Syllabus

IN THE MATTER OF

CECIL C., HAMILTON, JOHN, AND SIDNEY C. HOGE, AND BARBARA OBOLENSKY DOING BUSINESS AS HUBER HOGE AND SONS ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6097. Complaint, May 6, 1953—Decision, Dec. 16, 1953

Where four partners engaged in business as an advertising agency and mail order promotion house, and two individuals engaged in the mail order sale and distribution of various items, including books; in advertising a book entitled "TV Owner's Guide to Operation and Repair" in newspapers and periodicals of general circulation, and through broadcasts and direct mail advertising—

(a) Represented falsely that the usual television receiving set purchased after the spring of 1947, if cared for according to the instructions in their said book, would give sharp and distinct reception without special electronic equipment up to 100 miles away from the transmitting station;

(b) Represented falsely that through the information and instructions contained in said book, an owner would be able to trace each trouble to its source, make needed repairs, and locate and replace worn-out parts; that the book gave an effective method of locating burned-out tubes, and that, through following such instructions, the owner could prevent major breakdowns and keep his set in perfect operating condition;

(c) Represented falsely that such instructions would enable the owner to convert his set to color, save $65 to $100 per year in service charges, and obtain 40% discount when purchasing a new set; and

(d) Falsely represented that by following such instructions, repairs of and replacements in television sets might be made by inexperienced persons without danger:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of competitors and constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. W. J. Tompkins for the Commission.

Mr. James R. Withrow, Jr., *Mr. Thomas J. McFadden* and *Donovan, Leisure, Newton & Irvine*, of New York City, for Huber Hoge and Sons.

Conrad & Smith, of New York City, for Harry Schneiderman and Louis Linetsky.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 6, 1953, issued and served its complaint on the respondents named in the caption hereof, charging them with unfair and deceptive acts and practices in commerce within the intent and meaning of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and as to respondents Cecil C. Hoge, Hamilton Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky in lieu of answer to said complaint, and as to respondents Harry Schneiderman and Louis Linetsky, also known as Louis Linett, in lieu of the answer to said complaint heretofore filed by them and which, upon acceptance by the Commission of this consent settlement, is to be withdrawn from the record, hereby:

1. Admit all of the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease and desist. It is understood that the respondents in consenting to the Commission's entry of said findings as to the facts, conclusion and order to cease and desist specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law, or that such acts and practices, if engaged in, would be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

4. Assert that they have ceased advertising and selling the products here involved, namely, a book entitled "TV Owner's Guide to Operation and Repair."

The admitted jurisdictional facts, the statement of the acts and practices which the Commission has reason to believe are unlawful,

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on December 16, 1953, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

the conclusion based thereon and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents Cecil C. Hoge, Hamilton Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky are individuals and copartners and prior to October 1, 1952, were engaged in business as an advertising agency and mail order promotion house under the trade name of Huber Hoge and Sons with their office and principal place of business at 699 Madison Avenue, New York, New York. Effective October 1, 1952, the business known as Huber Hoge and Sons was incorporated under the laws of the State of New York as Huber Hoge and Sons, Inc., with respondents Cecil C. Hoge, Sidney C. Hoge and John Hoge as directors and president, vice president and secretary, respectively. Respondent Harry Schneiderman is an individual doing business under the trade name of Bedford Company with his office and principal place of business at 799 Broadway, New York, New York. He is engaged in the mail order business and sells and distributes in the course of such business various items, including books. Respondent Louis Linetsky is an individual and is employed in the business known as Bedford Company. He is also known as Louis Linett. His address is the same as that of respondent Harry Schneiderman. All of the respondents have participated in the performance of the acts and practices hereinafter set forth, except as otherwise specifically stated.

PAR. 2. Beginning in 1952 the respondents engaged in the sale and distribution of a book entitled "TV Owner's Guide to Operation and Repair". Respondents caused said book, when sold, to be transported from the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintained a substantial course of trade in their said book in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their said business, and for the purpose of inducing the purchase of said book, respondents have made many statements with regard to the ability of owners of television sets to keep their sets in proper working order by following the instructions contained in said book. These representations have been made by means of advertisements inserted in newspapers and other periodicals having a general circulation in the United States, by radio broadcasts, and by means of direct mail advertising.

PAR. 4. Through the use of various statements made in said advertisements, respondents represented, directly and by implication, that, if cared for according to the instructions in their book, the usual television receiving set purchased after the spring of 1947 will give a sharp and distinct reception, without special electronic equipment, up to 100 miles away from the transmitting station; that through the information and instructions contained in said book a television owner will be able to trace each trouble to its source, make needed repairs, locate and replace wornout parts; that the book gives an effective method of locating burned-out tubes; that by following the instructions in the book the owner can prevent major breakdowns and keep his set in perfect operating condition, convert his set to color, save $65 to $100 per year in service charges and obtain 40% discount when purchasing a new set; and that, by following the instructions in said book, repairs of, and replacements in, television sets may be made by inexperienced persons without danger.

PAR. 5. The said representations as set forth in Paragraph Four hereof are false, deceptive, and misleading. In truth and in fact, the failure to receive sharp and distinct pictures over a television receiver is sometimes governed by factors outside of the receiving set. Many television sets are so located as to make sharp and distinct picture reception an impossibility. Even those set owners whose sets are favorably located cannot always get sharp and distinct pictures because present day telecasting conditions make perfect or even satisfactory reception impossible in many instances. By using the most modern electronic equipment available and by following all of the instructions contained in respondents' book, a sharp and distinct picture reception cannot under all circumstances be obtained on present day television receivers from a telecasting station located as much as or slightly less than 100 miles away. The book contains information that should enable the television owner to make a number of different kinds of simple repairs but will not enable him to trace every trouble to its source or make all needed adjustments. The book does not inform the set owner as to how he may himself locate or replace wornout parts. The information contained therein may enable the owner to locate burned-out tubes in some instances. The majority of tube failures, however, are not due to burnout. The method of detecting defective tubes recommended is not an effective method of detecting a defective tube. Compliance with the instructions set out in this book will not enable a set owner to maintain his set in perfect working condition or prevent major breakdowns, will not enable a set owner to convert his set for colored reception; furthermore, colored television pictures are not now obtainable.

It is impossible to estimate the annual cost of television upkeep. Many sets give good reception for a year or longer without any servicing either by the owner or a repairman. It is therefore not possible to state what amount, if any, can be saved by reason of the information contained in said book. While information in the book may enable a person to select a television set more suitable for his purposes than would ordinarily be possible without such information, its use will not enable him to obtain a discount, the matter of price being entirely under sole control of the dealer. There is an element of danger to an inexperienced person who attempts to repair or replace parts in a television receiver. Some picture tubes retain an electric charge for a considerable time after the wall plug is removed and are capable of giving a shock which may have serious consequences.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondents Cecil C. Hoge, Hamilton Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky, individually and as copartners doing business under the name of Huber Hoge and Sons, or under any other name, and respondent Harry Schneiderman, doing business under the name of Bedford Company or under any other name, and respondent Louis Linetsky, also known as Louis Linett, and the respective respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the book entitled "TV Owner's Guide to Operation and Repair," whether sold under the same or any other name, or any book of substantially the same contents, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that ownership of and compliance with the instructions set forth in the "TV Owner's Guide to Operation and Repair" will enable a television set owner to maintain his set in perfect operating condition or prevent major breakdowns;

(a) Trace the source of all troubles;

(b) Make all needed repairs;

(c) Locate or replace all worn-out parts;

(d) Convert television sets to color;
(e) Save any stated amount in service charges;
(f) Obtain a discount upon purchase of a television set.

2. Representing that said book gives an effective method of detecting defective tubes.

3. Representing that, by following the instructions in said book, repairs or replacements may be made without danger.

4. Misrepresenting the distance from transmitting stations at which television sets, maintained in accordance with the instructions in said book, will give sharp and distinct reception.

It is further ordered, That the 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 this order.

Dated: Oct. 20, 1953.

(sgd.) *Cecil C. Hoge*
CECIL C. HOGE

Dated: Oct. 23, 1953.

(sgd.) *Hamilton Hoge*
HAMILTON HOGE

Dated: Oct. 20, 1953.

(sgd.) *John Hoge*
JOHN HOGE

Dated: Oct. 23, 1953.

(sgd.) *Sidney C. Hoge*
SIDNEY C. HOGE

Dated: Oct. 23, 1953.

(sgd.) *Barbara Obolensky*
BARBARA OBOLENSKY
Individually and as copartners doing business as Huber Hoge and Sons.

Dated Oct. 21, 1953.

(sgd.) *Harry Schneiderman*
HARRY SCHNEIDERMAN,
doing business as Bedford Company.

Dated: Oct. 21, 1953.

(sgd.) *Louis Linett*
LOUIS LINETSKY,
also known as Louis Linett.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on the 16th day of December 1953.

IN THE MATTER OF

CHARLES ANTELL CO., INC. ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6102. Complaint, June 8, 1953—Decision, Dec. 19, 1953

Where the corporation and its three officers, joint owners of its entire stock, engaged in the interstate sale and distribution of their "Charles Antell Formula No. 9" for the hair, "Charles Antell Shampoo," and "Hexachlorophene Soap"; together with an advertising agent whose principal client they were; in advertising their said "Formula No. 9" and "Shampoo" in daily papers and by broadcasts from many radio and television stations, directly and by implication—

(a) Represented falsely that the main ingredient in said "Formula No. 9" was lanolin, that lanolin was the only natural oil or grease that is absorbed by the hair or scalp, that the lanolin therein would reach the roots of the hair, and that it would cleanse the hair;

(b) Represented that the use of said "Formula" would loosen the scalp and constitute an effective treatment for infected scalp, dandruff, and cracked and split hair; and would remedy the damage caused by improper dyeing, permanents, burning and other harmful practices;

The facts being that it would not alone loosen the scalp; while use thereof as directed with massage and brushing would remove dandruff, it was not an effective treatment for said condition or infected scalps; and while its use would make the hair less brittle and more pliable and improve the appearance of hair which was cracked, split, or otherwise damaged by improper dyeing, permanents, burning and other harmful practices, it would not remedy the cause of cracked or split hair;

(c) Represented that use thereof would promote the growth of hair and improve the hair by imparting to it health and vitality, would change the color thereof, and would not leave grease on the hair;

The facts being that, while brushing, pulling, and massaging the hair regularly with said "No. 9" served as a stimulant to the circulation in and around the hair roots and thus helped maintain normal scalp and hair health, it would not grow hair; and, while used in excessive amounts, it might darken and leave grease on the hair of some persons, use as directed or in moderate amounts would not bring about such results;

(d) Represented falsely that use thereof would cause the hair to curl and would prevent loss of hair and baldness;

(e) Represented that the hormones contained in said "Shampoo" cleaned or aided in the cleaning of the hair and scalp; the facts being that it had not contained hormones for more than a year, and hormones have no cleansing action;

(f) Represented falsely that their said "Hexachlorophene Soap" would remove twenty-five times more dirt and other foreign matter from the skin than ordinary soap;

(g) Falsely represented that said soap would prevent the development of impetigo and cradle cap in the case of babies; and pimples, boils, blackheads, or other skin blemishes of external origin generally; and

(h) Represented that said "Formula No. 9" came in sizes that normally sell at \$3.98 and \$4.95, but that said prices were reduced to \$2.00 and \$3.00, respectively, as special introductory offers; when in fact said so-called special introductory prices were the regular prices at which said product has been sold for a long time:

Held, That such acts and practices constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. William L. Pencke, for the Commission.

Mr. Bernard H. Herzfeld, of Baltimore, Md., for respondents.

Decision of the Commission

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated December 19, 1953, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 8, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held before the above-named hearing examiner, theretofore duly designated by the Commission, at which hearings counsel for respondents and counsel supporting the complaint entered into a stipulation as to the facts in this proceeding in lieu of oral testimony and other evidence in support of or in opposition to the allegations of the complaint, said stipulation being spread upon the record at said hearings and duly filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, answer, and stipulation, counsel having elected not to file proposed findings and conclusions for consideration by the hearing examiner, and oral argument not having been requested; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Charles Antell, Inc., (incorrectly named in the complaint as Charles Antell Co., Inc.) is a corporation, organized and existing under the laws of the State of Maryland, with its office and principal place of business located at 112 South Street, Baltimore, Maryland.

Respondent T. A. A., Inc., is a corporation, organized and existing under the laws of the State of New York with its office and principal place of business located at 1710 Broadway, New York, New York, and another place of business at 4 West Eager Street, Baltimore, Maryland. The individuals named in the complaint are not officers of T. A. A., Inc.

Respondent Charles D. Kasher is President of Charles Antell, Inc. Respondent Leonard L. Rosen is Vice President, Secretary and Chairman of the Board of Charles Antell, Inc. These individuals direct, manage and control the policies and activities of said corporate respondent. Respondent Julius J. Rosen is Vice-President and Treasurer of Charles Antell, Inc. This individual participates in the direction, management and control of the policies and activities of said Charles Antell, Inc.

The principal office and place of business of respondent Charles D. Kasher is located at 1710 Broadway, New York, New York; that of Julius J. Rosen is located at 112 South Street, Baltimore, Maryland, and that of respondent Leonard L. Rosen is located at 4 West Eager Street, Baltimore, Maryland.

PAR. 2. For more than two years last past, respondents Charles Antell, Inc., Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, have been, and are now, engaged in the sale and distribution of certain cosmetic products, as "cosmetics" are defined in the Federal Trade Commission Act, and a soap.

Respondent T. A. A., Inc., has been and is, the advertising agent for respondent Charles Antell, Inc., and it, as well as the individual respondents Charles D. Kasher and Leonard L. Rosen have prepared and caused the dissemination of, or participated in the preparation and dissemination of, the advertising matter to which reference is hereinafter made.

Respondents Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, jointly own all of the stock of respondent Charles Antell, Inc. Said corporate respondent is the principal client of respondent T. A. A., Inc., and there exists a close business relationship between all of said respondents.

The designations used by respondents for said cosmetic products and soap, the essential information in regard to the composition thereof, and the directions for use of the cosmetic products, are as follows, except that hormones have not been used in either Charles Antell Formula No. 9 or Charles Antell shampoo since approximately June 1952:

Designation: *CHARLES ANTELL Formula #9*

Composition:

	Parts
Lanolin	13
Petroleum	8
Mineral Oil	20.5
Paraffin	8.05
Cetyl Alcohol	.49
Stearic Acid	10.4
TEA (triethanolamine)	2.47
Propylene Glycol	3.21
Vee Gum (colloidal clay)	.36
Methyl Parasept	.092
Water	32.35
Perfume	.25

Hormone

6.9 cc of a 3% Alpha Estradiol in Propylene Glycol solution for every 1000 lbs. of finished cream.

Directions for use:

Before applying, massage scalp thoroughly with finger tips to stimulate circulation. Then apply a small portion of Formula No. 9 to finger tips. Liquefy by rubbing in palms of hands. Massage thoroughly into scalp and through hair. Should be repeated daily for best results.

Designation: *CHARLES ANTELL SHAMPOO*

Composition:

	Percent
Oleic Acid	7.37
Coconut Oil Fatty Acid	6.42
G–1441 (derivative of lanolin sorbitol)	0.883
MEA (monoethanolamine)	2.19
TEA (triethanolamine)	3.64
Protovac 8894 (protein caseinate derivative)	0.475
Propylene Glycol	8.94
Sequestrene AA (ethylene diamine tetra acetic acid)	0.357
Perfume	0.208
Water	69.5

Horomone (Alpha estradiol 160cc of a 3% solution of Alpha Estradiol in Propylene Glycol for 42,000 lbs. of finished shampoo.)

Directions for use:

Wet Hair Thoroughly and Apply a small amount of Shampoo. Work Shampoo into Generous Lather. Rinse with tepid water. Repeat these steps For a Thorough Cleansing.

Designation: *HEXACHLOROPHENE SOAP*

Composition:

	Max. %	Min. %
Moisture and matter volatile at 105 degrees C.	15.0	
Sum of free alkali, total matter insoluble in alcohol and sodium chloride	1.7	
Free alkali, calculated as NaOH	0.1	
Matter insoluble in H_2O	0.4	
Unsaponified saponifiable (free fat)	0.3	
Anhydrous Soap		83.0

Lanolin—one percent
Chlorophyll—1/100 percent
Hexachlorophene—Two percent

PAR. 3. Respondents Charles Antell, Inc., and Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen cause said cosmetic products and soap, when sold, to be transported from their place of business in the State of Maryland to purchasers thereof located in various other States of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products and soap in commerce, between and among the various States of the United States and in the District of Columbia, and such trade has been and is substantial.

PAR. 4. In the course and conduct of said business, respondents have disseminated and caused the dissemination of certain advertisements concerning said cosmetic products by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to newspaper advertisements in the Evening Bulletin, Providence, Rhode Island, of February 19, 1952, the Baltimore, Maryland, News Post of November 13, 1951, and the Sunday Star, Washington, D. C., of May 18, 1952; and radio and television broadcasts entitled "Hair Raising Tale," "Some of My Best Friends are Women," "Hollywood Story" and "Hare Magic," transmitted over radio and television stations WFIL-TV and WIP at Philadelphia, Pennsylvania, KFRC at San Francisco, California, and many other radio and television stations in the United States, said broadcasts being of sufficient power to carry them across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said products; and respondents have also disseminated, and caused the dissemination of, advertisements concerning said products by various means including, but not limited to newspaper advertisements and the aforesaid radio and television broadcasts, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said cosmetic products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the further course and conduct of said business, respondents made certain statements more than a year ago and which have not been repeated since that time concerning their hexachlorophene soap including, but not limited to, television broadcasts over television station WMAL-TV at Washington, D. C. Among and typical of said statements, but not all inclusive, were the following:

Even if you are one of the two out of five people who bathe daily, you're only 1/25 as clean as you could be. For if we're really clean after a bath why do we spend millions of dollars on deodorants to prevent body odor. * * * A beautifying, soothing soap because of the lanolin, and a soap that will make you 25 times cleaner than ordinary soap because of the hexachlorophene.

Why is a baby that is bathed carefully every day in danger of impetigo, diaper rash and cradle cap? Why do people have externally caused skin blemishes—pimples, boils and blackheads? Because ordinary soap cannot kill the millions of skin bacteria that are the cause of body odor of babies' impetigo and skin rashes and of skin blemishes of external origin. All ordinary soap can do is wash a few of these bacteria away * * *. For the first time there is an ingredient that, added to soap, will kill these bacteria on contact and will continue to kill them as they get on your skin. One bath with this soap is as effective as a bath every hour for 24 hours with ordinary soap.

PAR. 5. Through the use of the advertisments referred to in Paragraph 4 with respect to Charles Antell Formula No. 9 and Charles Antell Shampoo and the advertisements quoted in said paragraph with respect to Hexachlorophene Soap, respondents have made, directly and by implication, the following representations:

A. With respect to Charles Antell Formula No. 9:

1. That the main ingredient in said product is lanolin; that the lanolin is full strength or maximum potency and that no other oils or greases are present.

2. That lanolin is the only natural oil which will or can be absorbed by the hair and scalp and that the lanolin in said product will be absorbed to the extent that it will reach the roots of the hair; that lanolin will cleanse the hair.

3. That the use of said Formula No. 9, according to directions, will loosen dry scalp and constitute an effective treatment for infected scalp, dandruff and cracked and split hair; will remedy the damage caused by improper dyeing, permanents, burning and other harmful practices; will promote the growth of hair and improve the hair by imparting to it health and vitality; will not change the color of the hair and will not leave grease on the hair.

4. That the use of said product will cause the hair to curl.

5. That its use will prevent loss of hair and baldness.

B. With respect to Charles Antell Shampoo:

That said shampoo contains substantial quantities of lanolin and that the hormones contained in said product clean or aid in the cleaning of the hair and scalp.

C. With respect to Hexachlorophene Soap:

1. That said soap will remove twenty-five times more dirt and other foreign matter from the skin than ordinary soap.

2. That said soap will prevent the development of impetigo and cradle cap in the case of babies, and pimples, boils, blackheads or other skin blemishes of external origin generally.

PAR. 6. The foregoing representations with respect to the said cosmetic products and soap are false and misleading in material respects and, with respect to said cosmetic products, constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

A. With respect to Charles Antell Formula No. 9:

1. The main ingredient in said product from a percentage standpoint is not lanolin, but the lanolin present in the product is of full strength or maximum potency.

2. Lanolin is not the only natural oil or grease that is absorbed by the hair or scalp. Lanolin may be absorbed into the scalp but will not reach to the roots of the hair. Lanolin will not cleanse the hair.

3. Said Formula No. 9 alone will not loosen the scalp. While the use of said product as directed with massage and brushing of the hair will effectively remove dandruff, it is not an effective treatment for dandruff or infected scalp. While the use of said product will make the hair less brittle and more pliable and improve the appearance of hair that is cracked, split or otherwise damaged by improper dyeing, permanents, burning and other harmful practices, its use will not remedy the cause of cracked or split hair. Formula No. 9 will not grow hair. However, brushing, pulling and massaging of the hair with Formula No. 9 regularly, serves as a stimulant to the circulation in and around the hair roots and, since a healthy condition of the hair and scalp is aided by proper circulation, stimulation by this procedure will help maintain normal scalp and hair health. Formula No. 9 used in excessive amounts may darken the hair and leave grease on the hair of some persons. However, the use of Formula No. 9 as directed, or in moderate amounts, will not darken the hair nor leave grease on the hair.

4. When the hair has been set in curls or in some other manner Formula No. 9 will help keep it as so set or arranged. However, said product will not curl the hair.

