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

By the Commission, Commissioner Elman dissenting.

IN THE MATTER OF

MARY CARTER PAINT COMPANY ET AL.

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

Docket 8290. Complaint, Feb. 15, 1961—Decision, June 28, 1962

Order requiring manufacturers of paint and related products, with principal place of business in Tampa, Fla., to cease representing falsely in advertisements in newspapers and periodicals and by radio and television—by such statements as "Buy only Half the Paint You Need", "Every Second Can Free of Extra Cost", etc.—that the advertised price was their usual retail price for a can of paint and was a factory price, and that if one can was purchased at that price, a second can would be given "free" when, actually, the advertised price was the regular retail price for two cans.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mary Carter Paint Company, Inc., a corporation, and John C. Miller and I. G. Davis, individually and as officers of said corporation, and Robert Van Worp, Jr., individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Mary Carter Paint Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Gunn Highway at Henderson Road, Tampa, Florida. Respondent corporation also maintains offices in New York, said address being 666 Fifth Avenue, New York, N.Y.

John C. Miller and I. G. Davis are officers of said corporation. They presently formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.

Robert Van Worp, Jr., was formerly an officer of said corporate respondent, at which time he cooperated in formulating, directing and controlling the policies of the said corporate respondent in connection with the acts and practices set forth herein. His address is the same as that of the corporate respondent.

PAR. 2. Corporate respondent Mary Carter Paint Company, Inc., and John C. Miller and I. G. Davis, officers of said corporation, are engaged in the business of manufacturing, selling and distributing paint and related products to the public, under the label or trade name of "Mary Carter", through various retail outlets and franchise dealers located in the various States of the United States.

PAR. 3. In the course and conduct of their business, respondents cause, and have caused, their paint products to be transferred from their factories in Florida, New Jersey and Texas to Mary Carter paint stores and franchise dealers located in various other States of the United States, where said products are sold at retail. Said respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in said paint products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents advertise, and have caused to be advertised, their paints in various newspapers and periodicals of general circulation, and by commercial announcements over the radio and television across state lines. Among and typical, but not all inclusive, of the statements contained in such advertisements are the following:

Buy only Half the Paint You Need

Every Second Can Free of Extra Cost

Let us show you how to save ONE HALF on your paint costs

Buy 1 and get 1 Free

I am satisfied with pennies per gallon! . . . . You buy only half the paint you need! . . . . The rest is free of extra cost

These Mary Carter Paint Factories will be making free paint half the coming year.

Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy

On all paint every Second can FREE, gallon or quart

No limit. . . .

Buy a gallon—get a gallon

Buy a quart—get a quart

How is the FREE gallon possible?

I can manufacture high quality paint at low cost because of operational economies and because I'M satisfied with a modest profit! Middleman eliminated by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost.

* * * * * * *

WHY NOT JUST CHARGE HALF PRICE? My paints are quality priced because they are quality paints, and I refuse to "second rate" them with low unrealistic price tags. I'll never classify Mary Carter Paints with cheap imitations being offered, nor will I ever downgrade my products with price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost!

ACRYLIC ROL-LATEX $2.25 Quart $6.98 Gallon Every 2nd CAN FREE OF EXTRA COST.

LIQUID GLASS OUTSIDE OIL PAINT $3.00 Quart $8.98 Gallon EVERY 2nd CAN FREE OF EXTRA COST.

PAR. 5. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and do represent, directly or by implication, that the usual and customary retail price of each can of Mary Carter Paint is the price designated in the advertisement; that this advertised price is a factory price; and that if one can of Mary Carter Paint is purchased at the advertised price, a second can will be given "free", that is, as a gift or gratuity without cost to the retail purchaser.

PAR. 6. The aforesaid advertisements referred to in paragraph 4 are false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisements but was, and is now, substantially less than such price. The advertised prices were not, and are not now, the prices charged by the factory for said paint but were, and are now, substantially in excess thereof. The second can of paint was not, and is not now, "free", that is, was not, and is not now, given without cost to the retail purchaser since the purchaser paid the advertised price, which was, and is now, the usual and regular retail selling price for two cans of Mary Carter paint.

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

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents

from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson for the Commission.

Sullivan & Cromwell, by *Mr. David W. Peck*, *Mr. Richard Sexton*, of New York, N.Y., and *Mr. Joseph P. Tumulty, Jr.*, of Washington, D.C., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

The Federal Trade Commission has charged the respondents in this proceeding with engaging in false and deceptive practices arising mainly from the use of the word "free" in the advertising of paint products offered for sale. The complaint was issued February 15, 1961, and alleges that these practices are in violation of the Federal Trade Commission Act because they constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of that Act. Although the corporate respondent is named in the complaint as Mary Carter Paint Company, Inc., its correct name is Mary Carter Paint Co. The case has been litigated in this form and, for the purposes of this proceeding, it may be regarded as being brought against Mary Carter Paint Co. and the individuals named. All the respondents appeared herein and filed an answer to which reference will be made below.

The advertising to which reference is made in the complaint is conceded to be that of the corporate respondent (to which reference may be made from time to time as Mary Carter and which, for the purpose of this proceeding, may be deemed to include its predecessor or predecessors in the paint business). The complaint charges that this advertising is false and deceptive and Mary Carter says it is not.

Typical are the following quotations from advertisements which appear repeatedly and consistently in newspapers and on the radio or television:

Buy only Half the Paint You Need

Every Second Can Free of Extra Cost

Let us show you how to save
ONE HALF on your paint costs

Buy 1 and get 1 Free
I am satisfied with pennies per gallon! . . . .
You buy only half the paint you need! . . . .
The rest is free of extra cost

These Mary Carter Paint Factories will be making free paint half the coming year.

Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy

On all paint every Second can FREE, gallon or quart
No limit. . . .

Buy a gallon—get a gallon
Buy a quart—get a quart

How is the FREE gallon possible?

I can manufacture high quality paint at low cost because of operational economies and because I'M satisfied with a modest profit! Middleman eliminated by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost.

* * * * * * *

WHY NOT JUST CHARGE HALF PRICE?
My paints are quality priced because they are quality paints, and I refuse to "second rate" them with low unrealistic price tags. I'll never classify Mary Carter Paints with cheap imitations being offered, nor will I ever downgrade my products with price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost!

ACRYLIC ROL-LATEX
$2.25 Quart $6.98 Gallon
Every 2nd CAN FREE OF EXTRA COST.

LIQUID GLASS OUTSIDE OIL PAINT
$3.00 Quart $8.98 Gallon
EVERY 2nd CAN FREE OF EXTRA COST.

It is clear that the attack is mainly on the use of the word "free," but the complaint alleges also that Mary Carter represents that purchasers of its paint acquire it at factory prices when such is not the fact.

Respondents freely concede that the method of advertising, using the word "free," in the manner shown, is Mary Carter's permanent, established policy and that this policy is accountable for its spectacular

growth. Indicative of its growth is the rise of its sales from just over $2,000,000 in 1956 to more than $12,000,000 in 1960. Basically, their position is (a) that there has been built up in the minds of the public by the large national brand paint companies, and the national trade association, the idea that quality of paint is to be judged by price; and (b) that since Mary Carter paint is of a quality comparable to the best paints of the industry, it very properly prices its paint at prices similar to the prices of such other paints and it distinguishes itself from the other manufacturers by passing on to consumers savings which it realizes in the manufacturing and distribution processes by giving to its customers a second can of paint free and without cost with each purchase of a first can. Since, under the theory thus espoused, price has become the standard of value in the paint industry, it contends it has every right to establish its prices at figures equivalent to the prices fixed for what it claims to be comparable paints. It says that if it were to place a lower price on its paints, this, in effect, would make it appear that its paints are not as good as the higher priced paints. However, since it wants to pass on to Mary Carter customers a part of the savings which it achieves, it does so by giving its customers the so-called "free" can of paint. It asserts that this practice, contrary to being against the public interest does in fact benefit the public by providing increased competition in the business and by providing consumers with true quality paint value.

Respondents contend also that, in any event, the individuals who have been charged are not such participants in the practices alleged as to justify their inclusion as respondents in this proceeding. Motions have been made to dismiss as to them. After consideration of all the evidence presented and the facts and nature of this case, it is my conclusion that neither Miller nor Davis ought to be made parties to any remedial action, if any be taken herein. Miller, although formerly an officer, was brought into the company as a result of a series of mergers and his identification with the particular practices which are involved herein is only incidental thereto. Similarly, Davis was brought into the company only late in 1960 and, to the extent that he may be connected with the practices involved herein, it can be said only that he acquired that connection by reason of having become president in December 1960. The company is a large publicly-owned corporation and his mere holding of the executive office does not justify his being charged with responsibility for the ancient practice involved herein. The motions to dismiss as to Miller and Davis will be granted. *Book of the Month Club, Inc., et al.*, 48 F.T.C. 1297, at 1308. However, the motion to dismiss as to Robert Van Worp., Jr., is denied. He and

his father always have been identified intimately with the practices herein under attack. He has been with the venture since its inception. He has been vice president and president, and is now a consultant to the Board of Directors. There is no reason to conclude that if remedial action be necessary, such remedial actions should not be taken against him as an individual in addition to that taken against the corporation.

We are confronted squarely in this proceeding with a policy statement issued by the Federal Trade Commission on December 3, 1953, as follows:

In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word "free," or any other word or words of similar import, in advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:

(1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

(2) When, with respect to any article of merchandise required to be purchased in order to obtain the "free" article or service, the offerer (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof.

(*Note:* The disclosure required by subsection (1) of this rule shall appear in close conjunction with the word "free" (or other word or words of similar import) wherever such word first appears in each advertisement or offer. A disclosure in the form of a footnote, to which reference is made by use of an asterisk or other symbol placed next to the word "free," will not be regarded as compliance.)[1]

The respondents rely most strongly on this statement. They contend that the advertising which is the subject matter of this proceeding is completely sanctioned by it. If what respondents say is so, a hearing examiner has no alternative but to dismiss the complaint.

To say that every *second* can is free of *extra* cost, leaves little doubt that payment must be made for the first can. The same is true of an advertisement saying, "*Buy* 1 and get 1 Free," and possibly for "You

[1] In promulgating this policy decision, the Commission was not like Humpty-Dumpty. It did not take the position that the word "free" had to have a definite unrealistic meaning which it chose to adopt, "neither more nor less." ("When I use a word," Humpty-Dumpty said, "it means just what I choose it to mean—neither more nor less." Ch. 6, *Through the Looking-Glass and What Alice Found There,* Lewis Carroll.)

buy only half the paint you need! . . . . The rest is free of *extra* cost," and so on. (Emphasis mine.) It is only a short step from statements like these to statements like "These Mary Carter Paint Factories will be making free paint half the coming year" or "Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy."

The fact that one can must be purchased and paid for before getting the second can "free" is always set forth somewhere in the advertising. However, even though the statement, as a *grouping of words*, says that payment always must be made for one can before a second can may be obtained without additional payment, the *visual* presentation is not clear. The emphasis is not as I have written above. On the contrary, the word "free" invariably jumps out from the advertisement because it is in larger letters, bolder type or more strategically placed than the words of qualification. In addition to this, some of the advertisements have lead or banner material which presents a puzzling or a definitely misleading approach. About one-fourth of one, in big letters, three lines, says:

Why Give a FREE
Can of PAINT?
Why Not Just Charge HALF PRICE?

The picture which catches the eye here is:

FREE
PAINT
HALF PRICE

Television announcements start off, "Now, take advantage of Mary Carter's famous free paint offer."

A mat for a columnar advertisement is in evidence. It is thirteen inches long. The top 2¼ inches is a box which is at least half covered with the word "FREE," the words below it being "PAINT" and "OFFER," so that the message is:

FREE
PAINT
OFFER

The bottom of this thirteen-inch column is another box, 2½ inches. Again, the dominant word is "FREE," more than three-fourths of an inch high. The legend is:

EVERY 2nd CAN
FREE
of extra cost
MARY CARTER
PAINT FACTORIES

The smallest letters are "of extra cost."

One card, although offered as a separate exhibit, is really one of a group of three television display cards. The No. 1 card contains the legend:

EVERY 2nd CAN
of
FREE extra
cost
MARY CARTER PAINT FACTORIES

The No. 2 card presents a square effect with four cans of paint forming a diagonal from lower left corner to upper right corner. In the upper left quadrant are the words "FIVE MILLION FREE GALLONS" and in the lower right quadrant the words "MARY CARTER PAINT FACTORIES." The No. 3 card just shows two cans of paint. The effect presented is the emphasis on "FREE" in the first card with the words "of extra cost" played down and this is followed with a card which howls "FIVE MILLION FREE GALLONS," and is wholly unqualified.

Another exhibit is a three-column advertisement about fifteen inches in length. The first two inches are "Why give a FREE can of PAINT?" After a one-half inch space, the next line is "Why Not Just Charge" and the next line in large capital letters is "HALF PRICE?" It is not until 5¼ inches down on the page, after an intervening text of ten lines in much smaller type and containing long narrative statements, that the disclosure is made that a sale is tied into the availability of a second can of paint, "It would be easy to cut the price in half for a single gallon, instead of giving a second can free with every one I sell, . . ." Squarely in the middle of this advertisement are two lines in bold, black, large print:

MY UNIQUE OPERATIONAL ECONOMIES
MAKE MY FREE PAINT OFFER POSSIBLE!

Qualification, if any there be, of the words "FREE" in this advertisement, is wholly lost to any but the keen and thorough reader.

