(C-468) Margo Walters, Inc., 1400 Broadway
(C-469) Wentworth Manufacturing Co., Blanding St., Lake City, S.C.
(C-470) White Stag Manufacturing Co., 5100 S. E. Harney Drive, Portland, Oreg.
(C-471) Wolfson & Greenbaum, Inc., 132 W. 36th St.
(C-472) Wright Manufacturing Co., Toccoa, Ga.
(C-473) Ben Zuckerman, Inc., 512 Seventh Ave.
(C-474) The Enro Shirt Co., Inc., 4300 Leghorn Drive, Louisville, Ky.
(C-475) Famous-Sternberg, Inc., 950 Poeyfarre St., New Orleans, La.
(C-476) Glen Mfg., Inc., 320 E. Buffalo St., Milwaukee, Wis.
(C-477) Ilene Manufacturing Co., Inc., 525 Seventh Ave.
(C-478) Jolee, Inc., 250 W. 39th St.
(C-479) M. J. Levine, Inc., 250 W. 39th St.
(C-480) Kelita, Inc., 1407 Broadway
(C-481) Malcolm Kenneth Co., 11 Leon St., Boston, Mass.
(C-482) Kimberly Knitwear, Inc., 1410 Broadway
(C-483) Leathermode Sportswear, Inc., 357 Kossuth St., Bridgeport, Conn.
(C-484) Mode de Paris, Inc., 58 Second St., San Francisco, Calif.
(C-485) New Era Shirt Co., 316 N. 18th St., St. Louis, Mo.
(C-486) Raab-Meyerhoff Co., 350 Fifth Ave.
(C-487) Ronnie Fashions, Inc., 1400 Broadway
(C-488) M. C. Schrank Co., 17-21 Broad St., Bridgeton, N.J.
(C-489) Norman Wiatt Co., 124 E. Olympic Blvd., Los Angeles, Calif.
(C-490) Wonderknit Corp., 112 W. 34th St.

IN THE MATTER OF

PERMA-LITE RAYBERN MFG. CORP. ET AL.

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

Docket 8486. Complaint, May 21, 1962—Decision, May 2, 1963

Order dismissing, without decision on the merits, complaint charging a Chicago concern with selling its home improvement products through misrepresentation, and directing preparation and submission to the Commission of a new complaint and proposed order.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the said Act, the Federal Trade Commission, having reason to believe that Perma-Lite Raybern Mfg. Corp., a corporation, and Harry E. Swirsky and Raymond Weller, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the 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, Perma-Lite Raybern Mfg. Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 3333 West Montrose Avenue, Chicago, Illinois.

Respondents, Harry E. Swirsky and Raymond Weller are officers of the corporate respondent. They cooperate and act together in formulating, directing and controlling the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is 3333 West Montrose Avenue, Chicago, Illinois.

Prior to December 30, 1961, Perma-Lite Raybern Corp. was the wholly owned sales subsidiary of the corporate respondent. On that day, Perma-Lite Raybern Corporation was dissolved and all of its assets transferred to the corporate respondent, since which time the selling of respondents' products has been under the control of the corporate respondent.

Whenever it is alleged hereafter that the respondents committed certain acts and practices which are claimed to be false, misleading and deceptive, it is intended to be alleged that the said acts and practices were committed by the individual respondents in conjunction with the corporate respondent and said Perma-Lite Raybern Corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, offering for sale, sale and distribution of aluminum storm doors and windows, canopies, patios and fiberglass awnings and in the offering for sale, sale and distribution of water softeners to the public and in the installation of said products.

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 and transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents' method of selling is either by door-to-door salesmen or by salesmen who keep appointments made in previous telephone solicitations by other employees of the respondents, operating in the branch office nearest to the prospective customer. Such salesmen or representatives are trained by respondents in respondents' sales techniques and are furnished by respondents with a sales promotion presentation, commonly known as a "canned sales talk", and with a sales kit containing advertising matter, order blanks and various other materials necessary to promote and to effectuate the sale of respondents' products. Such sales presentations and the material contained in said sales kits are used by respondents' salesmen and representatives in the course of offering for sale and selling respondents' said products and contain many representations respecting respondents' sales program and the prices of their products. Such representations are orally given by respondents' salesmen and representatives in the offering for sale of respondents' products.

PAR. 5. In the course of said solicitations and oral presentations of the sales talk, and by other means, respondents' salesmen or representatives have made many statements or representations, directly or by implication, to prospective purchasers of respondents' products. Typical, but not all inclusive of such statements and representations, are the following:

1. (a) That the respondents' salesmen or representatives are factory representatives dealing directly with the factory thus eliminating a salesman's commission and, therefore, are able to sell respondents' products at a lower price than an ordinary salesman.

(b) That respondents' salesmen or representatives are special representatives from the factory who will present to the prospective customer a "direct factory reference cost plan", thereby implying that said salesmen or representatives will quote a lower or factory price than the usual or regular price.

(c) That by dealing directly with the factory, the installation will be made at just a little more than half of what the same installation would cost if it were made by a representative of the sales department.

(d) That the respondents' salesmen or representatives are bonded and certified to design and advise on all awnings, storm windows and door installations.

(e) That respondents' salesmen or representatives are graduates of an academy, thereby implying that they are specially qualified.

2. (a) That the purpose of respondents' salesmen or representatives making the call on the prospective customer is to introduce respondents' products and to stimulate business in that particular area.

(b) That the persons solicited to purchase the respondents' products have been specially selected to receive the offer.

(c) That the prospective customers are contacted during the "off season" and, therefore, respondents' products are being sold at a reduced price.

(d) That the prospective customer must purchase immediately, on the day of the visit, or the offer will be withdrawn and the price will be higher.

3. That of two or more prices quoted to the customer, the particular salesman or representative will sell at the lowest price if the prospective customer will allow people to view the installation or permit the house to be used as a point of reference.

4. That the water softener sold by respondents is manufactured by Dow Chemical Company and Rheem Manufacturing Company in conjunction with the respondents and that the salesman or representative who will call upon the prospective purchaser of the water softener is a special factory representative.

PAR. 6. In truth and in fact:

1. Respondents' salesmen or representatives are not factory representatives, do not deal directly with the factory and are neither bonded nor certified nor are they graduates of any academy or school which specially qualifies them to design or advise on any awning, storm window or door installations, but on the contrary, are ordinary salesmen working out of a branch office and being paid a commission for each sale.

2. Prospective purchasers are not contacted for the purpose of introducing respondents' products in a particular area, the prospective purchasers have not been specially selected, the purchase price is not reduced because the sale is made in the "off season" and it is not necessary for the purchase to be made at that particular time, but on the contrary, sales are made at the same price at all times and to any person who will pay the price.

3. Respondents did not intend to ask, nor did they ask, other prospective customers to view the installation, and they did not intend to use, nor did they use, the home of any purchaser as a point of reference, this statement being used only as a means to induce hesitant buyers into buying respondents' products under the mistaken impression that they were receiving some sort of a special price because of their willingness to allow their homes to be used for these purposes.

4. The water softener sold by the respondents is manufactured by Rheem Manufacturing Company and the respondents have nothing whatsoever to do with its manufacture. Furthermore, the respondents' salesmen or representatives have no connection with the factory of Rheem Manufacturing Company but, on the contrary, are regular salesmen or representatives of the respondents, working out of their local branch offices.

Therefore, the statements and representations set forth in Paragraph 5 were, and are, false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of 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.

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 the respondent's competitiors, 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.

ORDER DISMISSING COMPLAINT

On February 5, 1963, the hearing examiner certified to the Commission the question of whether consent order procedure should be made available to the respondents; and

It appearing that the extensive delays and controversies encountered in this proceeding stem from the action taken by the Commission in a similar, related matter and that further delay and controversy can best be avoided by withdrawing said complaint and proposed order for the purpose of redrafting and eventual reservice pursuant to Part 3 of the Commission's Rules of Practice; and therefore

It is ordered, That the complaint in this matter be, and it hereby is, dismissed without decision on the merits and without prejudice to the Commission's right to summarily issue a new complaint covering the same or substantially similar alleged facts.

It is further ordered, That the Bureau of Deceptive Practices forthwith prepare and submit for Commission consideration a new complaint and proposed order appropriate to the circumstances.

IN THE MATTER OF

NANCYE FLEMING SHOP, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-494. Complaint, May 3, 1963—Decision, May 3, 1963

Consent order requiring retailers of ladies' ready-to-wear merchandise in Alexandria, Va., to cease violating the Textile Fiber Products Identification Act

by failing to make on labels full disclosure of fiber content, using fiber trademarks on labels without setting forth thereon the generic names of fibers and full disclosure of fiber content, and using on labels words, symbols, or depictions falsely implying the presence of certain fibers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Nancye Fleming Shop, Incorporated, a corporation, and Nancye Fleming Markle, Mildred Fleming Councilor, and Susan Councilor Jocelyn, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 Nancye Fleming Shop, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 325 South Washington Street, Alexandria, Virginia.

Individual respondents Nancye Fleming Markle, Mildred Fleming Councilor, and Susan Councilor Jocelyn are respectively president, vice president and secretary-treasurer of said corporation and all individual respondents formulate, direct and control the acts, practices and policies of said corporate respondent. Their business addresses are the same as said corporate respondent. Respondents are retailers of ladies' ready-to-wear merchandise.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce", and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

PAR. 4. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

A. Abbreviations, e.g., "D/C", were used on labels to designate fiber content of Dacron and cotton, without a full disclosure of the fiber content information required by the said Act and the Rules and Regulations, in violation of Rule 5.

B. Fiber trademarks were placed on labels without the generic names of the fibers appearing on such labels, in violation of Rule 17(a) of the aforesaid Rules and Regulations.

C. Fiber trademarks were used on labels without a full and complete fiber content disclosure appearing on such labels, in violation of Rule 17(b) of the aforesaid Rules and Regulations.

D. Words, symbols, and depictions which constitute or imply the name or designation of fibers were used on labels attached to textile fiber products when such fibers were not present in the aforesaid textile fiber products, in violation of Rule 18 of the aforesaid Rules and Regulations.

PAR. 5. After certain textile fiber products were shipped in commerce, respondents have removed, or caused or participated in the removal of (prior to the time such textile fiber products were sold and delivered to the ultimate consumer) the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to such products, in violation of Section 5(a) of said Act.

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification 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, Nancye Fleming Shop, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 325 South Washington Street, in the city of Alexandria, Commonwealth of Virginia.

Respondents Nancye Fleming Markle, Mildred Fleming Councilor and Susan Councilor Jocelyn are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Nancye Fleming Shop, Incorporated, a corporation, and its officers and Nancye Fleming Markle, Mildred Fleming Councilor, and Susan Councilor Jocelyn, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber products; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

2. Using abbreviations on labels to designate fiber content information required by said Act and Rules and Regulations thereunder.

3. Using a fiber trademark on labels affixed to such textile fiber products without the generic name of the fiber appearing on the said label in accordance with the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder.

4. Using a generic name or fiber trademark on any label whether required or nonrequired, without making a full and complete fiber content disclosure in accordance with the Act and Regulations the first time such generic name or fiber trademark appears on the label.

5. Using words, symbols, or depictions on labels attached to textile fiber products, which constitute or imply the name or designation of a fiber when such fiber is not present in the aforesaid product.

It is further ordered, That respondents Nancye Fleming Shop, Incorporated, a corporation, and its officers and Nancye Fleming Markle, Mildred Fleming Councilor, and Susan Councilor Jocelyn, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of, the stamp, tag, label, or other identification required by the Textile Fiber Products Identification Act to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce and prior to the time such textile fiber product is sold and delivered to the ultimate consumer.

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

UNIFORMS BY GILSON, INC., ET AL.

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

Docket C-495. Complaint, May 3, 1963—Decision, May 3, 1963

Consent order requiring Hempstead, Long Island, N.Y., distributors of uniforms, many of them by direct sale through their "Gilson Representative(s)" to whom they furnished a sales kit consisting of their catalog, swatch book and other sales material, to cease representing falsely in such catalogs and other advertising material and through their dealers that the "complete satisfaction" of the purchasing public was guaranteed "without any conditions whatsoever", and that their merchandise was unconditionally guaranteed, when in fact, their said representatives in many instances retained or misappropriated the full amount of the purchase price along with orders and failed to transmit to them orders received along with deposits, and in such cases respondents refused to deliver merchandise without additional payment and to refund deposits; and to disclose clearly to purchasers all of the terms and limitations, etc., under which their merchandise was offered for sale, including a statement as to any financial or other responsibility assumed by them.

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 Uniforms by Gilson, Inc., a corporation, and Louis K. Gilson and Stanley Gilson, individually and as officers of said corporation, and Arthur E. Marchetta, individually and as the sales manager of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Uniforms by Gilson, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160 Hempstead Turnpike, Hempstead, Long Island, State of New York.

Respondents Louis K. Gilson and Stanley Gilson are officers of the corporate respondent. Respondent Arthur E. Marchetta is the sales manager of the corporate respondent. The individual respondents formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of uniforms for sale to the public.

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

PAR. 4. In the course and conduct of their aforesaid business, respondents sell and distribute substantial quantities of their uniforms to the public by direct sales through sales persons whom they describe and characterize in their said catalog as "GILSON REPRESENTATIVE(S)" and to whom respondents furnish a sales kit usually consisting of respondents' catalog, swatch book and other sales material employed by respondents to promote the sale of their uniforms.

Respondents' said catalog contains complete descriptions of respondents' uniforms and other products offered for sale, including a detailed photographic representation of respondents' garments worn by what appear to be live models in many instances. Each and every item therein is described with respect to workmanship, fabric, size range, colors, deposit, and selling price. Respondents' swatch book contains representative textile samples supplementing the catalog description which are prominently described as "GILSON'S MIRACLE FABRICS". Respondents' catalog, and other sales materials by way of initial contact advertising employed by the respondents to promote the sale of their uniforms, fails to disclose the extent by which the respondents have imposed conditions, restrictions and limitations upon the apparent authority of said "GILSON REPRESENTATIVE(S)" to accept payment for respondents' products or the terms and conditions imposed on the purchasing public with respect to refunds of deposits paid to said "GILSON REPRESENTATIVE(S)" for the purchase of respondents' products.

PAR. 5. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their uniforms, the respondents in their catalogs and other advertising material and through their dealers have made numerous statements and representations of which the following are typical but not all inclusive:

A *Gilson* customer is a Guaranteed Customer!
Your satisfaction is unconditionally guaranteed.
COMPLETE, ABSOLUTE SATISFACTION! GILSON GUARANTEES

your complete satisfaction without any conditions whatsoever.——
YOUR GILSON REPRESENTATIVE IS MOST PLEASED TO SERVE YOU.
Gilson * * * the famous name in uniforms!

