reference.

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

INDEX[1]

DECISIONS AND ORDERS

[1] Covering practices and matters involved in Commission orders. For index of commodities, *see* Table o Commodities. References to matters involved in vacating or dismissing orders are indicated by *italics*.

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

ADVISORY OPINION DIGESTS