5. It will not prevent the loss of hair or baldness.

B. With respect to Charles Antell Shampoo:

Said shampoo does contain lanolin by the presence of G–1441 which is described as a modified or refined or processed lanolin product. However, said shampoo has not contained hormones for more than one year and has not been so advertised for more than one year. Moreover, hormones, if present, have no cleansing action.

C. With respect to Hexachlorophene Soap:

1. Respondents' soap is no more effective than ordinary soap as a cleansing agent for the removal of dirt, grit, and other soil.

2. Respondents' soap will not prevent impetigo and cradle cap in case of babies nor prevent the development of pimples, blackheads or other skin blemishes generally, however caused.

PAR. 7. In the course and conduct of their business, respondents represent and have represented that said Formula No. 9 comes in sizes that normally sell at $3.98 and $4.95, respectively, but that said prices are reduced to $2.00 and $3.00, respectively, as special introductory offers. In truth and in fact, said so-called special introductory prices are the regular prices at which said products are and have been sold for a long period of time.

PAR. 8. The use by respondents of the said false advertisements with respect to the cosmetic products and the false, misleading and deceptive statements made with respect to the said soap, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into erroneous and mistaken belief that the statements and representations contained in the advertisements are true; and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

CONCLUSION

The acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Charles Antell Formula No. 9 and Charles Antell Shampoo, or any products of substantially similar composition or possessing substantially similar properties, whether sold under the same names or any other names, do forthwith cease and desist from, directly or indirectly:

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

(a) With respect to Charles Antell Formula No. 9:

(1) That the main ingredient in said product is lanolin;

(2) That lanolin is the only natural oil or grease that is absorbed by the hair or scalp or that the lanolin in said product is absorbed by the scalp to the extent that it will reach the roots of the hair;

(3) That the lanolin in said product will cleanse the hair;

(4) That its use will loosen the scalp or constitute an effective treatment for dandruff or infected scalp;

(5) That it will remedy the cause of cracked or split hair or will remedy the damage caused by improper dyeing of the hair, permanents, burning or other harmful practices having to do with the hair;

(6) That the use of said products, as directed or otherwise, will promote the growth of the hair;

(7) That the use of said product will give the hair health or vitality, except to the extent that brushing, pulling and massaging of the hair and scalp with said product regularly serves as a stimulant to circulation around the hair roots and thereby helps maintain normal scalp and hair health;

(8) That the use of said products will not change the color of the hair or will not leave grease on the hair, unless such representation is limited to cases where said product is used in moderate amounts as directed;

(9) That its use will cause the hair to curl;

(10) That its use will prevent the loss of hair or baldness.

(b) With respect to Charles Antell Shampoo:

That the hormones present in said product will have any cleansing action on the hair.

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

It is further ordered, That respondents Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen, and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the product known as Hexachlorophene Soap, or any other soap or product of substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the effectiveness of said soap as a cleansing agent.

2. Representing, directly or by implication, that the use of said soap will prevent impetigo or cradle cap in case of babies or prevent the development of pimples, boils, blackheads or other skin blemishes generally.

It is further ordered, That respondents Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen, and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any article of merchandise do forthwith cease and desist from representing, directly or by implication:

That it is being sold at a reduced price when such price is the price at which the article is usually and regularly sold.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of December 19, 1953].

IN THE MATTER OF

MANCO WATCH STRAP CO., INC.

Docket 5854. Complaint, Feb. 23, 1951—Decision, Dec. 21, 1953

Charge: Advertising falsely and neglecting to disclose source of watch bands.

Before *Mr. Clyde M. Hadley* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. Jesse D. Kash for the Commission.

Sperry, Weinberg & Ruskay, of New York City, for respondent.

ORDER GRANTING RESPONDENT'S APPEAL FROM INITIAL DECISION OF HEARING EXAMINER AND DECISION OF THE COMMISSION DISMISSING COMPLAINT

This matter came on to be heard upon the complaint of the Commission, respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint, initial decision of the hearing examiner and the appeal therefrom by respondent, and briefs and oral argument of counsel.

The complaint alleges that the respondent imports watch bands from Occupied Japan and China in bulk and also expansion bands from China, to which respondent attaches end pieces of domestic manufacture to make completed bands, and that these bands bear words showing the country of origin imprinted on a link on the inside of a band in words so small and indistinct as to be practically illegible to the naked eye. Those of such products as are not resold in bulk are attached to cards, in a manner which conceals the aforesaid markings, the complaint additionally alleges, and it is further charged that the sale thereof in commerce under the manner aforesaid has the tendency and capacity to mislead retailers and members of the purchasing public into the erroneous and mistaken belief that said bands are wholly of domestic origin.

The hearing examiner in his initial decision concluded that the allegations of the complaint in substance have been supported by the evidence in the record, and the order contained in such initial decision would require respondent, among other things, to cease offering watch or wrist bands or similar products imported from any foreign country without affirmatively disclosing thereon, or in immediate conjunction therewith, the fact that they are of foreign origin.

It appears from the record that many of the bands distributed by respondent in commerce are sold to the purchasing public through the channels of variety store chains.

The evidence in the record indicates that there are no domestic watch or wrist bands which are sold at prices comparable to the prices at which respondent's imported bands are sold. There is no evidence in the record showing a preference on the part of a substantial number of members of the purchasing public for the higher priced domestic bands over respondent's lower priced imported bands. The Commission is therefore of the opinion that the complaint herein should be dismissed. This determination accordingly renders it unnecessary to rule more specifically on each of the objections to the initial decision raised in respondent's appeal.

The Commission having duly considered the matter and being now fully advised in the premises, and having concluded in such connection that respondent's appeal should be granted:

It is ordered, therefore, That respondent's appeal from the initial decision of the hearing examiner be, and it hereby is, granted, and that the complaint herein be, and it hereby is, dismissed.

Commissioner Mead dissenting and Commissioners Howrey and Gwynne not participating for the reason that oral argument on respondent's appeal from the initial decision of the hearing examiner was heard prior to their appointment to the Commission.

IN THE MATTER OF

PILLSBURY MILLS, INC.

Docket 6000. Order and opinions, Dec. 21, 1953

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. L. E. Creel, Jr., Mr. J. Wallace Adair and *Mr. Brockman Horne* for the Commission.

Hogan & Hartson and *Mr. E. Barrett Prettyman, Jr.*, of Washington, D. C., and *Mr. Terrance Hanold*, of Minneapolis, Minn., for respondent.

ORDER GRANTING APPEAL IN PART, SETTING ASIDE INITIAL DECISION AND REMANDING PROCEEDING TO HEARING EXAMINER

This matter is before the Commission upon an appeal by counsel supporting the complaint from an initial decision of the hearing examiner dismissing the complaint without prejudice, briefs in support of and in opposition to said appeal and oral argument of counsel.

In support of this appeal, it is contended that the hearing examiner erroneously held that the allegations of the complaint are not supported prima facie by reliable, probative and substantial evidence. For the reasons stated in the written opinion of the Commission, which is being issued simultaneously herewith, the Commission is of the opinion that a prima facie case has been made out and that the complaint was improperly dismissed.

Counsel supporting the complaint in their appeal also take exception to rulings of the hearing examiner excluding evidence relating to alleged price discriminations by respondent in Arkansas and Louisiana, excluding certain market surveys made by several Scripps-Howard newspapers, by Good Housekeeping Magazine and by the New York World-Telegram, excluding a summary of family flour and mix purchases made by the Weona Food Stores of Memphis and granting respondent's motion to strike all evidence relating to Oven Ready Biscuits.

The evidence as to the alleged price discrimination relates to prices at which respondent sold family flour in regions outside of the southeast area. At the most, such evidence could only tend to show that respondent in the past may have abused economic power in the family flour market in other areas than the flour market with which this proceeding is concerned. It is believed that such evidence was properly excluded from this record.

The hearing examiner did not reject all evidence of the results of market surveys. His rulings on this type of evidence which are excepted to in this appeal are based on the lack of materiality of the results of the surveys rejected. He excluded the Scripps-Howard survey which shows the brands of family flour and mixes on the store shelves in a cross section of stores in twelve cities in 1950 and in thirteen cities in 1951 as not having any bearing on sales. He excluded the Good Housekeeping survey, consisting of the answers of 1,717 of its subscribers as to the brands of mixes they used, and the survey of the New York World-Telegram showing the sales of mixes in 200 retail stores in the New York City area, conducted in 1949 and 1950, respectively, as being too remote in time to be of any value in determining the effect of the acquisitions. The Commission is of the opinion that this evidence was erroneously excluded. Market information for 1949 and 1950 is of value in determining the issues in this proceeding. Such surveys, if properly conducted, while certainly not conclusive are indicators of market trends and the existence of competitive products in the market surveyed. Such indicators, along with other information, may be of value in assisting the Commission in determining the actual market conditions.

The summary of purchases of family flour and mixes by the Weona Food Stores of Memphis was properly rejected as the employee of that company who identified the rejected exhibits was not sure that they were complete or correct. His testimony as to the circumstances under which the date in these exhibits were collected casts serious doubts on their correctness.

The evidence as to Ballard's Oven Ready Biscuits was properly stricken. Respondent did not make any comparable product and did not compete in the biscuit market. The fact that Oven Ready Biscuits are made from biscuit mixes does not make these products competitive except indirectly.

The Commission, therefore, being of the opinion that the complaint herein should not have been dismissed and being of the further opinion that certain evidence was erroneously excluded from the record:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision is granted in part and denied in part in the manner and to the extent hereinabove indicated.

It is further ordered, That the initial decision is hereby set aside.

It is further ordered, That this matter is hereby remanded to the hearing examiner for further appropriate proceedings in due course in accordance with this order.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the Opinion of the Commission.

The complaint in this case charges the respondent Pillsbury Mills, Inc. has violated Section 7 of the Clayton Act, as amended, by acquiring the assets of two of its competitors, namely, Ballard and Ballard Company and Duff's Baking Mix Division of American Home Products Corporation. It alleges that Pillsbury and Duff were, prior to the acquisitions, leaders throughout the United States (including the southeast) in the sale of flour-base mixes and that Pillsbury and Ballard were leaders in the southeastern part of the United States in the sale of family flour, bakery flour, and mixes.

A considerable amount of testimony was taken by attorneys in support of the complaint in Minneapolis, Louisville, Cincinnati, New York City and in many cities throughout the southeastern states. Subpoenas duces tecum were served on respondent to produce production and sales figures for a period of time before and after the dates of acquisition, and to produce other data to show competitive market shares and universe figures prepared for respondent by the Market Research Corporation of America. Respondent refused to honor these subpoenas and refused to produce the data requested.

Instead of seeking enforcement of the subpoenas in court and instead of seeking to subpoena figures from respondents' competitors as suggested by the hearing examiner, counsel supporting the complaint relied on figures and estimates for the fiscal year 1949–1950 furnished by respondent during the course of the preliminary investigation. In an effort to corroborate these estimates, counsel introduced surveys of specific market areas made by newspapers and other independent agencies.

At the close of the case-in-chief of attorneys supporting the complaint, respondent moved to dismiss on the ground that a *prima facie* case had not been made.

Without expressing an opinion as to whether Section 7 had been violated, the hearing examiner granted the motion to dismiss on the ground that the "allegations of the complaint were not supported by reliable, probative and substantial evidence in the record as required by the Administrative Procedure Act."

Section 7 of the Clayton Act, as amended December 29, 1950, which is now before us for construction for the first time, provides in relevant part:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade

Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." [1]

The salient facts as shown by the partial record now before us—respondent has not yet put in its case—are set forth below. We reserve until later the question as to the reliability of the evidence.

Respondent Pillsbury is the second largest flour miller in the United States. Prior to the acquisition it was the 2nd largest seller of family flour, the 2nd largest seller of flour-base mixes, the 3rd largest seller of bakery flour, and among the 15 largest sellers of formula feed in the United States.

In the southeast, that is, the area east of the Mississippi River and South of the Ohio and Potomac Rivers, respondent was the 5th largest seller of family flour, the 3rd largest seller of bakery flour, and the largest seller of mixes.

On June 12, 1951, respondent acquired all the assets of Ballard for approximately $5,172,000.[2] On March 7, 1952, it acquired Duff for about $2,238,000.[3]

By these acquisitions respondent increased its capacity for milling flour approximately 6 percent, for manufacturing mixes about 40 percent,[4] and for manufacturing commercial feed by almost 57 percent; its total sales of bakery flour increased 2.8 percent, family flour 23.8 percent, feeds 34.4 percent, and mixes 40.9 (32.8) percent;[5] its feed position improved from "among the first fifteen" to tenth place.

In the southeast respondent's sales of bakery flour increased 40 percent, mix sales increased 78 percent, and family flour sales increased 154 percent.[6] Respondent's feed sales in this market increased from

[1] 64 Stat. 1125, 15 U. S. C., sec. 18.

[2] Purchase was accomplished by issuing 115,000 shares of respondent's stock and turning them over to Ballard in exchange for all its assets and liabilities. Ballard's net worth as stated in its balance sheet of May 31, 1951, was $5,172,000.

[3] This amount was set forth in a statement which respondent filed with Securities and Exchange Commission.

[4] The attorneys supporting the complaint claim that the acquisitions increased respondent's mix capacity about 48 percent. We think this should be 40 rather than 48 percent. The latter figure seems to be based on the assumption that the capacity increased at Springfield, Illinois, resulted from the acquisition. Neither Duff nor Ballard had a plant at that location.

[5] These percentage figures, except the 40.9 percent for mixes, were arrived at by dividing the Pillsbury net dollar sales for the fiscal year ending May 31, 1950, into the Ballard net dollar sales for a similar fiscal year. Comparable fiscal year figures for Duff were not available so 1949 calendar year net sales were used to arrive at the 40.9 percent figure for mixes; if 1950 calendar year net sales were used the figure would be 32.8 percent.

[6] These percentage figures for the southeast were based on the 1949–1950 sales of respondent and the acquired companies and were arrived at by dividing the derived dollar

20,000 tons per year to 175,000 tons per year.

Attorneys supporting the complaint contend that the foregoing shows a "substantiality" of acquisitions sufficient to bring the mergers within the "substantiality doctrine" of the *Standard Stations* and *International Salt* cases.[7]

The record, however, contains much more in the way of economic and business facts—facts about Pillsbury, Ballard and Duff, about their respective shares of the market, and about the structure, behavior and characteristics of the flour market in general.

During the 11 year period ending in 1951 Pillsbury's net sales grew from approximately $47,000,000 to $224,500,000; its total assets increased from $30,000,000 to $95,500,000; and its net worth grew from $23,000,000 to $42,000,000. Its history during this period was marked by a number of acquisitions. It acquired a California milling company, two Iowa companies, four grain elevators in different parts of the country, and two Canadian flour mills.

During the 10 year period from 1940 to 1950 Ballard's net sales grew from approximately $8,000,000 to $30,000,000 and its assets increased from $2,600,000 to $11,300,000. The market for all of Ballard's relevant products was within the southeastern region. In this area it was the 3rd largest seller of family flour, the 3rd largest seller of mixes, and the 9th largest seller of bakery flour.

Duff, in 1950, was the 5th largest seller of mixes in the United States and the 5th largest seller of mixes in the southeast. Its gross sales for the 11 month period ending November 30, 1951 were about $6,500,000 and its gross profits were $1,919,404. Duff's inventory and fixed assets as of November 30, 1951 were $2,396,320.

By the acquisitions respondent was promoted in the southeastern area from 5th to 2nd place in family flour, from 3rd to 1st place in bakery flour, and increased its 1st place position in the mix market in the southeast from 22.7 percent to almost 45 percent.[8]

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sales figure for respondent into the actual dollar sales figures for Ballard and the derived sales figures for Duff.

The figures for the three companies were arrived at as follows:

Ballard's actual dollar sales for each class of products for the fiscal year 1949–1950 are in the record. As it sold only in the southeast, these were its dollar figures in that area.

For respondent and Duff, the record contains total dollar sales, total unit sales by product, and unit sales for each class of product in the southeast. Dollar sales in the southeast were calculated from its dollar sales for the country on the assumption that the percentage of its total dollar sales in the southeast would be the same as the percentage of unit sales in that area.

[7] *Standard Oil Co. of California* v. *United States* (Standard Stations), 337 U. S. 293 (1949); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947).

[8] Market positions and percentage figures were arrived at by combining respondent's figures with those of the acquired companies for 1950 and using them as a basis for estimating sales positions after the acquisitions.

The wheat flour milling industry in the United States has decreased in size from a peak of 11,691 mills in 1909 to 1,799 mills in 1951. In 1945 there were 2,571 mills with a total capacity of 1,349,699 cwt. daily. By 1951 the country's 1,799 mills had an aggregate daily capacity of 1,282,796 cwt. with about 97 percent of all flour products being accounted for by the 355 largest mills.

In 1945 the ten largest firms in the United States, measured by milling capacity, controlled about 34 percent of the industry's capacity. In 1951 the ten largest companies—the same firms as in 1945—had 40 percent of the capacity. Between 1945 and 1951, while the industry was losing about 67,000 cwt. in daily capacity, the ten largest companies increased their daily capacity by 57,000 cwt. Of this total increase, over 39,000 cwt. or 68 percent resulted from acquisitions. If the acquisition of Ballard by Pillsbury is included, the daily capacity gain is 62,000 cwt. with acquisitions accounting for over 71 percent of the increase.

Although the southeast had 21 percent of the country's population (1950) and 34 percent of the number of mills (January, 1951), it had only 11 percent of the nation's milling capacity. The number of mills in this area declined from 805 in 1945 to 660 in 1951; the total daily capacity declined from 154,073 cwt. to 142,907 cwt.[9] No new mills, of any size, have been established in the southeast in recent years.

For many years Ballard had offered effective competition to Pillsbury in the southeast.[10] In 1945 the Ballard flour mill had the largest capacity of any mill in this area. In 1951 it shared this distinction with the General Mills plant in Louisville. At the time it was acquired by Pillsbury it owned and operated one of the largest and most modern formula feed plants in the southeast. The Ballard brands of flour, formula feeds and prepared mixes enjoyed widespread consumer acceptance. Ballard had shown a profit for many years prior to its acquisition. It had sizable net earnings for the eleven month period just before its acquisition. It was an important factor in the competitive market.

Through its acquisition of Ballard respondent increased its share of the family flour market in the southeast from 3.66 percent to 8.31

[9] According to the trade publication, The Northwestern Miller, there were 805 mills in the southeast in 1945 of which capacity figures were given for only 757; namely, 154,073 cwt. Similarly, there were 660 mills in the southeast in 1951 of which capacity figures were given for only 615, namely, 142,907 cwt. It is assumed that the listed mills for which The Northwestern Miller could get no figures, were very small.

[10] Ballard's unit volume of sales of family flour and bakery flour combined in the southeast for the fiscal year 1949–1950 was slightly larger than respondent's and second only to General Mills.

percent; it increased its share of the bakery flour market from 4.93 percent to 8.55 percent.[11]

While there were a large number of mills selling flour in the southeast, respondent's sales were more concentrated in urban areas and it competed with relatively few flour millers in each of said urban areas.[12]

Respondent's and Ballard's prices differed in different locations prior to the acquisition. Afterwards the prices of the two brands became identical.

In the mix market, prior to the acquisitions, respondent was the largest seller in the southeast (22.7%) and the second largest seller in the United States (16%). It was in competition with both Ballard and Duff in the southeast and with Duff on a national basis. As a result of the acquisitions respondent increased its share of the market in the southeast to 44.9 percent.[13] In the national mix market, its position advanced from second to first place, or approximately 23 percent of the national market.[14]

Three questions are presented by brief and argument on appeal:

1. Do recent cases decided under Section 3 of the Clayton Act[15] apply to Section 7 cases; that is, where "substantiality" of the acquisition has been established, is it necessary to examine economic consequences or determine the probable effects of the acquisition?

2. If Section 3 cases are not applicable, what tests do apply under Section 7; do Sherman Act tests apply or does Section 7 have tests of its own?

3. Does the record show *prima facie*, by reliable evidence, that the effect of the acquisitions may be substantially to lessen competition or tend to create a monopoly in certain market areas?

I

The attorneys supporting the complaint rely, in the first place, on the "substantiality" doctrine of *International Salt*, *Standard Stations* and

[11] These figures were arrived at by combining Ballard's and respondent's percentage of the market during the 1949–1950 fiscal year.

[12] It is the policy of the chain stores to carry the leading national brands, the top one or two local brands, and one or two cheap priced brands or a total of five or six brands. Store movement records of certain chain stores, testimony of grocery wholesalers, and testimony of certain of respondent's regional managers taken together show that respondent's sales of flour in urban areas in the southeast are a much greater percentage of the total sales in such markets than its percentage of the entire southeast flour market. They also show that only a few brands are sold in all areas. Many local brands are important only in their own areas.

[13] This percentage figure was arrived at by combining respondent's, Ballard's, and Duff's percentages of the market during the fiscal year 1949–1950.

[14] Id.

[15] *Standard Oil Co. of California* v. *United States, supra; International Salt Co.* v. *United States, supra; United States* v. *Richfield Oil Corp.*, 343 U. S. 922 (1952); *Automatic Canteen Co. of America* v. *F. T. C.*, 194 F. 2d 433 (C. A. 7, 1952), reversed on grounds not presently pertinent, 346 U. S. 61 (1953).

other Section 3 cases.[16] To be on the safe side, however, they also introduced proof of market structure and characteristics which they claim are sufficient, even if the Commission rejects the substantiality theory, to show that respondent's acquisitions will substantially lessen competition.