PAR. 6. By and through the use of the aforesaid statements and others of similar import but not specifically set out herein, respondents represented, directly or by implication:

1. That the "complete satisfaction" of the purchasing public is guaranteed "without any conditions whatsoever."

2. That respondents' merchandise is unconditionally guaranteed.

PAR. 7. In truth and in fact:

1. The "complete satisfaction" of the purchasing public is not "guaranteed without any conditions whatsoever" for the following reasons:

a. In many instances, respondents' representatives retain or misappropriate the full amount of the purchase price along with orders given to them by members of the purchasing public for the purchase of respondents' uniforms. In those instances, where the full amount of the purchase price is prepaid to the "GILSON REPRESENTATIVE" so as to take advantage of respondents' advertised policy of prepaying all delivery charges, which the purchaser would otherwise be obliged to pay in the event that a C.O.D. balance were involved, and the "GILSON REPRESENTATIVE" thereafter fails to remit the necessary proceeds to the respondents, the respondents fail and refuse to deliver the merchandise so ordered and paid for unless an amount equivalent to 50% of the catalog price of the merchandise so ordered is remitted directly to the respondents by the purchaser in addition to the monies already expended by the purchaser for said purchase.

b. Respondents' representatives fail and neglect to transmit to respondents the orders given to them by members of the purchasing public in conjunction with deposits given to them for the purchase of respondents' uniforms. In those instances, where the "GILSON REPRESENTATIVE" has received the amount of the deposit specified by respondents' catalog for the particular purchase and the "GILSON REPRESENTATIVE" fails or neglects to forward such order to the respondents, the respondents refuse to make a refund of said deposit, and the purchaser then has no other alternative except being obliged by respondents to apply the amount so deposited with the "GILSON REPRESENTATIVE" exclusively as a credit towards the purchase of respondents' merchandise. In such instances purchasers usually do not learn of the omission of the "GILSON REPRESENTATIVE(S)" to transmit such orders and respondents' policies in the above respects until after a considerable delay in the receipt of the ordered merchandise has intervened, during which interval the purchasers often have been obliged to fill their uniform requirements promptly from sources other than the respondents. In such cases, nevertheless, respondents insist that persons who have made deposits in the manner aforesaid, can only recover the expenditure of such funds by applying the amount thereof solely and exclusively toward the purchase of respondents' merchandise, irrespective of the extent of the delay and inconvenience resulting from the failure of the purchaser to receive such merchandise and the necessity for the purchaser to obtain and pay for other merchandise to fill his immediate uniform needs which the respondents had failed to meet at the time.

2. The respondents' merchandise is not unconditionally guaranteed for the following reasons:

a. The respondents have failed to make clear and conspicuous disclosure in their catalog and other sales literature of the material fact that their purported unconditional and absolute guarantee of satisfaction is in fact, conditional, qualified and limited.

b. Respondents' sales program is further false and deceptive because it fails to make clear and conspicuous disclosure of the material facts respecting the exact nature and extent of their limited liability in transactions involving persons purporting to represent them.

c. The purported guarantee is limited by respondents to the replacement of uniforms or other garments which might be found unsatisfactory by the purchaser after delivery solely because of reasons of size, color or other inherent features of the merchandise itself with respect to material or workmanship, and which must be returned to the respondents for such adjustment only within a specified number of days after receipt of delivery by the purchaser.

Therefore, the statements and representations referred to in Paragraphs 5 and 6 are false, misleading and deceptive.

Par. 8. By the aforesaid practices, respondents place in the hands of dealers and other persons calling on the purchasing public, means and instrumentalities by and through which they may mislead the public as to the nature and extent of the guarantee, the manner in which the guarantor will perform and the identity of the guarantor.

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 the sale of uniforms of the same general kind and nature as that sold by respondents.

Par. 10. 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' product 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 the respondents named in the caption hereof with violation of the Federal Trade Commission 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 Uniforms by Gilson, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160 Hempstead Turnpike, Hempstead, Long Island, State of New York.

Respondents Louis K. Gilson and Stanley Gilson are officers of said corporation and respondent Arthur E. Marchetta is sales manager of said corporation. Their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Uniforms by Gilson, Inc., a corporation, and its officers, and Louis K. Gilson and Stanley Gilson, individually and as officers of said corporation, and Arthur E. Marchetta, individually and as sales manager of the aforesaid corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of uniforms or other products, 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 any of respondents' products are guaranteed or that the satisfaction of purchasers of respondents' products is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.
2. Representing that any product is guaranteed or the satisfaction of purchasers of respondents' products is guaranteed when any charge in addition to the advertised selling price is imposed as a condition to delivery unless there is clearly and conspicuously set forth in immediate conjunction therewith, any and all of the terms and conditions thereof.
3. Failing to disclose clearly and conspicuously to prospective purchasers and purchasers of respondents' merchandise, any and all of the terms, conditions, restrictions or limitations under which respondents' merchandise is offered for sale including a statement as to any limited financial or other responsibility assumed by respondents.
4. Placing in the hands of dealers or other persons calling on the purchasing public, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out in 1, 2 and 3 above.

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

COLGATE-PALMOLIVE COMPANY AND TED BATES & COMPANY, INC.

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

Docket 7736. Complaint, Jan. 8, 1960—Decision, May 7, 1963

Final Order, following remand from the Court of Appeals, First Circuit, dated November 20, 1962, 310 F. 2d 89, 7 S.&D. 574, cease and desist order dated December 29, 1961, 59 F.T.C. 1452, requiring respondent and its advertising agency Ted Bates & Company, Inc., to cease using deceptive television demonstrations and misrepresenting the qualities of shaving cream.

OPINION OF THE COMMISSION ON REMAND

FEBRUARY 18, 1963

BY ELMAN, *Commissioner:*

This case is again before the Commission, on remand from the Court of Appeals for the First Circuit.

On December 29, 1961, the Commission, finding that Colgate-Palmolive Company and its advertising agency, Ted Bates & Company, Inc., had violated Section 5 of the Federal Trade Commission Act, issued a cease and desist order against them. The Commission found that respondents, in numerous television commercials advertising the moisturizing qualities of Colgate's Rapid Shave cream, engaged in two distinct unfair and unlawful practices and methods of competition: (1) misrepresenting the qualities or merits of the product; and (2) using a sham demonstration purporting to prove a claim made for the product but which, because of the undisclosed substitution of a mock-up, did not in fact prove the claim. Our order was designed to prohibit respondents from continuing to engage in both of these illegal forms of advertising.

As to the first practice prohibited by the Commission's order, i.e., misrepresentation of the qualities of shaving cream products, the Court of Appeals in its opinion of November 20, 1962, sustained the Commission's decision, apparently in all respects. However, with respect to the second practice, i.e, the use of spurious television commercial demonstrations, the Court found the apparent reach of our order to be ambiguous. On the basis of an interpretation of the order it believed to be supported by our previous opinion and by certain statements made by Commission counsel during the oral argument of the appeal, the Court held that the order was permeated by "fundamental error" and went too far in prohibiting practices that do not violate Section 5. The case was accordingly remanded to permit the Commission to formulate a new order (310 F. 2d 89) [7 S.&D. 574, 582].

The appellate proceedings in this case demonstrate once again the imperative need for explicitness in administrative adjudication. An agency whose actions are subject to appellate review must always be mindful of its duty to the reviewing court to express clearly both the rationale and the bounds of its decision. As Mr. Justice Cardozo put it, the court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago M., St. P., & P.R.R.*, 294 U.S. 499, 511 (1935); and see *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943).

Reexamined in the light cast by the opinion of the Court of Appeals, the Commission's previous opinion and order in this case—to the extent that they dealt with respondents' practice of presenting spurious demonstrations in their television commercials—appear to have been wanting in the necessary clarity. Our opinion failed to spell out sufficiently the theory of law on which the order was based, and the prohibitions contained in the "demonstration" part of the order were not defined with sufficient precision. For that reason, it would clearly be inappropriate for the Commission to seek Supreme Court review of this case in its present posture. We believe it would be more orderly, less productive of delay, and in the public interest for the Commission now to remove the defects in its order found by the Court of Appeals, so that if there should be occasion for further judicial review, it will not be clouded by uncertainty as to the basis and breadth of our decision.

On this remand the Commission has undertaken to reconsider the entire case, and to formulate a new order in light of the various suggestions contained in the opinion of the Court. These suggestions have been carefully considered by the Commission and in substantial part have been accepted and incorporated in our order. In one respect (relating to the application to Bates of that part of the order prohibiting misrepresentation of the qualities or merits of shaving cream products), we have added a protective qualification beyond that suggested by the Court.

I

At the outset, we must emphasize what this case does and does not involve. The basic facts have never been in dispute. Respondents, in their television commercials for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited to that claim, the case would have raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper."

As stated in our previous opinion, "The heart of these commercials was the visual 'sandpaper test'—a test that was, in reality, not taking place. * * * [T]he pictorial test of Rapid Shave, proving to any doubting Thomas in the vast audience that 'By golly, it really *can* shave sandpaper!', was the clinching argument made by the commercials. * * * Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product."

Respondents did not present a fictional dramatization, obvious to viewers as such, of the claim being made for the product. Had they done so, an entirely different case would have been before us. But when a seller offers what he represents to be "documentary proof", he can hardly claim the privilege of dramatic license. Respondents presented what appeared to viewers and was described as a "test" or visual proof, which each viewer could verify with his own eyes, of the truth of their claim that Rapid Shave's moisturizing qualities enabled it to shave tough, dry sandpaper cleanly and immediately upon lathering. In fact, however, the "sandpaper test" was a hoax; the "proof" was not proof at all; and the "demonstration" demonstrated only how far some marketers feel they can go in "hard sell" advertising. As respondents have freely conceded, the material they affirmatively represented in the "test" to be "tough, dry sandpaper" was not sandpaper but a mock-up of loose sand spread on Plexiglas.

II

Having put to one side the finding of fact that sandpaper cannot be shaved clean upon the application of Rapid Shave in the manner depicted and described in the demonstration, the Commission held that even if Rapid Shave could shave sandpaper as represented, respondents' "sandpaper test" demonstration, being spurious, was an unfair and unlawful method of advertising. We held that when an advertiser purports to prove the existence of a quality claimed for his product by staging a sham test or demonstration that actually proves nothing, and the "demonstration" is material in affecting the judgment of buyers, the advertiser cannot defend the practice on the ground that the product in fact possesses the claimed quality.

In setting aside the Commission's order, the Court of Appeals held that it was susceptible of being interpreted to prohibit indiscriminately the use of mock-ups or substitute materials in all television commercials in every conceivable hypothetical situation. We agree that such an interpretation of our order would exceed its intended scope.

The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product.[1]

That the "sandpaper test" was calculated to affect the judgment of prospective buyers is beyond doubt. Respondents, who allocated so much of their television advertising to these bogus demonstrations, cannot dismiss them now on the ground that they were so ridiculous that nobody could have been influenced by them to choose Rapid Shave over a competitor's product. As the Court of Appeals pointed out, respondents' advertising "went far beyond generalities and eye-catching devices into asserting as a fact that the cream enables sand-

[1] We also agree with the Court of Appeals that where "products such as ice cream and the 'head' on beer melt under the hot camera lights and require the use of more stable substitutes", there could be no objection to the use of such substitutes in casual or incidental displays of the product, so long as the commercial does not seek thereby to prove visually the longevity or fine appearance of the product.

paper to be shaved forthwith, and that this fact 'proved' the cream's properties for shaving humans. They cannot now suggest that ability to shave sandpaper forthwith was an irrelevant fact and an irrevelant representation. We agree with the Commission that it is immaterial that the cream may in fact have adequate shaving qualities. *If a misrepresentation is calculated to affect a buyer's judgment it does not make it a fair business practice to say the judgment was capricious.*" (Emphasis added.)

III

With this ambiguity in our order resolved, we shall restate the factual and legal basis for our conclusion that it is unlawful for advertisers to stage television commercial demonstrations that purport to—but do not in fact, because of the undisclosed use of mock-ups or substitute materials—prove visually a quality or merit claimed for a product, regardless whether the product actually possesses such quality or merit.

The principle upon which the Commission decided this case is elemental in the law of unfair competition: A seller may not resort to material falsehoods in order to induce sales of his product; [2] and a misrepresentation may be material in affecting a buyer's choice even though it does not relate to the product's quality or merits.[3]

The product may in fact be all that the purchaser thinks it to be; but if he has been induced to buy it by the seller's fraud, injury is done both to the advertiser's competitors and to the public—which, through its representatives in Congress, has established the fundamental principle of law that sellers in interstate commerce may not indulge in material untruths in their advertising.[4]

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[2] In Section 15 of the Federal Trade Commission Act, in defining false advertising for the purposes of Section 12 of the Act covering foods, drugs, devices and cosmetics, Congress specifically spelled out the basic proposition underlying the whole Act that a false advertisement is one that is "*misleading in any material respect* * * *" (emphasis added). The validity of the complaint in this case, though expressly predicated on Section 5, may also be sustainable under Section 12, though the latter is not specifically cited therein. Cf. *Williams* v. *United States*, 161 U.S. 382 (1897). There can be no question that an advertisement that is "false" under Section 12 also violates the more general and comprehensive provisions of Section 5. See Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1025, 1031, n. 73 (1956).

[3] Among the cases illustrating this principle are those involving false disparagement of a competitor's reputation. methods, or products, e.g., *Steelco Stainless Steel, Inc.* v. *FTC*, 187 F. 2d 693 (7th Cir. 1951) [5 S.&D. 265]; bait advertising. e.g., *Lifetime, Inc.*, Docket 7616, December 1. 1961 [59 F.T.C. 1231]; deceptive pricing, e.g., *Niresk Industries, Inc.* v. *FTC*. 278 F. 2d 337 (7th Cir. 1960) [6 S.&D. 727] cert. denied, 364 U.S. 883 (1960); dishonest testimonials, e.g., *FTC* v. *Standard Education Society*, 86 F. 2d 692 (2d Cir. 1936) [2 S.&D. 366], modified, 302 U.S. 112 (1937) [2 S.&D. 429]; and misrepresentation of the seller's trade status, e.g., *FTC* v. *Royal Milling Co.*, 288 U.S. 212 (1932) [2 S.&D. 217]. *Deer* v. *FTC*, 152 F. 2d 65 (2d Cir. 1945) [4 S.&D. 437].

[4] See note 2. *supra*: see *National Trade Publications Serv.* v. *FTC*, 300 F. 2d 790, 792 (8th Cir. 1962) [7 S.&D. 455, 458].