I am not sure that I read CX 51 in the same manner as does Commission counsel. It shows three paint factories above which are the words, "THESE MARY CARTER PAINT FACTORIES" and below which, in big, bold, black, block letters are the words, "WILL BE MAKING FREE PAINT HALF THE COMING YEAR!" The legend surely presents a picture of a large company making paint for free distribution. This is followed by the smaller print, "Hard to believe? Well, it's true! For six months of the coming year, every one of my three paint factories will be working full time turning

out FREE PAINT for you! That's because, with every can of paint I sell in the next 12 months, I'll be giving a second can away free of extra cost." Thus far, the only change from the banner head is that now it appears that every time Mary Carter sells a can of paint it will set aside one can for free distribution. Not until the last sentence in the next smaller print paragraph does it come out that the free can is reserved only for the *buyer* of the first can. The rest of the advertisement is the typical Mary Carter "Every 2nd Can Free" theme but there are two large boxes just below its center. The left box, above 12 lines of fine print, has the two line black print question, "HOW IS THE FREE GALLON POSSIBLE?" and a similar right side box, the legend "WHY NOT JUST CHARGE HALF PRICE?"

Mary Carter's advertising copy writers have been caught up in the rhythm of this word "free" to the point where, not content with using the name Mary Carter for the company name, they have represented her as a real person who is sometimes the company and sometimes a part of it. She engages in disputes with the company's Board of Directors, always prevailing upon them not to abandon the distribution of the so-called "free" can. Thus, one of the exhibits is a copy of an advertisement containing a picture of a lady, presumably Mary Carter, in the upper lefthand corner and, to the right and partially under this picture, a picture of five men, presumably the Board of Directors, sitting around a board table. She is quoted as telling the Board of Directors "Positively no" in response to their annually recurring spring idea of terminating the "second can free policy . . . [to] . . . cut up a bigger profit for ourselves!" Her response to that is said to be invariably "No" and she assures the consuming public that, as long as she is able to outtalk the Board members ["(and being a woman gives me an edge in that department!)"], the buyer always will be able to get the second can free in a Mary Carter store. The truth is, there is no Mary Carter in the company and there never was!

In these days of visual, video and audio impact, words in the abstract do not constitute the offer. It cannot be said that "all of the conditions . . . are . . . clearly and conspicuously explained or set forth at the *outset* so as to leave no reasonable probability that the terms of the offer will be misunderstood." The criterion is in the first half of the policy statement.

The second half of the policy statement cannot absolve a vendor if he contravenes the first half. Since it has been injected into this proceeding some discussion may be appropriate. Under the second half, questions of fact are created as to whether the ordinary and usual price has been increased, whether quality has been reduced or

whether quantity or size has been reduced. These questions of fact do not take care of all situations which may arise in connection with a "free" offer. The reason for this stems from the manner in which the policy statement came to be evolved.

The policy statement was evolved in, and in connection with, the disposition of the Commission's complaint against *Walter J. Black, Inc.* (The Classics Club and Detective Book Club), F.T.C. Docket 5571, decided September 11, 1953, 50 F.T.C. 225. Unfortunately, *Black*, although an adversary proceeding, was decided on the basis of a stipulation of facts entered into between Black's attorney and counsel there supporting the complaint. No hearing was held and no witnesses were submitted by either of the parties. Black had offered, in connection with the sale of a series of books known as The Classics, two books characterized as "free"—a copy of the *Iliad* of Homer and a copy of the *Odyssey* of Homer. It was clear from the offer that the books were to be given free only if the recipient became a trial member of "The Classics Club." In order to become a trial member, it appeared to be necessary to purchase a first book. Black had also another book club called the "Detective Book Club." The sales device for that club was to give "free" to new members a three-volume book of detective fiction as a "Charter Membership Gift." The Classics Club did not obligate the trial member to take any particular number of books after buying the first one, but the Detective Book Club at first obligated the member to "take as few as four during" the twelve months following his becoming a member. The Detective Book Club offer was varied later in that it seemed to require only purchase of the current triple volume as distinguished from the prior obligation to make four purchases. The stipulation "included a statement to the effect that [Black] made no effort to collect for the so-called 'free' books or to obtain the return of same when the subscriber failed to carry out the other provisions of his contract." These were the matters before the Commission when it decided *Black*. It is difficult, therefore, to attempt to apply the facts of this Mary Carter case to the second half of the policy statement thus enunciated by the Commission.[2]

As pointed out by the respondents here, the policy statement does not take into consideration the possibility of a newcomer to a market giving anything as a free gift since there is no way (set forth in the statement) to determine whether the ordinary and usual price of "such" article was increased or whether its quality was reduced or

[2] Can anyone suggest that the buyer of a can of Mary Carter paint may return it, get his money back and still keep the "free" can?

whether its quantity or size was reduced. Respondents seek to supply this deficiency by referring to the Guides against Deceptive Pricing adopted October 2, 1958 ("Part V. TWO FOR ONE SALES"). There the Commission recognizes that a vendor may not previously have sold a particular article or articles and in such case it provides that the propriety of the advertised price shall be "determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made." I am in agreement with respondents when they say that a newcomer in any business should not be deprived of any benefit of the *Black* rule and that he should be permitted to make a free offer of merchandise identical with his new product in connection with the sale of that product. (In this I would not be inclined to rely on *Schaintuck*, 23 F.T.C. 151, because that too was decided on the basis of a stipulation.)

Of course, this could not be done within the rule of the policy statement on "free" if there is no compliance with its first half. But, let us assume a case of compliance with that first half. Then I would rule that the very argument on which respondents rely so strongly (that Mary Carter's offer always has been the same, that it will not be withdrawn), is fatal to their defense of this proceeding. *Black* had no cause to decide this situation and *Book of the Month*, 48 F.T.C. 1297, 50 F.T.C. 778, is distinguishable. *Black* decided only that the offer was valid for new members. I am sure that Black would not have permitted John Doe to become a member, get his free books, quit, join again and get more free books, quit and join *ad infinitum*. Yet, this is what Mary Carter permits in effect. While *Book of the Month* was a continuing offer in that a "book dividend" was given for every two books purchased, the decision as to what books were to become available for book dividends always remained with the Club and subscribers were limited to select from them. In our case, the published offer implies that double quantity of any particular paint always will be given for the list price per single can. We are told, however, that a buyer may elect to take *any Mary Carter* product, *priced* up to the price of the purchased can, as his free article. Articles manufactured by others and purchased for sale by Mary Carter are specifically excluded. This leads to two conclusions—the first that the list prices of Mary Carter's *own* products are increased to a point to make possible the apparently free gift tied into any purchase, and the second that the list price, the price for which any particular can is sold and required to be purchased, is not the true price per can but the price for two cans. Thus, there never is a free can of paint. It is always two cans for the price specified. Even if the offer had

been permissible under the "newcomer" rule, by lapse of time the *practice* would have lost its character of providing a *free* article incidental to a purchase and would have merged into a "two for $X" pricing arrangement, not a "two for the price of one" arrangement. (Conceivably there could be a question of fact as to what lapse of time is necessary to result in such a merger but the question cannot survive all the years during which Mary Carter has engaged in this practice.)

To the extent indicated thus far in this decision and, subject to my dismissal of the complaint as against respondents Miller and Davis, the complaint will be sustained. The conditions of the "free" offer are not clearly and conspicuously explained at the outset. The unit of sale is two cans.

This does not, however, dispose of all the issues. It still remains to be decided whether Mary Carter advertised the price of the paint as "a factory price" and whether, if it did so advertise, there was a false representation. While the advertising refers frequently to economies effected because of the mass production, great volume, modern methods of manufacture, elimination of the middleman (which I interpret as meaning the wholesaler or distributor), lessened or no freight costs, the sale in its own stores or in the stores of franchised dealers, and was subscribed, "Mary Carter Paint Factories," [3] I find nothing in the advertising from which I would conclude, *as a matter of law*, that any representation was made that the paint was being sold at *factory prices*. I do not interpret the words, *factory price*, as meaning anything but the price at which a factory might sell a commodity to a purchaser who comes to its door, there to make his purchase. There is nothing in the advertising suggesting that this is the method of sale. If *factory price* (which is a term used by Commission counsel and not by respondents) has some special meaning, or perhaps a meaning other than the meaning I ascribe to it, it seems to me that such a meaning ought to be brought out by evidence. For this reason, to the extent that the complaint alleges a deceptive practice involving alleged representations of sales at factory prices, it will be dismissed.

Report of Excluded Testimony and Rulings on Respondents' Requests To Find

Frequently, during the course of the proceeding and in the briefs submitted subsequent thereto, respondents have complained that they are sought to be made victims of a campaign against them by the

[3] This was the name of the corporate respondent's predecessor and was not a false characterization.

large national paint manufacturers and the National Paint, Varnish & Lacquer Association. That is irrelevant to the issues in this proceeding. If Mary Carter has indeed been injured by the practices and campaign of which it complains, it has its remedy and this is not the forum in which to pursue it. *Advance Music Corporation* v. *American Tobacco Co.*, 296 N.Y. 79.

The claim is that Mary Carter paint is top quality and equivalent to the paints vended by the large paint manufacturers; therefore, respondents say they have the right to price it at prices equivalent to the prices charged by the manufacturers of equivalent and competitive paints; consequently, any additional can, that is to say, the second can, is in fact free. On the basis of both the position asserted by Commission counsel and my interpretation of the complaint, I ruled that quality is not an issue; if in fact the advertising ascribed to the respondents is false, then the paint vended by them could be of the best quality in the world and it would make no difference. On the basis of that ruling, I excluded all evidence offered for the purpose of proving quality but, in conformance to the Rules of Procedure, I took, for the purpose of reporting, the evidence so offered. That evidence has been transcribed. The exhibits proffered have been preserved. Everything is available for consideration by the Commission. Since all that has been offered is condensed into the requests to find submitted on behalf of the respondents, those proposals and my rulings thereon ought to be sufficient for adequate consideration by the Commission. Also, in ruling on respondents' proposed findings, while I indicate many of them as being "found," I do not deem it necessary to adopt them as my findings hereinafter to be set forth.

Requests 1, 2, 4, 5 and 6 could be found as supported by the evidence.

I could find *Request 3*, but would eliminate the words "none of the individual respondents had or have a controlling stock interest in Mary Carter."

Request 7: I would substitute in the first line for the words "It has, over the years," the words "Respondents contend that, over the years, it has". I would delete the words "of giving 'double value'" and would insert in the third line of the second paragraph of this request the words, "which it claims is," after the word, "price." Also in that paragraph, I would change the last clause to read: "and it, therefore, advertises that it gives the purchaser a 'second can free of extra cost' or 'second can free.'" I would change the last sentence in the last paragraph of this request to read: "The evidence was taken for reporting, however, and had it been received and liti-

gated, if not rebutted by substantial evidence, would have been accepted as demonstrating that Mary Carter paints are as good or better than paints marketed under leading national brand names at comparable single can prices."

Request 8: I would use the word "state" instead of the words "make clear" in the first line. In place of the entire last sentence of this request, I would substitute "Only after analysis and complete reading of the advertising can it be ascertained that the second can of paint is 'free' only in conjunction with, or conditioned upon, the purchase of the first can."

Request 9: I would rewrite this request as follows: "The claimed single can price of Mary Carter paint is the advertised price (typically, $2.25 a quart, $6.98 a gallon). While it is generally the only price at which a single can is offered for sale, it is inherent in the entire transaction that the purchaser is entitled to get, as an incident of the purchase, a second can of Mary Carter paint bearing the same or a lower advertised can price.

"Counsel for the Commission introduced the testimony of one witness (a representative of a Mary Carter competitor), that he was able to persuade a salesman in a Mary Carter store to sell a gallon can of Mary Carter paint at $4.50 with a sales slip showing a sale of two quarts of Mary Carter paint at $2.25 a quart and two quarts free. It is clear from the circumstances of the sale that much persuasion was required to induce the sale in this manner but the Hearing Examiner is unable to say that it was unauthorized and a violation of firm company policy not to sell a can of Mary Carter paint at less than the advertised price in view of the testimony in the Municipal Court of the City of Miami, Dade County, Florida, and the company practice of providing can labels to dealers and retail outlets."

I would strike the entire last paragraph of this request.

Requests 10 and 11 are denied.

All rulings with respect to requests which are adverse thereto are made because the portions not accepted and those rejected are irrelevant, immaterial, not supported by the evidence or argumentative.

Rulings on the Requests Based on the Excluded Evidence

The following rulings are made only in response to the requirement that I report the excluded testimony. *The findings, it should be noted clearly, are not my findings.*

Request 12: I would change the last sentence to read: "His tests (in the absence of evidence litigiously offered in opposition thereto)

showed Mary Carter to be equal to or better than comparable, similarly-priced, top-quality national brand paints."

Request 13: I would eliminate the word "high" in the first paragraph, the word "thorough-going" in subparagraph (a), the word "comprehensive" in the first line of subparagraph (b) and I would change the last portion of subparagraph (b) following its next to the last semicolon to read: "Mary Carter paint, in the absence of evidence litigiously offered in opposition thereto, appeared to be of a high quality comparable to that of the other paints tested in each of the categories and its over-all total numerical score (subject to being litigated), according to the preassigned evaluation scale, was reported as being the best of the four brands." In subparagraph (f), I would eliminate the words "recognized independent." I would reject entirely subparagraph (g).

Requests 14 and 15: I would reject both of these as not being properly the subject of findings but rather the subject of argument.

An important question in this case is whether the order to be entered herein should follow the form of the order proposed by counsel supporting the complaint or whether it should be more in the form suggested by the second *Book of the Month* decision, 50 F.T.C. 778, and 782. After careful consideration of the manner in which the advertisements involved herein have been composed, it is my conclusion that the order should follow that proposed by counsel supporting the complaint, particularly since nothing in that order prevents respondents from availing themselves, in a proper situation, of the benefits to which they may be entitled under the Commission's policy statement of December 3, 1953.

Now, in view of the foregoing and upon the entire record herein, the following are my

FINDINGS OF FACT

1. Mary Carter Paint Co., erroneously named in the complaint as Mary Carter Paint Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Gunn Highway at Henderson Road, Tampa, Florida. It also maintains offices in New York, its address there being 666 Fifth Avenue, New York, New York. A predecessor corporation was Mary Carter Paint Factories.