Section 3 of the Clayton Act prohibits the use of tying and exclusive dealing contracts the effect of which "may be to substantially lessen competition or tend to create a monopoly."[17] The *International Salt* case,[18] brought under this section, involved a tying of the company's salt to the patented salt dispensing machine it leased to its customers. The tying device was struck down by the Supreme Court which held that the test of potential injury to competition was satisfied by proof that in one year the company had sold for use in its machines 119,000 tons of industrial salt valued at $500,000. Such a market, the Court said, was not "insignificant or insubstantial" and it is "unreasonable, *per se*, to foreclose competitors from any substantial market."[19]

In the *Standard Stations* case,[20] also brought under Section 3, the Supreme Court applied a like doctrine to requirements contracts in the retailing of gasoline by a major company through independent stations. In its holding, the Court appeared to read out of the qualifying clause any real consideration of the effect upon competition and declared that the requirement was satisfied by proof that a substantial share of the market was affected by the practice. Under the exclusive supply contracts which Standard Oil had entered into with independent service stations in a 7 State market area, $57,646,233 worth of gasoline, amounting to 6.7 percent of the total, was held to be a "substantial share."[21]

Although there is a considerable difference between the two cases,[22] it may be assumed for present purposes that in each case the Court held that the "qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected.[23]

It does not follow, however, that because the qualifying clauses of Sections 3 and 7 are expressed in the same language they prescribe the

[16] Id.
[17] 38 Stat. 731, 15 U. S. C. sec. 14.
[18] 332 U. S. 392 (1947).
[19] Id. at 396.
[20] 337 U. S. 293 (1949).
[21] Id. 295, 314 (1949).
[22] In the *Standard Stations* case—unlike the *Salt* case—the Supreme Court spoke of the "share" of the market foreclosed; it also showed a full awareness of the important difference between tying contracts and requirement contracts.
[23] 337 U. S. 293, at 304, 314, and 332 U. S. at 394–397.

same tests. "Familiar but loose language affords too ready a temptation for comprehensive but loose construction." [24]

"It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." [25] Accordingly, the respective tests prescribed by Sections 3 and 7 are to be determined in the light of the purpose of each section.

The primary purpose of Section 3 is the protection of buyers and sellers in the marketing process—to guarantee to buyers the right to handle any goods they see fit, and to sellers the opportunity to obtain the business of any buyer whose trade they wish to seek.[26]

Section 7, on the other hand, is directed toward adverse changes in competitive patterns that may result from mergers. It is concerned with the effects of acquisitions on the character of competition, with the maintenance of competition in every market to the end that business rivalry may produce better products at lower costs.

While both sections are designed to protect the competitive process, they reach this goal by different routes—one by protecting the seller and buyer segment of our economy, the other by protecting competition on an over-all basis.

The impact of a tying contract or a requirements contract is different from that of an acquisition. The forces of the former falls principally upon buyers or upon competitors of the company which imposes the contract, the effect of such contracts is thus to cut off these competitors from what would otherwise be part of their natural market.[27] In contrast, an acquisition seldom has such an immediate impact upon competitors. The reason that acquisitions are, under certain circumstances, to be regarded as illegal is not because of their effect on buying and selling practices but because of their probable effect on competition.[28]

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[24] *Automatic Canteen Co. of America* v. *F. T. C.*, 346 U. S. 61 at 65 (1953).

[25] *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, at 433 (1932); see also *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, at 46, Footnote 14.

[26] *Cf.* McAllister, "Where the effect may be to substantially lessen competition or tend to create a monopoly," Proceedings of the American Bar Association, Section of Antitrust Law, August 26–27, 1953, p. 131.

"Specifically, exclusive dealing and tying arrangements are forbidden when the restricted freedom of the buyer to purchase from competing suppliers injures his competitive position or that of the competing supplier."

[27] As the Commission said *In the Matter of Automatic Canteen Company of America*, 46 F. T. C. 861, and 894 (1950), "It is apparent that [respondent's exclusive dealing contracts] entirely foreclosed the sale and leasing of vending machines to respondent's distributors by anyone but respondent and that other sellers and suppliers of candy, gum, nuts and other confectionery products have been completely and effectively foreclosed from selling these products to respondent's distributors." Affirmed 194 F. 2d 433 (C. A. 7, 1952), reserved on grounds not presently pertinent, 346 U. S. 61 (1953).

[28] In determining the effect on competition under Section 7 the Commission is, of course, concerned with the relationships between an acquiring company and other parties, such as, competitors, suppliers and outlets, insofar as such relationships may affect competition in a given market.

Moreover, a further distinction can be drawn from the fact that tying and exclusive dealing contracts are frequently coercive, while acquisitions are usually voluntary in nature.

Competition cannot be directly measured; no single set of standards can be applied to the whole range of American industries. No single characteristic of an acquisition would of itself be sufficient to determine its effect on competition. For this reason it would not be sufficient to show that an acquiring and an acquired company together control a substantial amount of sales, or that a substantial portion of commerce is affected.[29]

Much as the simplified test laid down in *Standard Stations* and *International Salt* may aid in the presentation of proof in cases under Section 3, it is not in itself a reliable guide for the Commission in carrying out its long-run responsibility to prevent reductions in competition through acquisitions of assets or stock.

Furthermore, neither case can be construed as depriving the Federal Trade Commission, as an administrative agency, of the right to examine relevant economic factors and competitive effects (even in Section 3 cases) in the event it desires to do so.[30]

In creating the Federal Trade Commission, Congress had two principal ideas in mind: first, to create a "body of experts" competent to deal with complex competitive practices "by reason of information, experience, and careful study of business and economic conditions";[31] and second, to authorize this body of experts to deal with unfair competitive methods in their incipient stages.[32]

The driving impulse in creating this, and other administrative agencies, was the need for specialization and expertise.[33] The complexities of modern American trade and industry had made it apparent that effective trade regulation could neither be accomplished by "self-executing legislation nor the judicial process." See *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142 (1940); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*. 50 Mich. L. Rev. 1139, 1221, n. 215 (1952).

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[29] The attorneys supporting the complaint suggest the following test for Section 7 cases: "Where a leading factor in the relevant market having a substantial share of that market, acquires another factor in that market also having a substantial share of that market, the inference arises that competition may be substantially lessened in the lines of commerce involved."

[30] *In the Matter of The Maico Company, Inc.*, decided by F. T. C. December 7, 1953.

[31] Sen. Rep. No. 597, 63d Cong., 2d Sess., pp. 9, 11 (1914); *F. T. C.* v. *The Cement Institute*, 333 U. S. 683, 727 (1948); *F. T. C.* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 305, 314 (1934).

[32] *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

[33] The Commission was to be staffed with lawyers, economists, accountants, statisticians and other business experts. It was understood that this staff would become specialists in preventing improper business practices which interfered with the competitive process or were against the public interest. *Cf. United States* v. *Morton Salt Co.*, 338 U. S. 632, 640 (1940).

The laws given to the Commission to administer are, for the most part, general in nature and not clear of policy elements. "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business." [34] It contemplated clarification and completion by the Federal Trade Commission. If the administrative tribunal to which such discretion is delegated does nothing but promulgate *per se* doctrines, the rationale for its creation disappears.[35] If a particular competitive act is automatically to be presumed unlawful, the administrative process of the Commission loses its purpose, and the justification for limiting the scope of judicial review and for exempting the Commission from executive control no longer remain. In such event the administrative agency may as well give way to the prosecutor.

As we understand it, the Federal Trade Commission has a greater task than this in administering the broad provisions of Section 7 of the Clayton Act. There must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences.

The most recent decision interpreting Section 7, prior to its amendment, is *Transamerica Corporation* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (1953), cert. den. November 30, 1953. The Federal Reserve Board had ordered divestiture of stock in a number of banks comprising the so-called Giannini group in the West Coast and Rocky Mountain area. The Board pointed out that the Giannini banks did a large proportion of the banking business in five western states, invoked the *Standard Stations* case, and held that Section 7 was violated. The Third Circuit reversed, saying:

"* * * such acquisition is a violation only if its effect may be in fact to substantially lessen competition between such corporations, to restrain commerce or to tend to create a monopoly. Otherwise the acquisition is entirely lawful, so far as Section 7 is concerned. It necessarily follows that under Section 7, contrary to the rule under Section 3, the lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statutes may be invoked. Evidence of mere size and participation in a substantial share of the line of business involved, the 'quantitative substantiality' theory relied on by the Board, is not enough." [36]

The court was impressed by the "tremendous concentration of banking capital * * * in the hands of the Transamerica group," and

[34] *F. T. C.* v. *Motion Picture Advertising Service Co., Inc.,* 344 U. S. 392 (1952) ; *F. T. C.* v. *Keppel & Bro., supra,* 310–312.

[35] See dissenting opinion of Mr. Justice Jackson in *The Ruberoid Co.* v. *F. T. C.,* 343 U. S. 470 (1952).

[36] 206 F. 2d 163, at 170 (C. A. 3, 1953), cert. den. Nov. 30, 1953.

thought that legislative or administrative action might well be desirable to decrease it.[37] But the Court held that no case had been made under Section 7. Lessening of competition or tendency to monopoly were market phenomena, and could only refer to some particular market or set of markets. But the Board had not attempted to show any undesirable effect or dangerous probability in any given markets. The five state area was but an artificial segment of the United States, unrelated to any market activity. Hence, said the Court, the contention of the Reserve Board could not be sustained.[38]

While the *Transamerica* case does not question *Standard Stations* so far as Section 3 is concerned, it does seem to seal off Section 7 from the *per se* rule of that case. The fact that the *Transamerica* case was decided under old Section 7 does not in our opinion lessen its applicability in this respect. While the 1950 amendment modified Section 7 in many ways it did not change the basic purpose to protect competition in a given market.

II

This does not mean that we are thrown back on Sherman Act tests. In fact, one of the purposes of amended Section 7 was to reestablish the difference between Sherman Act and Clayton Act violations and to restate the legislative view, largely repudiated by the case law,[39] that the tests of the Sherman Act have no proper place in the application of Section 7.

"Monopoly and competition, as economic facts, are the same no matter what law is applied to them." [40] Market control, restraint of trade, injury to competition, tendency toward monopoly are the subjects of both the Sherman and Clayton Acts. But the standard of illegality is different; otherwise Congress would have been wasting its time by enacting duplicating legislation. The difference is usually said to be that under Section 7 the undesired condition may not yet be in existence; there is only a reasonable probability that it will come to pass if nothing is done to stop it. This, of course, was the underlying purpose of the original Clayton Act. It was designed to "supplement" the Sherman Act, to prohibit practices which singly and in themselves

[37] Id. 169.

[38] Id.

[39] *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930); *V. Vivaudou* v. *F. T. C.*, 54 F. 2d 273 (C. A. 2, 1931); *Temple Anthracite Coal Co.* v. *F. T. C.*, 51 F. 2d 656 (C. A. 3, 1931); *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio, 1935); see Irvine, "The Uncertainties of Section 7 of the Clayton Act," 14 Cornell L. Q. 28, 40 (1928) for a review of the earlier cases.

[40] See Adelman, "Acquire the Whole or Any Part of the Stock or Assets of Another Corporation," Proceedings of the American Bar Association, Section of Antitrust Law, Aug. 26–27, 1953, pp. 111, 117.

were not covered by that act, to arrest potential violations of the Sherman Act in their incipiency and before consummation.[41]

The trouble is that his sort of language, lawyer's language some call it, is not very meaningful until applied to a particular set of facts —facts which suffice for the Clayton Act but do not constitute a showing of evidence sufficiently impressive under the Sherman Act. The courts and the Commission have frequently paid homage to the incipiency doctrine and the difference between the Sherman and Clayton Act tests, but not clear standards have emerged.

Putting aside the broad concepts of competition and monopoly, the essential difference seems to be that the Clayton Act requires a lower standard of proof of the same kind of facts—"evidence which is quantitatively or qualitatively less impressive than where the Sherman Act is invoked."[42] More specifically, the merger in *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), which was examined under the Sherman Act, would probably not have been approved had new Section 7 been in existence and invoked against it.[43]

Section 7, before it was amended, prohibited corporate acquisitions of stock which might have any one of the following effects: (1) substantial lessening of competition between the merging companies, (2) restraint of commerce in any section or community, or (3) tendency to create a monopoly. This language, if taken literally, would have precluded almost every merger where competition existed between the two merging companies. As we have indicated, the courts shied away from this drastic interpretation and invoked the rule of reason of the Sherman Act.[44]

Section 7, as amended, prohibits the acquisition of assets as well as stock, thus closing the long-standing loophole on this point. The acquisition is prohibited "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." [45]

The earlier test as to competition between the acquiring and acquired companies is eliminated and so is the earlier alternative test of "to restrain such commerce in any section or community." The elimination of the first test eliminates the possibility of a strict and literal interpretation which would strike down local and unimportant acquisitions; the elimination of the second test removes any likelihood that broad Sherman Act tests will again be applied.[46] The legislative history is clear on this point.

[41] Sen. Rep. No. 698, 63d Cong., 2d Sess., p. 1 (1914); *Standard Fashion Company* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).
[42] See Adelman, *supra*, 118.
[43] H. R. Rep. No. 1191, 81st Cong., 1st Sess., pp. 10–11 (1949).
[44] See also McAllister, *supra*, 142–143.
[45] 64 Stat. 1125, 15 U. S. C., Sec. 18.
[46] See McAllister, *supra*, 143.

The Senate Committee said:

"The purpose of H. R. 2734 was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act. * * *

"The Committee believe that the excessive sweep that has been given to Section 7 of the present Clayton Act by these two features of that Section has been largely responsible for the tendency of the courts in cases under that Section to revert to the Sherman Act test. By eliminating the provisions of the existing Section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The Committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." [47]

This is confirmed in the House Report:

"Acquisitions of stock or assets by which any part of commerce is monopolized or by which a combination in restraint of trade is created are forbidden by the Sherman Act. The present bill is not intended as a mere reenactment of this prohibition. It is not the purpose of this committee to recommend duplication of existing legislation.

"Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete." [48]

The House and Senate committees also took the occasion to make clear that "may be" means reasonable "probability," not "possibility." The Senate Report said:

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[47] Sen. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4–5 (1950).

[48] H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8 (1949).

"The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable *probability* of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act." [49]

Under amended Section 7 "the Government must define and prove the relevant market and the relevant products involved in the acquisitions. The 'line of commerce' need not be industry-wide; any part of the domestic commerce is included. 'In any section of the country' apparently is intended to cover any market area in the United States in which the acquiring or acquired corporation is doing business and to embrace potential as well as actual competition. * * * The Government, therefore, has a lesser burden of proof under Section 7 than under the Sherman Act, which requires a proof of an unreaasonable restraint of trade." [50]

As we see it, amended Section 7 sought to reach the mergers embraced within its sphere in their incipiency, and to determine their legality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are Section 7 prohibitions to be added to the list of *per se* violations. Somewhere in between is Section 7, which prohibits acts that "may" happen in a particular market, that looks to "a reasonable probability," to "substantial" economic consequences, to acts that "tend" to a result. Over all is the broad purpose to supplement the Sherman Act and to reach incipient restraint.[51]

While these are far from specific standards—specificity would in any event be inconsistent with the "convenient vagueness" of antitrust prohibitions—they can, we believe, be applied on a case-by-case basis. We think the present case is the type Congress had in mind—one that presents a set of facts which would be insufficient under the Sherman Act but nonetheless establishes, *prima facie*, a violation of Section 7 of the Clayton Act.

Commission action, under Section 7 (c) of the Administrative Procedure Act, must be supported by "reliable, probative, and substantial evidence." [52] It is said that "These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand." [53] This is in reality a restatement of the

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[49] Sen. Rep. No. 1775, 81st Cong., 2d Sess., p. 6 (1950).

[50] Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 Mich. L. Rev. 1197 (1952).

[51] See McAllister, *supra*, 148.

[52] 60 Stat. 241, 5 U. S. C., Sec. 1006c.

[53] H. R. Rep. No. 1980, 79th Cong., 2d Sess., p. 36 (1946) ; Sen. Rep. No. 752, 79th Cong., 1st Sess., p. 22 (1945) ; (Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 208, 270 (1946).

"substantial evidence rule."[54] Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229 (1938).

Under Section 7 (c) it is clear that, as heretofore, the technical rules of evidence are not applicable to administrative hearings.[55] Thus it is stated that "the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence)."[56] "But this assurance of the desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force."[57]

The principal evidence in this case which the hearing examiner refused to accept as reliable, consists of several letters addressed to the Commission, in which respondent set forth (1) its sales of the relevant products in the southeast and in the nation,[58] (2) the acquired companies' sale of the relevant products in the southeast and in the nation,[59] and (3) respondent's best estimates of its major competitor's shares of the relevant markets. Respondent's counsel did not object to the introduction of these letters as not being competent evidence. In fact, respondent said at the time that there were no accurate, absolute figures available in the flour industry showing competitors' sales or total sales.

Whether or not respondent's estimates of competitors' shares of a particular market can be accepted as reliable depends upon the circumstances. According to the testimony of respondent's market analyst, the best data available showing the market position and trend of sales of respondent and certain of its competitors in the flour industry are surveys prepared by the Market Research Corporation of America. This organization makes a random sample audit of retail stores which the witness described as the only random sample available which he considered projectionable. Respondent must have considered this information reliable enough for its own purposes inasmuch as it paid about $50,000 per year for same.[60]

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[54] Attorney General's Manual on the Administrative Procedure Act, p. 76 (1947).

[55] Id. "Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. *Interstate Commerce Comm'n.* v. *Baird*, 194 U. S. 25, 44. And, of course, rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceeding like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." *F. T. C.* v. *The Cement Institute et al., supra,* 705.

[56] See footnote 53.

[57] *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* p. 230 (1938).

[58] The letters contained actual figures for respondent for the fiscal year 1949–1950.

[59] The letters set forth actual sales for Ballard for the fiscal year 1949–1950 and respondent's best estimates for Duff for the same period.

[60] The admissibility of commercial reports is well recognized. As Wigmore points out, "The * * * [exception to the Hearsay rule] is capable of liberal expansion to include

Respondent prepares periodic market analyses of flour and mix markets for its use in the regular course of business, in which it uses the information supplied by the Market Research Corporation. The market position information contained in these reports was used, together with respondent's own data, in the preparation of the estimates in question.

The reports containing the data supplied by the Market Research Corporation were subpoenaed by counsel supporting the complaint but respondent refused to comply on the ground that it was not at liberty to divulge such information.

The estimates were prepared by respondent and submitted to the Commission during the course of the preliminary investigation, and respondent asked the Commission to rely upon them in reviewing the case prior to the culmination of the acquisitions. Presumably respondent at that time, as an advocate, "put its best foot forward."

Under all the circumstances,[61] it is believed that the "common sense" and "reasonable mind" tests have been met and the estimates are *prima facie* evidence of respondent's market position, the market position of the acquired companies and the market position of its major competitors. *Prima facie* evidence is the minimum quantity necessary to raise a presumption of fact or is sufficient, if not rebutted, to establish the fact. *Otis & Co.* v. *S. E. C.*, 176 F. 2d 34 (C. A. D. C., 1949). Respondent, when it puts in its case will have full opportunity to rebut, explain, or contradict. It is important to remember in this connection that the issue here does not go to the absolute sales of respondent, the acquired companies or its competitors, but to the question as to the effect which the mergers may have on competition.

A few words should be said about the problem of proof in antitrust cases. Competition is a complex and constantly changing phenomenon. It has never been sharply defined. Injury to competition, as distinguished from injury to a competitor, is seldom capable of proof by direct testimony and may therefore be inferred from all the surrounding circumstances. "An antitrust charge may * * * be proved by circumstantial evidence, and the circumstances may include actions affecting any of the broad issues of fact posed in the complaint." [62]

Analysis of the competitive effects of an acquisition should begin, we believe, with the relevant facts concerning the competitive pattern

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* * * commercial and industrial records, made by persons disinterested in the particular litigation, published or kept accessible to third persons, and customarily relied upon by them in the conduct of particular occupations." 6 Wigmore on Evidence, sec. 1708 (3rd ed. 1940), p. 38.

[61] These circumstances include the fact that respondent refused to comply with Commission subpoenas seeking the basic data upon which the estimates were based.

[62] See McAllister, "The Big Case: Procedural Problems in Antitrust Litigation," 64 Harvard L. R. 27 at 28.

of the industry as a whole and its markets, particularly in the period preceding the acquisition. From such facts, and from information about the specific merger, it should be possible to determine what changes the acquisition can be expected to make in the character of competition in the markets concerned.

Counsel supporting the complaint say they have made such an analysis; that the evidence was not limited to the application of Section 3 cases to Section 7, but included in addition "an extensive showing of the character of the markets and the market setting in which the acquisitions took place."

To summarize the evidence, respondent, whose rapid growth during the past few years has been due in part to acquisitions and mergers, has now acquired two more substantial competitors. By these acquisitions it has substantially increased its milling and production capacity and its market position. In one of the relevant products, namely, mixes, its position in the southeast increased to about 45 percent.

These acquisitions have taken place in an industry which has steadily declined in size and capacity, and in which the big companies have increased their percentage share. This increase has been largely due—71 percent of it—to mergers. In the southeast the number of mills has not only declined but there have been no new entries of any size into the industry. The number of competitors in the southeast, more particularly in the urban markets, has been materially reduced by the acquisitions; in the mix business, for example, Ballard with 12 percent and Duff with 10.2 percent of the market, have been eliminated.

This establishes, it seems to us, a *prima facie* case.[63] The pattern of competition in the southeast, particularly in the cities, has undergone a considerable change as a result of the mergers. Unless explained, contradicted, or rebutted, and respondent will have every opportunity to do this when it puts in its case, it is a change which constitutes a move away from healthy competitive conditions.