The original concept of the Commission's jurisdiction over false advertising, it may be noted, was limited to cases in which the advertising was found to be an unfair method of competition. See *FTC* v. *Raladam*, 283 U.S. 643 (1931) [2 S.&D. 116]; Handler, *The Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 Colum. L. Rev. 527 (1931). While the Wheeler-Lea amendments to the Federal Trade Commission Act [5] established injury to consumers as an independently sufficient ground for finding a violation of Section 5, the basic proposition that advertising which is unfair to competitors violates the law has never been challenged.[6] If, relying on falsehoods told them by a seller, consumers have been persuaded to buy his product, they may perhaps not be deceived or hurt in a strict pecuniary sense if the falsehoods did not relate to the quality or merits of the product. But such "deception" of purchasers is by no means essential to a finding of unfair competition. Regardless whether consumers are "injured" when they are induced to buy through false advertising claims, honest competitors are injured—because some or many of such sales have been made at their expense. And the Federal Trade Commission Act has enacted into law the fundamental concept that businessmen may not, in competing with each other for the consumer's dollar, resort to "unfair methods of competition in commerce and unfair * * * acts or practices in commerce." Even apart from any moral or ethical considerations, Congress considered that such methods and practices must be outlawed in a competitive system where sellers should have fair and equal access to markets and where success should be the reward of the most efficient rather than the least scrupulous.

The Commission reiterates the basic principle that unscrupulous sellers and advertisers may not make misrepresentations that are material in inducing purchases. It is not enough for sellers to refrain from misrepresenting the merits of their wares; the law prohibits them from making any material misrepresentations designed to influence the public in choosing what, or what not, to buy.

What is essentially involved in this phase of the case is the question whether an advertiser may lie to prospective buyers to convince them that certain real qualities of a product actually exist. Consider, for

[5] 52 Stat. 111 (1938), as amended, 15 U.S.C. 545(a)(1) (1958).

[6] In the very first case arising under the Federal Trade Commission Act, *Sears, Roebuck & Co.* v. *FTC,* 258 Fed. 307, 311 (7th Cir. 1919) [1 S.&D. 36, 40] the court stated that the Commission is "not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. (The commissioners, representing the Government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases."

example, an advertisement for a product that falsely claims to have the "Good Housekeeping Seal of Approval". Surely it would not be a defense that the product in fact meets all the standards required for that seal. Cf. *Hearst Magazines, Inc.*, 32 F.T.C. 1440 (1941).

Other familiar examples of the same principle are faked "before" and "after" photographs and forged testimonials in advertisements for products that in fact possess the claimed quality or merits. A diet food may be effective as an aid in weight reduction, but that would not justify use of counterfeit photographic "proof" in advertising it. A brand of milk may be wholesome and nutritious, but parents may not be urged to buy it for their children on the false representation that the President's children drink it. A toothpaste may be beneficial in reducing the number of cavities, but if statistical proof is offered of its effectiveness in actual use by particular families or other groups, the proof must be genuine.

In short, if people are led by misrepresentations to buy an advertised product, in preference to an honest competitor's, it is not sufficient justification to say that the product actually possesses the claimed quality or merits. Allowance of such a defense would place a premium on false, and a penalty on honest, advertising. To say that selling is an art does not mean that artifice must be tolerated. If it is too difficult or even impossible in a particular medium to present a truthful demonstration proving a claim made for a product, the seller may be obliged to forego use of the demonstration form of advertising in that medium. There may indeed be some advertising claims that simply cannot be proved in a television pictorial demonstration. Nonetheless, as stated in our previous opinion, it would be a cynical subversion of the policy of the law to allow technical limitations of a particular medium to become lawful justification for resort to falsehoods and deception of the public.

The Commission recognizes that the task of convincing prospective customers of the various qualities of a product represents a challenge to every advertiser. An advertiser, promoting a product which he believes the public would benefit from buying, may feel—perhaps on the theory that the end justifies the means—that there is no harm in telling some "white lies" in order to induce consumers to buy it, so long as the product's merits are not misstated. But if a seller may indulge in falsehoods in order to do a more successful job of advocacy, then his competitors who are truthful in their advertising are put at a disadvantage. It would be ironical indeed if businessmen who do not resort to material deceptions in advertising their products were forced, as a result of a decision of the governmental agency responsible for enforcing truth in advertising, to do so or suffer competitively.

As the Court of Appeals for the First Circuit observed in a recent opinion, *Korber Hats, Inc.* v. *FTC*, decided December 31, 1962 [311 F. 2d 358; 7 S.&D. 611, 613], Congress "gave the Commission a broad mandate to prevent public deception in the give and take of the market place", and the "[c]ourts have consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labelling and advertising habits". "The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down." *FTC* v. *Algoma Lumber Company*, 291 U.S. 67, 79 [2 S.&D. 247, 254 (1934)].

IV

We consider, finally, the questions of (1) the applicability of the "demonstration" part of the order to all products advertised by Colgate, and (2) the responsibility of Bates.

(1) The Commission here found two unfair competitive practices, not one. The record showed that respondents went beyond misrepresentation of the qualities or merits of a particular advertised product. They used an unfair and unlawful method of advertising: stating fraudulent visual demonstrations purporting to prove a quality claimed for a product, but which do not in fact constitute such proof because of the undisclosed substitution of a mock-up. The illegality and unfairness inhere in the "spurious demonstration" *method* of advertising, and do not depend on the particular products advertised.

The Court of Appeals recognized, without deciding, that if a certain type of advertising demonstration is unlawful, "it might be appropriate * * * to enter a broad order forbidding all such demonstrations en masse." We think that the entry here of such a broad order is not only appropriate but, in the circumstances presented, our duty to the public and honest competitors under the Federal Trade Commission Act. It would be less than adequate protection of consumers and competitors to enjoin the use of this unfair method of competition (i.e., sham "demonstrations" that actually demonstrate or prove nothing) only insofar as it could be used in advertising one product, but not others. Respondents having been found to have engaged in that unlawful practice, the Commission was obliged to order them to stop it once and for all. If the function and purpose of a cease and desist order here are to halt respondents' unfair method of advertising, it would make no sense for the order to forbid them to stage spurious television demonstrations in advertising shaving cream, but to allow them to continue the practice in advertising toothpaste or soap.

In respect to the prohibition against misrepresentation of the quality or merits of products, our previous order was narrowly limited to Rapid Shave and other shaving creams. In view of our findings as to respondents' misrepresentations in that regard, as well as the fact that respondents are already subject to a number of outstanding orders and stipulations containing similar prohibitions with respect to other products,[7] the Commission would be amply justified in extending the prohibition against such misrepresentations to all products similarly advertised by respondents.[8] However, since our earlier order, though perhaps overly generous to respondents, has in this regard been reviewed and sustained by the Court of Appeals, we will not disturb the limitation to Rapid Shave or other shaving creams.

(2) Whatever may be the rule in a hypothetical case where there is an absence of any knowledge or suspicion on an agent's part that an advertisement is false, it is clear that this is not that case. It was Bates that conceived the idea of television commercials making the claim, and "proving" it with a "sandpaper test" demonstration, that Rapid Shave could shave sandpaper.[9] It was Bates that prepared, and placed for broadcast on national network television, the commercials in question.[10] The record establishes that the responsible Bates

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[7] In Docket 7737, June 1, 1960 [56 F.T.C. 1491, 1493], Bates was ordered to cease and desist from using, in connection with the advertising of oleomargarine, "any pictorial presentation or demonstration purporting to prove, or representing in any manner, that moisture drops appearing on said oleomargarine cause such oleomargarine to taste more like butter, or to be more similar in flavor, than competitive oleomargarine."

In Docket 7688, February 24, 1960 [56 F.T.C. 956, 958], Bates was ordered to cease and desist from using, in connection with the sale of filter cigarettes, "any pictorial presentation or demonstration purporting to prove that the filter * * * absorbs or retains more of the tars or nicotine in cigarette smoke than the filter used in other cigarettes [when such is not the fact] * * *" and from representing that any filter cigarette has the approval of any agency of the United States Government or has been found by any such agency to be lower in tar or nicotine content than other filter cigarettes.

In Docket 7660, March 9, 1961 [58 F.T.C. 422, 430], Colgate was ordered to cease and desist from representing, in connection with the sale of any dentifrice, "that said dentifrice affords the users thereof with complete protection against tooth decay * * * [or] misrepresenting in any manner the degree or extent of protection against tooth decay * * * afforded users of any such dentifrice."

In Stipulation 8380, October 9, 1952 [49 F.T.C. 1601], Colgate agreed to cease and desist from representing that "FAB washes clothes as clean without rinsing as with rinsing * * * [or that] * * * FAB without rinsing washes clothes cleaner than or as clean as soap with rinsing."

In Stipulation 2867, June 26, 1940 [31 F.T.C. 1630], Colgate agreed to eliminate twelve representations concerning the qualities of Palmolive soap, two representations concerning the qualities of Cashmere Bouquet soap, five representations concerning the qualities of Super Suds, three representations concerning the qualities of shaving creams (including Rapid Shave), three representations concerning the qualities of dental cream, and one concerning the qualities of Kirkman Soap Flakes.

[8] See *Niresk Industries* v. *FTC*, 278 F. 2d 337, 343 (7th Cir.) [6 S.&D. 727, 735], cert. denied, 364 U.S. 883 (1960); *America Tack Co.* v. *FTC*, 211 F. 2d 239 (2d Cir. 1954) [5 S.&D. 633]; *Hershey Chocolate Corp.* v. *FTC*, 121 F. 2d 968, 971–72 (3d Cir. 1941) [3 S.&D. 392, 396–97].

[9] Proceedings before the hearing examiner, p. 85, testimony of Brantz M. Bryan, Jr., executive officer of respondent Bates. (Joint Consolidated Record Appendix, p. 65.)

[10] Answer of respondent Bates, p. 2. (Joint Consolidated Record Appendix, pp. 9–10.)

officials knew that Rapid Shave could not shave sandpaper in the manner depicted and "proved" in the commercials. The record also establishes that it was this inability to shave sandpaper that led respondents to use a mock-up or artificial contrivance instead of real sandpaper in the visual "demonstration", wholly apart from any asserted technical photographic problems in reproducing sandpaper on the television screen.[11] While Colgate, as principal, is unquestionably responsible for the advertisements broadcast on its behalf, it would be strange indeed if Bates, as the moving party in originating, preparing, and publishing the commercials, and having full knowledge not only that the claim was false but that the "proof" offered to the public to support it was a sham, should be relieved from responsibility.

On the facts of record, therefore, this is *not* a case of holding an agency responsible for advertising a false claim originated by its principal, where the agency was wholly without knowledge, or "any suspicion", of the falsity of the claim. So far as our order forbids Bates to disseminate spurious television commercial "demonstrations", the agency will necessarily know of the use of mock-ups in commercials which it itself prepares. And, so far as our order prohibits Bates from misrepresenting the qualities of Rapid Shave or other shaving creams, we shall include a specific provision allowing a defense where respondent shows that it neither had knowledge of the falsity of such a representation nor had any reason to question its truthfulness.

Pursuant to Section 4.22(c) of the Commission's Rules of Practice, respondents will have twenty days to file exceptions to any provisions of the proposed new order, or to submit a proposed alternative form of order appropriate to carry out this decision.[12]

Commissioners Anderson and Higginbotham concur in the result.

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[11] Proceedings before the hearing examiner, p. 85, testimony of Mr. Bryan. (Joint Consolidated Record Appendix, p. 65.)

[12] To avoid any possible misunderstanding of its position, the Commission emphasizes that its proposed order here would not prohibit *per se* the use of a mock-up in television commercials, e.g., where it precisely depicts a substance or material that cannot accurately be reproduced on the television screen. As we recognize in Point II, *supra*, the limitations of television photography might in some circumstances permit use of such a mock-up. But it is one thing to use a mock-up merely as a substitute for an article whose image becomes distorted when photographed; it is something entirely different to use the mock-up in a "test" or "demonstration" of the advertised product's claimed qualities, and to represent it as being the genuine article.

Thus, even if it be assumed in the instant case that Rapid Shave can in fact shave sandpaper, precisely as shown in the commercials, and that a mock-up was used only because real sandpaper cannot faithfully be reproduced on television, it misses the point to say that the commercials were therefore free from falsehood. Respondents did more than merely use a mock-up. They made an affirmative representation that was false, namely, that they were presenting an actual test and giving actual proof of Rapid Shave's ability to shave real sandpaper, and that in the test real sandpaper was being used. The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: "This test is being made on real sandpaper, and not an

Order Providing for the Filing of Exceptions to Proposed Final Order

FEBRUARY 18, 1963

It is ordered, That respondents may, within twenty (20) days after service upon them of this order and the attached opinion of the Commission, file with the Commission their exceptions to any provisions of the Proposed Final Order, a statement of their reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision; and that complaint counsel may, within ten (10) days after service of respondents' exceptions, file a statement in reply thereto.

It is further ordered, That if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER

It is ordered, That respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate device, do forthwith cease and desist from using the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.
2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess.

It is further ordered, That respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate device, do forthwith cease and desist from engaging in the following methods of competition or acts or practices in commerce, as "commerce" is defined in the Federal Trade Commission Act:

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artificial mock-up contrived to look like sandpaper." The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of "proof" that in fact was not proof.

1. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because a mock-up or substitute material or article is used in the test or demonstration instead of the genuine material or article represented to be used therein.

2. Advertising Rapid Shave or any other shaving cream by claiming for it qualities or merits that the product does not in fact possess, unless respondent shows that it neither had knowledge of the falsity of such representation nor had any reason to question its truthfulness.

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.

By the Commission, Commissioners Anderson and Higginbotham concurring in the result.

Memorandum Accompanying Final Order

MAY 7, 1963

By the Commission:

On February 18, 1963, the Commission issued its opinion on remand and a proposed new cease and desist order. On April 15, 1963, each of the respondents filed exceptions to the proposed order, and an alternative form of order. Respondents would limit the order so that it would apply only to the advertising of Rapid Shave or other aerosol shaving creams; it would prohibit only misrepresentation of the "moisturizing qualities" of such shaving creams, and only where the misrepresentation is made in a "visual presentation of any experiment or test with the product, * * * when the product does not have the moisturizing qualities so represented." Respondent Bates proposes further that its order should apply only when it "knew or reasonably should have known that the product did not have the moisturizing qualities so represented."

The function of a cease and desist order is to give solid assurance to the public and honest competitors that the illegal and unfair practices found will not be resumed. Respondents' proposed order would do far too little in achieving that purpose. It would, at most, prevent respondents from repeating the precise misrepresentation of fact contained in the commercials which prompted the Commission to initiate this proceeding in January 1960. But the primary concern of Section 5 of the Federal Trade Commission Act, and cease and desist orders issued thereunder, is with "unfair *methods of competition*" and "unfair or deceptive * * * *practices* in commerce."