2. Robert Van Worp, Jr., was formerly its president and during that time, and during all the times that they were in effect, cooperated

in formulating, directing and controlling the acts and practices found herein. At present he is serving as a consultant to its Board of Directors. He maintains a financial interest in the corporation. His business address is that of the corporate respondent. His home address is Oldsmar, Florida.

3. Mary Carter Paint Co. is engaged in the business of manufacturing, selling and distributing paint and related products to the public under the label or trade name of "Mary Carter," through various retail outlets and franchised dealers located in various states of the United States.

4. In the course and conduct of their business, respondents cause, and have caused, their paint products to be shipped from their factories in Florida, New Jersey and Texas to Mary Carter paint stores and franchised dealers located in various other states of the United States, where said products are sold at retail. Said respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said paint products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Respondents advertise, and have caused to be advertised, their paints in various newspapers and periodicals of general circulation, and by commercial announcements over the radio and television across state lines. Among and typical, but not all-inclusive, of the statements contained in such advertisements are the following:

Buy only Half the Paint You Need

Every Second Can Free of Extra Cost

Let us show you how to save ONE HALF on your paint costs

Buy 1 and get 1 Free

I am satisfied with pennies per gallon! . . . You buy only half the paint you need! . . . The rest is free of extra cost

These Mary Carter Paint Factories will be making free paint half the coming year.

Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy.

On all paint every Second can Free, gallon or quart no limit. . . .

Buy a gallon—get a gallon Buy a quart—get a quart

How is the Free gallon possible?

I can manufacture high quality paint at low cost because of operational economies and because I'm satisfied with a modest profit! Middlemen eliminated by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost.

* * * * * * *

WHY NOT JUST CHARGE HALF PRICE? My paints are quality priced because they are quality paints, and I refuse to "second rate" them with low

unrealistic price tags. I'll never classify Mary Carter Paints with cheap imitations being offered, nor will I ever downgrade my products with price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost!

ACRYLIC ROL-LATEX
$2.25 Quart $6.98 Gallon
Every 2nd CAN FREE OF EXTRA COST.
LIQUID GLASS OUTSIDE OIL PAINT
$3.00 Quart $8.98 Gallon
Every 2nd CAN FREE OF EXTRA COST.

6. Through the use of said advertisements, and others similar thereto not specifically set out herein, and by the manner and form in which their contents were presented, respondents have represented, and do represent, directly or by implication, that the usual and customary retail price of each can of Mary Carter paint is the price designated in the advertisement. In conjunction therewith they represent that if one can of Mary Carter paint is purchased at the advertised price, a second can will be given "free," that is, as a gift or gratuity to the retail purchaser.

7. The said advertisements are false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisement but was, and is now, substantially less than such price. The second can of paint was not, and is not now, "free," that is, was not, and is not now, given as a gift or gratuity. The offer is, on the contrary, an offer of two cans of paint for the price advertised as or purporting to be the list price or customary and usual price of one can.

8. In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition in commerce with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has been, and is being, done to competition.

And, from the foregoing, the following is my

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair 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 Mary Carter Paint Co., a corporation, and its officers, and Robert Van Worp, Jr., individually, and 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 paint or any other product, do forthwith cease and desist from representing, directly or by implication:

(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business;

(b) That any article of merchandise is being given free or as a gift, or without cost or charge, when such is not the fact;

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as respects respondents John C. Miller and Irving G. Davis, Jr. (named in the complaint as I. G. Davis), in their individual capacities, but not to the extent that they may be subject to this order as officers or agents of the corporate respondent; and

It is further ordered, That to the extent that the complaint alleges that the respondents have represented that their advertised price is a factory price or that such a representation, if made, is false, such allegations in the complaint are dismissed.

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

The complaint in this matter charges respondents with violating Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision dismissed the complaint as to two of the officers of the corporate respondent in their individual capacities and dismissed one of the allegations of the complaint as to all of the respondents. He held, however, that the other allegations of the

complaint had been sustained by the evidence and included in his initial decision an order to cease and desist. Respondents, having been granted a petition for review, have filed exceptions to the initial decision and the matter is now before us for consideration.

The respondent corporation, Mary Carter Paint Co.,[1] hereinafter referred to as Mary Carter, and a predecessor corporation, Mary Carter Paint Factories, have been engaged in the manufacture, sale and distribution of paint under the trade name "Mary Carter". This product has been sold to the public through the company's own retail outlets and through franchise dealers. It has been Mary Carter's practice and policy for the past ten years to represent in advertising and otherwise that it will give a "free" can of paint with every single can purchased. The following representations are typical of those used by respondents:

Buy only Half the Paint You Need
Every Second Can Free of Extra Cost
Let us show you how to save ONE HALF on your paint costs
Buy 1 and get 1 Free
I am satisfied with pennies per gallon! . . . You buy only half the paint you need! . . . The rest is free of extra cost
These Mary Carter Paint Factories will be making free paint half the coming year.
Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy
How is the FREE gallon possible?
ACRYLIC ROL-LATEX $2.25 Quart $6.98 Gallon Every 2nd CAN FREE OF EXTRA COST.

The complaint alleges, in effect, and the hearing examiner found that respondents' advertising was false, misleading and deceptive in that each of the amounts designated by respondents as the price per single can of Mary Carter paint was, in fact, the usual and regular price of two cans of such paint and not one can as represented, and that the second can of paint, described as "free", was not given as a gift or gratuity without cost to the retail purchaser.[2]

Respondents have taken numerous exceptions to the hearing examiner's findings, conclusions and order, as well as to certain rulings excluding evidence offered by respondents relating to the quality of Mary Carter paints and to competitive factors existing in the national retail paint market. Their principal contention, however, is that the hearing examiner erred in concluding that Mary Carter's advertising

[1] Erroneously named in the complaint as Mary Carter Paint Company, Inc.

[2] The complaint also charged that respondents had falsely represented that the advertised price of its paint was the factory price but this allegation was dismissed by the hearing examiner.

was not proper under the so-called "free rule" enunciated by the Commission in the *Black* decision.[3] The position taken by the Commission in that case is as follows:

> The use of the word "free", or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in "commerce" as that term is defined in the Federal Trade Commission Act, is considered by the Commission to be an unfair or deceptive act or practice under the following circumstances:
>
> (1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or
>
> (2) When with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality or (3) reduces the quantity or size of such article of merchandise.

Respondents take issue first of all with the hearing examiner's ruling that the advertising in question did not comply with the first paragraph of the above statement since the terms and conditions of Mary Carter's offer of "Every second can free" were not clearly stated. It appears in this connection that the complaint does not allege that respondents had failed to make a clear and conspicuous disclosure of the conditions of their offer and no question was raised during the hearings as to the clarity of their advertising in this respect. We agree with respondents, therefore, that the hearing examiner erred in making a finding on this point and relying upon such finding in arriving at his ultimate decision in this matter.

Respondents next take exception to the hearing examiner's holding that Mary Carter's advertising did not comply with the aforementioned statement with respect to the use of the word "free" since the "second can of paint" referred to in the advertising was not a gift or gratuity. We do not thoroughly understand the hearing examiner's reasoning on this point, but it is clear from the initial decision that he did find that the cost of the second can of paint is included in the amount which respondents claim is the price per single can ($6.98 per gallon—$2.25 per quart). He specifically found in this connection that "The second can of paint was not, and is not now, 'free', that is, was not, and is not now, given as a gift or gratuity." Respondents do not seriously dispute this finding and apparently concede, as indeed they must, that the second can of paint is not free of charge to the purchaser. They argue, however, that the *Black* case squarely rejected the "gift or gratuity"

[3] In the Matter of *Walter J. Black, Inc.*, trading as *The Classics Club and Detective Book Club*, 50 F.T.C. 225 (1953).

theory as the test of legitimacy of a "free" offer and that their advertising is in compliance with the position taken by the Commission in that case.

Respondents are wrong in both of these contentions. The *Black* decision does not stand for the proposition that an article of merchandise, the receipt and retention of which is conditioned upon the purchase of another article, may be described as "free" when it is not, in fact, given without charge to the purchaser. And respondents' advertising is not sanctioned by the "rule" evolved in that case.

The Commission, on January 14, 1948, issued the following administrative interpretation with respect to the use of the word "free" to describe merchandise:

> The use of the word "free", or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act.

The *Black* case, decided almost six years later, modified this policy statement or rule.[4] It did not attempt to radically change the meaning of the word "free". In that case, the question before the Commission was not whether an article of merchandise designated as "free" was given without charge to the recipient, or as a gift or gratuity, but whether an article, free of charge, could be designated as "free" when the receipt and retention of such article was conditioned upon the purchase of another article and full and timely disclosure was made of such condition. As stated in that decision, the question before the Commission was:

> May a businessman doing business in interstate commerce be charged with engaging in unfair or deceptive acts or practices in violation of the Federal Trade Commission Act if he uses the word "free" in his advertising to indicate that he is prepared to give something to a purchaser *free of charge* upon the purchase of some other article of merchandise? (Italic supplied.)

In determining whether the article described as "free" by respondent in that case was given without charge, the Commission concluded that the article required to be purchased had an established price and that the price at which it was being offered for sale was not in excess of that established, or "ordinary and usual", price. It then adopted the reasoning employed in the brief filed on behalf of the Commission in the Supreme Court in the matter of *Federal Trade Commission* v.

[4] In the Matter of *Standard Distributors, Inc.*, Docket No. 5580 (1955).

Standard Education Society, 302 U.S. 112 (1937), and quoted several paragraphs from that brief in its opinion. We think that the following paragraph from that brief which appeared in the opinion succinctly states the Commission's position with respect to the use of the word "free" in the factual situation then before it:

> When such an offer of a gift is made, the customer understands from the use of the word "gift" that an article is to be received *without any payment being made for it.* If he is told that it is to be received "free of charge" if another article is purchased, *the word "free" causes him to understand that he is paying nothing for that article and only the usual price for the other. If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge.* (Italic supplied.)

The *Black* case, therefore, modified the earlier interpretation by permitting the use of the word "free" to describe an article of merchandise which was in fact free of charge but which was given to the recipient only upon the purchase of another article or upon the performance of some service inuring directly or indirectly to the benefit of the person making the offer. It did not hold that the word "free" may be used to describe an article which is not, in fact, free of charge or a gift or gratuity.

A necessary corollary to the "rule" in the *Black* case is that a person can offer as "free" an article which may be obtained upon the purchase of another article only if the article required to be purchased has an established market price. This concept is embodied in the Commission's Guides Against Deceptive Prices, adopted October 2, 1958. Guide V, which relates to "two for one sales" states as follows:

> No statement or representation of an offer to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business.
>
> (Note: Where the one responsible for a "two for the price of one" claim has not previously sold the article and/or articles, the propriety of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made.)

Under this Guide, a newcomer to a market selling a product which had not previously been sold in the trade area in which he is doing business would have no basis for claiming that two of such products were being sold for the price of one. However, a newcomer to a market, selling a product for which a usual and customary price has been established in the trade area in which he was doing business would be permitted to sell the product on the basis of "two for the price of one" if he complied with the Guide. It should be emphasized in this connection that the words "usual and customary retail price of

the single article in the trade area, or areas, where the claim is made" which appear in the note to Guide V refer to the price charged by other retailers for the *specific* article offered for sale by the person making the "two for the price of one" claim (see subparagraph (a) of Guide I and subparagraph (a) of Guide III), and not to a similar or comparable article.

In this case, when respondents began to offer Mary Carter paint on the basis of "buy one and get one free", there was no usual and customary price for a gallon or a quart of that particular brand of paint. Respondents contend, however, that usual and customary prices were established for their product because they refused to sell a single can at less than the list price of $6.98 a gallon and $2.25 a quart and because Mary Carter paint was of comparable quality to other brands of paint selling at these prices. With respect to the latter point, the hearing examiner properly refused to consider evidence offered by respondents to show that Mary Carter paint was comparable to any other brand of paint selling at $6.98 a gallon or $2.25 a quart. Such evidence would be completely irrelevant to the issue of whether respondents' paint was usually and customarily sold at those prices.

That respondents refused to sell a single can of Mary Carter paint at less than the list price of $6.98 a gallon or $2.25 a quart is only one factor to be considered in determining whether these amounts were the usual and customary prices of such paint. What is more important is that a purchaser paying $6.98 or $2.25 was entitled to receive and did receive two gallons or two quarts as the case may be. In other words, respondents sold their products in units of two and the price for each unit was $6.98 or $2.25. Although there may even have been a few isolated instances where a purchaser paid the list price and refused to take the second can, it is obvious that respondents have usually and customarily sold two cans of paint for the so-called single can price.[5] Certainly, under the circumstances, respondents could not, for example, change their advertising to read "usually and regularly $6.98 per gallon—now two gallons for $6.98". We are in full agreement, therefore, with the hearing examiner's finding that the amount designated in respondents' advertising as the price for a can of Mary Carter paint is not the usual and regular price per single can but the usual and regular price for two cans.

Respondents also take issue with the hearing examiner's conclu-

[5] In a somewhat analogous situation, we have held that the price at which a combination of books and other merchandise was ordinarily sold was the usual and regular price of that combination and not the sum of the prices at which single items in that combination had been offered for sale and had, in fact, been sold on a few occasions. In the Matter of *Encyclopedia Britannica, Inc.*, Docket No. 7137 (1961).

sion that even if respondents' practice of offering Mary Carter paint on the basis of "Buy one and get one free" had been permissible when the offer was first made, "by lapse of time the practice would have lost its character of providing a free article incidental to a purchase and would have merged into a 'two for $X' pricing arrangement, not a 'two for the price of one' arrangement". While the hearing examiner erred in assuming, as he apparently did, that the list price of respondents' paint was the usual and regular price of a single can when respondents' offer was first made, his conclusion that a "free" offer may become invalid "by lapse of time" does not conflict with the Commission's decisions in *Black* and *Book-of-the-Month Club* [6] Respondents contend, in this connection, that these decisions are authority against making the time over which a "free" offer may continue decisive or even a consideration in determining its legitimacy.