There is nothing in the record to indicate that the mergers will at present convert the industry in the southeast from a competitive to a noncompetitive pattern. The inference, in fact, must be to the contrary inasmuch as large national distributors, such as General Mills and Quaker Oats, and large regional distributors remain to furnish effective competition to Pillsbury Mills. However, in the urban

[63] As stated *In re Chicago Rys. Co.*, 175 F. 2d 282 (C. A. 7, 1949), *cert. denied*, (*Illinois* v. *Sullivan*), 338 U. S. 850 (1949), a *prima facie* case is established by evidence adduced by the plaintiff in support of its case up to the time such evidence stands unexplained and uncontradicted.

markets at least, the mergers lead in the direction of what is sometimes called oligopolistic or "monopolistic" competition, that is, to a situation where the remaining competition in the particular market is between big companies.

If, for example, respondent should continue to acquire competitors at the rate it has since 1940, and other large companies should do the same, the urban markets in the southeast may come to be dominated by a few large milling companies. This, of course, has been the trend in other industries. In some of them, under the policy of the Sherman Act, competition between the big companies continues to protect the consumer interest. But, as we understand it, it was this sort of trend that Congress condemned and desired to halt when it adopted the new Clayton Act antimerger provision.[64]

This matter, therefore, should be remanded to the hearing examiner for further consideration in conformity with this opinion.

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Mr. Mead, while concurring in the result, will file a separate concurring opinion.

CONCURRING OPINION OF COMMISSIONER MEAD

The Chairman in the very able Opinion of the Commission has stated the facts in this case and has discussed the applicable law in detail. I concur with his analysis of the facts and with his conclusion that the revelant evidence now in the record establishes "prima facie" that Pillsbury violated Section 7 of the Clayton Act by buying Ballard and Ballard Company and the Duff Division of American Home Products Corporation.

In view of the very important questions discussed in the Opinion, and of the fact that this is the first case considered by the Commission under the revised Section 7 of the Clayton Act, I deem it advisable to comment briefly.

The Opinion of the Commission in this matter (as well as in the recently decided Maico case, Docket 5822, brought under Section 3 of the Clayton Act) discusses broadly the necessity of "a case by case examination of all relevant factors in order to ascertain the probable economic consequences." In my opinion this language should not be interpreted as encouraging the introduction into trial records of remotely relevant economic evidence which is unnecessary for a determination of the issues.

Certain court opinions have suggested that the Commission is better equipped than courts to consider economic data. As to the extent

[64] Sen. Rep. No. 1775, 81st Cong., 2d Sess., p. 5 (1950) ; H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8 (1949).

to which economic or other data is necessary in trial records, I believe there is a difference between the Federal Trade Commission Act and the Clayton Act. In the Federal Trade Commission Act the Congress used broad sweeping language. It declared illegal unfair methods of competition in commerce. The Act does not define what the Congress meant by unfair methods of competition. The definition is left initially to the Federal Trade Commission. The only method by which the Commission can properly and adequately define such term is by a process of administrative inclusion and exclusion as complaints are issued and cases decided. Under the Trade Act, if the Commission in issuing its complaint has reason to believe that a practice not theretofore determined to be illegal is illegal, then the trial of such case should fully develop the facts so that the Commission in its role of expert would be fully informed in deciding the case of first impression. The Commission should then make adequate findings "with sufficient clarity" to enable a court to review the order. (See the dissent of Mr. Justice Frankfurter in *FTC* vs. *Motion Picture Advertising Service Co., Inc.*, 344 US 392 which was a Trade Act case.)

In Section 7 of the Clayton Act as distinguished from the Federal Trade Commission Act, the Congress specifically declared that the merger of certain types of corporations is illegal provided only that the effect of the mergers may be substantially to lessen competition or tend to create a monopoly. Other sections of the Clayton Act also describe in comparatively specific language the act or practice which may be illegal.

Mr. Justice Jackson in his dissent in FTC vs. Ruberoid Co., 343 US 470 (a Section 2(a) Clayton Act case) had specific reference to the remedy in the order to cease and desist and not to the elements of proof or evidence necessary to support a finding of illegality by the Commission. As I understand it, Mr. Justice Jackson indicated that the Congress, in writing legislation in the antitrust field, must necessarily limit the legislation to principles or policies. The Commission, in drafting its orders to cease and desist, should give meaning and purpose to the general legislative policy. This should be done where feasible, not by parroting the words of the statute but by prescribing a definite remedy within the general policy. The remedy should be adapted to the facts of the particular case. The Commission, guided by the Congressional mandate and using its expertness, should devise remedies which are effective and informative.

The question of whether or not certain types of corporate mergers are questionable has been determined by the Congress. The only issues other than jurisdictional which the Commission must decide are whether or not the particular merger may cause the injury described in the statute. The extent and character of economic or other data which is necessary in any particular case in order for the Commission to make an informed decision is a matter which must be determined by the facts of that particular case.

Economics is not an exact science. The economic factors and economic theories available for exposition relating to what effect a merger, an exclusive dealing contract or a discriminating price may have on competition may be so many and so changing that proceedings attempting to explore thoroughly all facets would have no foreseeable termination dates.

Many distinguished officials of Government and members of the Bar have been disturbed because of the length of trial records in administrative hearings. Consideration is now being given to various means to shorten these records so as to reduce the expense for all the parties, including the Government. Shorter yet adequate records should result in a reasonably prompt determination of issues. We certainly do not desire to take any action which will unnecessarily lengthen the records in cases before this Commission.

In my opinion the Commission does not desire economic or other data in trial records just for the sake of the data. We are trying cases in order to determine public legal rights. We are not in this forum making extensive economic investigations for the purpose of adding to the general store of knowledge. The facts to be determined may be so apparent that a reasonable man could fairly decide the issues without the benefit of extensive data. In such cases extensive hearings should be avoided.

The Commission was established so that the public would get prompt informed action when there is a reasonable probability that a trade act or practice will injure competition. Prompt informed action is particularly necessary in cases of mergers which may be finally found to be illegal. The passage of time may make much more difficult the task of unscrambling the assets of the merged companies and restoring competition to its original form.

In short, I agree with the result of the Commission's action in this case. I approve of the dispatch with which this decision was reached. In my opinion, however, the Commission does not desire to "gild the lily" by encouraging hearing examiners to admit in trial records interesting but unnecessary factual data. An expert can practice his expertness and yet act decisively and with dispatch. An expert can also be a reasonable man.

IN THE MATTER OF

MERCANTILE STORES COMPANY, INC., ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6094. Complaint, Apr. 24, 1953—Decision, Dec. 21, 1953

Where a corporation and its wholly owned subsidiary engaged in the interstate sale and distribution of children's shoes under the brand name "Health-Flex" which, thus stamped and boxed, were shipped from their place of manufacture to a number of retail stores' wholly owned subsidiaries in various other states and were by said stores in turn advertised and sold as "Health-Flex" shoes with the knowledge, consent, and approval of the aforesaid corporation—

Represented directly and by implication that said shoes were constructed in such a manner that their use would prevent and correct abnormalities and deformities and ailments of the feet and keep them healthy, through use of the word "Health" as a part of the trade or brand name therefor, and as stamped in and on said shoes and on the boxes in which they were sold;

The facts being said shoes were merely stock shoes, made on order by quantity production methods by the manufacturer from which said subsidiary bought the same and upon which, and upon the containers thereof, said name was stamped at its direction; and while said shoes might contain some features not found in other stock shoes, effect thereof upon the feet in the prevention or correction of abnormalities, deformities, or ailments or in keeping the feet healthy was insignificant:

Held, That such acts and practices constituted unfair and deceptive acts and practices in commerce.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. B. G. Wilson and *Mr. George E. Steinmetz* for the Commission.

DECISION OF THE COMMISSION, AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on April 24, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. The respondents filed a joint answer admitting all of the material allegations of the complaint and waiving all intervening procedure and further hearing as to the said facts, but reserving the right to withdraw said answer if the Commission failed to grant respondents' request for an extension of the effective date of any order to cease and desist which might be entered to a date specified by respondents. On July 24, 1953, the hearing examiner filed his initial decision.

The Commission, having reason to believe that said initial decision did not constitute an adequate and appropriate disposition of this matter, subsequently placed this case on its own docket for review. On October 5, 1953, the respondents filed their consent to the withdrawal of the portion of their admission answer relating to the effective date of the order to cease and desist which might be entered, and the Commission, on November 9, 1953, issued, and thereafter served upon the parties, its order setting time within which objections to a tentative decision of the Commission attached to said order, and reply thereto, might be filed. No objections having been filed within the time permitted, the proceeding regularly came on for final consideration by the Commission upon the record herein on review; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Mercantile Stores Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 West 10th Street, Wilmington, Delaware. Respondent Mercantile Stores Company, Inc. (N. Y.) is a corporation organized under and by virtue of the laws of the State of New York, with its office and principal place of business located at 128 West 31st Street, New York 1, New York. The said New York corporation is a wholly owned subsidiary of the said Delaware corporation. The two corporations act in conjunction and cooperation with each other in the performance of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for more than two years last past have been, engaged in the sale and distribution in commerce of children's shoes bearing the brand name "Health-Flex." Respondents cause, and have caused, their said shoes, when sold, to be transported from the place of their manufacture in Ephrata, Pennsylvania, to purchasers thereof located in various States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce in said shoes.

PAR. 3. Respondents' method of operation is as follows: Said shoes are manufactured on order of respondent New York corporation by the Eby Shoe Corporation of Ephrata, Pennsylvania. At the time of manufacture, in accordance with the direction of respondent New York corporation, the name "Health-Flex" is stamped in and on the shoes and on the boxes in which they are packed and sold. This is done with the consent and approval of, and inures to the benefit of, respondent Delaware corporation, which is the owner of the registered trade-mark "Health-Flex". Respondent New York corporation sells and causes said shoes, so stamped and boxed, to be shipped from the place of their manufacture in Pennsylvania to a number of retail stores, located in various other States of the United States, which are wholly owned subsidiaries of respondent Delaware corporation. These various retail stores in turn advertise and sell said shoes as "Health-Flex" shoes with the knowledge, consent and approval of respondent, the Delaware corporation.

PAR. 4. Through the use of the word "Health" as a part of the trade or brand name for said shoes and as stamped in and on said shoes and on the boxes in which they are sold, respondents have represented, directly and by implication, that said shoes are constructed in such a manner that their use will prevent and correct abnormalities, deformities and ailments of the feet and will keep the feet healthy.

PAR. 5. The said representation is false, deceptive, and misleading. In truth and in fact, the use of said shoes will not prevent or correct any abnormalities, deformities or ailments of the feet or keep the feet healthy. Respondents' shoes are merely stock shoes, made by quantity production methods, and while they may contain some features not found in other stock shoes, the effect of such features upon the feet in the prevention or correction of abnormalities, deformities or ailments of the feet or in keeping the feet healthy, is insignificant.

PAR. 6. The use by the respondents of the foregoing false, deceptive and misleading representation with respect to said shoes has had and now has the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said shoes are constructed in such a manner that their use will prevent and correct abnormalities, deformities and ailments of the feet and will keep the feet healthy, and into the purchase of substantial quantities of said shoes because of such erroneous and mistaken belief. Furthermore, respondents' said practices place in the hands of retailers of said shoes and others a means and instrumentality to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that said shoes are constructed in such a manner that their use will prevent and correct abnormalities, deformities and ailments of the feet and keep the feet healthy.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Mercantile Stores Company, Inc., a corporation, and Mercantile Stores Company, Inc. (N. Y.), a corporation, their officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of shoes now designated as "Health-Flex," or any other shoe of substantially the same constitution, do cease and desist from:

1. Using the name "Health-Flex" or any name in which the word "Health" appears as a trade or brand name therefor.

2. Representing, directly or by implication, that the said shoes are constructed in such a manner that their use will prevent or correct abnormalities, deformities, or ailments of the feet or will keep the feet healthy.

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

IN THE MATTER OF

GEORGE'S RADIO AND TELEVISION COMPANY, INC. ET AL.

CONSENT SETTLEMENT, IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6140. Complaint, Nov. 4, 1953—Decision, Dec. 22, 1953

Where a corporation and its two officers, engaged in the District of Columbia in the sale of electrical appliances including home freezers and television sets in selling their said freezers in connection with arrangements whereby purchasers were enrolled in a food distributing organization operated by a concern unaffiliated with them and under which members were entitled to purchase certain food items in bulk quantities—

(a) Represented through radio broadcasts and other means of advertising that participants in said plan could buy food at wholesale prices or from a wholesaler; when in fact said organization was not a wholesaler and the prices at which participants purchased were not wholesale prices;

(b) Represented that participants therein could effect overall monetary savings through the general use of frozen foods in place of corresponding foods in other forms;

The facts being, in the main, frozen foods thus purchased would cost more per edible pound than corresponding foods in other available forms normally consumed by the public; and no overall saving in food costs would be accomplished by the general substitution of frozen foods, thus available for corresponding foods in other forms;

(c) Represented that substantial overall reductions in food costs would be effected by participation in said plan; the facts being that, in the main, food plan prices were considerably in excess of usual retail prices of corresponding foods in other forms, and were close to and in some instances identical with usual retail prices of similar frozen foods; and no substantial overall reductions in food costs would thereby be effected; and

(d) Represented that net monetary savings could be effected by all who purchased and used their home freezers;

The facts being that in a substantial number of instances increase in expense directly attributable to the purchase and use of a home freezer including cost of financing where credit is used, and cost of operation, maintenance, and depreciation would eliminate savings, if any, which might be effected through the purchase of food in bulk quantities and in such instances purchase and use of such a product would not result in net monetary savings; and

Where said corporation and individuals in thus advertising their television sets —

(e) Represented through such statements as "brand new", that the particular sets offered were sets of the current year's models when in fact many of said sets were not such when advertised;

(f) Represented that higher prices shown for their "Mirrortone" sets in advertisements in which they were offered at a lower figure represented the usual price at which they were customarily offered for sale and sold in the recent regular course of their business;

When in fact said higher price greatly exceeded the usual price at which said sets were customarily thus offered and sold by them;

(g) Falsely represented that the price at which such sets were offered and sold was lower by 50% than the usual price at which they were thus customarily offered and sold by them; and

(h) Represented that they were making bona fide offers to sell such sets for $99 and various other prices stated from time to time;

When in fact such advertised prices were not genuine or bona fide offers, but were made to induce persons to visit their stores or to obtain leads as to persons interested in the purchase of television sets in order that they might be solicited in said person's home by their salesman; and they and their salesmen in many instances displayed great reluctance or refused to demonstrate or improperly demonstrated such sets or disparaged the design, workmanship, and performance thereof and attempted to demonstrate and sell different and more expensive sets than those advertised:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Ames W. Williams and *Mr. John J. McNally* for the Commission.

Grossberg, Yochelson & Brill, of Washington, D. C., for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 4, 1953, issued its complaint, which was duly served on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.
2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on December 22, 1953 and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

and desist. It is understood that the respondents in consenting to the Commission's entry of said findings as to the facts, conclusion and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

PARAGRAPH 1. George's Radio and Television Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 816 F Street NW., Washington, D. C. George Wasserman is president and treasurer, and Philip Keller is general manager of the corporate respondent George's Radio and Television Co., Inc. These individual respondents formulated, controlled and directed the affairs and policies of the corporate respondent at the time the acts and practices hereinafter set forth transpired. Said individual respondents have their offices at the same place as corporate respondent.

Individual respondents George Wasserman and Phillip Keller have executed affidavits dated November 24, 1953, which state that individual respondents Leopold Freudberg and Solomon Grossberg are officers for convenience purposes only, and during their tenure of office as Vice President and Secretary, respectively, have had no voice whatever in the formulation, control or direction of the affairs, policies or advertising practices of respondent George's Radio and Television Company, Inc.

By reason of the matters set forth in said affidavits, the Commission finds that the complaint herein, insofar as it relates to the respondents Leopold Freudberg and Solomon Grossberg as individuals, should be dismissed, and accordingly, the term respondents, as hereinafter used, shall refer to respondents George's Radio and Television Company, Inc., and George Wasserman and Phillip Keller, individuals.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale of electrical appliances, including home freezers and television sets. Respondents have made arrangements whereby purchasers of said home freezers are enrolled in a food distributing organization operated by a concern unaffiliated with respondents, which entitles members to purchase certain food items in bulk quantities.

PAR. 3. In the course and conduct of their business, respondents caused their home freezers, television sets and other electrical appliances, when sold, to be transported to the purchasers thereof at their places of residence in the District of Columbia and in the States adjacent thereto, and at all times material herein have maintained a course of trade in said home freezers, television sets and other electrical appliances in commerce in the District of Columbia and adjacent States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents, through the use of radio broadcasts and other means of advertising, have made certain statements and representations of which the following are typical:

Continuity broadcast over Station WARL, Arlington, Virginia, on June 7, 1952.

* * * Friends, if you've been doing without—if you've been denying yourself big necessities and little luxuries because you just can't see where the money's coming from: this revolutionary plan may alter your whole life. Now George's makes it possible for you to buy food the way your grocer does—buy it packaged the way you want—meats cut the way you want—buy it at tremendous savings—buy it at George's Food Chest Plan Way. Call George's at RE 7420 now for all the details at no obligation. Find out what the Food Chest way can mean to your standard of living now that prices are going up again in foods * * *

A plan that will save you hundreds of dollars and still let your family eat better than before. Has the cost of living got you down? Are you constantly worried about how you can make your budget stretch? Friends, savings on your food bill can be the difference between poverty and plenty. George's has gotten together with nationally famous food distributors and now you can buy direct with fantastic savings * * * Call RE 7420 now to see how you can buy as your grocer buys, direct, and save hundreds of dollars * * *

* * * If you've ever been worried about money—if you're seriously concerned about how your salary can stretch—or how your husband's salary can meet ever-increasing expenses—a simple phone call can open up a whole new way of running your household."

Continuity broadcast over Station WTTG, Washington, D. C., June 7, 1952.

* * * I'm going to tell you how you can eat better than you've ever eaten, and spend less. How you can put money in the bank, not for one month, not for one year, but for the rest of your life! George's * * * Washington's great appliance dealer and the nation's famous food distributors have gotten together. Famous brands like Snow Crop, Armour, Swift, dozens more. They've cooked up a fantastic plan to let you buy direct with incredible savings. You actually buy as your grocer himself buys, with foods packaged and meat cut the way

you specify. You buy direct, and save hundreds of dollars, with no money down, for your food, and convenient installments * * * This revolutionary new way to eat better and actually save money is as close as your telephone * * * Call George's and ask about the fantastic Food Chest Food Plan, to save you hundreds of dollars * * * it's money in the bank, tremendous lifetime savings * * *

Continuity broadcast over Station WARL, Arlington, Virginia, on June 12, 1952.

Republic 7420—that's the number to call now for the fantastic George's Food Plan—the food plan that's sweeping the whole country—the food chest you've heard so many incredible things about. Yes, it's an amazing new idea—and here's the lowdown on how you can save hundreds of dollars * * * Because now with a Food Chest not only can you buy food in season, not only can you buy it in quantity, but you can actually buy it with a big quantity discount! Yes, because of a special new arrangement with the big national distributors, you get the benefit of buying with a discount that saves you an incredible percentage of your whole food budget and you pay no money down for your food. Imagine being able to buy meats, fish, fruits, and vegetables, at actual discount that will mean fantastic savings for you and your family * * *

Continuity broadcast over Station WTOP, Washington, D. C., on June 13, 1952.

Now for years people have been buying food chests and saving money every year by having the facilities to buy in quantity. When beef is low they buy 100 pounds of beef. In the summer they buy strawberries and eat them all year around. And now something sensational has been added, because now with a Food Chest not only can you buy food in season, not only can you buy it in quantity, but you can actually buy it with a big quantity discount * * *

PAR. 5. Through the use of the foregoing statements and representations and others of the same import, but not specifically set out herein, respondents represented, directly or by implication:

1. That participants in said plan can buy food at wholesale prices or from a wholesaler.

2. That participants in said food plan can effect over-all monetary savings through the general use of frozen foods in place of corresponding foods in other forms.

3. That substantial over-all reductions in food costs will be effected through participation in said food plan.

4. That net monetary savings can be effected by all who purchase and use respondents' home freezers.

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

1. The food distributing organization from which participants in said plan purchase is not a wholesaler and the prices at which participants purchase are not wholesale prices.

2. In the main, frozen foods, purchased through said plan, will cost more per edible pound than corresponding foods in other available

forms normally consumed by the public. No over-all saving in food costs will be accomplished by the general substitution of frozen foods, available under said plan, for corresponding foods in other forms.

3. In the main, food plan prices are considerably in excess of usual retail prices of corresponding foods in other forms, and are close to, and in some instances identical with, usual retail prices of similar frozen foods. As a consequence, substantial over-all reductions in food costs will not be effected through participation in said food plan.

4. In a substantial number of instances, the purchase and use of a home freezer will not result in net monetary savings. In such instances the increase in expenses directly attributable to the purchase and use of a home freezer will eliminate savings, if any, which may be effected through the purchase of food in bulk quantities. Among the expenses which will be thus incurred are the costs of financing where credit is used, and the costs of operation, maintenance and depreciation of the home freezer.

PAR. 7. In the course and conduct of their business, respondents, through the use of radio broadcasts, newspaper advertisements, and other means of advertising, have made certain statements with respect to their television sets. Among and typical, but not all inclusive, of said statements, are the following:

In the Washington, D. C., "Evening Star," issue of April 11, 1952.

Brand-New $309.95 MAJESTIC 20″ CONSOLE TELEVISION. Fully guaranteed—on sale at all stores. $188.

Brand-New $279.95 MAJESTIC 20″ TABLE MODEL TELEVISION. Fully guaranteed—on sale at all stores. $134.

New 1952 $259.95 MIRRORTONE 20 In. TV Fully guaranteed—on sale at all stores. $99.

Brand-New $299.95 CBS COLUMBIA 20 In. TV. In full supply at all stores. $149.

In the Washington, D. C., "Evening Star" issue of April 18, 1952.