When, as in this case, the record shows not merely a misrepresentation of fact concerning a product offered for sale, but the pursuance of an unfair and illegal form of advertising, manifested by its repetition over a substantial period of time, an effective order must also be directed at the form of advertising (i.e., the "practice" or "method of competition") found illegal. Respondents did more than misrepresent the moisturizing properties of Rapid Shave; they adopted, and pursued, a method of advertising* which, because of the material falsehoods contained in such advertising, made it unfair to honest competitors and the public.

Respondents' proposed alternative form of order must, therefore, be rejected as ineffective and unrealistic. In the light of respondents' exceptions to the proposed final order, the Commission has modified it in minor respects to make it more clear and specific; and as thus modified, the final order will be issued.

A word must be said about respondents' vigorous assertion that the Commission, since it did not file a petition for certiorari in the Supreme Court to review the decision of the Court of Appeals, is therefore barred from entering a new order at this time. In vacating our original order and remanding the case to the Commission for further proceedings because "we think it best that an entirely new one be prepared", 310 F. 2d at 94, the Court of Appeals expressed doubt and uncertainty as to the reach and scope of the original order. It seemed to the Commission that, to a very considerable extent, these ambiguities were engendered by the extreme arguments made by counsel on both sides, in attacking as well as defending the order on appeal. In the circumstances, the most sensible, as well as the least dilatory, course for the Commission to follow was to proceed at once to remove those ambiguities, and to restate with clarity and precision the basis and breadth of our findings and order. This task, as the Supreme Court has frequently reminded the federal administrative agencies, is to be performed by the agency and not by its lawyers arguing on appeal. See, e.g., *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). For only the agency can, and should, exercise the administrative judgment and discretion involved in the formulation of an order.

Respondents urge nonetheless that the Commission, as a condition precedent to the formulation of a new order, was obliged to invoke the appellate jurisdiction of the Supreme Court by the filing of a

*Presenting tests, demonstrations or experiments which are represented to the public to be actual proof of a material claim made for the product but which in fact are spurious and rigged, actually proving nothing.

petition for certiorari. But one need not be an expert in such matters to know that, in the posture of the case after the Court of Appeals decision, the filing of a petition for certiorari would not only have been inappropriate but an unwarranted imposition on the Supreme Court, which has repeatedly admonished against the filing of improvident petitions for certiorari. In light of the ambiguities found in our original decision and order by the Court of Appeals, the case was in no posture for Supreme Court review. Had such a petition been filed, the Supreme Court undoubtedly would have considered that the Commission, not the Court, should undertake to remove those ambiguities—a task we have now performed without wasting the Court's and the public's time. Possibly the Commission has erred in its handling of this case, but it most assuredly has not failed in its duty of respect to the Supreme Court and the Court of Appeals.

Commissioner Anderson concurs in the result.

Final Order

MAY 7, 1963

I

It is ordered, That respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein.

II

It is further ordered, That respondent Colgate-Palmolive Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving.

III

It is further ordered, That respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein: *Provided, however*, That it shall be a defense hereunder that respondent neither knew nor had reason to know that the product, article or substance used in the test, experiment or demonstration was a mock-up or prop.

IV

It is further ordered, That respondent Ted Bates & Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Palmolive Rapid Shave" or any other shaving cream, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its moisturizing properties or other qualities or merits as an aid to shaving: *Provided, however*, That it shall be a defense hereunder that respondent neither knew nor had reason to know of the falsity of such representation.

V

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

Commissioner Anderson concurring in the result.

IN THE MATTER OF

EMIL BRAUDE & SONS, INC., ET AL.

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

Docket C-496. Complaint, May 7, 1963—Decision, May 7, 1963

Consent order requiring Chicago distributors of watches, jewelry, etc., to retailers to cease representing falsely, in catalogs and by stamping on the dials and backs, that their "Grant" watches were "SHOCK PROTECTED" and "SHOCKPROOF"; and to cease selling watch cases having bezels of base metal treated to simulate gold or plated with a gold alloy of ten karat fineness, without disclosing the true metal composition.

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 Emil Braude & Sons, Inc., a corporation, and Benjamin Braude, Stuart Braude, Kenneth Braude and Abraham S. Braude, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Emil Braude & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 10 South Wabash Avenue, in the city of Chicago, State of Illinois.

Respondents Benjamin Braude, Stuart Braude, Kenneth Braude and Abraham S. Braude are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of watches, jewelry, and other articles of merchandise to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise 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 "Grant" watches, respondents have advertised certain of said watches in their catalogs and have stamped on the dials and on the backs of certain of said watches, the terms "SHOCK PROTECTED" and "SHOCKPROOF".

Through the use of the aforesaid statements and representations, respondents represent that the entire watch is protected against damage from any type or amount of shock.

PAR. 5. In truth and in fact, the entire watch is not protected against damage from any type or amount of shock. Therefore, the statements and representations as set forth in Paragraph 4 hereof were and are false, misleading and deceptive.

PAR. 6. Certain of the watches offered for sale and sold by respondents consist of two parts, that is, a back and a bezel. The backs of certain of said watches have the appearance of base metal and are marked "BASE METAL". The bezels are composed of base metal, that is, aluminum, which has been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose the true metal composition of the bezels, or to disclose that the bezels are composed of base metal.

PAR. 7. Respondents' practice of offering for sale and selling watches, the cases of which incorporate bezels composed of base metal which have been treated or processed to simulate or have the appearance of precious metal as aforesaid in Paragraph 6, without disclosing the true metal composition of said bezels, is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal.

PAR. 8. Certain of the watches offered for sale and sold by respondents have cases which incorporate bezels plated with an alloy of gold of ten karat fineness. The backs of certain said watch cases are composed of white base metal. Said watch cases are not marked to disclose the true metal composition of the bezels, or to disclose that said bezels are

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plated, or the degree of karat fineness of the gold alloy employed in the plating.

The bezels of said watch cases have the appearance of being solid gold of twenty-four karat fineness, or gold filled, or gold plated with an alloy of gold which is in excess of ten karat fineness.

PAR. 9. Respondents' practice of offering for sale and selling watches, the cases of which incorporate bezels plated with an alloy of gold of ten karat fineness, as aforesaid in Paragraph 8, without disclosing the true metal composition of said bezels, and without disclosing that said bezels are plated with gold alloy of ten karat fineness, is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that said bezels are composed of solid gold of twenty-four karat fineness, or that said bezels are gold filled, or gold plated with an alloy of gold which is in excess of ten karat fineness.

PAR. 10. By the aforesaid practices, respondents place in the hands of others means and instrumentalities by and through which they may mislead the public as to the metallic content and the shockproof and shock protected character of their watches.

PAR. 11. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of watches of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. 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 the respondents named in the caption hereof with violation of the Federal Trade Commission 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 Emil Braude & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 10 South Wabash Avenue, in the city of Chicago, State of Illinois.

Respondents Benjamin Braude, Stuart Braude, Kenneth Braude and Abraham S. Braude are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, Emil Braude & Sons, Inc., a corporation, and its officers, and Benjamin Braude, Stuart Braude, Kenneth Braude and Abraham S. Braude, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches, 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 their watches are shockproof or shock protected.

2. Offering for sale or selling watches, the cases of which are composed in whole or in part of base metal which has been treated or processed to simulate or have the appearance of precious metal, without clearly and conspicuously disclosing by mark legibly stamped, embossed, or engraved into the metal on the outside of the case, the true metal composition of such treated cases or parts.

3. Offering for sale or selling watches, the cases of which are composed in whole or in part of precious metal, without clearly

and conspicuously disclosing by mark legibly stamped, embossed, or engraved into the metal on the outside of the case:

(a) the kind of precious metal composition, and

(b) if less than solid gold of twenty-four karat fineness, the kind of process employed to apply the gold or gold alloy to the case or part, and

(c) the karat fineness of the gold or gold alloy used in the process.

4. Misrepresenting, in any manner, the true metal composition of watch cases or parts thereof.

5. Placing any means or instrumentalities in the hands of others whereby they may mislead and deceive the purchasing public as to the metallic content or the shockproof or shock protected character of their products.

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

IN THE MATTER OF

DIETETIC FOOD CO., INC., ET AL.

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

Docket C-497. Complaint, May 7, 1963—Decision, May 7, 1963

Consent order requiring Brooklyn, N.Y., manufacturers of dietetic foods which they sold to wholesalers, retailers, and retail chainstores, to cease violating Sec. 2(a) of the Clayton Act by charging some purchasers higher prices for their products than they charged others competing with them, such as granting substantial discounts to a Philadelphia wholesaler and to two retail food stores in Pittsburgh without offering discounts to such dealers' competitors.

COMPLAINT

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

PARAGRAPH 1. Respondent Dietetic Food Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 975 Georgia Avenue, Borough of Brooklyn, County of Kings, City and State of New York.

Respondent Anne Roseman is president of said corporation, and respondent Ronald Kalmore is secretary thereof. These individuals acting in cooperation with one another, formulate, direct and control the acts, policies and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

PAR. 2. Respondents have been and are now engaged in the manufacture, sale and distribution of dietetic foods, dietetic crackers, dietetic preserves and dietetic cookies. Respondents sell said products to a large number of customers located throughout the United States purchasing such products for use, consumption, or resale therein, including wholesalers, retailers and retail chainstores. Respondents' sales of the products are substantial, exceeding $1 million annually.

PAR. 3. Respondents sell and cause their products to be transported from their principal place of business in the State of New York to purchasers located in other states of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of their business in commerce, respondents sell their products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of respondents' like products.

PAR. 5. In the course and conduct of their business in commerce, and particularly since 1959, respondents have been, and are now discriminating in price between different purchasers of their products of like grade and quality by selling said products to some purchasers at higher and less favorable prices than the prices charged competing purchasers for such products of like grade and quality.

PAR. 6. For example, in one Philadelphia, Pa., trading area, respondents gave substantial price discounts on their products to one wholesale food distributor, but did not offer or grant such discounts to other wholesale food distributor accounts who compete with the said favored wholesale food distributor in the sale and distribution of respondents' like products.

PAR. 7. As a further example, in one Pittsburgh, Pa., trading area, respondents gave substantial price discounts on their products to two retail food stores, but did not offer or grant such discounts to other purchasers who compete with the said two favored retail food stores in the sale and distribution of respondents' like products.

PAR. 8. The effect of such discriminations in price made by respondents in the sale of their products, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the favored purchasers from respondents are engaged, or to injure, destroy or prevent competition with the favored purchasers from respondents who receive the discriminatory lower prices.

PAR. 9. The discriminations in price made by respondents in the sale of their products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of subsection (a) of Section 2 of the Clayton Act, as amended; and

The respondents 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated subsection (a) of Section 2 of the Clayton Act, as amended, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Dietetic Food Co., Inc., is a corporation 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 975 Georgia Avenue, in the Borough of Brooklyn, County of Kings, City and State of New York.

Respondent Anne Roseman is the president of said corporation, and respondent Ronald Kalmore is secretary thereof. Their addresses are the same as that of said corporate respondent.

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

ORDER

It is ordered, That Dietetic Food Co., Inc., a corporation, and its officers, and Anne Roseman and Ronald Kalmore, individually and as officers of said corporation, and respondents' officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

> By selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price.

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

RADIO CORPORATION OF AMERICA

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

Docket 7676. Complaint, Dec. 3, 1959—Decision, May 14, 1963

Order setting aside cease and desist order issued December 15, 1959, 56 F.T.C. 660, requiring cessation of concealed "payola" to television and radio disc jockeys to induce them to play its recordings.

ORDER GRANTING RESPONDENT'S PETITION TO REOPEN AND SET ASIDE ORDER TO CEASE AND DESIST

Respondent by petition filed April 4, 1963, having requested that the decision of the Commission in this proceeding entered December 15, 1959 [56 F.T.C. 660], be reopened and the order to cease and desist be set aside; and

The Commission having duly considered said request and the opposition thereto filed by complaint counsel, and having determined that the vacation of the order herein would be equitable and in the public interest:

It is ordered, That respondent's petition be, and it hereby is, granted, and that the order to cease and desist previously entered in this proceeding be, and it hereby is, set aside.

Commissioner Anderson not participating.

IN THE MATTER OF

BERNARD SAMUELS ET AL. TRADING AS PENNCRAFT METALS CO.

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

Docket C-498. Complaint, May 14, 1963—Decision, May 14, 1963

Consent order requiring Philadelphia distributors of home improvement products, including aluminum siding, aluminum storm windows and doors, and aluminum and fiber glass awnings, to cease using bait advertisements in newspapers which were not bona fide offers to sell but were made for the purpose of obtaining leads to prospective buyers whom, when contacted, they discouraged from buying the advertised products and instead, tried to sell much higher priced products.

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 Bernard Samuels and Louis Hurwitz, individually and as copartners trading as Penncraft Metals Co., 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. Respondents Bernard Samuels and Louis Hurwitz are individuals and copartners trading as Penncraft Metals Co., with their principal office and place of business located at 5315 North Fifth Street in the city of Philadelphia, State of Pennsylvania.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of aluminum siding, aluminum storm windows and doors, aluminum and fiber glass awnings and other home improvement products.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of

Pennsylvania to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said home improvement products and services in connection therewith, respondents have made various statements in advertisements in newspapers of general circulation. Among and typical, but not all inclusive, of such statements are the following:

ALUMINUM OR FIBERGLAS AWNINGS
PATIO AWNING SPECIAL
$49 96" x 120" COMPLETE

COMBINATION SCREEN & STORM
ALUMINUM WINDOWS
6 FOR $43.00 DELIVERED COMPLETE

ALUMINUM SIDING
HOUSE AS LOW AS $179

CALL NOW — DAY — NIGHT — SUNDAY
OR MAIL COUPON
WA 4-9676
OUT OF TOWN CALL COLLECT

* * * * * * *

PENNCRAFT METALS CO. 5339 N. 5TH ST.

PAR. 5. By and through the use of said statements in said advertisements and others of similar import but not specifically set out herein, respondents represented that they were making a bona fide offer to sell the aluminum and fiber glass awnings, the combination screen and storm aluminum windows, and the aluminum siding at the prices specified in the advertising.

PAR. 6. In truth and in fact respondents' offers were not bona fide offers to sell the said awnings, storm windows and screens, and siding at the advertised prices but were made for the purpose of obtaining leads and information as to persons interested in the purchase of said products for improvement of their homes. After obtaining leads through response to said advertisements, respondents' salesmen called upon such persons but made no effort to sell said products at the advertised prices. Instead, they exhibited miniature models of the products or samples of the material of which they were made in demonstrating that they were manifestly unsuitable for the purpose intended and disparaged the advertised products in such a manner as to discourage their purchase and attempted to and frequently did sell much higher priced products. Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were false, misleading and deceptive.

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

PAR. 8. The use by respondents of the aforesaid false, misleading or 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 and services by reason of said erroneous and mistaken belief.