The facts of this case are clearly distinguishable from those of the two cases upon which respondents rely. In this case, the item required to be purchased in order to obtain another article has always been sold with the so-called "free" article. Consequently, even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint. In *Black* and *Book-of-the-Month Club*, however, while the policy of offering "free" books was a continuing one, the merchandise required to be purchased in order to obtain a "free" article was not always the same merchandise. In other words, the respondents in those cases made a series of offers involving entirely different books at varying prices, not a continuing offer of a combination of the same two articles, as respondents in this case have done. Moreover, the cases are disinguishable in other respects. In *Book-of-the-Month Club*, the respondents advertised that a member of the Club would pay "no more than the publisher's set price for each book-of-the-month, the price you would pay in any retail store; indeed, frequently you pay less". This representation was never challenged and apparently was accepted as true by the Commission. Furthermore, it appears that in *Black*, books required to be purchased at stated prices in order to obtain a "free" article were usually and regularly sold by that respondent at those prices without the "free" article since the "free" offer was limited to new members. Consequently, it appears that the Commission had no occasion to decide in either case whether the usual and regular price of a book required

[6] In the Matter of *Book-of-the-Month Club, Inc., et al.*, 50 F.T.C. 778 (1954).

to be purchased in order to obtain a "free" book might at some future date become the usual and regular price of both books.

Summarizing our conclusions on this phase of respondents' appeal, it is our opinion that the policy statement with respect to the use of the word "free" announced in the *Black* decision is not applicable to respondents' advertising since a usual and regular price had never been established for a single can of Mary Carter paint. Each of the amounts designated by the respondents in their advertising as the price per single can of Mary Carter paint has, in fact, been the usual and regular price of two cans of such paint, and not one, as represented. The cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser.

Respondents have also taken exception to the hearing examiner's refusal to consider certain evidence. As stated above, evidence offered by respondents for the purpose of showing that Mary Carter paints are comparable to national brand paints was properly excluded by the hearing examiner as irrelevant to any of the issues in this proceeding. Evidence offered by respondents to show why they had adopted the merchandising practices was also properly excluded by the hearing examiner. Whatever respondents' motive may have been, it cannot justify practices found to be misleading and deceptive, and the hearing examiner did not err in refusing to consider this evidence. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67 (1934).

Respondents' final exception to the initial decision relates to the order to cease and desist contained therein. Their contention on this point is also without merit. They have not submitted any proposed modifications of the order nor made any suggestions as to how the order should be changed, but merely attack it as being "inapposite and unjustified". Apparently they believe that it should be framed in the language of the policy statement announced in the *Black* case. Such an order would not be appropriate, however, since, as we have held, the article offered by respondents as "free" was not given free of charge to the purchaser of another article for which a usual and regular price has been established. The order as drafted would prohibit respondents from misrepresenting the usual and regular price of the products they sell and from using the word "free" or similar words to describe an article of merchandise which is not given as a gift or free of charge to the recipient. The order adequately covers the practices engaged in by respondents and cannot easily be misunderstood.

To the extent indicated herein, respondents' exceptions are denied. The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission.

Commissioner Elman dissented to the decision herein.

DISSENTING OPINION

By ELMAN, *Commissioner:*

In 1953, in a landmark decision, *Walter J. Black, Inc.*, 50 F.T.C. 225, 232, the Commission stated that the "businessmen of the United States are entitled to a clear and unequivocal answer" to the question whether, and how, the word "free" may honestly and truthfully be used in offering "something to a purchaser free of charge upon the purchase of some other article of merchandise". The *Black* opinion was not a narrow disposition of a particular case on its own special facts. Instead, the Commission, acting "in the public interest, and for the advice, guidance and information of businessmen" (p. 235), laid down comprehensive and specific guidelines on use of the word "free" in advertising goods for sale. On December 3, 1953, shortly after the *Black* case was decided, the Commission took the further step of issuing a policy statement which incorporated almost *in haec verba* the rules formulated in the *Black* opinion.

Today's decision neither overrules nor reaffirms the rules established in *Black*. Instead, the case is "explained" and "distinguished". As a result, uncertainty and confusion are being introduced, needlessly and unsettlingly, into an area of business activity where businessmen and the bar have long regarded the Commission's position as definite and clear. It would seem to me far better, if the *Black* case is to be overruled, that it be done forthrightly and without equivocation. Such a disposition of the case, whatever else might be said about it, would have the merit of candor; and businessmen and lawyers would at least know where the Commission now stands in the matter.

I

Prior to the *Black* decision the problem of how to treat "free" offers of goods had been a perplexing and vexatious one, both to business and the Commission. It is, and has long been, commonplace in the United States for merchandise to be advertised and sold at a stated price, with another article, or installation or service, or an incidental part or accessory, included "free"—that is, in the sense of being without extra cost to the purchaser. But where receipt of the "free" item

is tied to the purchase of another article, it is of course not "free" in other senses of the word:

(1) It is not "free" in that it is not being given away, absolutely and unconditionally, with no strings attached.

(2) It is not "free" in that, unlike an ordinary commonlaw "gift or gratuity", the donor is not motivated by a "detached and disinterested generosity" (*Commissioner* v. *LoBue*, 351 U.S. 243, 246), or by "affection, respect, admiration, charity or like impulses" (*Robertson* v. *United States*, 343 U.S. 711, 714). Commercial transactions are usually entered into for mutual profit, and the *quid pro quo* received by the seller for making a "free" gift to the buyer is the latter's purchase of the article offered for sale.

(3) It is not "free" in that the seller ordinarily recoups the cost of the "gift" out of the price he obtains for the article sold. Sellers are not usually, and cannot afford to be, philanthropists. Unless he wants to go bankrupt, or is able to sustain unending losses on a single product line, a seller must recover the cost of the "free" article in profits from sales.

II

Thus, the use of the word "free to describe an article given on the purchase of some other article raises problems of importance to an agency, like the Commission, charged with protecting consumers against deception. The Commission's opinion in the *Black* case recognized and squarely addressed itself to these problems, which were constantly recurring and which the Commission had not theretofore definitively resolved. In order to appreciate the great significance of the *Black* case as *the* leading precedent in this field, it is necessary to describe the background against which that case was decided.

On January 14, 1948, the Commission had issued a policy statement with respect to the use of the word "free" in advertising. That statement read as follows:

> **The use of the word "free," or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act. (48 F.T.C., at 1315)**

Thereafter, on June 30, 1948, the Commission issued a complaint against *Book-of-the-Month Club, Inc.* In that case new members were offered one "free" book on enrollment and one "free" book for

every two books bought from the club. On June 8, 1952, the Commission entered its decision and order. (48 F.T.C. 1297) The majority opinion, written by Commissioner Mead, adhered to the policy statement of January 14, 1948. It held that the "meaning of the word 'free' remains more or less fixed"; that it had "the definite and absolute meaning of a gift or a gratuity given without charge, cost or condition"; and that, accordingly, where there were "a few 'provided, howevers' or other conditional strings to the so-called 'free' offer", it was deceptive and misleading, even though the conditions on receipt of the "free" article were clearly disclosed. (pp. 1309–12)

The order issued by the Commission on May 8, 1952, in *Book-of-the-Month Club, Inc.*, was substantially in the language of the 1948 policy statement. That is, it prohibited use of the word "free" to describe merchandise "which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent." (48 F.T.C., at 1307)

On the same day (June 30, 1948) that the Commission issued its complaint against *Book-of-the-Month Club, Inc.*, it also issued a similar complaint against *Walter J. Black, Inc.*, trading as the Classics Club and Detective Book Club, which also offered "free" books to members who bought a specified number of books. The *Black* case was not decided, however, until September 11, 1953, sixteen months after the *Book-of-the-Month Club* decision. (50 F.T.C. 225) In the meantime, significant changes in the membership of the Commission had occurred.

The arguments in the *Black* case on June 29, 1953, including submissions by *amici curiae*, covered a broad range of questions concerning the correctness and scope of the holding in the *Book-of-the-Month Club* case. And it was for the manifest purpose of setting these questions to rest, once and for all, that the Commission's opinion in *Black* was written as it was. Not only did the Commission in *Black* not follow the 1948 policy statement and its prior opinion in *Book-of-the-Month Club*, it did not even refer to them. Instead, the *Black* opinion treated the subject of "free" goods advertising as *res nova*, to be considered wholly without regard to any actions or statements made by the Commission in the past. The opinion was plainly intended to clear away the residue of uncertainty and doubt left by the Commission's various previous rulings, and to formulate an authoritative, complete, and self-contained exposition of the Commission's position on the subject. Accordingly, the Commission went to un-

usual lengths in *Black* to make its opinion not only specific and precise but comprehensive and definitive.

The opinion in the *Black* case recognized the semantic and other problems raised by use of the word "free" in advertising goods for sale. It noted that such advertising "is by no means new. It has been used by businessmen in the United States for almost 100 years." (p. 232) The facts, it said, "very pointedly present to the Commission the following question for its determination:

> MAY A BUSINESSMAN DOING BUSINESS IN INTERSTATE COMMERCE BE CHARGED WITH ENGAGING IN UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN VIOLATION OF THE FEDERAL TRADE COMMISSION ACT IF HE USES THE WORD "FREE" IN HIS ADVERTISING TO INDICATE THAT HE IS PREPARED TO GIVE SOMETHING TO A PURCHASER FREE OF CHARGE UPON THE PURCHASE OF SOME OTHER ARTICLE OF MERCHANDISE? (50 F.T.C. 232; capitalized as in the original)

The Commission declared, "The businessmen of the United States are entitled to a clear and unequivocal answer to this question. * * * [I]n the public interest, and for the advice, guidance, and information of businessmen, we want, through this opinion, to make the position of the Commission as clear as possible." (pp. 232, 235) The Commission concluded its opinion as follows:

> For the advice and guidance of the respondent herein, and also for the advice and guidance of the thousands of other advertisers who today are using the word "free" in advertising, we should like to make our position clear. Until such time as either the Congress of the United States amends Section 5 of the Federal Trade Commission Act, or until an appellate court of the United States clearly interprets the existing provisions of Section 5 of the Federal Trade Commission Act to mean otherwise, our position in this matter is as follows:
>
> The use of the word "Free," or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in "commerce", as that term is defined in the Federal Trade Commission Act, is considered by the Commission to be an unfair or deceptive act of practice under the following circumstances:
>
> (1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or
>
> (2) When, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such article of merchandise. (at pp. 235-36)

Commissioner Mead, who had written the majority opinion in *Book-of-the-Month Club*, dissented in *Black*. The Commission's

action, he correctly observed, "constitutes a reversal" of the 1948 policy statement which, as he described it, "held it unreasonable and untrue and therefore illegal per se to describe goods as free which are not free." (pp. 236, 240) In Commissioner Mead's view, goods cannot truthfully be advertised as "free" where *any* strings or conditions, such as buying another article, are attached. In his opinion, such goods are not free and therefore cannot truthfully be advertised as "free" no matter how clearly the conditions of receipt are set forth in the advertising. As he forcefully expressed his position in the first sentence of his dissent, "This is a case about 'free' books which were not free." But Commissioner Mead also frankly recognized that, although he had won a battle in *Book-of-the-Month Club, Inc.*, he lost the war in *Black*. He was under no illusions that the position he advocated, and which temporarily prevailed in the former case, had been finally and definitively rejected in *Black*.

The last nail in the coffin of the 1948 policy statement was driven by the Commission on March 9, 1954, when it reopened and substantially modified the order in *Book-of-the-Month Club, Inc.* (50 F.T.C. 778) The Commission held that the order entered May 8, 1952, prohibited use of the word "free" in advertising "under circumstances which would not now be considered unfair or deceptive." (50 F.T.C., at 781) It noted that "the order was in strict conformity with the Commission's policy in effect at the time the order was issued. * * * As pointed out by the respondents, however, the Commission's position on this subject has now been changed." (p. 780) Citing and quoting extensively from the *Black* opinion, the Commission thereupon deleted in its entirety the operative language of its previous order and substituted an order paralleling, almost to the word, the language of the *Black* opinion.

As already noted, the Commission on December 3, 1953, publicly announced that, in conformity with its opinion in *Black*, it had "approved a new trade practice rule with respect to the use of the word 'free' in advertising and other commercial offers as descriptive of any article of merchandise or service." The announcement stated that:

> The new rule will be included in all future trade practice rules for industries in which there is found to be a need for a rule of this character and the administration of existing rules on the subject previously approved by the Commission will be in accord with the provisions of the new rule.
>
> Previously approved "free" rules prohibited the designation of an article of merchandise as "free" if there were any conditions, even though fully disclosed, which had to be complied with in order to receive such article. However, under the new rule the word "free" can be used even though receipt of the article

or service described is contingent on compliance with certain conditions, provided all such conditions are clearly and conspicuously disclosed.

In accordance with the Commission's action of December 3, 1953, the "free" goods rule—incorporating the requirements laid down in *Black*—has been included as a matter of regular course in many trade practice rules promulgated by the Commission. Since 1953, it has commonly been referred to as the Commission's "standard" rule on the subject of "free" advertising offers. And, as recently as June 15, 1962, the Commission included this "standard" rule in the Trade Practice Rules promulgated for the Stationers Industry.

III

Before today's decision, therefore, the Commission's position on "free" advertising was crystallized and clear. The comprehensive rules and guidelines laid down by the Commission in 1953 have neither been revised by Congress nor rejected by the courts. Until today, they have been accepted by businessmen and the bar as an authoritative statement of the governing requirements of law.