* * * We may be stepping on toes but for once and for all let's get the record straight. George's has served the Washington area for over a quarter century. We've grown and prospered with your patronage and we did it by honest, straight-forward selling. The record proves it! Over a million satisfied customers. Satisfied with Bargains NOT BAIT! When George's advertises such Specials as appear on this page you can be sure of quality and value. A Quarter-Century of Successful business proves it!

BRAND-NEW 1952 MIRRORTONE TV REG. $249.95. $99.95

In the Washington, D. C., "Times Herald" issue of April 25, 1952.

50%
OFF!
Brand-New
Famous Make Television

Brand-New $459.95 EMERSON 19″ Console. This merchandise on sale at all stores. $229.98

Brand-New $525 ADMIRAL 20″ Console. This merchandise on sale at all stores. $262.50

Brand-New $369.95 PHILCO 17″ Console. This merchandise on sale at all stores. $184.98

Brand-New $299.95 MOTOROLA 20″ Ensemble. $149.98

Brand-New $299 CBS–COLUMBIA 20″ table model. This merchandise on sale at all stores. $149.98

Brand-New $279.95 HALLICRAFTERS 20″ Table model. $139.98, Base extra.

Brand-New $249.95 1952 MIRRORTONE 20″ table model. This merchandise on sale at all stores. $99

Brand-New $299.95 1952 MIRRORTONE 20″ TV Console. This merchandise on sale at all stores. $129

Continuity Broadcast by Station WRC, Washington, D. C., on June 29, 1952.

* * * Georges, makes a special offer of 20-inch table model television for just 99 dollars plus tax and warranty. A fabulous price and a great value you can't afford to miss. A 99 dollar price tag on any television is going some—but when its a 20 inch television from George's its the buy of a lifetime! George's invites you to look this set over at no cost, no obligation. Right now special operators are waiting to take your calls at RE–7420. We'll rush a 20-inch television to your home this very afternoon for a free look. * * *

Par. 8. Through the use of the foregoing statements and others of the same import, but not specifically set out herein, respondents represented, directly or by implication:

1. That their television sets which are described as brand new, are sets of the current year's model.

2. That the higher price for "Mirrortone" sets shown in said advertisements, represents the usual price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

3. That the price at which said "Mirrortone" sets are offered is lower by 50% than the usual price at which they were customarily offered for sale and sold by respondents in the recent regular course of their business.

4. That respondents were making bona fide offers to sell "Mirrortone" television sets for $99 and various other prices stated from time to time.

Par. 9. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Many of the television sets described as brand new were not current models at the time the said advertisements were published.

2. The higher price for "Mirrortone" sets shown in said advertisements does not represent, but on the contrary greatly exceeds, the usual

price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

3. The price at which said "Mirrortone" sets are offered is not 50% less than the usual price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

4. Respondents' offers to sell "Mirrortone" television sets at the various advertised prices were not genuine or bona fide offers to sell such sets. On the contrary, said offers were made for the purpose of inducing persons to visit respondents' stores or to obtain leads as to persons interested in the purchase of television sets in order that they could be solicited in their homes by respondents' salesmen.

Respondents and their salesmen, at their places of business and in calling upon persons at their homes, in many instances displayed great reluctance or refused to demonstrate or gave an improper demonstration of said television sets, or disparaged the design, workmanship and performance of said sets and attempted to demonstrate and sell different and more expensive sets than those advertised.

PAR. 10. The use by respondents of the said false and misleading statements and representations, had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations contained therein were true and to induce the purchase of substantial quantities of respondents' freezers and television sets by reason of such erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of respondents, George's Radio and Television Co., Inc., and George Wasserman and Phillip Keller, individually, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondents, George's Radio and Television Company, Inc., a corporation, and its officers, and George Wasserman and Phillip Keller, individually, 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 home freezers and television sets in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That participants in a food purchasing plan can buy food at wholesale prices or from a wholesaler, contrary to the fact.

2. That overall monetary savings can be effected through the general use of frozen foods in place of corresponding foods in other forms.

3. That substantial overall reductions in food costs will be effected through participation in a food purchasing plan.

4. That net monetary savings, however expressed, can be effected through the use of freezers purchased from respondents, unless the costs of operation, maintenance and depreciation and, in the event that the freezer is purchased on credit, the costs of such credit, are taken into account.

5. That television sets which are not of the current year's model are new, through the use of such terms as "Brand-New" or any other terms which describe said sets as new, unless the year in which said sets were current models is disclosed.

6. As the usual price of television sets, any price or value which is in excess of the price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

7. That the price at which respondents' television sets are offered is lower by 50% or any other designated percentage, than the usual price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

8. That television sets are being offered for sale when such offer is not a genuine and bona fide offer to sell the sets so offered.

It is further ordered, That respondents, George's Radio and Television Company, Inc., and George Wasserman and Phillip Keller, individually, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied therewith.

It is further ordered, That the complaint be, and it hereby is, dismissed as to the respondents Leopold Freudberg and Solomon Grossberg, individually.

George's Radio and Television Company, Inc.
By (Sgd) George Wasserman,
George Wasserman, President and Treasurer.
By (Sgd) George Wasserman,
George Wasserman, individually.
(Sgd) Phillip P. Keller,
Phillip Keller, individually.

Date: December 4, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 22nd day of December 1953.

In the Matter of

CHAIN INSTITUTE, INC. ET AL.

Docket 4878. Order and opinions, Dec. 28, 1953

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. Everette MacIntyre and *Mr. Karl E. Steinhauer* for the Commission.

Kittelle & Lamb, of Washington, D. C., for respondents generally, and along with—

Mr. Clarence M. Dinkins, of Washington, D. C., for Chain Institute, Inc. and George J. Campbell, Jr.;

Mr. Frederick S. Duncan, of New York City, for American Chain & Cable Co., Inc., St. Pierre Chain Corp. and Wm. D. Kirkpatrick;

Alvord & Alvord, of Washington, D. C., and *Reed, Smith, Shaw & McClay*, of Pittsburgh, Pa., for The McKay Co. and Frank A. Bond;

Ganger & Ganger, of Cleveland, Ohio, for Bridgeport Chain & Manufacturing Co., Cleveland Chain & Manufacturing Co., Round California Chain Co. and Seattle Chain & Mfg. Co.;

Thompson, Hine & Flory, of Cleveland, Ohio, for Hodell Chain Co.;

Mr. Charles R. Fay, of Worcester, Mass., for St. Pierre Chain Corp.;

Sidley, Austin, Burgess & Smith, of Chicago, Ill., for S. G. Taylor Chain Co.;

Finck & Huber, of Buffalo, N. Y., for Columbus McKinnon Chain Corp.;

Mr. Frederick B. Gerber, of York, Pa., for Campbell Chain Co.;

Lawrence, Goldberg, Lawrence & Lewin, of Chicago, Ill., for Nixdorff-Krein Manufacturing Co., Peerless Chain Co. and Dennis A. Merriman;

Marsh, Day & Calhoun, of Bridgeport, Conn., for John M. Russell Manufacturing Co., Inc. and Turner & Seymour Manufacturing Co.

Order Disposing of Motions for Modification or Setting Aside of Findings as to the Facts, Conclusion, and Order To Cease and Desist;[1] Modifying Order To Cease and Desist and Dismissing Complaint as to Respondent Frank A. Bond

This matter came on to be heard by the Commission upon the application and motion, with supporting affidavits and memorandum, for modification or setting aside of the findings as to the facts conclusion, and order to cease and desist, filed by respondents Chain Institute,

[1] Reported in 49 F. T. C. 1041.

Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company, Woodhouse Chain Works, Dennis A Merriman, Wm. D. Kirkpatrick, and George J. Campbell, Jr.; the motion, with supporting affidavit, to vacate or modify the findings as to the facts, conclusion, and order to cease and desist, filed by respondent Columbus McKinnon Chain Corporation; answer to said motions filed by counsel supporting the complaint; and reply to said answer filed by certain of the respondents.

The Commission having duly considered the motions filed by certain of the respondents herein for the setting aside or modification of the findings as to the facts, conclusion, and order to cease and desist, and the requests for permission to file briefs and to be heard in oral argument on such motions, answer of counsel supporting the complaint, reply by certain of the respondents, and pertinent portions of the record, and being of the opinion, for the reasons appearing in the accompanying opinion of the Commission, that said motions and requests are without merit except for the request that the complaint be dismissed as to respondent Frank A. Bond:

It is ordered, That the application and motion for modification or setting aside of the findings as to the facts, conclusion, and order to cease and desist, filed by respondents Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company, Woodhouse Chain Works, Dennis A. Merriman, Wm. D. Kirkpatrick, and George J. Campbell, Jr., and the motion to vacate or modify the findings as to the facts, conclusion, and order to cease and desist, filed by respondent Columbus McKinnon Chain Corporation, and the requests for permission to file briefs and to be heard in oral argument on said motions, be, and they hereby are, denied except for the request that the complaint be dismissed as to respondent Frank A. Bond.

It is further ordered, That the order to cease and desist heretofore entered in this matter be, and it hereby is, modified by striking therefrom Frank A. Bond as a respondent against whom said order was directed.

It is further ordered, That the amended complaint herein be, and it hereby is, dismissed as to respondent Frank A. Bond.

Commissioner CARRETTA dissenting in part and concurring in part.

Chairman HOWREY delivered the Opinion of the Commission.

This is one of a number of motions, filed in recent months, to reopen and reconsider matters, previously adjudicated, upon the ground that there have been changes in the membership of the Commission.

This particular case was decided during February 1953, when the Commission was comprised of Commissioners Mead, Mason, Carson, Spingarn and Carretta, and is now pending before the United States Court of Appeals for the Eighth Circuit. Of the present Commission, Commissioner Mead is the only member who voted with the majority when the case was adjudicated on the merits. Commissioner Mason dissented. Commissioner Carretta did not participate for the reason that oral argument was heard before he became a member. Chairman Howrey and Commissioner Gwynne have not, of course, participated in any phase of the proceeding.[1]

The complaint was issued on December 22, 1942. Lengthy hearings were held before a hearing examiner and concluded in August 1948. The examiner issued a recommended decision on September 25, 1948, and an amended decision at a later date. Thereafter, an appeal was taken to the full Commission, and oral argument was heard on April 7, 1949. The case was re-argued before the Commission on September 24, 1950.

On April 20, 1953, respondents filed their petition for review with the court of appeals. However, prior to the time the record was certified to that court and following the aforementioned changes in the membership of the Commission, respondents filed the present motion asking us to reopen and reconsider a number of enumerated questions.

It appears to us that the controlling ground offered by respondents in support of the motion is this change in membership.

We are not disposed to grant a motion predicated principally upon such a ground. The Commission is an independent and continuing statutory body. The terms of its members were arranged by Congress

[1] Chairman Howrey became a member of the Commission on April 1, 1953, and Commissioner Gwynne on September 27, 1953.

in a manner to prevent any abrupt dislocations in the discharge of its responsibilities.

More importantly, the Commission, like the courts, operates prospectively, not retroactively. This principle is fundamental, we believe, to our system of law, both administrative and judicial. While the views of individual commissioners may differ, each is like a member of the judiciary in the sense that he customarily makes decisions on upcoming issues on a case-by-case basis. A judge appointed to fill a vacancy on the bench does not set about to reopen and retry previously adjudicated cases simply because he is a new member.

The machinery of the quasi-judicial agency, like the courts, contemplates a continuing process; it looks to current litigation, not past litigation. If our procedures were otherwise, delay and inaction would surround enforcement of the statutes committed to the Commission's jurisdiction. To grant the present motion would be to require a third review of a voluminous record made many years ago.

The principal question presented by the motion, as we see it, is whether the Commission, in prescribing a remedy in a conspiracy case, can require respondents not only to cease and desist their alleged conspiratorial activity but also to stop the individual use of certain delivered pricing methods. This is an important question and if it were not for the overriding considerations already stated, the motion might be well grounded. However, since the question of the remedy is one of law, the respondents will not be prejudiced. They will, we are certain, receive a full hearing on this question in the court of appeals.

SEPARATE AND CONCURRING OPINION OF COMMISSIONER MEAD

The Commission, on February 16, 1953, made its findings as to the facts and conclusion based thereon and issued its order to cease and desist in this matter. All of the respondents against whom the order to cease and desist is directed, except Frank A. Bond (who died subsequent to the time the case was originally presented to the Commission) and Pyrene Manufacturing Company, have filed motions requesting that the findings as to the facts, conclusion, and order to cease and desist be vacated or set aside or, in the alternative, that the findings and order be modified in material respects. Permission to file briefs and to be heard in oral argument on the motions was requested.

The Commission has denied the motions and the requests for permission to file briefs and to be heard in oral argument for the reason that the respondents have presented no matters which were not before the Commission at the time it made its decision, and an order to that effect is being entered herewith. I am in entire agreement with the Commission's action in denying the motions for the reasons stated. The respondents in their motions have raised questions as to the validity of and necessity for the provision in the order to cease and desist which prohibits each of the respondent manufacturers from using any one of the three delivered pricing methods they have heretofore used as a part of their conspiracy "for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." I was a member of the Commission at the time the original decision was made. I deem it in the public interest to issue this opinion setting forth some of the considerations which led me to conclude then and to conclude now that the inclusion of such prohibition in the order to cease and desist was not only valid but necessary for effective relief from the conspiracy in which the respondents have engaged. In this opinion I am speaking only for myself.

The validity of and necessity for a prohibition such as that here under consideration in a situation where, as here, the maintenance of and adherence to a delivered pricing method or system constituted the very heart of the conspiracy found are fully discussed in the opinion of the Commission in the matter of *National Lead Company, et al*, Docket 5253, January 12, 1953. The reasons there set forth for including such a prohibition in the order to cease and desist in that case are applicable to this case.

The Commission, having found that the respondents had engaged in a conspiracy to restrain and suppress competition in the sale of chain and chain products, had the duty to determine the remedy necessary to suppress and insure against a revival of the trade-restraining conspiracy. In making such determination we considered a number of factors, including the fact that each of the respondent manufacturers quoted and sold chain and chain products at prices calculated pursuant to and in accordance with the particular method or system of computing delivered prices applicable to the products it sold with the knowledge that all other respondent manufacturers selling the same products were simultaneously doing likewise. The various cooperative and collective activities which the evidence clearly shows that the respondents engaged in would not have brought about the results desired in the absence of an understanding between all of the respondents that each of the respondent manufacturers would continue to use the particular delivered pricing method applicable to the products it sold. The use of the different delivered pricing methods or systems thus constituted an integral part of the over-all conspiracy among and between the respondents. A majority of the Commission was of the opinion that an effective order in this case must not only prohibit the respondents from "entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy" to engage in the particular practices by which the conspiracy had been effectuated, but must also prohibit the individual use of a particular delivered pricing system or method "for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." Such a prohibition was necessary not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered-price basis, but to make the order fully effective against the trade-restraining conspiracy in which each of the respondents participated.

There were three different kinds of chain involved in this proceeding, namely, welded chain, weldless chain, and tire chain. As shown in the Commission's findings, welded chain was generally quoted and sold on a "Pittsburgh plus" or single basing point delivered-price method or system. Weldless chain was generally quoted and sold on a freight equalization delivered-price method or system. Tire chain was generally quoted and sold on a single zone, or as respondents prefer to call it, a universal delivered-price method or system. All of the respondent manufacturers did not manufacture all three types of chain, but some of them did. Each of them used the particular delivered pricing method or system applicable to the products it sold.

The maintenance of the different delivered pricing systems constituted the very cornerstone of the conspiracy among and between the respondents. The adherence to the applicable system by each of the respondent manufacturers was necessary to make the conspiracy effective. The matching of delivered prices was one of the objectives of the conspiracy and this was accomplished through the use of the different delivered pricing systems. Unless and until each of the respondent manufacturers is prohibited from so adhering to a particular delivered pricing system, the evils springing from the conspiracy, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondent manufacturers, representing practically the entire economic power of the industry, are deprived of the device which made the combination effective, an order merely prohibiting the combination may well be a useless gesture.

If the usual type of conspiracy order had been entered in this case, the respondents would have been prohibited from agreeing to fix prices and from agreeing to do a number of other specified things they had been doing as a part of their conspiracy. The respondent manufacturers would not have been prohibited from continuing to use, without any agreement between them, the same delivered pricing systems they had been using and thus continuing to enjoy the fruits of their conspiracy. The effects of the conspiracy, one of which was the elimination of price competition, might continue for some time unless effective measures to break it up were taken. That is the purpose of the prohibition in the order to cease and desist directed against each of the respondent manufacturers individually. In my opinion, the effect of the order to cease and desist will be to restore a condition of sharp and healthy competition in the chain industry. I realize that in such competition the weak may be hurt, but social security is not the province of the Commission. The only way to have competition is to compete. If, after competition is restored in the industry, any of the respondents can make a proper showing that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission, of course, will at that time take such action as may be appropriate in the light of the facts and the law.

In my opinion the Commission has the power to take the steps necessary to correct the evils found to exist in this industry. The courts in addition to recognizing the power of the Commission to stop any method of competition, even though individually pursued, if it has a dangerous tendency unduly to hinder competition or create a monopoly, have also clearly indicated the extent to which the Commission may go in an effort to make its orders effective and to prevent evasion. In the case of *Hershey Chocolate Corporation* v. *Federal Trade Commission*, for example, the Court of Appeals for the Third Circuit, in upholding the Commission's order notwithstanding attack on the ground that it went beyond the scope of the complaint, said:

"* * * the Commission's power would be limited indeed if it were restricted to enjoin unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function." (121 F. 2d 968, 971–972.)

In the case of *Local 167* v. *United States*, 291 U. S. 293, 299, involving conspiracy among a number of defendants, the defendants sought to eliminate from the injunction certain provisions enjoining conduct which they contended had not been proved to be a part of the conspiracy. The Court held—

"The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against conspirators."

In *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 435–437, the Supreme Court said—

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.

"Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts * * * found to have been committed * * * in the past."

In the case of *Haskelite Mfg. Corporation* v. *Federal Trade Commission*, the Court of Appeals for the Seventh Circuit accepted and applied the same principle and held that the Commission could prescribe reasonable requirements and "guarantees against a recurrence of the past unfair and deceptive acts" and which "were calculated to aid in dispelling for the future the unfair and deceptive practices of the past" (127 F. 2d 765, 766).

Nor is the relief to which the Commission is entitled limited to the performance of "other related unlawful acts," referred to by the Court in the Express Publishing Company case. Even acts lawful in themselves may be prohibited when they cannot be separated from the unlawful scheme of which they are a part. The applicable law has been settled by the Supreme Court. In the Ethyl Gasoline case (*Ethyl Gasoline Corporation, et al* v. *United States*, 309 U. S. 436), the Supreme Court disposed of a contention that the decree should not extend to the prohibition of a device that could be lawfully used, as follows:

"Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightfully suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." (P. 461.) Two years later, in the case of *United States* v. *Univis Lens Company, Inc., et al.*, 316 U. S. 241, the Court again applied the same rule. It said that even assuming the validity of certain licensing restrictions, "these features are so interwoven with and identified with the price restrictions which are the core of the licensing system that the case is an appropriate one for the suppression of the entire licensing scheme even though some of its features, independently established, might have been used for lawful purposes." (P. 254.)

Under all the circumstances, in the light of the entire record, including the motions now before the Commission, I am of the opinion that the prohibition in the order against the persistent, continuing, and intended matching of prices through the use by each of the respondents of one or more delivered pricing systems was particularly appropriate.

OPINION OF ALBERT A. CARRETTA

DISSENTING IN PART AND CONCURRING IN PART

WITH THE ORDER OF THE COMMISSION

This matter is before the Commission upon an "Application and Motion for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist" filed in behalf of Chain Institute, Inc., and 19 other corporate and individual respondents. Included in said application was also a motion to the effect that the Order to Cease and Desist herein be modified by including therein a provision dismissing the amended complaint against respondent Frank A. Bond, for the reason that said respondent died on July 3, 1950.

There is also before the Commission a "Motion of Respondent Columbus McKinnon Chain Corporation to Vacate or Modify Findings as to the Facts, Conclusion and Order to Cease and Desist." This motion is somewhat similar to the Application and Motion filed in behalf of Chain Institute, Inc., and others, and it includes the additional request that the proceedings be dismissed as to respondent Columbus McKinnon Chain Corporation.

In the two motions which have been filed, permission was requested to file briefs and to be heard in oral argument.

The Commission, by order, has denied both motions except insofar as the first motion requested dismissal of the proceedings as to respondent Frank A. Bond. While I concur in the decision of the Commission to the extent that the proceeding herein should be dismissed as to respondent Frank A. Bond, I disagree with the conclusion reached by my colleagues in denying respondents the opportunity to be heard orally upon their motions.

Because the above-mentioned separate motions are somewhat similar, I shall limit my discussion to the contents of the Application and Motion filed in behalf of Chain Institute, Inc., and others. However, my comments and my conclusion apply with equal force to the motion filed in behalf of respondent Columbus McKinnon Chain Corporation.

This dissent is being filed with full knowledge and appreciation of the fact that the original complaint in this matter was issued by the Federal Trade Commission on December 22, 1942—more than 11 years ago. It is also realized that the granting of respondents' motions would necessitate a further delay in the final disposition of this case. However, the Federal Trade Commission, when acting in its quasi-judicial capacity, must be more concerned with due process and with equity than with speed in arriving at its decisions.