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 methods of competition in commerce and unfair 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 the respondents named in the caption hereof with violation of the Federal Trade Commission 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. Respondents Bernard Samuels and Louis Hurwitz are individuals and copartners trading as Penncraft Metals Co., with their principal office and place of business located at 5315 North Fifth Street in the city of Philadelphia, State of Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Bernard Samuels and Louis Hurwitz, individually and as copartners trading as Penncraft Metals Co., or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of aluminum siding, aluminum storm windows or doors, aluminum or fiber glass awnings, or any other product or services in connection with the improvement, repair or remodeling of homes or other buildings, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising or offering any products for sale for the purpose of obtaining leads or prospects for the sale of different products unless the advertised products are capable of adequately performing the function for which they are offered and respondents maintain an adequate and readily available stock of said products.
2. Disparaging in any manner or refusing to sell any product advertised.
3. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or representations which are designed to obtain leads or prospects for the sale of other merchandise.
4. Representing directly or indirectly that any products or services are offered for sale when such offer is not a bona fide offer to sell said products or services.

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

WARNER COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 7770. Complaint, Feb. 4, 1960—Decision, May 15, 1963

Order vacating initial decision and dismissing charges that the largest supplier of ready-mixed concrete in the southeastern Pennsylvania and northern Dela-

ware area, illegally acquired two competitors, the Commission deciding that the public interest would be adequately served by exercising close scrutiny of any similar future acquisitions made by respondent.

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 Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C., Title 15, Sec. 21), charging as follows:

PARAGRAPH 1. Respondent Warner Company is a corporation organized and existing under the laws of the State of Delaware since 1929, with its office and principal place of business at 1721 Arch Street, Philadelphia 3, Pennsylvania.

PAR. 2. Respondent is engaged in the production, transportation and sale of sand, gravel, crushed stone, ready-mixed concrete, limestone, lime and lime products in commerce, as "commerce" is defined in the Clayton Act.

PAR. 3. Respondent was, prior to the acquisitions described hereinafter, the largest supplier of ready-mixed concrete in southeastern Pennsylvania and northern Delaware. More particularly, respondent's ready-mixed concrete area of distribution was principally in the Delaware River Valley from Morrisville, Pennsylvania to Wilmington, Delaware, and included the greater Philadelphia and adjacent areas. Assets of the respondent were substantial. On December 31, 1955, total assets were $25,434,001 and for the year ended December 31, 1955, net sales were $25,874,601.

Respondent is a vertically integrated corporation with respect to sand and gravel essential to the production of ready-mixed concrete. Respondent's sand and gravel deposits are located on 6,000 acres of land in Bucks County, near Morrisville, Pennsylvania, on the Delaware River, about 25 miles northeast of Philadelphia. Estimated sand and gravel reserves are 120,000,000 tons, which, at the present rate of exhaustion, would last in excess of forty years. Respondent's sand is approved by the State of Pennsylvania Department of Highways.

Respondent is also integrated insofar as its transportation facilities are concerned. Sand and gravel are floated along the Delaware River aboard a company fleet of seventy-eight barges. In 1959, ready-mixed concrete was delivered to customers on two hundred fifty-two company trucks equipped with mixer and agitator bodies.

In 1955, prior to the hereinafter described acquisitions, respondent operated seven ready-mixed concrete plants throughout the above-described area. Locations of these plants were as follows:

Morrisville, Pennsylvania	1
Philadelphia, Pennsylvania	4
Tyson Street Plant on Delaware River	
Berks Street Plant on Delaware River	
Christiana Street Plant on Schuylkill River	
51st Street Plant on Schuylkill River	
Wilmington, Delaware on Christiana River	1
Porter Concrete Plant near Delaware City, Pennsylvania	1

All of respondent's Philadelphia plants have dock facilities for the handling of sand and gravel. With the exception of the Liberty Corporation, a company also selling ready-mixed concrete in the Philadelphia area, respondent is the only company in that area with such facilities.

PAR. 4. Ready-mixed concrete is produced by the mixing, in proper proportions, of four ingredients: cement, fine aggregate (sand), coarse aggregate (gravel or crushed stone) and water. The strength of the concrete is determined by the proportions in which the dry ingredients (cement, sand and gravel) are mixed. Generally, stronger concrete is produced by the use of greater quantities of cement.

Ready-mixed concrete is mixed and made ready for use prior to the time of its delivery at the construction site at which it is to be used. Ready-mixed concrete is of two types: central mix and transit mix. In producing central mix concrete, all four ingredients are mixed in a stationary mixer at the plant of the producer and, when thoroughly mixed, are poured into a ready-mix concrete truck which is so designed as to permit constant agitation of the fluid concrete while in transit to the delivery site. Transit mix concrete is actually mixed in the truck itself. The dry ingredients are first mixed in a stationary plant and poured, in their dry state, into a ready-mix truck. The water is not added until the truck is within a certain distance from its delivery point, at which time the water is added and agitation in the truck mixes the concrete prior to its delivery. With negligible exception, transit mix concrete and central mix concrete are used for the same purposes.

PAR. 5. Chester Materials Company (hereinafter sometimes referred to as "Chester") was a corporation organized under the laws of the State of Delaware in 1923, with its principal place of business located at Front and Franklin Streets, Chester, Pennsylvania. Prior to its acquisition, Chester was engaged primarily in the manufacture and sale of ready-mixed concrete and in the sale and distribution of sand and gravel. All sand and gravel used and sold by Chester prior to its acquisition by respondent was sold to it by said respondent.

The property of Chester consisted of 4.73 acres of land, with a frontage of 260 feet on the Delaware River, together with a ready-mix concrete plant, two unloading cranes, a truck shop building and office, and 26 ready-mix concrete trucks. Chester owned the only waterfront site in the Chester, Pennsylvania area which was used for the handling of sand and gravel.

The total dollar value of sales of Chester for the year 1955 for each of the three products sold by it was:

Sand	$32,989
Gravel	54,208
Ready-mix concrete	834,751

During the year 1955, respondent sold sand and gravel to Chester in the following amounts:

Sand	$158,720
Gravel	273,028

PAR. 6. Chester Materials Company was engaged in commerce as "commerce" is defined in the Clayton Act. Chester's ready-mixed concrete plant was located approximately 14 miles south of respondent's 51st Street, Philadelphia plant. It sold and delivered, and was potentially able to sell and deliver, ready-mixed concrete within areas in which respondent sells and delivers ready-mixed concrete.

PAR. 7. On February 24, 1956, respondent acquired the assets of the Chester Materials Company in exchange for 23,085 shares of Warner's common stock. The cash value of the consideration was approximately $1,143,000.

PAR. 8. W. E. Johnson, Inc., was a corporation organized under the laws of Pennsylvania on November 24, 1953, and had its principal place of business at Route 202 and Mill Road, Paoli, Pennsylvania. Prior to its acquisition, W. E. Johnson, Inc., was engaged in the production and sale of ready-mixed concrete and crushed stone. The properties formerly owned by W. E. Johnson, Inc., and acquired by respondent include the following:

500 shares of common stock of Allentown-Portland Cement Company;

34.772 acres of land on which are located:

Developed quarry;
Undeveloped quarry;
Concrete batch plant;
Garage and shop building;
24 transit mix concrete trucks;
1 1¼-yard shovel;
2 6-ton cranes;

4 quarry trucks; and
2 Hough front-end loaders.

During the year ending October 31, 1956, total sales of ready-mixed concrete by W. E. Johnson, Inc., amounted to $1,159,173.

Although supplying all of its own coarse aggregate, W. E. Johnson, Inc., produced no sand. During the year ending October 31, 1956, W. E. Johnson, Inc., purchased approximately 73% of its sand requirements from the respondent and 27% of its sand requirements from Mason Dixon Sand and Gravel Company, Perryville, Maryland.

PAR. 10. W. E. Johnson, Inc., was engaged in commerce as "commerce" is defined in the Clayton Act. W. E. Johnson, Inc., prior to its acquisition by respondent, was located approximately 18 miles from respondent's 51st Street plant and sold and delivered ready-mixed concrete within areas in which respondent sold and delivered ready-mixed concrete.

PAR. 11. On February 15, 1959, respondent acquired the assets of W. E. Johnson, Inc., in exchange for 24,500 shares of respondent's stock. The consideration paid for W. E. Johnson, Inc., was approximately $1,109,000.

PAR. 12. Fine aggregate (sand) is in a limited supply in the area in which respondent and the two acquired firms operate. This is particularly true of sand approved by the Pennsylvania Department of Highways. In addition, transportation costs delimit the area in which said sand may be shipped profitably. Respondent is the largest producer of building and paving sand among sand producers capable of supplying sand to manufacturers of ready-mixed concrete in the marketing areas in which the respondent, and in particular, Chester and W. E. Johnson, Inc., sold said concrete. In 1955, Warner's sand production, amounting to 2,153,877 tons, exceeded the combined production of sand totaling approximately 1,600,000 tons by twelve sand producers within selling range of the acquired corporations' markets. The majority of the competitors of the former Chester and Johnson corporations were purchasers of said sand from respondent, prior to said acquisitions. As a result of said acquisitions, many competitors of the former Chester and Johnson companies are presently in actual and potential competition in the ready-mixed concrete market with their major supplier of an essential ingredient of said concrete, i.e., sand.

PAR. 13. In the year 1955, respondent ranked first in sales of ready-mixed concrete in the market area encompassed by the respondent and the two herein named acquired companies, with sales totaling $14,899,578. The Chester Materials Company with sales of $1,834,751, and the W. E. Johnson, Inc., with sales of $1,095,300 ranked fourth and sixth, respectively, for that same year. Percentage-wise, respondent's sales represented approximately 50 percent of said market; Chester sales approximately 6 percent; and Johnson sales approximately 4 percent. In a market consisting of approximately fifteen actual and potential competitors, the first six ranking companies including respondent and the two acquired firms accounted for approximately 83 percent of the sales for the year 1955.

PAR. 14. The effect of the aforesaid acquisitions of Chester Materials Company and W. E. Johnson, Inc., by Warner Company may be substantially to lessen competition or tend toward a monopoly in the ready-mixed concrete industry in an area approximately encompassing the geographic markets for ready-mixed concrete serviced (1) by respondent in and adjacent to Philadelphia in Pennsylvania, and in particular, by respondent's 51st Street plant; (2) by Chester Materials Company in and adjacent to Chester, Pennsylvania; (3) by W. E. Johnson, Inc., in and adjacent to Paoli, Pennsylvania; and (4) the areas of overlap which geographically and competitively connected respondent and the two acquired firms into one contiguous area.

More specifically, the aforesaid effects include the substantial, actual or potential lessening of competition or a tendency to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

1. Chester Materials Company has been permanently eliminated as an independent competitive factor in the ready-mixed concrete market in the above-designated area.

2. W. E. Johnson, Inc., has been permanently eliminated as an independent competitive factor in the ready-mixed concrete market in the above-designated area.

3. Actual and potential competition between respondent and Chester Materials Company has been and will be eliminated in the production and sale of ready-mixed concrete in the above-designated area.

4. Actual and potential competition between respondent and W. E. Johnson, Inc., has been and will be eliminated in the production and sale of ready-mixed concrete in the above-designated area.

5. Actual and potential competition generally in the production and sale of ready-mixed concrete may be substantially lessened in the above-designated area.

6. Industry-wide concentration of the production and sale of ready-mixed concrete in the above-designated area has been and may be increased.

7. The acquisitions give respondent the facilities and added market and geographic position and ability to actually and potentially domi-

nate the primary areas in which the two acquired firms formerly operated, in addition to enhancing its pre-acquisition position.

8. Respondent's acquisition of both Chester Materials Company and W. E. Johnson, Inc., has completely foreclosed the actual or potential sale of sand essential to the production of ready-mixed concrete to these two firms by any producer of sand.

9. Respondent's acquisition of said corporations, in combination with its control of a major portion of the areas' limited supply of approved fine aggregate essential for ready-mixed concrete production, has provided and may potentially provide, respondent with the ability to substantially lessen competition or tend toward a monopoly in the areas in which the acquired firms sold ready-mixed concrete.

PAR. 15. The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. Eugene Kaplan and *Mr. Daniel H. Hanscom* for the Commission.

Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., for the respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

HISTORY OF THE PROCEEDING

The complaint herein was issued by the Federal Trade Commission on February 4, 1960, charging that Warner's acquisition on February 24, 1956, of the assets of Chester Materials Company and Warner's acquisition on February 15, 1959, [actually 1957], of W. E. Johnson, Inc., constitute violations in two particulars of Section 7 of the Clayton Act. Firstly, the complaint alleges that the effect of the acquisitions was substantially to lessen competition or tend toward a monopoly in the sale of ready-mix concrete in the area or areas in which Warner's 51st Street, Philadelphia, plant and those of the acquired companies sold that product. Secondly, the complaint alleges that the effect of these acquisitions was substantially to lessen competition or tend to create a monopoly in the sale of sand used as an ingredient of concrete in the aforesaid area or areas.

Warner's answer admits the acquisitions were made, but denies there was a single contiguous market area for ready-mix concrete in which Warner and the two acquired companies sold ready-mix concrete, denies that either ready-mix concrete or concrete sand constitutes a "line of commerce" as that term is used in Section 7 of the Clayton Act, and denies that the effect of the acquisitions constitutes a violation of Section 7 in either the sale of ready-mix concrete or the sale of concrete sand.

A separate hearing, pursuant to Warner's motion to dismiss the complaint for lack of jurisdiction in the Commission, was held—limited to the single issue whether each of the acquired companies was engaged in interstate commerce. Upon the evidence adduced, and after oral argument and submission of supporting briefs, the hearing examiner on September 23, 1960, denied Warner's motion but made no specific findings of fact at that time.

Following the examiner's ruling on the jurisdictional issue, a hearing on the merits of the complaint was held, covering a period of 12 hearing days in which counsel supporting the complaint adduced testimony from 32 witnesses, including Robert C. Collins, a director and former president of Warner. The record of the hearing on the merits embraces 1250 pages of testimony and 128 documentary exhibits.

On June 28, 1961, at the conclusion of the presentation by counsel supporting the complaint, Warner made a motion to dismiss the complaint which was denied by an order of the hearing examiner dated November 6, 1961.

Also, on June 28, 1961, at the conclusion of the presentation of evidence by counsel supporting the complaint, respondent moved to strike certain specified items of evidence. Throughout the presentation of the case in support of the complaint against Warner, there were introduced into evidence, over objections made by Warner, many items of evidence, which, on their face, were not directed to any issue in the complaint and which were wholly irrelevant to this proceeding. Many of these items of evidence to which respondent's motion to strike was directed were received by the examiner "subject to connection". They are as follows:

1. *Evidence relating to coarse aggregates*

Although the complaint makes no charge that the questioned acquisitions may have an effect upon the production or sale of gravel, crushed stone, or other coarse aggregates, counsel supporting the complaint saw fit to introduce evidence relating to reserves, production and sales of coarse aggregates by Warner and by many other producers of ready-mix concrete located both within and without the geographical area which counsel supporting the complaint alleges is "the section of the country" here involved. These items were all received in evidence by the examiner subject to connection. Since the complaint makes no allegation of any effect upon competition in the production or sale of coarse aggregates, and since none of the evidence relating to coarse aggregates was shown to have any relevance to the allegations made in the complaint, respondent validly urged that the following Commission exhibits be stricken in their entirety, except where a portion thereof is indicated:

Commission's Exhibit No.