Under these rules, the word "free" may be used to describe an article offered to a purchaser without extra cost to him, provided (1) all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article are clearly and conspicuously explained to the purchaser at the outset, so as to leave no reasonable likelihood of misunderstanding; and (2) the article which must be purchased to obtain the "free" gift is neither increased in price nor reduced in quality, quantity, or size in conjunction with such offer.[1]

Where the requirements thus described in *Black* are satisfied, a seller is not barred from using the word "free" either because (1) the "free" gift is tied to the purchase of another article; or (2) the seller is not making a "gift" in the classic sense, i.e., prompted by personal or

[1] The *Black* opinion was specific on this point (50 F.T.C. at 235):

"If a businessman desires to use the word 'free' in his advertising, he must use it honestly. He may not use the word as a device for deceiving the public. For example, if he normally sells a toothbrush for 49¢, he may not advertise that he will give away 'free' a package of toothpaste with the purchase of that same toothbrush at 69¢. In such a case, while the advertiser is holding out to the public that he is giving the toothpaste away 'free,' he is actually adding 20¢ to the price of the toothbrush which must be purchased in order to obtain the 'free' toothpaste. Many examples could be cited, both as to the proper and improper uses of the word 'free' in advertising. However, the essence of this opinion is that there must be truth in advertising to support the use of the word 'free.' If an advertiser either lies as to the facts or tells only part of the truth in his advertising, and such lies or omissions have the tendency or capacity to mislead or deceive the public, this Commission, pursuant to the authority delegated to it by Congress, must inhibit such use of the word 'free' in advertising."

philanthropic motives; or (3) the cost of the "free" gift is recouped out of profits derived from sales of the tied product.

Today, however, the Commission resurrects the 1948 policy statement—which had been regarded even by its staunchest adherents, like Commissioner Mead, as having been interred by *Black*. It holds, despite *Black*, that the 1948 statement has always been the authoritative and fundamental expression of the Commission's position in this area. It holds, further, that the *Black* case merely "modified" the 1948 statement "by permitting the use of the word 'free' to describe an article of merchandise which was in fact free of charge but which was given to the recipient only upon purchase of another article * * *. It did not hold that the word 'free' may be used to describe an article which is not, in fact, free of charge or a gift or gratuity." (Opinion, p. 1849)

And why, in this case, does the Commission find that respondents' "free" second can of paint was "not, in fact, free of charge or a gift or gratuity"? Because (1) "a usual and regular price had never been established for a single can of Mary Carter paint", and (2) the "cost of the second can of paint was included in the price by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser." (Opinion, p. 1852)

The first reason, as I shall try to show, is specious and without relevance to the facts of the case. The second reason is, in essence, a rejection and overruling of *Black*.

IV

Mary Carter Paint Co. makes and sells paint. For the past ten years it has followed a basic merchandising policy expressed by the advertising slogans: "Buy 1 and get 1 Free" and "Every Second Can Free of Extra Cost." The Commission states (opinion, p. 1850) that "respondents sold their products in units of two and the price for each unit was $6.98 [per gallon] or $2.25 [per quart]." This simply is not so.

When Mary Carter advertises one quart for $2.25 and a second quart free, it means that the buyer must pay $2.25 for the first quart and then may have a second quart for nothing. It does not mean that the buyer may purchase two quarts of paint for $2.25 and one quart for half that price. The price of a single quart of paint is $2.25, regardless of whether the buyer wants one quart, two, or a dozen. The customer may and usually does take the second "free" can; but, whether he does or not, the first can will still cost him $2.25.

Obviously, the second can is "free" to the customer only in the sense that he pays nothing extra for it. It is not "free" in the sense that it is being given, absolutely and unconditionally, as a gift or gratuity. And, since it costs as much to manufacture one can of paint as another, Mary Carter recoups the cost of the second "free" can out of the price it obtains for the first can. All this is perfectly obvious to all concerned here, as it also was in *Black* and *Book-of-the-Month Club*. And, unless those cases are now overruled, they permit use of the word "free" in such circumstances.

I emphasize the absence here of any possible deception arising from a failure to disclose, clearly and conspicuously in the advertising, all of the conditions, obligations, or other prerequisites to the receipt of the "free" article. Without question, as *Black* recognized, the word "free" may be dishonestly and misleadingly used. Especially in advertising addressed to children, it may be used to give a false impression that something is being given absolutely "for free", with no strings of any sort attached, and with nothing to buy or do in order to obtain the "gift." Such advertising, as *Black* makes clear, is fraudulent if in fact the "free" article is not being given away absolutely, unconditionally, and without any *quid pro quo*.

But that is not this case. As the Commission agrees (opinion, p. 1847), there is neither allegation nor proof here that "respondents had failed to make a clear and conspicuous disclosure of the conditions of their offer." In other words, Mary Carter's advertising straightforwardly conveyed the "message" to customers that they had to "buy 1" to "get 1 free". The Commission does not suggest that anyone, no matter how naive, could have been misled into believing that he did *not* have to buy the first can in order to get the second can free. The whole aim of Mary Carter's sales and merchandising policy was to communicate, as simply and directly as possible, that one had to buy the first can to get a second can free.

The Commission nowhere finds that the *Black* rules have been violated by respondents' advertising. As to the first—that the terms of the offer must be clearly disclosed—the Commission specifically reverses the hearing examiner's finding that Mary Carter's offer lacked the requisite clarity. And a holding of violation of the second requirement—that the advertiser not increase the usual price or reduce the quality or reduce the quantity or size of the merchandise—is negatived by the finding (opinion, p. 1846) that Mary Carter has followed the same "Buy 1 and get 1 Free" policy for the past ten years.

But, the Commission points out, the cost of the second can of paint must be recovered by respondents out of their sales; it is necessarily

included in the price of the first can; the purchaser "pays" for the second can when he buys the first one; and, therefore, the second can is not free of charge to the purchaser. The short answer is, of course, that this is always true whenever a gift of a "free" article is conditioned upon purchase of another article. The customer always pays, in that sense, for the "free" article. This was just as true in *Black* and *Book-of-the-Month Club, Inc.*, as it is here. If this is the determinative consideration, then Commissioner Mead was right and we should ban use of the word "free" in every situation where the purchaser has to buy something in order to obtain the "free" gift. But this use of the word "free" was explicitly upheld in the *Black* case:

"if the regular price of the article sold without the premium is the same as the price with the premium, the premium does not cost the customer anything. It is FREE TO HIM regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss." (50 F.T.C., at 234, quoting from the Commission's brief in *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112; "FREE TO HIM" capitalized in the original)

Such usage of the word "free" corresponds precisely to its meaning in Mary Carter's advertising. The Commission does not dispute Mary Carter's contention that it refuses to sell a single can of paint at less than the stated price of $6.98 per gallon or $2.25 per quart. Thus, to paraphrase *Black*, the "regular price" of Mary Carter paint "sold without the premium is the same as the price with the premium." The second can of paint "does not cost the customer anything"; regardless of how it is paid for, it "is FREE TO HIM."

In this respect, the case is also on all fours with *Book-of-the-Month Club*. There the Club's offer amounted to "Buy 2 books and get 1 Free"; the member paid no more than he otherwise would for the two books (under the rule of the *Black* case their price cannot be artificially inflated); and so the third book was "FREE TO HIM". The Commission's attempt to distinguish *Book-of-the-Month Club* here (opinion, p. 1851) is baffling. Both involve a continuing offer over an indefinite period of time that can be acted upon again and again by the same purchasers. The fact—deemed crucial by the Commission—that Mary Carter's paint remains the same without the Club's book titles change is obviously a distinction without a difference. The Book-of-the-Month Club offer of "Buy 2 books and get 1 Free" was without reference to the names or contents of the books. The practice upheld in *Book-of-the-Month Club* is indistinguishable from Mary Carter's

practice, which the Commission now prohibits. What, it is fair to ask, is left of *Black* and *Book-of-the-Month Club?*

V

The Commission attempts to buttress its position here by reference to the Guides Against Deceptive Pricing. It cites Guide V, which states that "No statement or representation of an offer to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business." The "Note" to Guide V explains that "Where the one responsible for a 'two for the price of one' claim has not previously sold the article and/or articles, the propriety of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made."

From these propositions, the Commission reasons, first, that "a newcomer to a market selling a product which had not previously been sold in the trade area in which he is doing business would have no basis for claiming that two of such products were being sold for the price of one", and, second, that "the hearing examiner properly refused to consider evidence offered by respondents to show that Mary Carter paint was comparable to any other brand of paint selling at $6.98 a gallon or $2.25 a quart", because "[s]uch evidence would be completely irrelevant to the issue whether respondents' paint was usually and customarily sold at those prices". (Opinion, p. 1850)

At the root of what is wrong with this line of argument is a misconception of the relevance of Guide V to the subject matter of this proceeding. A reading of Guide V and its explanatory Note shows that they were drafted to deal with the entirely different problem arising when an item is normally sold at a stated price, and a seller offers "two-for-the-price-of-one" by fraudulently inflating the normal selling price.

This problem of the phony two-for-the-price-of-one offer, expressly dealt with in *Black* (see footnote 1, *supra*), is not presented by this case. Mary Carter does not claim to be offering two cans of paint for the "recent" price of one, but two cans for the regular and current price of one. Mary Carter has always offered one can at the stated price and a second free of charge if the customer wants it. Guide V is sound, but it has no application to the sales promotion scheme that Mary Carter has followed for the past ten years.

The second rule laid down in *Black* provides, in part, that the word "free" may not be used "When, with respect to the article of merchandise required to be purchased in order to obtain the 'free' article, the offerer * * * increases the ordinary and usual price". If Mary Carter had regularly sold its paint at $1.13 per quart, and then raised the price to $2.25 per quart with a second quart offered "free", that would have been a deceptive and dishonest use of the word "free". See, *e.g.*, *Puro Company*, 50 F.T.C. 454, decided November 19, 1953, two months after *Black*. In that case, advertisements reading "BUY ONE—GET ONE FREE * * * Two 25¢ Packages—25¢" were held to be false and deceptive, because the record disclosed that the product "was regularly sold in retail grocery stores at two packages for 25¢; there was no evidence that a single package was ever sold for 25¢; and certain retail stores sold it at 13¢". In the instant case, the record does *not* disclose that a single quart of Mary Carter paint was ever sold for $1.13; and, in view of Mary Carter's established and long-continued merchandising policy, it clearly would not sell a single quart at that price. To the extent, therefore, that it is meaningful to speak of a "usual and regular" price for a single quart of Mary Carter paint, it must be $2.25.[2]

The same error infects the determination to exclude evidence offered by Mary Carter to prove that its paint is comparable to any other brand selling at $6.98 per gallon or $2.25 per quart. If Mary Carter were representing that it now offers two gallons of paint for $6.98 whereas it once offered only one gallon at that price, Guide V would apply and only a comparison with the prior price of the specific product—not with prices of comparable products—would be relevant. But this is not Mary Carter's representation; rather, it is that Mary Carter paint has a genuine value, by comparison with other paints, equal to the current prices charged for each can. Given the requisite facts, the Commission might find that Mary Carter had deceived

[2] If the Commission were correct in interpreting Guide V to apply to this type of case, then Guide V would also have to be interpreted as overruling and superseding the *Book-of-the-Month Club* case. There the Commission permitted use of the word "free" to describe the offer of a third book as a bonus upon purchase of two books at their current prices. No comparison with the prior prices of those books in the "recent" course of business was made or intended, although the Commission's reading of Guide V would require such a comparison and no other. Since the Commission does not hold that Guide V has overruled *Book-of-the-Month Club*, it cannot consistently find that Guide V controls the result here.

Guide V may support the conclusion that a newcomer to an area may not market a product not previously sold there on the basis that he is now selling two for the price at which he previously sold one; there is no "previously" to cite for comparison. But Guide V is not authority to prevent a newcomer from setting a definite price for his product and then offering to sell each item at that price or to give the buyer a second "free" item for that price. Here there is a basis for comparison; it is the established price of the single item.

purchasers by manufacturing a type of paint generally sold at $3.49, doubling the price to $6.98, and then making a two-for-the-price-of-one offer. The lack of such facts here, however, rules out any basis for a finding of deception on that score.

VI

This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Section 5 of the Federal Trade Commission Act by engaging in any "unfair or deceptive acts or practices". Yet nowhere does the Commission explain what was "unfair or deceptive" about what Mary Carter did. The word "deceptive" appears in the Commission's opinion on p. 1846 in a description of the allegations of the complaint and again on p. 1852 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's "Buy 1 and get 1 Free" offer, or as to how that deception might be brought about. On the contrary, the Commission specifically agrees with respondents that the examiner erred in finding that they "had failed to make a clear and conspicuous disclosure of the conditions of their offer" (Opinion, p. 1847). Who, then, was deceived? And how was he injured? A finding of deception is crucial to the issuance of an order. Without it, the order is patently invalid and the Commission's strained effort to "distinguish" *Black* is much ado about nothing.

VII

The Commission's order prohibits respondents from representing:

"(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business;

"(b) That any article of merchandise is being given free or as a gift, or without cost or charge, when such is not the fact. . . ." (Initial Decision, p. 1845)

A reading of the order invites this question: What must respondents stop doing that they are now doing? Paragraph "(a)" declares that they may not call any amount their usual and customary price if it is in excess of their usual and customary price in the recent, regular course of business. Obviously, this has as little to do with the case as Guide V of the Guides Against Deceptive Pricing. Respondents have never sought to represent their "recent" prices; they advertise only their current prices. As it happens, however, their current prices

are the same as their recent prices. Whether regarded as a one-can or two-can price, respondents advertised price of $2.25 per quart, for example, is their "usual and customary retail price" *now*, and it is not in excess of $2.25 per quart, which is "the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business". Does this mean that paragraph "(a)" has no effect at all on respondents' advertising practice? Surely not, or the Commission would not issue it. But what effect does it really have, and how are respondents to comply with it? I confess I do not know.