In its Application and Motion for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist, the respondents Chain Institute, Inc. and others, prayed for the following relief:

1. That the Findings as to the Facts, Conclusion and Order to Cease and Desist issued by the Commission in said proceeding on February 16, 1953, be set aside in their entirety by the Commission, and that the Commission, in lieu thereof, issue Findings as to the Facts to the effect that the allegations of the amended complaint in said proceeding have not been established by the evidence in said proceeding, and a Conclusion to the effect that the respondents in said proceeding have not violated either of the statutes mentioned in said amended complaint, and an Order to the effect that said amended complaint be dismissed with prejudice; *or in the alternative*

2. That said Findings as to the Facts issued by the Commission in such proceeding on February 16, 1953, be modified in certain enumerated respects.

3. That said Order to Cease and Desist issued by the Commission in said proceeding on February 16, 1953, be modified in the following respects:

(a) That there be deleted in its entirety from said Order to Cease and Desist the subparagraph numbered "(6)" which appears as one of a series of numbered subparagraphs under a main paragraph which begins with the words "*It is ordered*" and

(b) That there be deleted in its entirety from said Order to Cease and Desist the paragraph thereof which begins with the words "*It is further ordered*, That each of the corporate respondents" and ends with the words "one or more sellers as against another."

In an affidavit submitted by counsel representing the respondents Chain Institute, Inc. and others, various grounds were therein set forth in support of the application and motion, and in support of respondents' request for permission to argue orally before the Commission. For the majority of the Commission to have reached its conclusion that respondents' application and motion should be denied (except insofar as it applied to the dismissal of the proceeding against Frank A. Bond), it was necessary for the Commission to conclude that *each and every ground* cited by respondents was without merit. I cannot reach the same conclusion as the majority of the Commission did because I feel that at least one ground cited by the respondents entitles them to the privilege of being heard in oral argument before the Commission. That particular ground is stated in Paragraph 6 (a) (6) on Pages 5 and 6 of the "Affidavit of Sumner S. Kittelle in Support of Application and Motion of Respondents for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist." That particular ground refers to the Paragraph in the Order of the Commission to Cease and Desist dated February 16, 1953, which reads as follows:

"*It is further ordered*, That each of the corporate respondents (the various respondents are then named), its officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of chain or chain products in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." With respect to the foregoing quoted paragraph, the respondents state:

"Respondents had no opportunity to argue the merits or demerits of the paragraph of the Order to Cease and Desist herein which, in substance, prevents any respondent, individually and noncollusively, from using any of the delivered pricing methods to meet competition regularly or systematically. No such paragraph was incorporated in the proposed order to cease and desist filed by the Trial Examiner in this proceeding, nor was there anything in the record, briefs or arguments to indicate that any such drastic and far-reaching paragraph was contemplated. No provision like said paragraph was ever inserted by the Commission in any of its orders in any contested proceeding prior to the *National Lead Company* case, Docket No. 5253, and both the majority and dissenting opinions in said case demonstrate that said paragraph was and is a highly novel and controversial one. The Order in the *National Lead* case was issued January 12, 1953, only about a month before the Order in this proceeding."

Without passing upon the question as to whether a paragraph of this nature is proper or improper in an order of the Commission, it is my opinion that the respondents herein should have been afforded the opportunity to submit arguments to the Commission *against* the inclusion of such a paragraph. Of course, counsel in support of the complaint should also have been heard *in support of* the inclusion of such a paragraph in an order of the Commission. This opportunity not having been afforded to the respondents and to counsel in support of the complaint by the then existing Commission, it appears to me imperative that the existing Commission should correct such defect in the proceedings. This position I would hold whether or not any change in the personnel of the Commission had occurred between the date of the Order of the Commission and the date of filing of the motion for review. It cannot be denied that this paragraph enjoins the respondents from *individually* engaging in certain practices which they may not engage in in concert with others, I do not want it to be understood that I would not, myself, vote for the inclusion of such a paragraph in an order of the Commission after being fully advised of the best arguments which could be presented by both sides.

It is to be noted that in this proceeding, the Trial Examiner, under date of September 23, 1948, filed his "Recommended Decision" which was also included as part thereof a "Recommended Order." It was that Order which was briefed by both sides, and it was that Order which was argued orally before the Commission. An examination of that Order will disclose that the subject paragraph was not contained in the Recommended Order of the Trial Examiner. However, after twice hearing oral argument upon the Recommended Decision of the Trial Examiner, the Commission, out of a clear sky, decided to impose the restrictions contained in the above-quoted paragraph.

How consistent is the Commission in guaranteeing "due process" [1] to respondents before the Commission? At the present time, and I

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[1] Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, *in its most comprehensive sense;* to be heard, by *testimony or otherwise,* and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

understand that the following has been the practice for more than three years, when a Hearing Examiner completes a case, he files with the Secretary of the Commission an "Initial Decision" which includes a form of Order to Cease and Desist which becomes the Order of the Commission unless (1) either side files an appeal with the Commission; or (2) the Commission, by order, stays the effective date of the decision; or (3) the Commission, upon its own initiative, issues an order placing the case on its own docket for review. When the Commission places the case on its own docket for review, it considers the record therein, and if, for any reason, the Commission is of the opinion that the Findings or Order to Cease and Desist should be modified in any respect, it serves upon the respondent and upon counsel in support of the complaint a "Tentative Decision of the Commission." This "Tentative Decision of the Commission" includes modified Findings as to the Facts, Conclusion and Order to Cease and Desist. These papers apprise the respondent and counsel in support of the complaint of the changes which the Commission intends to make in the findings and order as submitted by the Hearing Examiner. Each side is then offered an opportunity to file, within 20 days, an appropriate memorandum or brief setting forth any objections which they may have to the changes contemplated by the Commission in the Hearing Examiner's Initial Decision. Further, after such objections, if any, are filed, each side is afforded the opportunity to reply to the objections of the other party within a period of 10 days after the filing of such objections.

If the foregoing is the current practice, why should not the parties in the subject case be afforded the same opportunity to argue either for or against the changes which the Commission made in the order as recommended by the Trial Examiner?

To say that the respondents herein have a remedy in the courts is for the Commission to pass its burden upon the already overcrowded dockets of the courts. It is our duty to be fully advised in all matters upon which we sit as judges, and we cannot shirk our duty by saying that parties have an adequate remedy in the courts.

Consequently, it is my opinion that both motions filed herein should have been granted by the Commission, *but only* to the extent that both counsel for the respondents and counsel in support of the complaint should have been afforded the opportunity to file briefs and to argue orally before the Commission upon any provisions contained in the Order to Cease and Desist issued by the Commission which were at variance with the provisions in the "Recommended Order" contained in the "Recommended Decision" filed by the Trial Examiner herein. This same opportunity should be afforded all respondents whenever the Commission intends to make a "change of substance" in any recommended order of a Hearing Examiner. If the change contemplated by the Commission is "de minimis," then I might hold that denial of an opportunity to be heard would not deprive the respondent of "due process."

Because the opinion of the Commission in this matter, as prepared by Chairman Howrey, discusses at some length the matter of reopening previously adjudicated cases upon the ground that there have been changes in the membership of the Commission, I should like to state that I concur in the reasoning of the majority of the Commission in concluding that, *standing alone*, a change in the membership of the Commission is without merit to support a petition of a respondent for an opportunity to argue orally before the Commission upon a matter already decided.

I also concur with the majority of the Commission in concluding that the Order to Cease and Desist heretofore entered in this matter be modified by striking therefrom Frank A. Bond as a respondent against whom said order was directed, and in concluding that the amended complaint herein be dismissed as to him.

Syllabus

IN THE MATTER OF

RAY R. GOLDIE AND DAVID BACHMAN DOING BUSINESS AS MERCURY VACUUM STORES AND MERCURY VACUUM CLEANER STORES

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6064. Complaint, Nov. 24, 1952—Decision, Jan. 14, 1954

Where two parties engaged in the competitive interstate sale and distribution of new and rebuilt sewing machines and vacuum cleaners through retail stores in California, Washington, and Oregon, to purchasers in various other states and in Alaska, including among the former products several brands made in Japan, upon the back of the vertical arm of which machines the word "Japan", when sold to members of the purchasing public, became covered by the motor and upon which the word "Japan" as displayed in some instances upon a medallion on the front of the vertical arm was so small and indistinct as not to constitute adequate notice that the heads were imported—

(a) Offered and sold such machines without placing any other mark thereon or otherwise informing the public that the heads thereof were of foreign origin;

(b) Represented falsely, directly or by implication, that one of the sewing machines sold by them was manufactured by or connected in some manner with the well and favorably known American firm or firms with which the word "Universal" had long been associated through use of said word as a trade or brand name for said product and conspicuous display thereof on its front horizontal arm and use thereof in their advertising matter; and through use of such trade or brand names enhanced the belief on the part of the public that their said machines were of domestic origin;

(c) Frequently advertised rebuilt sewing machines and vacuum cleaners at extremely low prices through their retail stores;

When in fact such advertisements were not genuine or bona fide offers to sell the articles advertised but were run to obtain the names of persons who were interested in the purchase of such products; while their salesmen, when responses were obtained, demonstrated said products, their sole purpose was to sell new and much higher priced machines and cleaners; and products in question were not intended to do satisfactory work and very few of them were sold;

(d) Made use in the advertising of their rebuilt vacuum cleaners of such terms as "complete with attachments", "3 days only", and "2-year guarantee";

When in fact attachments were frequently not furnished; offers were continuous, the only changes being slight variations in the prices charged; no guarantee was given without payment of a substantial sum therefor in addition to the purchase price of the machine; and use of the word "guarantee" without a statement of the terms and conditions and the manner in which the guarantor would perform was misleading and confusing and constituted a misleading and deceptive practice;

(e) Falsely represented through their salesmen that their said machines containing heads imported from Japan were manufactured by the Singer Sewing Machine Co.; and

(f) Quoted directly and through their salesmen fictitious prices for various machines as their usual selling prices and represented that they were able to offer same at a much lower price since they had been used as demonstrators or for some other reason:

When in fact such machines were usually new machines and the price at which they were offered constituted their usual selling price and not, as the prospective purchaser was thus led to believe, a reduced one:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of their competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. William L. Pack*, hearing examiner.

Mr. William L. Taggart and *Mr. J. C. Williams* for the Commission.

Mr. Myer Koonin, of Washington, D. C., for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 24, 1952, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

The respondents desiring that this proceeding be disposed of by the Consent Settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, and review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the Consent Settlement hereinafter set forth and in lieu of the answer to said complaint heretofore filed, and which, upon acceptance by the Commission of this settlement, is to be withdrawn from the record, hereby:

1. Admit all of the jurisdiction allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusions and order to cease and desist. It is understood that the respondents, in consenting to

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on January 14, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

the Commission's entry of said findings as to the facts, conclusion and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this Consent Settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents, Ray R. Goldie and David Bachman are copartners doing business under the names of Mercury Vacuum Stores and Mercury Vacuum Cleaner Stores with their principal place of business at Room 216, Fleming Building, San Bernardino, California.

PAR. 2. Respondents are now, and for some time in the past have been, engaged in the sale and distribution of new and rebuilt sewing machines and vacuum cleaners through retail stores located in the States of California, Washington, and Oregon. Included in the sewing machines sold by them are several brands, the heads of which are manufactured in Japan.

PAR. 3. In the course and conduct of their business, respondents cause certain of their said products, when sold, to be transported from their places of business in the States of California, Washington, and Oregon to purchasers thereof located in various other States of the United States and in the Territory of Alaska, and at all times mentioned herein have maintained, a course of trade in said products in commerce between various States of the United States and the Territory of Alaska.

PAR. 4. When the sewing machines are sold by respondents to members of the purchasing public, the word "Japan" appears on the back of the vertical arm but such name is covered by the motor so that it is not visible. In some instances, the heads are marked with a medallion placed on the front of the vertical arm upon which the word "Japan" appears. This word is, however, so small and indistinct that it does not constitute adequate notice to the public that the heads are imported. Respondents place no other mark on said sewing machines or otherwise inform the public that the heads thereof are of foreign origin.

PAR. 5. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and such articles are not marked or are inadequately marked showing they are of foreign origin, or if marked and the markings are covered over or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

There is among the members of the purchasing public a large number who have a decided preference for products originating in the United States over products originating in whole or in part in foreign countries, including sewing machines.

PAR. 6. Respondents use the word "Universal" as a trade or brand name for one of the sewing machines sold by them, which word is printed or embossed on the front horizontal arm of the head in large conspicuous letters and use said trade or brand name in their advertising matter. The word "Universal" is the name or a part of the name of or used as a trade name, mark or brand by one or more business organizations transacting and doing business in the United States which are and have been well and favorably known to the purchasing public and which are and have been well and long established in various industries.

PAR. 7. By using the trade or brand name "Universal" respondents represent, directly or by implication, that their product is manufactured by or connected in some manner with the well and favorably known American firm or firms with which said name has long been associated, which is contrary to the fact.

PAR. 8. There is a preference among members of the purchasing public for products manufactured by well and long established concerns whose identity is connected with the word "Universal." The use of said trade or brand name by respondents enhances the belief on the part of the public that the said sewing machines are of domestic origin.

PAR. 9. In the course and conduct of their business, respondents, through their retail stores frequently advertise rebuilt sewing machines and vacuum cleaners at extremely low prices. Such advertisements are not genuine or bona fide offers to sell the articles advertised but are run for the purpose of obtaining the names of persons who are interested in the purchase of sewing machines or vacuum cleaners. When responses are obtained to such advertisements, salesmen for respondents demonstrate the rebuilt sewing machines and vacuum cleaners but their sole purpose is to sell new and much higher priced sewing machines and vacuum cleaners. As a matter of fact, the rebuilt sewing machines and vacuum cleaners are not intended to do satisfactory work. As a result, very few of the rebuilt sewing machines or vacuum cleaners are sold.

PAR. 10. Respondents, in the advertising matter of their rebuilt vacuum cleaners, make use of such terms as "complete with attachments," "three days only," and "2 year guarantee." Such statements are misleading and deceptive. In truth and in fact, attachments are frequently not furnished. The offers are continuous, the only changes being slight variations in the prices charged. The use of the word "guarantee" without a statement of the terms and conditions thereof and the manner in which the guarantor will perform is misleading and confusing and constitutes a misleading and deceptive practice. In truth and in fact, no guarantee is given without the payment of a substantial sum therefor in addition to the purchase price of the machine.

PAR. 11. Respondents' salesmen, in soliciting the sale of sewing machines containing heads imported from Japan, represent, contrary to the fact, that the machines were manufactured by the Singer Sewing Machine Company. The respondents and their salesmen also quote fictitious prices for various machines as the usual selling prices and represent that, because the machines have been used as demonstrators or for some other reason, they are able to offer the machines at a much lower price thus inducing the prospective purchaser to believe that the price asked is a reduced price. As a matter of fact, the machines so offered are usually new machines and the price at which the machines are offered for sale are the usual selling prices.

PAR. 12. Respondents, in the course and conduct of their business, are in substantial competition with other individuals and with firms and corporations engaged in the sale in commerce of sewing machines and vacuum cleaners.

PAR. 13. The failure of respondents to adequately disclose on the sewing machine heads that they are manufactured in Japan and the use of the trade or brand name "Universal" have the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that their sewing machines are of domestic origin and manufactured by the well and favorably known firm or firms with which said trade or brand name has long been associated.

Furthermore, the other misleading and deceptive statements enumerated above have the capacity and tendency to lead members of the purchasing public into the erroneous and mistaken belief that such statements are true. All of the aforesaid practices have the capacity and tendency to induce members of the public to purchase respondents' sewing machines and vacuum cleaners because of the erroneous belief engendered thereby.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondents Ray R. Goldie and David Bachman, individually and as copartners doing business as Mercury Vacuum Stores and Mercury Vacuum Cleaner Stores, or doing business under any other name, and their representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of sewing machines, vacuum cleaners or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing sewing machines, of which foreign made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof.
2. Using the word "Universal" or any simulation thereof as a brand or trade name or in any other manner to designate, describe, or refer to sewing machines or representing, through the use of any other words or in any other manner that their sewing machines or any part thereof are made by any other than the actual manufacturer.
3. Representing, directly or by implication, that certain merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.
4. Representing, directly or by implication, that attachments are included with their rebuilt vacuum cleaners unless such is the fact.
5. Representing, directly or by implication, that offers are limited as to time when they are continuous offers.
6. Representing, directly or by implication, that any merchandise is guaranteed unless the nature and extent of the guarantee and the manner and form in which the guarantor will perform thereunder are clearly and conspicuously disclosed.
7. Representing, directly or by implication, that the usual or customary price of any merchandise is in excess of the price at which said merchandise is regularly and customarily sold in the normal course of business, or that the price at which any merchandise is regularly and customarily sold in the normal course of business is a reduced price.

It is further ordered, That the respondents, Ray R. Goldie and David Bachman, individually and as copartners doing business as Mercury Vacuum Stores and Mercury Vacuum Cleaner Stores, shall within sixty (60) days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

(Sgd.) Ray R. Goldie
RAY R. GOLDIE
(Sgd.) David Bachman
DAVID BACHMAN,
individually and as copartners doing business as Mercury Vacuum Stores and Mercury Vacuum Cleaner Stores.
Date: November 6, 1953.

(Sgd.) Myer Koonin
MYER KOONIN,
721 Sheraton Building,
Washington, D. C.
Attorney for Respondents.
Date: November 10, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 14th day of January 1954.

403443—57——40

IN THE MATTER OF

ROYAL APPLIANCE COMPANY, INC. AND DAVID E. RESNICK

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6122. Complaint, Aug. 31, 1953—Decision, Jan. 14, 1954

Where a corporation and its responsible officer competitively engaged in the sale and distribution in the District of Columbia and adjoining States, among other things, of television receivers and replacement parts and in the furnishing of television repair services under contracts whereby they undertook to keep sets in good repair; in advertising their products in newspapers and other advertising media—

(a) Represented that they would keep television receivers sold by them in good working order for a period of two years, any necessary repairs to be made within a reasonable time after being requested;

The facts being that while such contracts, issued for a consideration, so provided, they did not in many instances comply with such contracts during the second year or provided such service only after undue and unreasonable delay;

(b) Represented that they would either remove television receivers to one of their four places of business and return them the same day fully repaired and in proper working order, or repair such receivers in the homes of the owners;

The facts being their repairmen constantly refused to repair such receivers in the home; and when they were removed to respondents' place of business for repair, respondents returned them to their owners in many instances only after many days or weeks of delay;

(c) Falsely represented that they would estimate the cost of necessary parts or services or both parts and services to place television receivers in proper working order and would provide such service and parts for approximately the amount of such estimate;

The facts being their estimates were not bona fide; prices ultimately charged by them for repair in virtually all instances did not approximate their estimates and sometimes exceeded them by more than twice as much; and in most instances where the final charge exceeded the estimate, they failed to apprise the customers of such increase to obtain authorization for the performance of the work, but required nevertheless the payment of the total amount before they would release the receivers to the owners; and

(d) Represented that they owned, operated, or maintained offices or branches in four different locations in the metropolitan area of Washington, D. C.; when in fact they operated one place of business only in said area:

Held, That such acts and practices were all to the prejudice and injury of the public and of their competitors, and constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. John Lewis*, hearing examiner.

Mr. Harold A. Kennedy for the Commission.

Costantini & Raffel, of Washington, D. C., for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 31, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth and in lieu of answer to said complaint, hereby

(1) Admit all the jurisdictional allegations set forth in the complaint.

(2) Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting that they have engaged in any of the acts or practices stated therein to be in violation of law.

(3) Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Royal Appliance Company, Inc., is a corporation, organized and existing under the laws of the State of Maryland, which had its principal office and place of business at 1911

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on January 14, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusions, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

Nichols Avenue SE., in the City of Washington, D. C., until approximately July 1, 1953, at which time, both it and respondent suspended the operation of said business.

Respondent David E. Resnick is an individual and, although presently president of said corporation, was secretary-treasurer during the pertinent and applicable time period. He individually formulated all the policies and controlled and managed all of the affairs of said corporation and would do so in future. His principal office and place of business had been the same as that of the corporate respondent.

PAR. 2. Respondents, until approximately July 1, 1953, were engaged in the sale and distribution, among other things, of television receivers and replacement parts. An essential and integral part of respondents' said business was the furnishing of television repair services. In connection with their said repair service, respondents issued contracts whereby they agreed to keep television sets in good repair for a period of two years. Respondents caused their said television sets, when sold, to be transported from their place of business in the District of Columbia to purchasers located in the District of Columbia and in the States of Maryland and Virginia and caused their said service contracts and various other written instruments of a commercial nature, issued and made use of in connection therewith, to be transported by means of the United States mails and otherwise to various persons located in the District of Columbia and in the States aforesaid.

Respondents maintained a course of trade in said products and service contracts and various other instruments issued in connection therewith in commerce in the District of Columbia and between the District of Columbia and other States, and such course of trade was substantial.

PAR. 3. In the course and conduct of their said business, respondents have been in substantial competition in commerce with other corporations and with individuals and partnerships engaged in the sale of television receivers and repair parts therefor.

PAR. 4. In the course and conduct of their aforesaid business, respondents have made certain statements and representations concerning said products by means of advertisements inserted in newspapers and other advertising media of general circulation in the States of Maryland and Virginia and in the District of Columbia. Typical, but not all inclusive, of such representations are the following:

ROYAL GIVES YOU THIS SENSATIONAL 2 YEARS SERVICE ON ANY TV SET OF YOUR CHOICE. The only Appliance Store in Washington * * * and in the United States to offer you one full year of unconditional guarantee * * * and an extra year of service free of any cost.