137—Petrillo Bros., Inc.
138—Petrillo Bros., Inc.
149—G. & W. H. Corson, Inc. (line headed "Tons of gravel sold")
151—Liberty Corp. (last two columns)
155—Allied Concrete & Supply Co.
156—V. DiFrancesco & Sons, Inc. (last two columns)
158—Fizzano Bros. Concrete Products, Inc. (figures under heading "STONE")
210—Trap Rock, Inc. (last two columns)
237—Warner Co.
238—Warner Co.
241—Warner Co.
248—Chester Materials Co.
251—W. E. Johnson, Inc.
252—W. E. Johnson, Inc.
253—W. E. Johnson, Inc.
254—W. E. Johnson, Inc.
257—Warner Co. (portion reading "Cost of Gravel to Warner Co. at 51st Street Plant" and the figure contained thereafter)
258—A. L. Lewis Co.
259—A. L. Lewis Co. (columns headed "Gravel" and "Total")
261—Glenside Lumber & Coal Co. (columns dealing with gravel purchases.)

2. *Evidence relating to additions and improvements to the acquired plants*

Counsel supporting the complaint introduced in evidence Commission's Exhibits 243 and 244 and elicited testimony from Robert C. Collins, at pages 1840 through 1852 in the transcript, relating to various additions and improvements made by Warner at its Chester and Johnson plants since the acquisitions of Chester Materials and Johnson. No allegation is made in the complaint that any such additions or improvements have had or may have any effect whatever upon competition in the sale of ready-mix concrete. Moreover, there is no showing that the additions or improvements reflected in these exhibits and in Mr. Collins' testimony have any relevance to the allegations made in the complaint. Consequently, this evidence serves no useful purpose.

3. *Annual reports of Warner Company*

Counsel supporting the complaint also introduced in evidence, subject to connection, Commission's Exhibits 221 through 233, inclusive, which are annual and semiannual reports of Warner. During the hearing, counsel supporting the complaint indicated that the purpose for which these reports were introduced was to explain the "general organization of the company, the several acquisitions involved, the financial status of the company over the years and, again, additional description of the company itself."

Examination of these documents shows that they are comprehensive reports to the shareholders of a publicly owned company. Although they contain some information which is not relevant to this proceeding, they are reflective of the nature of the business and of the financial status of the company which, in part, is indicative of the economic power that may be exerted by the respondent pursuant to other evidence adduced in this case. The hearing examiner therefore, was inclined to receive such evidence to the extent that it has relevance. Irrelevant, immaterial or incompetent data contained therein has been excluded from consideration in rendering the initial decision in this case.

4. *Evidence by Samson Ready-Mix Concrete Co. representatives regarding alleged statements of Warner employees*

Three representatives of Samson Ready-Mix Concrete Co. testified with respect to statements allegedly made by employees of Warner. These statements, mainly those purportedly made in 1956 by two former Warner employees, Roy Miles and Sam Norley, in a bar of a tavern in Media, were interpreted by the witnesses to constitute threats by Warner against Samson. The import of such "threats" was presumably that Warner, after the acquisition of Chester Materials in that year, would aggressively compete with Samson, and that the result might put Samson out of business. The specific items of evidence regarding these alleged economic threats purportedly made by Warner employees are the following: Commission's Exhibits 146, 212, 213, 215, and 216, and the testimony of Samuel W. Williamson at transcript page 1056, line 6, through page 1092, line 22, and page 1699, line 13, through page 1704, line 14; the testimony of Mrs. Martha S. Williamson at transcript page 1511, line 21, through page 1582, line 11; and the testimony of Edward J. McKenna at transcript page 1584, line 3 through page 1598, line 19.

This evidence, which was received over Warner's timely objections, subject to a proper foundation being laid appears to be incompetent in that the statements attributed to Warner employees were not shown to represent the policy of Warner. Moreover, it was not shown that those Warner employees were, in any event, authorized implicitly or otherwise to make the statements which they are alleged to have made as representative of Warner's competitive policy.

For the foregoing reasons the hearing examiner by order dated November 6, 1961, granted respondent's motion to strike the aforesaid identified evidence relating to (1) coarse aggregates, (2) additions and improvements to acquired plants, and (3) economic threats, purportedly by Warner employees as stated by Samson Ready-Mixed Concrete Company representatives, including part of the testimony of Samuel W. Williamson and Mrs. Martha S. Williamson in this regard. The motion to strike was otherwise denied. Thus the annual reports of Warner Company remain a part of the record with other evidence considered by the hearing examiner in resolving the issues in this case and in rendering findings. The evidence stricken for the reasons hereinbefore indicated has not been considered. However, consideration of such evidence would not in any event materially affect the decision in this case.

Although counsel in support of the complaint made a motion to reargue respondent's motion to strike the foregoing evidence, after reconsideration, the hearing examiner reaffirmed his decision on respondent's motion to strike.

On March 15, 1962, prior to oral argument on the proposed findings, respondent formally rested its case on the record, having previously indicated an intention to do so.

Thereafter, the hearing examiner carefully reviewed and considered the proposed findings of fact and conclusions of law filed by counsel in support of the complaint and counsel for respondent on February 13, 1962. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following

FINDINGS OF FACT

I. *The Acquiring Company*

1. The Warner Company, respondent herein (hereinafter referred to as "Warner") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with

its office and principal place of business located at 1721 Arch Street, Philadelphia, Pennsylvania.

2. Warner is engaged in the production, manufacture and sale of ready-mixed concrete, sand, gravel, crushed stone, railroad ballast, bituminous concrete (asphalt), blast furnace slag, lime, limestone, and "Lelite" (a light weight aggregate where a light weight concrete is specified).

3. During 1959, the last year prior to the issuance of the complaint, Warner's sales totaled $32,382,052. Warner's sales of ready-mixed concrete for that year totaled $16,717,526. As of December 31, 1959, Warner's assets in dollar value were $33,100,081.

4. Warner is engaged in interstate commerce.

5. Warner Company is a producer and seller of ready-mixed concrete in the Delaware River industrial area from Princeton Junction, New Jersey, through Philadelphia, to below Wilmington, Delaware. Warner now operates a chain of ten modern ready-mixed concrete plants. Warner services by truck the metropolitan areas of Trenton, Philadelphia, Chester, Wilmington, and contiguous areas, westward to Paoli. Sand, gravel and "Super-Limoid" are also available at these plants.

6. Warner owns its own sources of sand and gravel consisting of a 6,000 acre deposit near Morrisville, Pennsylvania. Warner's reserves of sand and gravel as of January 1, 1956, were estimated to amount to 120,000,000 tons, or an estimated 40-year supply. In addition, Warner employs dredges on the Delaware River. Warner provides its ready-mixed concrete plants with sand and gravel by means of Warner owned tugboats and a fleet of seventy (70) river barges operating on the Delaware River, the last several of which cost $65,000 to $70,000 each, and by Warner owned railroad cars. Warner, except for the Liberty Corporation, is the only company having dock and crane facilities for the handling of these materials. Dock and crane facilities are available at all the Warner ready-mixed concrete plants except the Warner plants at Princeton Junction, New Jersey, Paoli, Pennsylvania, and Porter Station, Delaware.

7. In 1959, Warner owned over 250 ready-mixed concrete mixer trucks. Ready-mixed concrete trucks are shifted by Warner from plant to plant from Princeton Junction, New Jersey, to Porter Station, Delaware, below Wilmington, as the Warner ready-mixed concrete business requires. A ready-mixed concrete truck costs between $17,000 and $30,000. Liberty Corporation, the nearest competitor of Warner, has only 68 ready-mixed concrete trucks. Other ready-mixed con-

crete companies competing with Warner operated between 4 and 25 ready-mixed concrete mixer trucks, many of them fewer than 20.

II. *The Acquired Companies*

A. *Chester Materials Company*

8. On February 24, 1956, Warner acquired the assets of Chester Materials Company.

9. The Chester Materials Company (hereinafter referred to as Chester) was a corporation organized, existing and doing business under the laws of the State of Delaware since 1923, with its principal place of business at Chester, Pennsylvania. Chester, prior to February 24, 1956, was a producer of ready-mixed concrete in the greater Chester area. In 1955, sales of ready-mixed concrete by Chester totaled $1,834,751. Chester purchased sand and gravel for its ready-mixed concrete business from Warner.

10. In the course and conduct of its business Chester was engaged in interstate commerce. There is substantial evidence of record that Chester Materials Company, prior to its acquisition by the respondent on February 24, 1956, consummated out-of-state sales indicative of engagement in interstate commerce. Chester trucks regularly delivered ready-mixed concrete, and other materials from its source of supply in Chester, Pennsylvania, to the Delaware works of the General Chemical Division of Allied Chemical & Dye Company, to the Colorado Fuel & Iron Company, and to other customers located in the State of Delaware.

11. Chester's plant, located on the Delaware River, consisted of approximately five acres containing a ready-mixed concrete plant, two unloading cranes, a truck shop, twenty-six trucks for transporting and delivering ready-mixed concrete, and various other equipment. Chester Materials Company owned a frontage of 260 feet on the Delaware River, together with all the machinery and equipment for a ready-mix operation and dock facilities for the handling of aggregates.

12. Chester Materials Company in 1955 was a substantial factor in the ready-mixed concrete business with a ready-mixed concrete plant about fourteen miles down the Delaware River from the Warner 51st Street Philadelphia, Pennsylvania, plant, and midway between this plant and the Warner Wilmington, Delaware, ready-mixed concrete plant.

Chester Materials Company in 1955 held fourth position in volume of business as a ready-mixed concrete producer and seller in the Philadelphia-Chester relevant market area hereinafter defined.

B. *W. E. Johnson, Inc.*

13. On February 15, 1957, Warner acquired the assets of W. E. Johnson, Inc.

14. W. E. Johnson, Inc. (hereinafter referred to as Johnson) was a corporation organized, existing and doing business since November 24, 1953, under the laws of the State of Pennsylvania, with its plant and principal place of business at Paoli, Pennsylvania. Johnson was engaged in the manufacture, production and sale of ready-mixed concrete and crushed stone. During the year ending October 31, 1956, Johnson sold ready-mixed concrete in the amount of over $1,105,607.

15. In the course and conduct of its business Johnson was engaged in interstate commerce. Substantial evidence of record indicates that in 1954, Johnson sold in interstate commerce a railroad carload of crushed stone to a customer located at Camden, New Jersey. The railroad car was brought on to the siding of the Pennsylvania Railroad in the Johnson plant at Paoli, Pennsylvania, and there loaded with crushed stone by Johnson. Thereafter, Johnson caused the carload of crushed stone to be transported and delivered to the customer at Camden, New Jersey. In 1955, Johnson also sold in interstate commerce a carload of crushed stone to a customer located at Camden, New Jersey. The railroad car was brought on to the siding of the Pennsylvania Railroad in the Johnson plant at Paoli, Pennsylvania, and there loaded with crushed stone by Johnson. Thereafter, Johnson caused the carload of crushed stone to be transported and delivered to the customer at Camden, New Jersey.

Respondent has contended that the out-of-state sales by W. E. Johnson, Inc., were isolated, exploratory, experimental, unprofitable and two years precedent to the acquisition by Warner Company. The fact that the sales were an unprofitable experience of brief duration and infrequent, in no way diminishes the fact that interstate commerce was engaged in by Johnson within a reasonably brief period precedent to acquisition by Warner on February 15, 1957. Engagement by Johnson in interstate commerce is not predicated upon interstate purchases or upon the interstate movement of goods concept.[1]

16. The Johnson plant was located on approximately thirty-four acres of land at Paoli, Pennsylvania, which contained the ready-mixed concrete plant, a railroad siding, a developed stone quarry, an

[1] See orders of hearing examiner dated September 23, 1960 and September 30, 1960.

undeveloped stone quarry, a garage, and a shop building. Johnson utilized 24 trucks for the transportation and delivery of ready-mixed concrete.

The Johnson plant, near Paoli, Pennsylvania, was located about sixteen (16) miles west of the Warner 51st Street, Philadelphia, Pennsylvania, plant and about the same distance north of the Chester Materials Plant at Chester, Pennsylvania.

17. In 1956, Johnson ranked fifth (5th) in the sale of ready-mixed concrete in the Philadelphia-Paoli-Chester area. Johnson purchased its requirements of sand for its ready-mixed concrete operation from Warner Company.

III. *The Nature of the Business*

18. Ready-mixed concrete is concrete delivered ready to pour at the construction site by means of special trucks with rotating barrels designed to permit mixing or agitation of the fluid concrete while in transit to the delivery site.

Such concrete is produced by the mixing, in proper proportions, of four ingredients: cement, fine aggregate (sand), coarse aggregate (gravel or crushed stone), and water. Ready-mixed concrete is of two types: central mix and transit mix. In producing central mix concrete, all four ingredients are combined in a stationary mixer at the plant of the producer and when thoroughly mixed are poured into a ready-mixed concrete truck which is designed to permit constant agitation of the fluid concrete while in transit to the delivery site. Transit mix concrete is actually mixed in the truck itself. The dry ingredients are poured, in their dry state, into a ready-mixed truck. The water is not added until the truck arrives at or is within a certain distance from its delivery point, at which time the water is added and agitation in the truck mixes the concrete prior to its delivery. Transit mix concrete and central mix concrete are both used for the same purposes. The term "ready-mixed concrete" is used to describe both central and transit mix concrete.

19. Ready-mixed concrete is utilized generally for all construction purposes such as the building of industrial, commercial and residential structures, foundations, bridges, highways, sidewalks, streets and sewers.

20. Ready-mixed concrete is used wherever concrete is required as a construction material. "On-site" concrete is no longer used to any significant degree in the Trenton-Philadelphia-Chester-Wilmington-Paoli area.

21. Ready-mixed concrete plants of the transit mix type can market

their product within any radius from the plant that the management finds it desirable to send its trucks. This is true because the water need not be added until arrival at the job site, or shortly before. "Central mix" ready-mixed concrete, because the water has been added at the plant to the dry cement and aggregate, cannot be allowed to remain in the mixer truck indefinitely because of the danger of the ready-mixed concrete "setting" or hardening within the mixer barrel.