Paragraph "(b)" is almost as puzzling. Presumably, it is intended to require respondents to cease advertising "Buy 1 and get 1 Free". But this cannot be deduced from anything to be found in the terms of the order. As the Commission's own troubles with the problem show, the definition of "free" merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free "when such is not the fact". Surely this provision, like paragraph "(a)", is indefensibly vague, particularly in light of the Supreme Court's recent call for Commission orders "sufficiently clear and precise to avoid raising serious questions as to their meaning and application". *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 368 (1962).

VIII

The Commission's action today cannot help but have unfortunate effects reaching far beyond the four corners of the present proceeding. It is bound to become a leading "authority" in the field and therefore a necessary source of reference for businessmen planning to conduct "free" goods advertising campaigns. Yet, how anything but uncertainty and confusion can follow today's decision, I do not know. Respondents here engaged in a form of advertising which Commission rulings expressly and repeatedly sanctioned, and on which they had every right to rely. Yet now they are held to have violated the law and are being subjected to a broad and indefinite cease-and-desist order with severe penalties for any violations.

To discover the Commission's current views of the requirements of law in this field, businessmen and their lawyers will no longer be able to rely upon the comprehensive and comprehensible rules laid down in *Black*. Instead, they will have to read (1) the 1948 policy statement, which was overruled in *Black*, (2) the *Black* majority opinion, which is "distinguished" but not overruled today, (3) the *Black* dissenting opinion, which while not expressly adopted by the Commission

today seems at least to be back in good favor, and (4) the majority opinion in the instant case. After examining these materials, how will a lawyer answer a client who asks: "May I advertise something as 'free' to purchasers who buy another article at a stated price, if the advertisement clearly discloses all the terms and conditions of the offer?" The only safe answer would seem to be: "I don't know. I've read all the Commission opinions on the subject, and I still don't know. What's more, I don't think the Commission knows. You better not take any chances." [3]

FINAL ORDER

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondents, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions, and having determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

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

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

Commissioner Elman dissenting.

IN THE MATTER OF

LANGLEY T.V., INC., ET AL.

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

Docket C-154. Complaint, June 28, 1962—Decision, June 28, 1962

Consent order requiring four television repair concerns in the Washington, D.C., area to cease representing, in newspaper advertising and otherwise, that rebuilt television picture tubes containing used parts were new and fully guaranteed, and to disclose clearly when the tubes they sold were not new in their entirety.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

[3] How, for example, would a lawyer be able to advise his client as to the legality of so entertaining and honest a use of the word "free" as appears in the advertisement appended hereto?

Trade Commission, having reason to believe that Langley T.V., Inc., a corporation, Belmont Electronics, Inc., a corporation, and Casper Sickmen and Robert Sickmen, individually and as officers of said corporations, and Belmont of Virginia, Inc., a corporation, and Walter Sickmen, Abe Mason, and Casper Sickmen, individually and as officers of Belmont of Virginia, Inc., and Casper Sickmen and Abe Mason, individually and as copartners trading as Belmont Radio & Television Service, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Langley T. V., 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 8034 New Hampshire Avenue, in the city of Silver Spring, State of Maryland.

Respondent Belmont Electronics, 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 12410 Layhill Road, in the city of Silver Spring, State of Maryland.

Respondents Casper Sickmen and Robert Sickmen are officers of both corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Respondent Belmont of Virginia, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 3676 King Street, in the city of Alexandria, State of Virginia.

Respondents Walter Sickmen, Abe Mason and Casper Sickmen are officers of said Belmont of Virginia, Inc. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the said corporate respondent.

Respondents Casper Sickmen and Abe Mason are copartners trading as Belmont Radio & Television Service. Their place of business is located at 2414 14th Street, N.W., Washington, D.C.

All of the aforesaid respondents have cooperated in and acted jointly in the advertising practices hereinafter set forth and referred to.

PAR. 2. All of the aforesaid respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of radio and television parts, including rebuilt television picture tubes containing used parts, and a service in connection therewith, direct to the purchasing public and to others.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their products, respondents made certain statements concerning their products in a Washington, D.C., newspaper of wide circulation, and by other media. Among and typical of such statements is the following:

STABRITE
ALUMINIZED
RCA LICENSED
PICTURE TUBE
ONLY ONE PRICE

ANY 21 INCH
ONLY
15.95
Written 3 year guarantee
on all installations.

PAR. 5. Through the use of the aforesaid statement, the respondents represented, directly or by implication:

1. That certain of their television picture tubes were new in their entirety;

2. That their television picture tubes were guaranteed in all respects.

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

1. The television picture tubes advertised as set forth above were not new in their entirety but were rebuilt tubes and contained used parts;

2. The guarantee provided for respondents' television picture tubes was limited both as to time and extent.

PAR. 7. Respondents did not disclose their advertising, invoices, or warranties that said television pictures tubes were rebuilt and

contained used parts. When television picture tubes are rebuilt and contain used parts, in the absence of a disclosure to the contrary, such tubes are understood to be and are readily accepted by the public as new tubes.

PAR. 8. By failing to disclose the facts as set forth in paragraphs 6 and 7, respondents also place in the hands of uninformed or unscrupulous dealers and technicians the means and instrumentalities whereby they may mislead and deceive the public as to the nature of their said television picture tubes.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in a business of a similar nature.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements and representations, and the failure of respondents to disclose in their advertising or in their invoices that their said television picture tubes are rebuilt and contain used parts, have had, and now have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondents' said products by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement,

makes the following jurisdictional findings, and enters the following order:

1. Respondent Langley T.V., 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 8034 New Hampshire Avenue, in the city of Silver Spring, State of Maryland.

Respondent Belmont Electronics, 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 12410 Layhill Road, in the city of Silver Spring, State of Maryland.

Respondents Casper Sickmen and Robert Sickmen are officers of both corporate respondents and their address is the same as that of the corporate respondents.

Respondent Belmont of Virginia, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 3676 King Street, in the city of Alexandria, State of Virginia.

Respondents Walter Sickmen, Abe Mason and Casper Sickmen are officers of said Belmont of Virginia, Inc., and their address is the same as that of said corporate respondent.

Respondents Casper Sickmen and Abe Mason are copartners trading as Belmont Radio & Television Service. Their place of business is located at 2414 14th Street, N.W., Washington, D.C.

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

ORDER

It is ordered, That respondent Langley T.V., Inc., a corporation, and its officers, and Belmont Electronics, Inc., a corporation, and its officers, and Casper Sickmen and Robert Sickmen, individually and as officers of said corporations, and Belmont of Virginia, Inc., a corporation, and its officers, and Walter Sickmen, Abe Mason and Casper Sickmen, individually and as officers of Belmont of Virginia, Inc., and Casper Sickmen and Abe Mason, individually and as copartners trading as Belmont Radio & Television Service, or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of rebuilt television picture tubes containing used parts, or any other merchandise, in commerce,

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

1. Representing, directly or by implication, that television picture tubes, or any other products, are new, when contrary to the facts;

2. Failing to clearly disclose in advertising, in invoices and warranties that said tubes are rebuilt and contain used parts, when such is the fact;

3. Representing, directly or by implication, that any merchandise is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

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

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

IN THE MATTER OF

WILLIAMS PRESS, INC.

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

Docket C-155. Complaint, June 28, 1962—Decision, June 28, 1962

Consent order requiring the Albany, N.Y., publisher of "Flower Grower" magazine to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by paying promotional allowances to certain retail customers—some of whom operated chain retail outlets in railroad, airport, and bus terminals, and outlets in hotels and office buildings, and others of whom furnished services in connection with the handling of respondent's publication such as the taking of purchase orders and distributing, billing, and collecting—while not making such payments available on proportionally equal terms to competitors of those favored, including drug chains, grocery chains, and other newsstands.

COMPLAINT

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

hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Williams Press, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 99 North Broadway, Albany, New York. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Flower Grower". Respondent's sales of publications during the calendar year 1960 exceeded one million seven hundred thousand dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Fawcett Publications, Inc.

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

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

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

PAR. 4. In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on

proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

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

Customer	Approximate amount received	
	1960	1961 (Jan.-June)
Union News Co., New York City	$3415.78	$1315.56
Fred Harvey, Chicago, Ill.	56.84	14.16
Armstrong Co., Boston, Mass.	3.48	1.28

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

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

DECISION AND ORDER

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

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

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

1. Respondent, Williams Press, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 99 North Broadway, in the city of Albany, State of New York.

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

ORDER

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

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

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

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

Complaint

IN THE MATTER OF

STEIN BROTHERS FUR COMPANY, INC., ET AL.

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

Docket C-156. Complaint, June 28, 1962—Decision, June 28, 1962

Consent order requiring furriers with places of business in Wichita, Kans., and Kansas City, Mo., to cease violating the Fur Products Labeling Act by labeling fur products with fictitious prices represented thereby as the usual retail prices, and by advertising in newspapers which failed to describe fur products as "natural" when such was the fact, and which represented fur products falsely as stock of a business of a recently deceased individual or as being sold for the benefit of the estate of a late owner of a business, or as distress merchandise or products unclaimed from storage.

COMPLAINT

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

PARAGRAPH 1. Respondent Stein Brothers Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas. Morris S. Lavin is president of the corporate respondent and formulates, directs and controls its policies, acts and practices. Respondent Morris S. Lavin also trades as A. Keller Fur Company. The office and address of the respondents is at 201 South Main Street, Wichita, Kansas, although the address of A. Keller Fur Company is at 218 East 11th Street, Kansas City, Mo. The respondents are engaged in the retail sale of fur products.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered

for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such products in that prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which respondents usually and regularly sold such fur products in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that labels affixed thereto contained a purported sale price which was in fact, fictitious in that such price was in excess of the price at which respondents actually sold such fur products during the period such products were represented as being on sale, in violation of Section 4(1) of the Fur Products Labeling Act.

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

PAR. 6. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of the respondents which appeared in issues of The Kansas City Times, a newspaper published in the city of Kansas City, State of Missouri, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements:

(a) Failed to describe as natural, fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Represented fur products as being from the stock of a business of an individual who had recently died, when such fur products were not, in fact, a part of the stock of such business, in violation of Rule 44(g) of said Rules and Regulations.

(c) Represented that fur products were being sold for the benefit of the estate of the late owner of a business, when such was not the fact, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

(d) Represented, contrary to fact, that fur products were distress merchandise, or were fur products uncalled for or unclaimed from storage or were from a business or estate in the process of liquidation, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 7. Respondents falsely and deceptively advertised fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act, by affixing labels to such fur products which contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which respondents usually and regularly sold such products in the recent regular course of business.

PAR. 8. Respondents falsely and deceptively advertised fur products in violation of Section 5(a)(5) of the Fur Products Labeling Act, by affixing labels to such fur products which contained a purported sales price which was, in fact, fictitious in that such price was in excess of the price at which respondents actually sold such fur products during the period such products were represented as being on sale.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Stein Brothers Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 201 South Main Street, in the city of Wichita, State of Kansas.

Respondent Morris S. Lavin is an officer of the aforesaid corporation and his address is the same as that of the said corporation. He further trades as A. Keller Fur Company with his address at 218 East 11th Street, in the city of Kansas City, State of Missouri.

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

ORDER

It is ordered, That respondent Stein Brothers Fur Company, Inc., and its officers, and respondent Morris S. Lavin, individually and as an officer of said corporation and also trading as A. Keller Fur Company or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. Falsely or deceptively labeling or otherwise identifying such products by any representation, directly or by implication:

(1) That the regular or usual prices of such products are any amount in excess of the prices at which respondents have usually and customarily sold such products in the recent regular course of business.

(2) That the prices of such products are reduced from the prices at which respondents have usually or customarily sold such products, when such is not the case.

(3) That any amount is the sale price of any fur product, when such amount is in excess of the price at which such fur product is actually

sold during the period such product is labeled or otherwise represented as being on sale.

(4) That savings are available to purchasers of respondents' fur products, when such is not the case.

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

A. Fails to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, as natural.

B. Represents directly or by implication, contrary to fact, that any such products are the regular stock of a business.

C. Represents in any manner, contrary to fact, that fur products are being sold for the benefit of any one other than the owners of such business.

D. Represents in any manner, contrary to fact, directly or by implication, that fur products are distress merchandise, or are fur products uncalled for or unclaimed from storage or are fur products from a business or estate in the process of liquidation.

E. Represents in any manner, contrary to fact, directly or by implication, that prices of such products are reduced from the prices at which respondents have usually or customarily sold such products in the recent regular course of business.

F. Represents in any manner, directly or by implication, that any amount is the sale price of any fur product, when such amount is in excess of the price at which such fur product is actually sold during the period the fur product is represented as being on sale.

G. Represents in any manner that savings are available to purchasers of respondents' products, when such is not 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 this order.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

LIGGETT & MYERS TOBACCO COMPANY, INC.

Docket 6642. Order, Jan. 22, 1962

Order vacating prior order reopening proceeding.

The Commission, on August 4, 1961, upon motion of counsel supporting the complaint, having reopened this proceeding for reconsideration of its disposition of the issue concerning certain promotional payments made by respondent to cigarette vending machine operators, and having heard the matter on the brief and oral argument of counsel supporting the complaint requesting that the Commission vacate its conclusion on this issue in its opinion and hold that Section 2(d) of the amended Clayton Act was violated in connection with the making of the aforementioned payments, and the opposing brief and oral argument of the respondent; and

The Commission having determined that there has been no showing of any change in conditions of law or fact or showing of any other circumstance requiring the action sought in the public interest and, therefore, that modification of the Commission's opinion in the manner requested has not been justified:

It is ordered, That the order of August 4, 1961, reopening this proceeding be, and it hereby is, vacated, without implying any views as to the merits of its prior opinion dated September 9, 1959, and without prejudice to the statutory right and duty of the Commission to take such further action, if any, as may be appropriate, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

Commissioner Kern not participating and Commissioner MacIntyre dissenting.