ROYAL
APPLIANCE CO. INC.
SALES SERVICE

Picture of man holding television set	SHE'S O. K. NOW and BACK HOME THE SAME DAY! ON CALL 24 HOURS A DAY

ANY MAKE TELEVISION REPAIRED
2 YEARS SERVICE
FREE PICK UP, DELIVERY & ESTIMATES
TV REPAIRS
IN YOUR HOME
or
1 DAY SERVICE

FREE ESTIMATES		REPAIRS ON CREDIT
N.W.—S.W.		N.E.—S.E.
DU. 1400		LU 4–7000
	SILVER SPRING, ARL.-ALEX.	
JU. 7–5484		JA. 4–1883

ROYAL
CONSOLIDATED TV SERVICES

PAR. 5. By means of the foregoing statements and representations, respondents, directly and by implication, represented:

1. That they would keep television receivers sold by them in good working order for a period of two years, any necessary repairs to be made within a reasonable time after being requested.

2. That they would either remove television receivers to one of their four places of business and return them the same day fully repaired and in proper working order or repair such receivers in the homes of the owners.

3. That they would estimate the cost of necessary parts or services or both parts and services to place television receivers in proper working order and would provide such service and parts for approximately the amount of such estimate.

4. That they owned, operated, or maintained offices or branches in four different locations of the metropolitan area of Washington, D. C.

PAR. 6. All of the aforesaid representations, statements and implications were false, exaggerated, deceptive, and misleading. In truth and in fact:

1. While respondents issued service contracts to purchasers of television receivers, for a consideration, which provided that they would render necessary service to keep such receivers in good working order for a period of two years, they did not in many instances comply with such contracts during the second year or provided such service only after undue and unreasonable delay.

2. Respondents' television repairmen consistently refused to repair television receivers in the home; and when said receivers were removed to respondents' place of business for repair, respondents returned them to their owners in many instances only after many days or weeks of delay.

3. The estimates given by respondents on the cost of television repairs were not bona fide estimates. The prices ultimately charged by respondents for television repairs in virtually all instances did not approximate the estimates given by them, and sometimes exceeded said estimates by more than twice as much. In most instances where the final charge exceeded the estimate, respondents failed to apprise their customers of such increase in price or to obtain authorization for the work prior to performing the same, but nevertheless required the payment of the total amount before they would release the television receivers to the owners.

4. Respondents operated only one place of business located at 1911 Nichols Avenue S. E., Washington, D. C.

PAR. 7. The use by the respondents of the aforesaid false, misleading and deceptive statements and representations has had the tendency and capacity to lead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were true, and to induce the purchase of said products and the entering into service contracts because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

CONCLUSION

The aforesaid acts and practices of respondents were all to the prejudice and injury of the public and of respondents' competitors and constituted 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, Royal Appliance Company, Inc., a corporation, and its officers, and David E. Resnick, individually, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of television receivers or other electronic equipment and service contracts, in connection therewith, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that they will keep such products in good working order for a period of two years or for any other specified period of time, unless in fact the services necessary to accomplish that result be provided within a reasonable time after notification by customer or vendee during such specified time period.

2. Representing, directly or by implication, contrary to the fact, that repairs on such products will be made either in the home or in one day or in any other specified period of time.

3. Either giving so-called estimates or representing that they will give estimates for repairs on such products, which are not in fact bona fide estimates or which bear no reasonable relationship to the prices ultimately charged for such repairs.

4. Representing, directly or by implication, that they maintain more places of business than is actually the fact.

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

(Sgd.) Royal Appliance Co., Inc.
ROYAL APPLIANCE COMPANY, INC.
(Sgd.) By David E. Resnick, Pres.
(Sgd.) David E. Resnick
DAVID E. RESNICK, individually.

Date: December 1, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 14th day of January, 1954.

IN THE MATTER OF

YAMI YOGURT PRODUCTS, INC., AND RICHARD TILLE, INDIVIDUALLY AND AS AN OFFICER THEREOF AND ALSO DOING BUSINESS AS INTERNATIONAL YOGURT COMPANY

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6066. Complaint, Nov. 25, 1952—Decision, Jan. 21, 1954

Where a corporation and an officer thereof who did business also at the same address under a separate trade name, engaged in the interstate sale and distribution of food products for use in making yogurt, respectively known in the case of the product of the former as "Yami Yogurt Culture," and in that of the latter as "International Yogurt Culture" and "International Roselle Yogurt Culture"; in advertising their said products in newspapers and magazines, etc. and by radio—

(a) Falsely represented that proteins in yogurt are in predigested form, that proteins and minerals are more rapidly assimilable and milk nutrients more easily absorbed by the blood by reason of being in the form supplied by yogurt, and that the casein and albumin of cow's milk fermented with yogurt culture are transformed into more highly digestible form;

(b) Falsely represented that yogurt promotes digestion and intestinal hygiene, helps to digest other foods, promotes longevity and helps to prevent senility; that its use builds, restores, and insures good health, is effective in preventing typhoid, paratyphoid, diphtheria and dysentery, and is a cure or remedy for constipation, ulcers, gastritis, enteritis, colitis, dyspepsia, diarrhea, dysentery, celiac disease, colon troubles, and stomach distress;

(c) Falsely represented that it is a benefit in cases of pulmonary diseases, keeps the digestive tract clean, lessens the nausea or stomach sickness associated with pregnancy, results in fine complexions or improves the complexion; and

(d) Falsely represented that yogurt softens or tenderizes meat and that through yogurt one may eat himself to health:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Earl J. Kolb*, hearing examiner.
Mr. J. W. Brookfield, Jr., for the Commission.
Mr. Alfred L. Fox, of Los Angeles, Calif., for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 25, 1952, issued and

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is subsequently served its Complaint on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Act.

Subsequent to the issuance of the Complaint in this matter it was suggested that respondent Richard Tille was deceased, and by agreement there was substituted for respondent Richard Tille respondent Reny Tille, both as an individual respondent doing business as International Yogurt Company and as an officer of corporate respondent Yami Yogurt Products, Inc.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the Order consented to, and conditioned upon the Commission's acceptance of the Consent Settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its Findings as to the Facts and Conclusion and Order to Cease and Desist. It is understood that the respondents in consenting to the Commission's entry of said Findings as to the Facts, Conclusion and Order to Cease and Desist specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of the law.

3. Agree that the Consent Settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon and the Order to Cease and Desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Yami Yogurt Products, Inc., is a corporation organized, existing and doing business under and by virtue of the

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served herewith, was accepted by the Commission on January 21, 1954 and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

laws of the State of California, with its office and principal place of business located at 8478 Melrose Place, Los Angeles, California.

Respondent Reny Tille is an individual and officer of corporate respondent, Yami Yogurt Products, Inc., and participates in the policies and practices of said corporation.

Respondent Reny Tille also trades and does business under the trade name, International Yogurt Company, whose office is also located at 8478 Melrose Place, Los Angeles, California. All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter described.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the selling and distribution of food products as "food" is defined in the Federal Trade Commission Act. The product sold by corporate respondent is known as Yami Yogurt Culture and that sold by Reny Tille as International Yogurt Culture and International Roselle Yogurt Culture. Both of these products are used in making yogurt.

PAR. 3. Respondent Yami Yogurt Products, Inc., receives orders from customers located in the various States of the United States, and has its product shipped to these customers at their various locations in the United States from the Roselle Bacteriological Dairy Institute in La Trappe, Province of Quebec, Canada. Respondent Reny Tille, trading as International Yogurt Company, causes her said food product, when sold, to be transported from her place of business in Los Angeles, California, to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said food products in commerce between and among the various States of the United States. Respondents' volume of business in commerce in said food products is and has been substantial.

PAR. 4. In the course and conduct of their aforesaid business, respondents, subsequent to March 21, 1938, have disseminated, and are now disseminating, and have caused, and are now causing, the dissemination of advertisements concerning their said food products by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and magazines of general circulation, by means of radio continuities and in circulars and leaflets for the purpose of inducing, and which are and were likely to induce, directly or indirectly, the purchase of said food products; and respondents have also disseminated, and are now causing the dissemination of, advertisements concerning their said food products by the aforesaid means for the purpose of inducing, and which are and were likely to induce, directly or indirectly, the purchase of their said food products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Through the use of said advertisements, respondents represented, directly and by implication, that the proteins in yogurt are in predigested form; that proteins and minerals are more rapidly assimilable, and milk nutrients are more easily absorbed by the blood, by reason of being in the form supplied by yogurt; and that the casein and albumin of cow's milk fermented with yogurt culture are transformed into more highly digestible forms. Further, through the use of said advertisements, respondents represented that yogurt promotes digestion and intestinal hygiene, helps to digest other foods, promotes longevity and helps to prevent senility; that its use builds, restores, and insures good health, is effective in preventing typhoid, paratyphoid, diphtheria and dysentery, and is a cure or remedy for constipation, ulcers, gastritis, enteritis, colitis, dyspepsia, diarrhea, dysentery, celiac disease, colon troubles and stomach distress; that it is of benefit in cases of pulmonary diseases, keeps the digestive tract clean, lessens the nausea or stomach sickness associated with pregnancy, results in fine complexions or improves the complexion; that yogurt softens or tenderizes meats; and that through yogurt one may eat himself to health.

PAR. 6. The aforesaid statements and representations are misleading in material respects and constitute false advertisements as that term is defined in the Federal Trade Commission Act. In truth and in fact, the proteins in yogurt are not predigested. The proteins and minerals are not more rapidly assimilable and milk nutrients are not more easily absorbed by the blood, by reason of being in the form supplied by yogurt. The casein and albumin of cow's milk fermented with yogurt cultures are not, because of that treatment made more highly digestible. Yogurt does not promote digestion or intestinal hygiene, does not help to digest other foods. Its use does not promote longevity nor help to prevent senility. It does not build, restore or insure good health. Yogurt is not effective in preventing typhoid, paratyphoid, diphtheria, or dysentery. It is not a cure for constipation, ulcers, gastritis, enteritis, colitis, dyspepsia, diarrhea, dysentery, celiac disease, colon troubles or stomach distress, nor is its use of benefit in cases of pulmonary diseases. Yogurt does not keep the digestive tract clean, nor is it a competent treatment for nausea or stomach sickness associated with pregnancy. The use of yogurt will not in itself result in fine complexion or improve the complexion. The application of yogurt to meats will not soften or tenderize them. The use of yogurt will not enable one to eat himself to good health.

PAR. 7. The use by respondent of the foregoing false and misleading statements and representations contained in said advertisements has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of said products because of such erroneous and mistaken belief.

PAR. 8. The acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Yami Yogurt Products, Inc., a corporation, and its officers, and respondent Reny Tille, an individual, trading under the name of International Yogurt Company or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of yogurt cultures do forthwith cease and desist from:

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

(a) That the proteins in yogurt are in predigested form;

(b) That proteins or minerals are more rapidly assimilable by reason of being in the form supplied by yogurt;

(c) That milk nutrients are more easily absorbed by the blood by reason of being in the form supplied by yogurt;

(d) That the casein or albumin of cow's milk by being fermented with yogurt culture are transformed into more highly digestible forms;

(e) That yogurt promotes digestion or intestinal hygiene or helps to digest other foods;

(f) That yogurt promotes longevity or helps prevent senility;

(g) That yogurt builds, restores or insures good health;

(h) That Yogurt is effective in preventing typhoid, paratyphoid, diphtheria or dysentery or is a cure or remedy for constipation, ulcers, gastritis, enteritis, colitis, dyspepsia, diarrhea, dysentery, celiac disease, colon troubles or stomach distress;

(i) That yogurt is of benefit in cases of pulmonary diseases;

(j) That yogurt keeps the digestive tract clean;

(k) That yogurt lessens the nausea or "stomach sickness" associated with pregnancy;

(l) That yogurt results in fine complexions or improves the complexion;

(m) That the application of yogurt softens or tenderizes meats;

(n) That one may eat himself to good health by using yogurt.

Provided, *however*, That nothing herein contained shall be construed as preventing respondents from advertising or otherwise representing that Yami Yogurt is a recommended dietary supplement for individuals suffering from certain intestinal or digestive disturbances.

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

Yami Yogurt Products, Inc.
By (sgd) Reny Tille, *Treasurer*.
(sgd) Reny Tille
RENY TILLE, trading as International Yogurt Co.

(Sgd) Alfred L. Fox, *Counsel for Respondents*.
Date: Nov. 20, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and entered of record on this 21st day of January 1954.

IN THE MATTER OF

THE B. F. GOODRICH CO.

Docket 5677. Complaint, July 8, 1949—Decision, Jan. 24, 1954

Charge: Discriminating in price by selling rubber and canvas footwear to some customers at higher prices than to others competitively engaged with the former in the resale of said products, in violation of subsection 2 (a) of the Clayton Act, as amended.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. James I. Rooney and *Mr. James S. Kelaher* for the Commission.

Mr. G. T. Kilmon and *Mr. R. G. Jeter*, of Akron, Ohio, and *Kirkland, Fleming, Green, Martin & Ellis*, of Washington, D. C., for respondent.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the attached decision of the hearing examiner shall, on January 24, 1954, become the decision of the Commission.

Commissioner HOWREY not participating.

INITIAL DECISION BY WEBSTER BALLINGER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 8, 1949, issued and subsequently served its complaint in this proceeding upon the respondent The B. F. Goodrich Company charging it with having since June 19, 1936, violated and now violating the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act approved June 19, 1936. After the filing and service of said complaint respondent answered. Issues joined hearings were thereafter held at which testimony and other evidence in support of the allegations of the complaint and in opposition thereto were introduced before the above-named Hearing Examiner theretofore duly designated by the Commission. The testimony and other evidence offered and admitted were duly filed and recorded in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing upon a motion by counsel for respondent, uncontested by counsel for the complaint, to dismiss the complaint, and the Examiner after a careful review of the entire record finds that this proceeding is not in the interest of the public.

The complaint charges respondent with having since June 19, 1936, violated and "now" violating the provisions of subsection (a) of

Section 2 of the Clayton Act as amended by the Robinson-Patman Act by "discriminating in price between purchasers of its rubber and canvas footwear of like grade and quality in so selling said products to some of its customers at higher prices than it sells such products of like grade and quality to other of its customers who are competitively engaged one with the other in the resale of said products within the United States." It is further charged that the effect of the discriminations in price "has been or may be substantially to lessen, injure, destroy or prevent competition in the sale and distribution of rubber and canvas footwear between those of respondent's purchasers who receive the benefits of such discriminations and competing purchasers who do not receive the same benefits." The discrimination in price, it is charged, is effectuated through quantity discounts depicted in 10 quantity discount brackets set forth in the complaint.

Respondent denied that it had or was violating the provisions of the statute referred to and pleaded "cost justification" for the quantity discounts set forth in the ten brackets it allowed purchasers.

After the taking of approximately 650 pages of testimony and the introduction of a number of exhibits, the hearings were arrested to afford Commission accountants an opportunity to make a more thorough examination of the books and records of the respondent than was made prior to the issuance of the complaint, which resulted in a stipulation wherein it is stated:

"* * * that all price differences are * * * cost justified, excepting therefrom the 13% discount from list price bracket in relation to other higher discounts applicable to waterproof footwear."

"* * * that the total sales made by respondent pursuant to its price policy in the said 13% discount from list price bracket amounted to substantially less than ½ of 1% of the total sales of waterproof footwear made by respondent for the year 1949." (The last full year referred to in the complaint.)

There can be no public interest, and the Commission would not be warranted, in pursuing an inquiry relating to a discount bracket affecting such an insignificant proportion of respondent's business from which no possible substantial injury to competitors could result.

The motion to dismiss recites the above facts and counsel for the complaint make no objection to the granting of the motion.

It is therefore ordered, That the complaint be and it is hereby dismissed.

IN THE MATTER OF

STANDARD MOTOR PRODUCTS, INC.

Docket 5721. Order and opinion, Jan. 29, 1954

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Mr. Edward S. St. John, of New York City, for respondent.

ORDER DISPOSING OF APPEALS FROM ORDERS OF THE HEARING EXAMINER

This matter having come on to be heard by the Commission upon appeals, under Rule XVI of the Commission's Rules of Practice, by P. Sorensen Manufacturing Co., Inc., P. and D. Manufacturing Co., Inc., and the respondent, Standard Motor Products, Inc., from orders of the hearing examiner pertaining to certain subpoenas duces tecum issued by him at the request of the respondent; and

The Commission having duly considered said appeals, briefs of counsel, and pertinent portions of the record herein, and being of the opinion, for the reasons appearing in the accompanying opinion of the Commission, that the appeals of P. Sorensen Manufacturing Co., Inc., and P. and D. Manufacturing Co., Inc., should be sustained and that the appeal of the respondent, Standard Motor Products, Inc., should be denied, and being of the further opinion that oral argument on the appeals, which was requested by P. Sorensen Manufacturing Co., Inc., and P. and D. Manufacturing Co., Inc., is unnecessary:

It is ordered, That the said appeals of P. Sorensen Manufacturing Co., Inc., and P. and D. Manufacturing Co., Inc., be, and they hereby are, granted, and that the requests for oral argument on said appeals be, and they hereby are, denied.

It is further ordered, That the said appeal of respondent Standard Motor Products, Inc., be, and it hereby is, denied.

It is further ordered, That the subpoenas duces tecum issued by the hearing examiner on October 19, 1953, directing P. Sorensen Manufacturing Co., Inc., and P. and D. Manufacturing Co., Inc., to produce specified documents and records be, and they hereby are, quashed, but with the understanding that, if respondent so requests, new subpoenas, limited as indicated in the accompanying opinion, will be issued.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

During the course of the hearings in this matter, the hearing examiner, upon the request of the respondent, issued a subpoena duces tecum directing P. Sorensen Manufacturing Co., Inc. (herein referred to as Sorensen) to produce specified documents and records pertaining to Sorensen's transactions with certain of its customers during certain years. A subpoena duces tecum was also issued by the hearing examiner, at the request of the respondent, directing the P. and D. Manufacturing Co., Inc. (herein referred to as P. and D.) to produce similar documents and records pertaining to its transactions with certain of its customers during certain years. Upon the return of these subpoenas, Sorensen and P. and D. each filed a motion with the hearing examiner requesting that the subpoenas be quashed; that respondent be required to establish which, if any, of the documents demanded are relevant and material to the respondent's alleged defense; or that the subpoenas be limited in their scope and effect. After hearing argument on the motions, the hearing examiner entered orders on the record limiting the scope and effect of the subpoenas in certain respects and otherwise denying the motions. Appeals from these orders have been filed under Rule XVI of the Commission's Rules of Practice by Sorensen and P. and D. and also by the respondent. Oral argument is requested in the appeals of Sorensen and P. and D.

Respondent Standard Motor Products, Inc., is charged in the complaint in this proceeding with violation of Section 2 (a) of the Clayton Act, as amended, by selling its automotive parts and supplies to some customers at higher and less favorable prices than it sold said products and supplies to other customers. As one of its defenses to the charge of price discrimination, respondent alleges that any discounts or allowances granted by it were made solely for the purpose of meeting price competition from its competitors. Respondent contends that the documents and records demanded in the subpoenas as originally issued are necessary to enable it to establish its said defense. Sorensen and P. and D., competitors of the respondent, contend in their appeals that the subpoenas as originally issued, and also as subsequently limited by the hearing examiner, require them to produce documents and records which are in no way relevant or material to the issues in this proceeding; that respondent should be required to establish which, if any, of the numerous documents demanded by the subpoenas are relevant and material to its defense; that the only records of theirs which are relevant to the respondent's defense are those pertaining to transactions with concerns who were customers of the respondent at the time and to whom the respondent gave a lower price than it gave to other customers; and that any data which they are required to produce with respect to their transactions with such customers should be limited to the year in which the lower prices were given by the respondent.

The respondent is entitled to subpoenas directing the production of such documents and records as are relevant to its defense that its lower prices were made in good faith to meet a lawful equally low price of a competitor. Respondent is not entitled to access to documents and records of its competitors which are not relevant to that defense. The question for determination in these appeals is whether or not respondent has made an adequate showing that the documents and records demanded by the subpoenas as originally issued, or as subsequently limited by the hearing examiner, are relevant to respondent's said defense.

In order to establish its defense under Section 2 (b) of the Clayton Act, respondent must show that the lower prices which constituted the basis for the price discrimination charge were made in good faith to meet a lawful equally low price of a competitor. The lower prices given by the respondent must be shown to have been the direct result of specific offers by respondent's competitors to the customers receiving the lower prices. The subpoenas as originally issued, and also as limited by the hearing examiner, demand the production of data pertaining to transactions with concerns which were formerly customers of the respondent as well as with concerns which have never been customers of the respondent. Respondent states that these documents and records are desired for the purpose of showing the pricing practices of its competitors. There is no showing as to how the pricing practices of its competitors with respect to customers to whom the respondent does not sell and did not sell are relevant to the respondent's alleged defense.

The record in this proceeding contains evidence that respondent has made sales to certain customers at prices lower than those charged other customers. Under all the circumstances, the Commission is of the opinion that unless and until the respondent shows the relevancy to its defense of data pertaining to transactions by competitors with concerns other than those to whom the respondent has sold at the lower prices, any subpoenas directing a competitor of the respondent to produce documents and records should be limited to documents and records pertaining to sales and offers to sell by such competitors to customers of the respondent who the record shows were sold at the lower prices.

Any such subpoenas should be further limited to requiring the production of documents and records pertaining only to sales and offers to sell during the time period in which the respondent sold at the lower prices which make out the prima facie case.

In view of the foregoing, the Commission is of the opinion that subpoenas issued by the hearing examiner directing Sorensen and P. and D. to produce specified documents and records should be quashed, but with the understanding that, if respondent so requests, new subpoenas, limited as herein indicated, will be issued.

The Commission is of the further opinion that oral argument on the appeals, which was requested by Sorensen and P. and D., is unnecessary.

IN THE MATTER OF

CUSTOM UPHOLSTERING & CARPET CO., INC., ET AL.