22. The Warner ready-mixed concrete plants in Philadelphia, Pennsylvania, are all of the "central mix" type. Chester Materials Company, at the time of acquisition by Warner, was also of the "central mix" type. Johnson, when acquired by Warner, was a "transit mix" ready-mix operation.

23. Ready-mixed concrete has sufficient peculiar characteristics and uses to make it distinguishable from all other products.

24. "Central mix" ready-mixed concrete can be delivered at a distance up to two hours driving time from the plant, and "transit-mix" can be delivered to any distance a ready-mixed concrete company may desire to send a truck.

As a practical matter, however, a distance of 11 miles from the plant may be taken as the normal marketing area [2] of the Warner Philadelphia ready-mixed concrete plants, of the acquired ready-mixed concrete plant at Chester, Pennsylvania, and of the Johnson plant at Howellville, near Paoli, Pennsylvania.

25. The sales areas of Johnson, Chester, and Warner all overlapped in large and substantial territories in the area of South Philadelphia, Chester, and Paoli. Warner, Chester, and Johnson, prior to the acquisitions, all competed in geographic areas between the Warner 51st and Christian Street ready-mixed concrete plants, the Chester plant, and the Johnson plant.

The common sales area of Warner and Johnson was an area of about 70 square miles.

The common sales area of Warner and Chester was an area of about 75 square miles containing the southern portions of Philadelphia, the northern portions of Chester, the intervening area, and the area to the north and west of these territories.

Chester and Johnson also had a common sales area of about 70 square miles situated between Paoli and Chester. This area overlaps the foregoing described common sales area of Warner and both Chester and Johnson and contains a similar industrial and residential complexion.

[2] The marketing area, however, may extend to 15 or 20 miles.

IV. *The Markets Served*

26. The effective marketing area of a ready-mix concrete producer in the Greater Philadelphia area is normally a distance of about 11 miles from his plant, depending on the particular combination of circumstances involved. Under some circumstances the effective marketing area may extend a distance of 20 miles from the plant.

27. There are at least three geographic areas which constitute sections of the country within the meaning of Section 7, relevant to the acquisitions of Johnson and Chester by Warner.[3] They are as follows:

(a) With respect to the acquisition of Chester, that section of the country in the area of overlap between a circle centered on the location of the plant of Chester at Chester, Pennsylvania, with a radius of approximately 11 miles, and a circle centered on the nearest Warner ready-mixed concrete plant (51st Street), with a radius also of 11 miles.

(b) With respect to the acquisition of Johnson, that section of the country in the area of overlap between a circle centered on the location of the Johnson plant at Howellville, near Paoli, with a radius of approximately 11 miles, and circles with a radius of 11 miles centered on the Warner plants at 51st Street, Philadelphia, and the Warner Chester plant (the former Chester Materials plant).

(c) With respect to the acquisitions of Johnson and Chester taken together, both the areas described above.

28. Allied Concrete & Supply Corp. operates a ready-mix concrete plant at Dresher, Pennsylvania. Allied delivers concrete in Pennsylvania within 8 to 12 miles of its plant.

29. Commercial Concrete Co. operates ready-mix concrete plants at Phoenixville and Norristown, Pennsylvania. Commercial delivers concrete in Pennsylvania within 12 to 15 miles of each plant.

30. G. & W. H. Corson, Inc., operates a ready-mix concrete plant near Plymouth Meeting, Pennsylvania, 9 miles east of Norristown. Corson delivers concrete in Pennsylvania within 10 to 12 miles of its plant.

31. V. DiFrancesco & Sons operates a ready-mix concrete plant at Havertown, Pennsylvania. DiFrancesco delivers concrete in Pennsylvania within 10 miles of its plant.

32. John T. Dyer Quarry Co. operated a ready-mix concrete plant in Bridgeport, a few miles northeast of the Johnson plant in Howell-

[3] See Appendix A, a map of the relevant geographic market areas. In some instances this may extend from an 11 mile radius to 20 miles. [App. A omitted in printing.]

ville, from 1946 to 1958. In January 1959, several years after Warner's acquisition of Johnson, Dyer sold its Bridgeport plant to Highway Concrete Co. The evidence does not establish the sale was related to the fact of the acquisition.

33. The owner of Highway Concrete Co., who was then engaged in the bituminous concrete business, testified that he had concluded, after considering the existence of other concrete plants in the area (including Warner's Johnson plant), that Dyer's Bridgeport plant was a good investment and would earn a profit. After acquiring this plant, Highway invested additional amounts of capital to build a new central-mix concrete plant at that location. Highway delivers concrete within 12 miles of its plant.

34. Fizzano Bros. Concrete Products, Inc., operates a ready-mix concrete plant at Crum Lynne, Pennsylvania. Fizzano delivers concrete within 8 to 10 miles of its plant.

35. Glenside Lumber & Coal Co. operates a ready-mix concrete plant at Willow Grove, Pennsylvania. Glenside delivers concrete within 10 miles of its plant.

36. Liberty Corporation operates a ready-mix concrete plant at Delaware River and Orthodox Street, Philadelphia, Pennsylvania. Liberty delivers concrete within 12½ miles to 14 miles of its plant.

37. Samson Ready-Mix Concrete Co. operates a ready-mix concrete plant in Media, Pennsylvania. Samson delivers concrete within 8 to 12 miles of its plant.

38. Trans-Materials Co. operates a ready-mix concrete plant at West Chester, Pennsylvania. Trans-Materials delivers concrete within 5 to 20 miles of its plant.

39. Trap Rock, Inc., constructed a ready-mix concrete plant at 58th Street and Eastwick in Philadelphia, Pennsylvania, in 1959. Trap Rock's new plant was constructed less than 1 mile from Warner's 51st Street plant and not far distant from the plant of V. DiFrancesco & Sons. Trap Rock delivers concrete within 10 miles of its plant.

V. *Position in Business of Respondent and its Competitors*

40. The following chart reflects total annual sales of ready-mix concrete, in dollars, by Warner, Chester, and Johnson and by competitor firms aforenamed for the period from 1955 to 1960, inclusive: [4]

[4] Sources: Exhibits CX–140, 145, 149a, 151, 154a, 156, 158, 207, 209, 210, 245, 250, 255, 260, 261. (See also Appendix B reflecting percentages of total dollar volume of business and positions of competitors in business which is also made a part of these findings. [App. B omitted in printing.]

Company	1955	1956	1957	1958	1959	1960
Warner*	$10, 441, 093	$11, 564, 404	$10, 695, 589	$10, 556, 989	$12, 046, 666	$8, 214, 259
Chester	1, 834, 751	125, 581	----------	----------	----------	----------
Johnson	1, 127, 437	1, 105, 627	23, 310	----------	----------	----------
Allied	593, 007	750, 437	724, 414	652, 902	746, 162	928, 187
Commercial (2 plants)	1, 064, 818	1, 211, 372	1, 182, 664	1, 231, 940	1, 301, 680	1, 394, 364
Corson	970, 936	973, 299	1, 125, 070	900, 736	619, 677	**942, 076
DiFrancesco	2, 129, 567	1, 538, 061	1, 251, 644	950, 911	1, 059, 045	1, 076, 113
Dyer and Highway (in 1959)	461, 173	379, 520	356, 255	345, 958	368, 167	662, 288
Fizzano	92, 497	137, 039	176, 387	175, 865	208, 314	193, 551
Glenside	889, 392	626, 658	600, 653	518, 578	546, 820	544, 358
Liberty	3, 121, 276	3, 091, 954	3, 179, 771	3, 268, 664	3, 548, 713	2, 811, 304
Samson	443, 955	905, 858	764, 441	723, 927	683, 938	695, 709
Trans-Materials	590, 042	660, 139	584, 225	717, 414	811, 600	530, 627
Trap Rock (from May 1959)	----------	----------	----------	----------	254, 540	784, 847
Total	23, 759, 944	23, 069, 949	20, 664, 423	20, 043, 884	22, 195, 322	18, 777, 683

*Berks Street, Christian Street, 51st Street and Tyson Street plants, and also Chester (from February 25, 1956) and Johnson (from February 16, 1957) plants.
**Figure for 1960 only is given on a fiscal year basis.

41. The following chart reflects total annual sales of ready-mix concrete in cubic yards, by Warner, Chester, and Johnson and by competitor firms aforenamed.[5]

Company	1955	1956	1957	1958	1959	1960
Warner*	784, 983	846, 528	752, 729	749, 001	874, 472	601, 227
Chester	129, 253	9, 455	----------	----------	----------	----------
Johnson	79, 337	79, 058	2, 602	----------	----------	----------
Allied	45, 602	59, 278	55, 331	49, 032	57, 114	69, 616
Commercial (2 plants)	78, 876	89, 028	83, 057	87, 571	92, 492	104, 465
Corson	75, 902	75, 102	82, 387	65, 417	44, 318	**70, 734
DiFrancesco	155, 614	110, 992	88, 338	65, 831	73, 144	74, 420
Dyer and Highway (in 1959)	33, 801	26, 589	25, 183	24, 540	26, 152	47, 001
Fizzano	7, 115	10, 541	13, 065	13, 027	14, 880	13, 825
Glenside	65, 121	47, 626	45, 512	38, 873	40, 541	39, 977
Liberty	249, 895	244, 124	235, 606	243, 580	272, 019	225, 636
Samson	32, 709	65, 821	54, 391	51, 718	48, 411	50, 237
Trans-Materials	41, 912	47, 468	41, 541	51, 789	57, 956	37, 197
Trap Rock (from May 1959)	----------	----------	----------	----------	19, 983	59, 140
Total	1, 780, 120	1, 711, 610	1, 479, 640	1, 440, 379	1, 621, 482	1, 393, 475

*Berks Street, Christian Street, 51st Street and Tyson Street, and also Chester (from February 25, 1956) and Johnson (from February 16, 1957) plants.
**Figure for 1960 only is given on a fiscal year basis.

VI. *Threat to Competition or Tendency to Create Monopoly Resulting From Acquisitions at Issue*

42. Prior to the acquisition of Chester Materials, Warner in 1955 had 43.9% in dollar volume and 44.1% in cubic yard volume of the total ready-mixed concrete sales by the companies doing business in the relevant market areas hereinbefore defined. From 1956 through 1959, Warner's share of the total increased to 54.3% in dollar volume and 53.9% in cubic yard volume. In 1960, the foregoing decreased

[5] Sources: Exhibits CX–140, 145, 149, 151, 154a, 156, 158, 207, 209, 210, 246, 249, 256, 260, 261. (See also Appendix C reflecting percentages of total cubic yard volume of business and positions of competitors in business which is also a part of these findings.) [App. C omitted in printing.]

to 43.7% and 43.1% respectively. There is no evidence explaining the aforesaid reduction. At all times from 1955 through 1960, Warner held first position in volume of sales in these relevant market areas. Chester Materials' share of the business was approximately 7.7% of the total dollar volume of sales and 7.3% of the total cubic yard volume of sales in the relevant market areas prior to its acquisition by Warner in 1955. Also in 1955, prior to acquisition by Warner, Chester held fourth position in volume of sales in the relevant market areas hereinbefore defined.[6]

43. Prior to the acquisition of Johnson, Warner in 1956 had 50.4% in dollar volume and 49.7% in cubic yard volume of the total ready-mixed concrete sales by the companies doing business in the relevant market areas hereinbefore defined. From 1957 through 1959, Warner's share of the total increased to 53.3% in dollar volume and 53.9% in cubic yard volume. In 1960, there was a decrease to 43.7% and 43.1%, respectively. There is no evidence explaining the reason for the decrease. At all times as hereinbefore stated from 1955 through 1960, Warner held first position in volume of sales in these relevant market areas. Johnson's share of the business was approximately 4.7% of the total dollar volume of sales and 4.5% of the total cubic yard volume of sales in 1955. In 1956, immediately prior to acquisition by Warner, Johnson's share of the total business was approximately 4.8% in dollar volume and 4.6% in cubic yard volume in the relevant market areas. In 1955 and in 1956, prior to acquisition by Warner, Johnson held fifth position in volume of sales in the relevant market areas.[7]

44. There is evidence of record and the hearing examiner finds that after the acquisition of Chester and Johnson, some competitors of Warner in the relevant market areas reduced their prices approximately a dollar a yard or 5% to 7% in order to meet the reduced prices of Warner which the evidence suggests had assumed price leadership in consummating such reductions. There is also evidence of the fact that Warner's competitors reduced prices to meet the prices of competitors other than Warner, although more frequently it was to meet Warner competition. This evidence, however, has limited probative weight in the absence of comparative and complete documented prices of the various competitors including Warner in

[6] See Appendix A for relevant market areas and Appendices B and C for the volume of business of Warner and Chester Materials. "Business" refers to the ready-mixed concrete business or sales. [Apps. A, B, and C omitted in printing.]

[7] See Appendix A for relevant market areas, and Appendices B and C for volume of business acquired by the various competitors in the relevant market areas from 1955 through 1956, based on dollar volume and on cubic yard volume, respectively. "Business" refers to the ready-mixed concrete business or sales. [Apps. A, B, and C omitted in printing.]

the relevant market areas corroborative of the testimony to this effect. The evidence adduced nevertheless justifies the conclusion that Warner had the economic ability to assume price leadership and did so as hereinafter discussed.

45. There is no evidence having substantial probative weight indicative of actual diversion of business from competitors of Warner to Warner after the acquisition of Chester and Johnson except as may be reflected by Appendices B and C and testimony involving general statements to the effect that not infrequently a concrete job sought by a competitor of Warner was lost to Warner because of Warner's lower costs, better facilities and reduced ready-mixed concrete prices. Appendices B and C, with regard to certain companies losing business appear to suggest that the business rather than being diverted to Warner may have been diverted in part to other competitors whose volume of business increased from 1955 through 1960.[8]

46. The evidence also reflects and the hearing examiner further finds that a new competitor, i.e., Trap Rock entered into the business of selling ready-mixed concrete in the relevant market areas in 1959,[9] attaining eleventh position of the twelve positions in those areas with 1.1% of the total dollar volume and 1.2% of the cubic yard volume of the total sales. In 1960, this same company attained seventh position with a dollar volume of 4.2% of the total business and a cubic yard volume of 4.2% of the total volume business.[10] This evidence in and of itself does not of course impute that there may not be a lessening of competition resulting from the acquisitions.

47. Warner produces its own complete requirements of concrete, sand and coarse aggregate (gravel or crushed stone). Gravel is obtained by Warner from the Delaware River and from its deposits near Morrisville, Pennsylvania. Crushed stone is obtained from the Johnson quarry near Howellville, Pennsylvania. The securing of a supply of crushed stone was one of the dividends accruing to Warner from the acquisition of Johnson.