AMERICAN CYANAMID COMPANY ET AL.

Docket 7211. Order, Feb. 5, 1962

Order denying motions to reconsider the Commission's order of December 20, 1961, denying motions to disqualify.

MEMORANDUM OF CHAIRMAN DIXON IN REGARD TO RESPONDENTS' MOTIONS THAT HE BE DISQUALIFIED

By separate motions supported by affidavits the respondents herein have requested that I be disqualified from participating in this pro-

ceeding. All of the motions were filed pursuant to Section 7(a) of the Administrative Procedure Act and allege in substance that my prior position and duties as Counsel and Staff Director of the Antitrust and Monopoly Subcommittee of the Committee on the Judiciary of the United States Senate disqualify me from further participation in this matter.

As the motions disclose, the Subcommittee for which I acted as Counsel and Staff Director did, during 1959 and 1960, conduct an investigation, including public hearings, into certain pricing and other practices of the ethical drug industry. As leading members of that industry, the respondents herein were requested to, and did, furnish documents and other information to the Subcommittee. As counsel, I played an active role in the accumulation and presentation of this factual data to the members of the Subcommittee.

While the motions inaccurately describe the role I played in the aforesaid investigation as "advocacy," it should be unnecessary for me to point out that hearings before Congressional committees are *ex parte* and in no sense adversary in nature. Further, they cannot be said to be adjudicative, since they have as their sole purpose the amassing of facts in order that the Congress may be adequately informed concerning the desirability or need for legislation. The entire extent of my participation in the Subcommittee's investigation of the ethical drug industry is a matter of public record. I stand on that record but, of course, do not consider myself bound by the writings or statements of others who participated in that investigation, including Subcommittee members or employees.

My duties with the Subcommittee staff definitely did not involve the making of decisions or judgments on the facts accumulated. It was my duty to assist in adducing all of the facts with respect to the subject being investigated and to refrain from presenting only one side of controversial subjects.

Respondents' motions refer to the phrasing of questions which I directed to witnesses during public hearings before the Subcommittee as indicating my advocacy of positions opposed to those of the respondents herein. It is elementary that the questions of a lawyer engaged in eliciting facts from a witness do not necessarily indicate his state of mind but are couched in terms best calculated to adduce the truth.

The points raised by the respondents against my participation in this proceeding are not unlike the charge of bias raised against the complete membership of the Commission in the case of *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683 (1948). In that case, after the taking of testimony had been concluded and while the proceeding was still pending before the Commission, one

of the respondents asked the Commission to disqualify itself from passing upon the issues involved, alleging that the Commission had previously prejudged the issues and was prejudiced and biased against the Portland cement industry generally. The Commission refused to disqualify itself, and the contention was subsequently presented to and rejected by both the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court. Because the situation there dealt with is so analogous to the situation in which I now find myself and because the Supreme Court's consideration of this point is so clear and so complete, I quote from that opinion (pp. 700–702, *supra*):

Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by §6 of the Trade Commission Act. 15 U.S.C. § 46. These reports, as well as the testimony given by members of the Commission before congressional committees make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

Moreover, Marquette's position, if sustained, would to a large extend [*sic*] defeat the congressional purposes which promoted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against the respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade pro-

ceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10-11.

Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. *Tumey* v. *Ohio*, 273 U.S. 510, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. *Id.* at 523.

Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

The Commission properly refused to disqualify itself. We thus need not review the additional holding of the Circuit Court of Appeals that Marquette's objection on the ground of the alleged bias of the Commission was filed too late in the proceedings before that agency to warrant consideration.

Should I accede to the respondents' motions here, I might also find myself barred from consideration of cases in other industries investigated while I served as Counsel and Staff Director to the Senate Antitrust and Monopoly Subcommittee of the Committee on the Judiciary. These industries include, among others, the steel, automobile, milk, bread and roofing industries. I would thus find myself in the position where my experience acquired from working as a legislative counsel would be a handicap instead of an advantage. This, in my opinion, would defeat the very intendment of Congress in creating a Commission to be manned by commissioners with some degree of expertise.

Following the respondents' contentions to their ultimate conclusion, the Commission itself might be alleged to be disqualified from ultimately judging a proceeding because of the fact that, under its basic responsibilities, it reviews, prior to the issuance of a complaint, investigational records. Such investigational records are not unlike

investigative records of legislative bodies. They are both *ex parte*. However, after the issuance of a complaint by the Commission and the joinder of issues, it is clear that the proceedings then become adversary and the record must be finally judged in this climate. I find myself in a position not greatly different from that of my fellow Commissioners.

The respondents' motions are founded upon the assumption that I have prejudged the issues here involved, and I am incapable of rendering an impartial decision. Thus, what is here involved is the present state of my mind with respect to these issues. The state of a man's mind is by the nature of things known only to him and to his Maker. I have carefully and conscientiously considered the question here presented and have concluded, and hereby state, that I have not formed a definite opinion with respect to any of the material issues involved in this proceeding and honestly believe that I have a free and open mind with respect thereto, and I am fully capable of rendering a completely impartial decision based solely upon the facts contained in the record. Accordingly, I shall not withdraw from participation in this proceeding.

In view of the nature of these motions, I am not participating in the Commission's deliberations and decision upon them.

ORDER

On December 13, 1961, all of the respondents in this proceeding filed seperate motions requesting the Commission to disqualify Commissioner Dixon from participating in the appeal from the initial decision of the hearing examiner. These motions were based on an alleged prejudgment of the issues of fact and law to be presented in the appeal. On December 20, 1961, the Commission issued an order denying these motions. Assuming that it had the power to disqualify one of its members from participating in an appeal from an initial decision, the Commission found that the showing made by respondents was insufficient to warrant exercise of such power in the particular circumstances presented here. The order stated, *inter alia:*

"The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

"Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law. In the instant proceeding, no basis for departing from the normal practice has been shown."

On January 17, 1962, the respondents filed "Motions to Disqualify and to Reconsider". The full text of these motions is as follows:

"The undersigned respondents, being uncertain as to the procedural status resulting from the Commission's order of December 20, 1961 and as to the procedural steps which they may be required to take pursuant thereto, respectfully move the Honorable Chairman to disqualify himself because of the matters set forth in the affidavits attached to the respondents' motions filed on December 13, 1961; and, in the event that the Chairman should reach the decision that he is not disqualified, that the Commission reconsider its order of December 20, 1961 on the grounds that, irrespective of the applicability of the Administrative Procedure Act, the Commission has inherent power to regulate the course of proceedings before it and that the facts set forth in the said affidavits show that the Chairman is disqualified from acting in this cause, not only by virtue of said Administrative Procedure Act but also under principles of law applicable to the disqualification of judicial officers generally and to the right to a fair and impartial hearing guaranteed by the due process clause of the Constitution."

In accordance with the Commission's order of December 20, 1961, the instant motions filed by respondents are addressed primarily to Commissioner Dixon who, on this date, has filed a memorandum in regard thereto. For the reasons stated by him in that memorandum, Commissioner Dixon has determined not to withdraw from participation in this proceeding.

To the extent that respondents' motions are addressed to the Commission, they present no new grounds in support of the request to disqualify Commissioner Dixon. There is no basis or justification, therefore, for the Commission to reconsider its action of December 20, 1961.

Accordingly, it is ordered, That the motions to reconsider the Commission's order of December 20, 1961, be, and they hereby are, denied.

Commissioner Dixon not participating.

THE TEXAS COMPANY

Docket 6898. Order and Opinion, Mar. 9, 1962

Order denying respondent's application for disclosure of confidential documents.

OPINION OF THE COMMISSION

By the COMMISSION:

Respondent, pursuant to §§ 1.131 and 1.134 of the Commission's Rules of Practice, has applied for the disclosure of certain documents and materials, and pursuant to § 3.17 of the Commission's Rules, published May 6, 1955, as amended, has applied for issuance of a subpoena to the Secretary of the Commission directing him to appear and to testify and to bring with him the documents and materials requested in this application.

The documents sought are in two general categories: (a) those having to do with "the administrative construction of the meeting competition provisions" of the amended Clayton Act or any other statute barring price fixing and (b) alleged "ex parte communications . . . made outside the regular adjudicative process" with respect to this proceeding and other "communications" between the Commission or any member or employee in the decisional process in the proceeding and any agent or employee engaged in investigative or prosecutive functions with respect to (1) any investigation of respondent's pricing activities in 1957 and 1958 in Detroit, Michigan; (2) any enlargement of the scope of the hearings herein; (3) any amendment or supplementation of the complaint; and (4) the merits of this or a factually related proceeding.

In determining the action to take on a request for the release of documents, the Commission will consider not only the confidential and privileged nature of the material, but also the purpose for which the respondent intends to use it. *Postal Life and Casualty Insurance Company*, 52 F.T.C. 651 (1956).

Here respondent contends that the decision in *Sun Oil Co.* v. *Federal Trade Commission*, 294 F. 2d 465 [7 S. & D. 191] (5th Cir. 1961), indicates the importance of developing facts bearing upon the administrative construction of relevant statutes. A petition to review in this case was filed with the United States Supreme Court by the Solicitor General on behalf of the Federal Trade Commission, December 22, 1961.

Respondent also asserts, on the question of relevance and materiality, that the United States Supreme Court has been persuaded to reject a statutory construction urged by the Commission, by the fact, among

others, that it was inconsistent with the interpretation previously placed upon the critical language by that body. The cases cited to support this argument are: *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351–52 [3 S. & D. 337] (1941); and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 246 [5 S. & D. 221] (1951). In the *Bunte Bros.* case, the want of an assertion of power by the Commission was considered in determining whether such power was actually conferred. There the court referred to the Commission's unsuccessful attempt to secure the particular authority from Congress. In the *Standard Oil* decision, the court mentioned the "widespread understanding" as to the construction of the law and said that this understanding was reflected in "actions and statements of members and counsel" of the Commission. In documenting this observation in a footnote, the court referred only to public information and, in fact, seemed to emphasize the official action of the Commission itself in issuing cease and desist orders in which were inserted "savings" clauses bearing on the construction of the statute. Compare *United States* v. *E. I. duPont de Nemours & Company*, 353 U.S. 586 (1957). There the court stated that the failure of the Commission to act was not a binding administrative interpretation on the issue under consideration. (Id. 590.)

The information and documents considered by the Court in *Bunte Bros.* and *Standard Oil Co.* are on a different footing from the kind of materials here sought. The former were publicly known; the latter involved the inner workings of the agency. The implication of a thoroughness of consideration could not be drawn in the case of purely internal papers as it might be for documents or statements issued or made public by the Commission or one of its members. We conclude that the confidential documents here considered would not be relevant to any issue in this proceeding. Moreover, such documents might include, among other things, correspondence or other material relating to or identifying applicants or complaining parties. Such material is treated with strict confidentiality by the Commission. See § 1.15 of the Commission's Rules of Practice.

Respondent, as to the second category of documents requested, asserts that enough has been disclosed to make it clear that there are materials which have not been made a part of the public record bearing upon the possible commingling of the adjudicative and enforcing functions and the receipt of *ex parte* communications. In the principal instance referred to, it appears that a former chairman of the Commission and a member of the Commission's staff met with certain industry members. Respondent makes no assertion that the meeting

itself was in any way improper and states that it seeks only to ascertain the facts. We cannot open up confidential files on such vague and speculative grounds.

Moreover, respondent's contention appears to be mainly against alleged contacts involving certain third party organizations or persons. These organizations and individuals, however, are not parties to this proceeding. Information received from such sources on an *ex parte* basis does not come within § 4.27 of the Commission's Rules of Practice dealing with *ex parte* communications. The documents in the second category of the request also might involve the name of applicants or complaining persons, although we here make no reference to the individuals and organizations listed; and such information, as above indicated, is held in strict confidence.

For the above-stated reasons, we will not grant a release of the requested documents and materials. We need not discuss the application for the issuance of a subpoena directed to the Secretary of the Commission since, without the documents, the subpoena would serve no purpose.

Accordingly, respondent's application for access to documents and materials and for the issuance of a subpoena will be denied.

Commissioner Elman, being of the view that the opinion fails to deal adequately with the issues raised by respondent's application, does not concur in the Commission's disposition of the matter.

ORDER

Respondent having filed an application requesting disclosure of certain confidential documents and materials and the issuance of a subpoena directed to the Secretary of the Commission; and

The Commission having determined, for reasons stated in the accompanying opinion, that said application should be denied:

It is ordered, That the aforesaid application of the respondent for the disclosure of documents and materials and the issuance of a subpoena be, and it hereby is, denied.

Commissioner Elman not concurring.

CHATHAM RESEARCH LABORATORIES ET AL.

Docket 7609. Order, Apr. 5, 1962

Order reopening matter, vacating order, amending complaint, and remanding for further proceedings.

The Commission, by order of January 19, 1962, having given respondents opportunity to show cause, if any there be, why the public

interest does not require: (1) that this proceeding be reopened, (2) that the order to cease and desist and actions bearing on its interpretation be vacated and set aside, (3) that the complaint be amended in the manner set out in the show cause order, (4) that the amended complaint be accompanied by a proposed order in the form contained in the show cause order, and (5) that the matter be assigned for further appropriate proceedings under the complaint as so amended; and

Respondents, on March 26, 1962, having filed a paper designated Respondents' Memorandum Showing Cause; and

The Commission, after notice and opportunity for hearing as above described, having considered the matter, and having determined that the public interest requires that the proposed action as set forth in the aforementioned order to show cause be taken:

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

It is further ordered, That the order to cease and desist, issued April 8, 1960,* and subsequent actions bearing on the interpretation of such order, be, and they hereby are, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, amended by modifying paragraphs 4, 5 and 6 to read, respectively, as follows:

PAR. 4. In the course and conduct of their businesses, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements with respect to the nature of the synthetic stones offered for sale and sold by them, in advertisements in magazines of national circulation and by other means, of which the following are typical:

"Chatham Emeralds"

"Chatham Created Emeralds"

"Chatham Cultured Emeralds"

"These stones are identical to natural emeralds in all their properties: chemically, physically, optically, with the same crystal faces, atomic arrangement, and even the same inclusions and 'gardens'."