Docket 6111. Complaint, July 27, 1953—Decision, Jan. 30, 1954

Charge: Advertising falsely as to prices and free goods or service; in connection with the business of selling upholstery materials and upholstering furniture.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Mr. Frank A. Kaufman and *Frank & Oppenheimer*, of Baltimore, Md., for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the attached initial decision of the hearing examiner shall, on January 30, 1954, become the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 27th day of July 1953, issued and subsequently served its complaint in this proceeding upon the respondent Custom Upholstering & Carpet Company, Inc., a corporation, and respondents Charles D. Weisberg, Melvin Weisberg, and Seymour S. Weisberg, individually, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which evidence in support of and in opposition to the allegations of said complaint was introduced before the above-named hearing examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, the answer thereto, testimony and other evidence, and proposed findings of fact and conclusion presented by counsel for the respondents, counsel in support of the complaint not submitting proposed findings of fact or conclusion.

The respondents are engaged in the business of reupholstering furniture with their main office at 4103 Reisterstown Road, Baltimore, Maryland, and branch offices in Washington, D. C., and Philadelphia, Pennsylvania. They have used three types of special advertising. In the first type they offer big savings, "as much as $100," on reupholstery and slipcover work; in the second type they offer to reupholster a third chair free in connection with the reupholstering of a three-piece living room suite; in the third type they offer for $7.50 a chair valued up to $149 if the customer has a two-piece suite reupholstered at the regular price.

Since the imposition of price controls in 1951 by the U. S. Government, the respondents have maintained regular, uniform prices for products and services and approximately two-thirds of their business has been conducted at these regular prices. The balance of their business has been conducted pursuant to their special advertising offers and the evidence establishes clearly that during the periods when such advertising was effective sales were made and work performed strictly in accordance with the terms of the special offers. Numerous invoices of actual sales were presented in evidence which clearly establish that fact.

The advertising relating to "free" goods and services was discontinued in the latter part of 1952. However, respondents stated, through their counsel, that it was their expectation in the future to make use of the word "free" and other similar words strictly in accordance with the decision of the Commission in the matter of Walter J. Black, Inc., Docket No. 5571, which use would be in conformity with the new trade practice rule on use of the word "free" as adopted by the Commission on December 3, 1953. Respondents' past use of the word also was in conformity with this rule.

The reliable, probative and substantial evidence does not establish that the respondents have violated any of the provisions of the Federal Trade Commission Act and the complaint must therefore be dismissed.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed as to all respondents.

IN THE MATTER OF

HEARN DEPARTMENT STORES, INC.

Docket 3453. Complaint, June 8, 1938—Order, Feb. 1, 1954

Charge: Advertising falsely and misbranding as to nature and composition of product; in connection with the sale of fabrics, garments, etc.

Before *Mr. Edward E. Reardon*, hearing examiner.

Mr. George W. Williams and *Mr. R. P. Bellinger* for the Commission.

Mr. Jay Leo Rothschild, of New York City, for respondent.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter coming on to be heard by the Commission upon a motion, filed by counsel in support of the complaint, requesting that the complaint herein be dismissed without prejudice, which motion was unopposed by the respondent; and

It appearing from said motion and from the record that the complaint was issued in June 1938 and was based upon practices alleged to have been engaged in prior to that time; that the case was placed upon the Commission's suspense calendar on December 14, 1944, pending the final disposition of Docket No. 4934, Celanese Corporation of America, and that the Celanese case was finally disposed of by the Commission on August 2, 1953; and

The Commission being of the opinion that because of the lapse of time since the complaint was issued there is now insufficient public interest in the subject matter to warrant a continuance of the proceeding at this time:

It is ordered that the complaint herein be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to take such further action against the respondent at any time in the future as may be warranted by the then existing circumstances.

IN THE MATTER OF

ASSOCIATED GREETING CARD DISTRIBUTORS OF AMERICA ET AL.

Docket 5983. Complaint, May 8, 1952—Order, etc., and opinion, Feb. 3, 1954

Charge: Conspiring with respect to prices, terms and conditions of sale of greeting cards, gift-tying ribbons and gift wrapping paper.

Before *Mr. J. Earl Cox*, hearing examiner.
Mr. Floyd O. Collins for the Commission.
Dunning, Nellis & Lundin, of Washington, D. C., for respondents.

ORDER DISPOSING OF APPEALS FROM INITIAL DECISION OF HEARING EXAMINER, AND DECISION OF THE COMMISSION DISMISSING COMPLAINT

This matter came before the Commission upon cross-appeals of counsel for respondents and counsel supporting the complaint from an initial decision of the hearing examiner dismissing all of the allegations of the complaint except those relating to respondents' alleged use of their combined purchasing power to secure discounts and advertising allowances.

For the reasons stated in the written opinion of the Commission which is issued herewith, the Commission is of the opinion that the appeal of counsel supporting the complaint should be denied and that respondents' appeal should be granted and the complaint herein dismissed.

The Commission has considered all of the exceptions of counsel and is of the opinion that the rulings of the hearing examiner are free of prejudicial error. In reaching its decision, Commission's Exhibit 126 for identification, which contains the opinion of the Secretary of the respondent Association that all of the large distributors in the field belong to the Association, was fully considered.

It is ordered, therefore, that respondents' appeal from the initial decision is hereby granted; that the appeal of counsel supporting the complaint is hereby denied; and that the allegations of the complaint are hereby dismissed.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the opinion of the Commission:

This case is before us upon cross appeals of counsel for respondents and counsel supporting the complaint from an initial decision of the hearing examiner dismissing all but one phase of the case.

Twenty-seven wholesale distributors of greeting cards and accessories throughout the United States, all members of the Associated Greeting Card Distributors of America, are charged with hindering and suppressing competition in violation of Section 5 of the Federal Trade Commission Act. Also named as respondents are the Association's Secretary-Treasurer, members of its merchandise committee, and Charmcraft Publishers, Inc., a corporation owned by members of the Association through which they buy certain of their greeting cards and related products.[1] This line of merchandise, which is especially designed and produced for respondents by a variety of manufacturers, is designated "Charmcraft" and is handled by Association members exclusively.

Respondent Association members compete with wholesalers who are not members of the Association and with manufacturers who sell directly to the retail trade. In some instances, members compete with each other in the buying and selling of their products. In an industry which does a total volume of approximately 250 million annually, respondents, whose total annual sales are something like $3,000,000, are not, as the Examiner found, in either a dominant or a monopolistic position.[2]

The case involves six practices alleged in Paragraph Eight of the Complaint. At the completion of the case-in-chief of counsel supporting the complaint, the hearing examiner ruled [3] that a *prima facie* case had been made out on only one phase of the case; namely that respondents had obtained favorable prices on Charmcraft lines and were awarded discounts and advertising allowances based on their combined purchasing power. The examiner dismissed the remaining charges in the complaint, including the general allegation in the initial paragraph of Paragraph Eight to the effect that respondents had conspired to suppress competition.

An examination of the record shows that his ruling dismissing all of the other allegations of the complaint was correct.[4]

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[1] One Association member testified that Charmcraft cards accounted for 12% of his total requirements; another testified that about 15% of his needs were supplied by Charmcraft.

[2] There are no figures in the record, however, indicating total annual sales by wholesalers, and there are no figures showing the number of wholesalers of greeting cards in the United States.

[3] The examiner's failure to issue an initial decision following this ruling as requested by counsel in support of the complaint is subject to an exception by Commission's counsel. However, we fail to see that anyone has been prejudiced by the ruling.

[4] The complaint alleges that respondents have falsely represented that they are publishers of Charmcraft cards. Counsel supporting the complaint was able to show that respondents' salesmen had been furnished pictures of press rooms and printing equipment not owned by respondents. The examiner disregarded this evidence because there was no showing that such pictures were ever used. In any event, however, while the use of such pictures might well imply that respondents own their own printing facilities, it does not establish that they are publishers as that term is used and understood in the greeting card trade.

After completion of respondents' case, the examiner filed his initial decision containing the same ruling in substance and an order which prohibited respondent from exerting the influence of their combined purchasing power to obtain any price discount or other preferential treatment not allowed, accorded or made available by such manufacturer or manufacturers to competitors of respondent or any of them. The examiner's order also prohibited respondents from misrepresenting the volume of purchasing power [5] and from receiving any discount or other preferential treatment as a result of the use of such misrepresentation or combined purchasing power.

While the complaint charges respondents with misrepresenting themselves as publishers and with engaging in certain other unlawful practices, the crux of the case against respondents is that, by pooling their combined purchasing power to obtain favorable prices and terms on greeting cards, tying ribbons and wrapping paper, they have engaged in unfair methods of competition in violation of Section 5 of the Act.

We may assume that collusive activity by buyers to coerce a seller or sellers, through boycott, threat of boycott, intimidation, or like means, is unreasonable and therefore unlawful. See *Eastern States Lumber Association* v. *United States*, 234 U. S. 600 (1914); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941); *United States* v. *Southern California Grocers' Association*, 7 F. 2d 944 (S. D. Calif. 1925); *Arkansas Wholesale Grocers' Association et al.* v. *F. T. C.*, 18 F. 2d 866 (C. A. 8, 1927) (*cert. den.* 275 U. S. 533); *Southern Hardware Jobbers' Association et al.* v. *F. T. C.*, 290 Fed. 773 (C. A. 5, 1923); *Wholesale Grocers' Association* v. *F. T. C.*, 277 Fed. 657 (C. A. 5, 1922).

The record in this case, however, contains none of these elements of illegality. There is no evidence, moreover, showing injury to competing wholesalers or to the manufacturing segment. Likewise, there is no evidence that retailers have been adversely affected.

The facts indicate nothing more than a relatively simple practice of joint purchasing by small business wholesalers in an industry marked by the predominant use of other distribution methods. These small concerns have purchased Charmcraft greeting cards and accessories as a result of open bargaining, and such purchases have been made from numerous manufacturers. Furthermore, individual association

[5] We find no allegation in the complaint affording any basis for this part of the order except the reference to the use of "pretense of cooperative purchasing" in Paragraph Eight (B). The examiner found, however, and we think properly so, that "The record does not establish * * * that * * * '*pretense* of cooperative purchasing' * * * (was) used by respondents * * * ". We conclude, therefore, that there is no basis for a provision in the order prohibiting misrepresentations of the volume of purchasing power.

members have continued to buy from the regular stock of manufacturers, including many that have never produced Charmcraft merchandise.

In brief, this appears to be an instance in which a few small concerns have joined together as buyers in a non-collusive effort to wage competition, not to restrict it.[6]

Quite unlike the present case was *United States* v. *New York Great A. & P. Tea Co.*, 173 F. 2d 79 (C. A. 7, 1949), (affirming 67 F. Supp. 626), in which it was the use of monopoly power to obtain preferences in price and other terms that brought the grocery chain's buying practices within the purview of the Sherman Act. See also *United States* v. *Crescent Amusement Company et al.*, 323 U. S. 173 (1944);[7] *Schine Chain Theatres, Inc., et al.* v. *United States*, 334 U. S. 110 (1948); *United States* v. *Griffith*, 334 U. S. 100 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948), which involved the use of mass buying power to obtain first runs and other preferences in the motion picture industry.

At the hearing, evidence was adduced in an attempt to show that certain of the discounts and allowances received by respondents were justified by savings in cost. However, the hearing examiner found that these discounts and allowances were not justified by savings in view of the fact that, while they were based upon the total purchases of all members of the association, there was no single billing or delivery point. Assuming these facts as found by the examiner to be correct, we are unable to agree that it follows that Section 5 of the Federal Trade Commission Act has been violated. This is not a case brought under Section 2 (f) of the Clayton Act. If there is reason to believe that respondents have knowingly induced or received the granting of a discriminatory price in violation of the Clayton Act, then such a violation should be pleaded and proved. Suffice it to say that the evidence does not persuade us that Section 5 of the Federal Trade Commission Act has been violated.

It should be noted that the case involves no issue as to intermediaries or of brokerage, or discounts in lieu thereof, under Section 2 (c) of the Clayton Act, as amended.

The complaint should be dismissed.

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[6] The Commission's order in the *Southern Jobbers' Hardware* case, *supra*, which involved a conspiracy among the members of a hardware jobbers association to dominate the wholesale and jobbing trade, was issued to protect an association of retail dealers who, like the respondents in this case, were organized for the purpose of obtaining their supplies from manufacturers to effect savings.

[7] The Supreme Court in the *Crescent Amusement* case appears to have had in mind the kind of situation before us here and intimates that it would not consider it unlawful. "It will not do to analogize this to a case where purchasing power is pooled so that the buyers may obtain more favorable terms. The plan here was to crush competition and to build a support for the exhibitors." 323 U. S. at page 183.

IN THE MATTER OF

MELVIN MARCUS, DOING BUSINESS AS TELERON COMPANY, AND CECIL C. HOGE ET AL., DOING BUSINESS AS HUBER HOGE AND SONS

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6083. Complaint, Feb. 19, 1953—Decision, Feb. 4, 1954

Where an individual, and an advertising agency and mail order promotion house, engaged, under an agreement entered into between them, in the competitive interstate sale and distribution of a television accessory originally designated as an "Interference Absorber" and later as a "TV Wave Trap" or "Teleron TV Wave Trap"; in advertising their said product in newspapers and other periodicals—

(a) Represented that the same was a new invention or development, notwithstanding the fact that high pass filters, the technical name of the device, had been in use since 1946 and was standard equipment on some TV sets;

(b) Represented that the use of said product would immediately and permanently eliminate all forms of TV interference and enable owners of TV sets to get picture-clear reception at all times;

The facts being that while it would block out certain types of interference, there were a number of forms that it would not eliminate and some that it would only partially eliminate; and since they could not determine the forms of interference that might be present in the case of any owner, they could not truthfully claim that the use of their product would enable any owner to get picture-clear reception at any time; and

(c) Represented that the regular price of their product was $5; notwithstanding the fact that the price thereof was $3 and not $5:

Held, That such acts and practices constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. Earl J. Kolb,* hearing examiner.

Mr. W. J. Tompkins for the Commission.

Mr. Joseph A. Mitschel, of Ridgewood, Queens, N. Y., for Melvin Marcus.

Mr. George Landesman, Mr. James R. Withrow, Jr., Mr. Thomas J. McFadden and *Donovan, Leisure, Newton & Irvine,* of New York City, for Huber Hoge and Sons.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 19, 1953, issued and subsequently served its complaint on the respondents named in the cap-

[1] See footnote on following page.

tion hereof, charging them with unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof and the enforcement of the order consented to and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth and in lieu of the answers to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, are to be withdrawn from the record, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease and desist. It is understood that the respondents in consenting to the Commission's entry of said findings as to the facts, conclusion and order to cease and desist specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law, or that such acts and practices, if engaged in, would be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

4. Severally assert:

(a) That the respondent copartners have ceased advertising and selling the product here involved, namely, a television accessory designated "Teleron TV Wave Trap";

(b) That the respondent Melvin Marcus, although still engaged in selling the said product, has eliminated from his advertising matter relating thereto the statements and representations alleged in the complaint herein to be false, deceptive and misleading.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission has reason to believe are unlawful, the conclusion based thereon and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on February 4, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusions, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Melvin Marcus is an individual doing business under the trade name of Teleron Company, with his office and principal place of business located at 21–02 122nd Street, College Point, Long Island, New York. Respondents Cecil C. Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky are individuals and copartners and, prior to October 1, 1952, were engaged in business as an advertising agency and mail order promotion house under the trade name of Huber Hoge and Sons, with their office and principal place of business at 699 Madison Avenue, New York, New York. Effective October 1, 1952, the business known as Huber Hoge and Sons was incorporated under the laws of the State of New York as Huber Hoge & Sons, Inc., with respondents Cecil C. Hoge, Sidney C. Hoge and John Hoge as directors and president, vice president and secretary, respectively.

PAR. 2. In the year 1950 respondent Melvin Marcus began advertising and selling a television accessory originally designated as an Interference Absorber and later denominated as a TV Wave Trap or Teleron TV Wave Trap. In February 1952 respondent Melvin Marcus entered into an agreement with respondents Cecil C. Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky, doing business as Huber Hoge and Sons, whereby he agreed to give the latter the exclusive right to advertise the aforesaid product. Respondent Melvin Marcus further agreed to purchase from the respondent copartners all of the orders they received for the product at a price of $1.75 per order, later reduced to $1.65 per order. Beginning in February, 1952, the respondents engaged in the sale and distribution of the said TV accessory under the aforementioned agreement.

PAR. 3. At all times mentioned herein, respondents have been in substantial competition with other firms and individuals and with corporations in the sale and distribution of similar television accessories in commerce.

PAR. 4. In the course and conduct of their respective businesses respondents caused their said product, when sold, to be transported from the State of New York to purchasers thereof located in other states of the United States and in the District of Columbia. Respondents at all times mentioned herein have maintained a substantial course of trade in their said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their respective businesses, as aforesaid, and for the purpose of inducing the purchase of their TV accessory, respondents have made numerous statements and representations concerning their said product by means of advertisements caused to be published in newspapers and other periodicals having a large circulation outside the State of New York. Among and typical of such statements and representations, but not all inclusive thereof, are the following:

STOP TV INTERFERENCE AT ONCE

STOP IT FOR GOOD

2 WAYS TO STOP TV INTERFERENCE FOR GOOD

The only way to permanently remove your interference is to block it out, before it reaches your set, in exactly the same way sunlight glare is blocked out by sunglasses before it reaches your eyes!

Either you can go out and purchase a custom-made electronic interference absorber and have it installed in your set by your repairman. This will stop your TV interference. It will cost you anywhere from $30 to $40.

Or you can do what thousands of other TV owners did—you can fix your set yourself in just 45 seconds—simply by clipping onto the back of your set a newly invented bypass filter called the Teleron Wave Trap. This new miracle of modern science, automatically blocks out interference waves before they can reach your set, and is guaranteed to stop TV interference once and for all.

WHICH OF THESE TV HEADACHES DO YOU WANT TO STOP FOR GOOD—IN JUST 5 MINUTES?

(Here follow six picturizations of TV interferences designated as Streaks, Distortion, Wavy Lines, Borer Effect, Snow and TV Static.)

PICTURE-CLEAR RECEPTION 365 DAYS A YEAR!
ORDER TODAY AND SAVE $2.00

If you order your TELERON WAVE TRAP today, you do not pay the $5 that 350,000 other TV owners paid. Due to mass demand and mass production for the TELERON WAVE TRAP, this amazing invention is now yours for only $2.98 with this amazing no-risk guarantee.

PAR. 6. By and through the use of the foregoing statements and representations, and others of similar import but not specifically set out herein, respondents have represented, either directly or by implication, that their product, technically known as a high pass filter, is a new invention or development; that it will immediately and permanently eliminate all forms of TV interference; that it will enable owners of TV sets to get picture-clear reception at all times; and that the regular price of their product has been $5.00.

PAR. 7. The aforesaid statements, representations and implications, as set forth in Paragraph Five hereof, are false, misleading and deceptive. In truth and in fact, respondents' product is not a new invention or development. High pass filters have been in use since the year 1946 and are standard equipment on some TV sets. There are a number of forms of TV interference that will not be eliminated by respondents' product and some forms that will be only partially eliminated. It will, however, block out certain types of interference. Respondents cannot determine the forms of interference that may be present in the case of any television owner and consequently cannot truthfully claim that the use of their product will enable any TV owner to get picture-clear reception at any time. The regular selling price of respondents' product has been $3.00 and not $5.00.

PAR. 8. The use by respondents of the foregoing false, misleading and deceptive statements and representations had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and to induce the purchasing public to purchase substantial quantities of respondents' product as a result of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, were all to the prejudice and injury of the public and of respondents' competitors and constituted 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 TO CEASE AND DESIST

It is ordered, That the respondent Melvin Marcus, doing business as Teleron Company, or under any other name, and respondents Cecil C. Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky, individually and as copartners doing business as Huber Hoge and Sons, or under any other name, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their TV accessory designated as Interference Absorber, TV Wave Trap or Teleron TV Wave Trap, or designated by any other name, or any other product of substantially similar design, do forthwith cease and desist from representing directly or by implication:

1. That the said product is a new invention or development;
2. That the use of said product will eliminate or reduce interference with television reception irrespective of the form of interference;

3. That the use of said product will result in picture-clear television reception, irrespective of circumstances;

4. That any price is, or was, the customary or usual price for said product which is in excess of the price at which it is, or was, customarily sold by respondents in the usual course of business.

It is further ordered, That the 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 this order.

(Sgd.) Melvin Marcus,
MELVIN MARCUS, doing business as Teleron Company.

Dated: Nov. 10, 1953.

(Sgd.) Cecil C. Hoge,
CECIL C. HOGE.

Dated: Oct. 20, 1953.

(Sgd.) John Hoge,
JOHN HOGE.

Dated: Oct. 21, 1953.

(Sgd.) Sidney C. Hoge,
SIDNEY C. HOGE.

Dated: Oct. 23, 1953.

(Sgd.) Barbara Obolensky,
BARBARA OBOLENSKY,
Individually and as copartners doing business as Huber Hoge and Sons.

Dated Oct. 23, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on the 4th day of February, 1954.

3. That the use of said product will result in picture-clear television reception, irrespective of circumstances;

4. That any price is, or was, the customary or usual price for said product which is in excess of the price at which it is, or was, customarily sold by respondents in the usual course of business.

It is further ordered, That the 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 this order.

(Sgd.) Melvin Marcus,
MELVIN MARCUS, doing business as Teleron Company.

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JOHN HOGE.

Dated: Oct. 21, 1953.

(Sgd.) Sidney C. Hoge,
SIDNEY C. HOGE.

Dated: Oct. 23, 1953.

(Sgd.) Barbara Obolensky,
BARBARA OBOLENSKY,
Individually and as co-partners doing business as Huber Hoge and Sons.

Dated Oct. 23, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on the 4th day of February, 1954.