PAR. 5. Through the use of the aforesaid statements, by positive assertion and by the failure to reveal the material fact that the products were synthetic and not natural stones, respondents variously represented that their said synthetic stones or synthetic emerald products had been cultured, were emeralds and were identical to emeralds.

PAR. 6. Said statements and representations, including the failure to disclose the material fact that the products were synthetic and not natural stones, were exaggerated, false, misleading, and deceptive. In truth and in fact, said synthetic stones or synthetic emerald products

*56 F.T.C. 1196.

had not been cultured, were not emeralds and were not identical to emeralds.

It is further ordered, That the amended complaint be accompanied by a proposed order reading as follows:

ORDER

It is ordered, That respondents, Carroll F. Chatham, an individual, trading as Chatham Research Laboratories, or under any other name; Anglomex, Inc., a corporation, and its officers, and Dan E. Mayers, individually and as an officer of said corporation; Ipekdjian, Inc., a corporation, and its officers, and Cultured Gem Stones, Inc., a corporation, and its officers, and Adom Ipekdjian and Georges Ipekdjian, individually and as officers of said corporations, and respondents' representatives, agents 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 stones now known as Chatham Emeralds, Chatham Created Emeralds or Chatham Cultured Emeralds, or any other manufactured stone having essentially the same optical, physical and chemical properties, or any other manufactured stone having essentially the same optical, physical and chemical properties as a natural stone, do forthwith cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;

2. Using the word "emerald" or the name of any other precious or semi-precious stone as descriptive of such stones, unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic".

It is further ordered, That the matter be assigned to the hearing examiner for further appropriate proceedings under the complaint as so amended.

Commissioner Elman dissenting.

CHATHAM RESEARCH LABORATORIES ET AL.

Docket 7609. Order, May 29, 1962

Order denying motion to rescind order of April 5, 1962.

By motion filed April 23, 1962, the respondents have requested the Commission to reconsider and to rescind, set aside or vacate its order of April 5, 1962. The Commission in said order directed that this proceeding be reopened; that the order to cease and desist theretofore entered herein be vacated; that the complaint be amended; and

that the case be remanded to the hearing examiner for further appropriate proceedings under the complaint as amended. The ground for the motion is that the Commission was without authority to issue the order of April 5 and that such order is void and of no effect, for the stated reason that the respondents were not afforded an "opportunity for hearing."

Acting under the authority of Section 5(b) of the Federal Trade Commission Act, the Commission, on January 19, 1962, had issued and had thereafter served upon the respondents, an order in which it had recited that the then outstanding order to cease and desist was deficient in that it failed to provide clear and definite guidance to the respondents or to adequately protect the public. The order further informed the respondents of the Commission's tentative conclusion that in the circumstances the order to cease and desist should be vacated and additional proceedings conducted. And finally, the order provided that the respondents, within thirty (30) days after service thereof (which time was subsequently extended at the respondents' request to March 26), might file with the Commission a memorandum showing cause why the public interest did not require the proposed actions.

In response to this invitation, the respondents, on March 26, 1962, did file with the Commission a memorandum, twenty-three pages in length, supported by affidavits executed by respondents Carrol F. Chatham and Georges Ipekdjian and by Edward G. Coyne, an employee of the respondent corporations, and twenty-four exhibits and attachments. In these documents the respondents discussed in some detail the nature and characteristics of their product, reviewed the history of this proceeding, set forth their argument that the advertising under attack in the proposed complaint does not have the tendency or capacity to mislead or deceive prospective purchasers, and expressed the conclusion that the public interest does not require further action by the Commission.

The Commission, on April 5, 1962, after having fully considered the material submitted, determined that the public interest does require the actions proposed in its order of January 19, and, accordingly, entered the order complained of.

Section 5(b) of the Federal Trade Commission Act provides, in part, that after expiration of the time allowed for the filing in a United States Court of Appeals of a petition for review of an order of the Commission issued under said section, the Commission may at any time, "after notice and opportunity for hearing," reopen and alter, modify, or set aside, in whole or in part any such order, whenever in the opinion of the Commission conditions of fact or of law

have so changed as to require such action or if the public interest shall so require.

In light of all of the foregoing, the Commission has concluded (1) that its authority to issue its order of April 5, 1962, is clear and specific; (2) that all of the statutory requirements preliminary to the issuance of said order, including the provision for "notice and opportunity for hearing," were fully complied with; and (3) that the respondents' motion to rescind the order is without merit.

Accordingly, it is ordered, That said motion be, and it hereby is, denied.

Commissioner Elman dissenting.

UNITED BISCUIT COMPANY OF AMERICA

Docket 7817. Order and opinion, June 28, 1962

Order vacating initial decision and remanding proceeding to hearing examiner.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner:*

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, dismissing the complaint as to Count I. The hearing examiner in the aforementioned initial decision sustained the respondent's motion of April 28, 1961, made at the close of the case in chief in support of the complaint, to dismiss Count I, stating that the ground for his action was the failure of the evidence to prove the competitive injury required to be shown under Section 2(a) of the amended Clayton Act.[1]

Counsel in support of the complaint appeals, averring (1) that the examiner erred in failing specifically to find that respondent discriminated in price between competing customers, and (2) that he erred in failing to find that the price discriminations charged had the adverse effects proscribed by the statute and that a *prima facie* case had been proved. Said counsel requests that the initial decision be reversed and the case be remanded.

The complaint alleges in part that respondent discriminated in price between different purchasers of its biscuit products of like grade and quality and that such discriminations have been effectuated through the use of respondent's cumulative discount systems based on

[1] The hearing examiner refers to the filing of his initial decision as to Count II, under which decision, subject to Commission review, Count II would be disposed of pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice, published May 6, 1955.

the dollar volume of the customer's monthly purchases. Respondent's answer does not challenge the fact that its Sawyer Division used in the designated periods the several discount schedules set out in the complaint. These schedules provided graduated discounts up to 6% for varying amounts of monthly purchases. They are as follows:

For the Period July 1, 1958, to June 30, 1959:

Monthly purchases	*Discount percent*
$00.00 to $24.99	0
$25.00 to $39.99	2
$40.00 to $69.99	3
$70.00 to $99.99	4
$100.00 to $124.99	5
$125.00 and over	6

For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960:

Monthly purchases	*Discount percent*
$00.00 to $24.99	0
$25.00 to $44.99	1½
$45.00 to $59.99	2
$60.00 to $74.99	2½
$75.00 to $89.99	3
$90.00 to $109.99	3½
$110.00 to $129.99	4
$130.00 to $149.99	5
$150.00 and over	6

In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount to such purchaser under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser. The discounts under these schedules will be referred to hereinafter as "volume" discounts.

The hearing examiner failed to make a specific finding that, as a result of such volume discounts, some customers were charged higher prices for like goods than others competing with such customers and that this constituted price discrimination under Section 2(a) of the amended Clayton Act. However, he clearly assumed such to be the fact; otherwise he would not have reached the injury question.

The present record amply supports a finding that respondent did discriminate in price as charged.[2] The evidence, while not limited to a single division of respondent, largely concerns the Sawyer Biscuit Company Division of United Biscuit Company of America (Sawyer

[2] A price discrimination within the meaning of the phrase "discriminate in price" in Section 2(a) is merely a price difference. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) [6 S. & D. 817].

Division), and so the following references are generally to the activities of that division. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year, Sawyer Division sold to 21,773 customers operating 23,664 outlets. It should be noted that the number of customers and outlets varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, i.e., the amount was credited to them which they also received at that time or later, and 13,716 neither earned nor received such a discount. Of those receiving volume discounts, many received less than 6%. For instance, in January 1959, retail grocery customers of respondent earned and, either then or later, received volume discount payments as follows:

Customers	*Percent*
3,718	2
2,287	3
704	4
310	5
1,038	6

Certain of the customers receiving no volume discount or less than 6% discount were in competition with one or more customers receiving the full 6%. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National).[3]

The evidence of record includes a showing as to price discriminations between and among competing customers in the trading areas of Gary, Indiana; South Bend, Indiana; and Burlington, Wisconsin. Specific examples for two of the areas will be discussed below.

In Gary, Indiana, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. The record shows that Wally's earned, i.e., it was credited with, and then or later received, the following volume discounts in various months in 1959: 3.0% in January and February, 2.0% in March, 0% in October, 1.5% in November, and 2.0% in December. There is no specific evi-

[3] Counsel supporting the complaint has included with his brief an appendix showing a comparison of purchase volumes and discounts of individual chain stores and independent grocery stores. Respondent apparently does not contest the accuracy of the figures in the appendix although it does contend that the schedule is not complete.

The record shows that of the 43 chain group purchasers listed in Commission Exhibit 120-A, including Kroger, A & P and National, all received 6% volume discounts for 1959 purchases except that for certain months—January, April, May, August, November and December—one corporate chain, not identified, did not receive the full 6% discount. Accordingly, the record will sustain a finding that, for 1959 purchases, all chains so listed in the months other than those mentioned received 6%; for the remaining months all chains so listed other than one received the 6%.

dence as to the other months of 1959, although the owner of the store, Walter Pall, testified, in effect, that Wally's earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6% included Better Foods, Inc. (e.g., 1.5%, earned October 1959), Gene's Super Market (e.g., 3.5%, earned December 1959), and Tobe's Super Market (e.g., 3.5%, earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6% discounts for purchases made at the same time, which favored customers included Kroger and A & P.

In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January 1959, if any, included the following:

	Percent
Horvath's Self Service	3
Vince's Super Saver	3
Food Center	2
A & J Market	0
K & F Food Market	4

Those who earned also received payments. Discounts under 6% or no discounts are also shown for other months in 1959 for these customers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time, which favored customers included Kroger and National.

In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Super Market in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of $66.63, while A & P received a 6% volume discount on smaller purchases of $26.28 delivered to one of its outlets competing with Gene's. As another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of $24.05, while National received a 6% discount on purchases of $3.00 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

The hearing examiner, in his consideration of whether the price discriminations so disclosed resulted in the competitive effect defined in the Act, erred in failing to apply the proper test to make this determination. He first cites *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961) [7 S. & D. 19], and *General Foods Corp.*, 50 F.T.C. 885 (1954), to support his decision, but in light of the specifically applicable judicial authority to be mentioned hereafter, these cases are not controlling for this proceeding. While the hearing examiner refers to *Corn Products Refining Company, et al.* v. *Federal Trade Commission*, 324 U.S. 726 (1945) [4 S. & D. 331], and *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948) [4 S. & D. 716], as well as *P. Sorensen Mfg. Co., Inc.*, 52 F.T.C. 1659 (1952), *aff'd per curiam, P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957) [6 S. & D. 332], he does not apply the principles set forth in these cases and, in effect, rejects the holdings.

Section 2(a) of the amended Clayton Act does not require a finding that price discriminations have in fact had an adverse effect on competition (there is no need, for instance, to show that a competitor has suffered financial losses or has been forced out of business); it is enough that they may have the prescribed effect. *Federal Trade Commission* v. *Morton Salt Company*, *supra*. The "gone out of business" test is not a part of Section 2(a). To insist on any such requirement would be contrary to the purposes and intention of Congress in passing this legislation. A showing in the *Morton Salt* case that certain merchants had to pay the respondent therein substantially more for like goods than their competitors justified a finding of competitive injury within the meaning of the Act. In *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956) [6 S. & D. 91], the court in considering the question of injury to competition held in part as follows:

> With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition. (Id. 51)

See also *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956) [6 S. & D. 113]; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956) [6 S. & D. 107]; *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265, F. 2d 674 (2nd Cir. 1959) [6 S. & D. 553]; *P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission*, *supra*. Recently in *Tri-Valley Packing Association*, Docket Nos. 7225 and 7496 (1962) [60 F.T.C.

1134], we held that in any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case.

Fred Bronner Corporation, et al., Docket No. 7068 (1960) [57 F.T.C. 771], a Section 2(a) matter dismissed by the Commission for lack of a showing of competitive injury, differs from the secondary line injury cases cited above because the evidence in that matter was not such as to warrant a finding that the price differential was substantial or competitively significant in the market.

Clearly, the test for competitive injury set forth in *Morton Salt* and applied in the automotive cases above mentioned should govern this proceeding.

We turn now to the facts shown in the present record. The majority of respondent's customers received no volume discount. Independent store owners testified generally as to the highly competitive nature of the retail food business. Net profits are low and cash discounts and other allowances are important. One store owner witness testified: ". . . we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record, such as 2%, 3 to 5% and 4 to 5%. A number of independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is testimony from such witnesses to the effect that if they could buy cheaper they could sell for less, and that customers will, in the over-all picture, buy where the prices are lower. Considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6%, tantamount to a difference in price of 6%, was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%.

On the basis of these facts, there is in the present record sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. We believe that the examiner's failure to so find was clearly erroneous. Unless the showing in the record is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the price discrimination practice charged.

1881 Order

The appeal of counsel supporting the complaint is granted. It is directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views herein expressed. An appropriate order will be entered.

Commissioner Elman concurred in the result of the decision of this matter.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING EXAMINER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, and upon the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons appearing in the accompanying opinion, having granted the appeal, and having directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the opinion:

It is ordered, That the initial decision as to Count I, filed November 13, 1961, be, and it hereby is, vacated and set aside.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further proceedings in conformity with the views expressed in the Commission's opinion.

Commissioner Elman concurring in the result.

TABLE OF COMMODITIES [1]

DECISIONS AND ORDERS

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

INDEX [1]

DECISIONS AND ORDERS

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

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