There is also some evidence to the effect that Warner supplies sand and gravel to some of its competitors in the relevant market area. One competitor seeking to purchase these ingredients from which ready-mixed concrete is made was advised by Warner that only a limited amount of such ingredients would be sold to him. This evidence, however, contrary to the view of counsel in support of the complaint in no way establishes that Warner was in a position to

[8] See Appendices B and C, particularly as to the increased volume of sales of Allied, Trans-Materials, Samson, Corson (except in 1959), Liberty, and Fizzano and loss in volume of sales of DiFrancesco, Dyer and Glenside. [Apps. B and C omitted in printing.]

[9] This is the period Warner had the highest percentage share of the business from 1955 to 1959.

[10] See Appendices B and C. [Apps. B and C omitted in printing.]

control the ready-mixed concrete market as a result of its surplus supply of certain ingredients of ready-mixed concrete since there is no substantial evidence having probative weight indicative of a shortage of these ingredients in the relevant market. Furthermore, Warner's control over the sand and gravel market is unestablished.

48. Although counsel in support of the complaint contends that respondent has a cost advantage in marketing ready-mixed concrete because it has its own supply of ingredients such as sand and coarse aggregate, there is no evidence in the record of the cost of sand and gravel to Warner at its Chester or Johnson plants and there is no evidence of the price which Chester or Johnson paid to Warner for sand and gravel prior to the acquisitions. The record contains only scanty evidence as to the cost of aggregates to other companies which do business in the areas served by Chester and Johnson plants. What evidence there is leads to the inevitable conclusion that Warner's ownership of aggregates gives it no measurable competitive advantage in the areas served by its Chester and Johnson plants.

The record discloses that Warner's cost for sand delivered at its 51st Street plant is $1.22 but there is no evidence of the cost to Warner of sand at its Chester or Johnson plants. Albert L. Lewis, owner of A. L. Lewis Co., testified that it costs approximately 5 cents per ton per mile to haul sand. John W. Fitzgerald, president of Liberty Corporation, testified that the cost of hauling a ton of sand 15 miles is approximately $1.10. On the basis of these figures, it might be determined that sand hauled from Warner's 51st Street plant to its Johnson plant in Howellville costs Warner from $2.10 to $2.40 per ton. On the other hand, DiFrancesco pays $1.90 per ton, delivered, for sand; Fizzano pays $1.85 per ton, delivered, for sand and Samson purchases sand at $1.85 per ton, delivered. It is apparent Warner has no cost advantage at its Johnson plant over the other firms mentioned on that basis.

There is no way to calculate the cost of sand to Warner at its Chester plant, since the cost per ton per mile of hauling sand by barge is not reflected in the record. There also is no evidence of the cost of coarse aggregates to Warner at Warner's Johnson, Chester or 51st Street plants. However, it seems clear that Warner has little or no price advantage over any other ready-mix producer in the areas around Howellville and Chester. Moreover, when the price of a cubic yard of concrete is in the range of $13 to $16 (e.g., CX–160 to 206), a price differential of 50 cents a cubic yard is deemed to be "negligible" by a contractor who weighs other factors such as quality.[11] Consequently, the record does not support and the hearing examiner so

[11] Tr. 1349.

finds that the contention that a price differential in favor of Warner at Chester of about 50 cents, which is the maximum differential which could conceivably be inferred from this record, is meaningful or would tend toward lessening of competition or the creation of a monopoly in the sale of ready-mix concrete.

CONCLUSIONS OF FACT

1. Chester Materials Company has been eliminated as an independent competitive factor in the ready-mixed concrete market in the effective area of competition hereinbefore defined.

2. W. E. Johnson, Inc., has been eliminated as an independent competitive factor in the ready-mixed concrete market in the effective area of competition hereinbefore defined.

3. Competition between respondent and Chester Materials has been eliminated in the production and sale of ready-mixed concrete in the effective area of competition hereinbefore defined.

4. Competition between respondent and W. E. Johnson, Inc., has been eliminated in the production and sale of ready-mixed concrete in the area of effective competition.

5. Considered either separately or jointly, the acquisition of Chester Materials Company and then W. E. Johnson, Inc., by respondent, both substantial competitors in the ready-mixed concrete industry in the designated areas, has increased respondent's share of the total ready-mixed concrete business to over 50% during the period from 1956 through 1959. Although in 1960 this share was reduced to the approximate percentage respondent had precedent to the acquisition, the reduction is unexplained and therefore inconclusive since there may have been special circumstances during the brief one year period that caused reduction in sales volume without relation to competition. The longer period from 1956 through 1959 is obviously more impressive as a valid basis for determining the economic ability of the respondent to control the market in contravention of Section 7 of the Clayton Act. As pointed out by Professor Derek C. Bok in 74 Harvard Law Review 226 at Page 277, in an article entitled "Section 7 of the Clayton Act and Merging of Law and Economics" cited in *Crown Zellerbach Corp.* v. *Federal Trade Commission* 296 F. 2d 800 (9th Cir. 1961):

> * * * if the leader's share of the market exceeds fifty per cent, any given percentage increase in his sales will necessarily cause a larger percentage decrease in the sales of his rivals.

Thus the demonstrated ability of the respondent in the within case to attain a share of more than 50% by acquisitions during a substantial period of four years is also indicative of its ability to divert busi-

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ness from its competitors by means of price leadership in reducing prices to a level constituting a threat to competition. As further pointed out by Professor Bok at page 278: "in most instances of price leadership it is the largest firm which leads." [12] The greater size connotes a greater striking power which may coerce the smaller firms into passive submission.[13] This would appear to be particularly true in a competitive environment involving the limited geographic market within which ready-mixed concrete may as a practical matter be transported and sold. The Commission in order to establish a Section 7 case is not required to prove actual diversion of business to Warner or actual lessening of competition resulting from the acquisitions at issue. (See p. 44 of Commission Opinion, Foremost Dairies Inc., Docket No. 6495).

The Commission's case, however, is not dependent exclusively upon statistical data indicative of the ability of the respondent to control the market by sharing in more than 50% of the business in the relevant market. It is also based upon an actual assumption of price leadership in reducing prices whereby respondent has been able to divert business to itself within the relevant market area to a point where the hearing examiner believes it has been established that the acquisitions may be said with reasonable probability to contain a threat that they may lead to a restraint of commerce or tend to create a monopoly of a line of commerce and the hearing examiner so finds. In fact, the acquisition of Chester alone in 1956 precedent to the acquisition of Johnson in 1957 enabled respondent to acquire over 50% of the share of the business in the relevant market area. Thus the cumulative effect of each company (i.e., Chester and Johnson) acquired by Warner reflects economic power which may tend to lead to the end result of eliminating competition within the relevant market area. (See concept enunciated in majority Commission Opinion re Foremost Dairies, Inc., Docket No. 6495, page 44.)

Although in 1959 when respondent's share of the business was at its peak, new competition developed in the relevant market areas, as pointed out by Professor Bok in his article published in 74 Harvard Law Review 226, this is not incompatible with the reduction in the vigor of competition resulting from the loss of substantial competitors by acquisition. On this point he states as follows:

The loss of a substantial firm, however, may of itself induce a reduction in the vigor of competition. For even if new entrants are coming into the market or

[12] See, e.g., the case studies summarized in Bain, Industrial Organization 301–10 (1959). On the basis of his observation of competitive conditions in many industries, Professor Burns declared that "leadership would be expected to fall to the largest firm in an industry where there is any leader at all." A. R. Burns, The Decline of Competition 77 (1936).

[13] See Bok, 74 Harvard Law Review 226, 227.

concentration is for some other reason declining, there will be one less substantial firm that would have existed but for the merger, and an adverse finding under § 7 is predicated on the presumption that competition would have been benefited had that firm remained independent.

6. The hearing examiner further finds and concludes the evidence reflects the respondent's self-recognition of its economic power to limit the sales of its competitors in restraint of competition and the expressed intent of respondent's representatives to impress competitors with such power. The uncontradicted testimony of Samuel W. Williamson, associated with Warner's competitor Samson, during cross-examination at pages 1705 and 1706 of the record referring to a conversation with Robert C. Collins, a director and former officer (i.e., 1942–1957 General Sales Manager, 1957–1960 Vice President, 1960 President and then Chairman) of the respondent corporation, indicates as follows:

Q. If Mr. Collins stated that you were not telling the truth when you said that he said that he didn't know whether Warner would let you sell 66,000 yards of concrete, would you change your testimony?

A. I would say he was respectfully mistaken.

Q. Now did you regard that as a threat by the Warner Company to your business?

A. Yes, I did.

Q. Did you take that threat seriously?

A. Yes.

Q. I suppose you took it seriously, because you knew the Warner Company was bigger than you were and any company that had the money to do so could cut prices and keep them cut until you could no longer afford to stay in business; is that right?

A. I knew they had me surrounded. When I went into that business in '55, Warner was just in Philadelphia, and by the time I woke up in time, they were all around me.

In the foregoing connection, Professor Bok in 74 Harvard Law Review, 226, at page 277, suggests the likely effect on competition when the leader or largest competitor asserts what he believes is his ability to control business. He states:

Still another significant aspect of increased size has to do with the psychological reaction which such growth may evoke in rival firms. The smaller companies cannot be expected to know all the relevant facts concerning the capacity of the leader to do them harm. They operate in a situation of considerable uncertainty, there the *status quo* is usually far preferable to being beaten in a serious fight with a larger organization. Under these circumstances size alone is likely to breed respect, and the smaller firms may simply assume that their bigger rival possesses a strength equivalent to his market share.

Of course if the bigger rival such as the respondent in the instant case does not in fact have economic strength equivalent to its market share, the probability of restraint could hardly be imputed from the psychological reaction of a smaller competitor. In the instant case, however, the respondent's actual ability to control the market is demonstrated not only by its overwhelming share of the business, but by its assumption of price leadership in reducing prices of ready-mixed concrete to divert sales to itself. The evidence, however, does not with certainty establish that such a reduction actually affected competition. The respondent's competitors in the relevant market areas, eleven in number, with the exception of three, increased their business while in competition with the respondent. However, the evidence does establish that as a result of the acquisitions at issue, separately or jointly considered, there may be a substantial lessening of competition or a tendency to create a monopoly in the relevant market within the purview of Section 7 of the Clayton Act [14] requiring that preventive measures be taken to preclude the effects of respondent's economic power or its exercise. The Commission does not need to establish its actual exercise or effect. It is sufficient that economic power incipiently exists that may be exercised or may have the effect of substantially lessening competition.[15]

7. The effect of the acquisitions of Chester Materials Company and W. E. Johnson, Inc. (separately or jointly in order of acquirement), by Warner Company may be substantially to lessen competition or tend toward a monopoly in the ready-mixed concrete industry in an area approximately encompassing the geographic markets for ready-mixed concrete serviced (1) by respondent in and adjacent to Philadelphia in Pennsylvania, and in particular, but not limited to, by respondent's 51st Street plant; (2) by the former Chester Materials Company plant in and adjacent to Chester, Pennsylvania; (3) by the former W. E. Johnson, Inc., plant in and adjacent to Paoli, Pennsylvania; and (4) the areas of overlap which geographically and competitively connect respondent and the two acquired firms into one contiguous area.[16] This effect does not extend to the sale of sand used as an ingredient of concrete.

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[14] Section 7 of the Clayton Act provides in part as follows: "No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[15] See *U.S.* v. *E. I. du Pont de Nemours and Company*, 353 U.S. 586 (1957).

[16] See *Foremost Dairies, Inc.*, Commission majority opinion at p. 49, Docket 6495, to the effect that the probable adverse effect of a merger on potential competition should be viewed in the environment within which it occurred. See also, Appendix A in this connection reflective of the geographic limitations of the market. [App. A omitted in printing.]

CONCLUSIONS OF LAW

1. Chester Materials Company was a corporation engaged "in commerce" within the meaning of Section 7 of the Clayton Act, as amended.

2. W. E. Johnson, Inc., was a corporation engaged "in commerce" within the meaning of Section 7 of the Clayton Act, as amended.

3. The Warner Company is a corporation engaged "in commerce" within the meaning of Section 7 of the Clayton Act, as amended.

4. Respondent acquired the business and assets of Chester Materials Company and W. E. Johnson, Inc., within the meaning of Section 7 of the Clayton Act, as amended.

5. Ready-mixed concrete is a "line of commerce" within the meaning of Section 7 of the Clayton Act, as amended.

6. An area approximately encompassing the geographic markets for ready-mixed concrete serviced (1) by respondent in and adjacent to Philadelphia in Pennsylvania, and in particular, but not limited to, by respondent's 51st Street plant; (2) by Chester Materials Company in and adjacent to Chester, Pennsylvania; (3) by W. E. Johnson, Inc., in and adjacent to Paoli, Pennsylvania; and (4) the areas of overlap which geographically and competitively connect respondent and the two acquired firms into one contiguous area are the area and areas of effective competition insofar as the aforesaid "line of commerce" is concerned and such area and areas of effective competition are a section and sections of the country, within the meaning of Section 7 of the Clayton Act, as amended.

7. In the aforesaid line of commerce, in the aforesaid section and sections of the country, the effects of respondent's acquisitions of Chester Materials Company and W. E. Johnson, Inc., may be substantially to lessen competition or tend to create a monopoly within the meaning of Section 7 of the Clayton Act, as amended.

Respondent argues that under Section 7 the adverse competitive impact or effect must be felt in a line of interstate commerce in which the acquired company is engaged. This argument is based on its interpretation of the statute. It is pointed out that Section 7 of the Clayton Act provides that "commerce" as used therein "means trade or commerce among the several states," that is, interstate commerce. It follows, therefore, according to respondent that the competitive injury must occur in "any line of (interstate) commerce." Citing *United States* v. *Brown Shoe Company*, 179 Fed. Supp. 721 (E.D. Mo. 1959) the Commission, however, in *Foremost Dairies, Inc.*, Docket No. 6495 decided to the contrary and in the majority opinion of the

Commission by Chairman Dixon dated April 30, 1962, at pp. 36 and 37 thereof it states as follows:

We do not agree with respondent's construction of this language which was added by the 1950 amendment of Section 7. It is our view that "line of commerce" denotes a product market. It has thus been defined by the court in the *Brown Shoe* case, *supra*, and in other cases therein cited. Moreover, considering the fact that the courts have held that a single state or a lesser area within a state may comprise an effective area of competition, we think it necessarily follows that the adverse competitive effects directly resulting from an acquisition can be measured upon intrastate competition. We do not think Congress, in expressly broadening the provisions of Section 7 by the 1950 amendment, intended to limit its application in the manner proposed by respondent. Section 7 does require that both the acquired and acquiring corporations be engaged in commerce and this is conceded as to both Golden State and Foremost. Having met this requirement, adverse competitive effects resulting from the activities of such interstate companies, whether such effects be local or interstate, are within the scope of Section 7.[17]

To the contrary in *Page* v. *Work*, 290 F. 2d 323 (9 Cir. 1961), with specific reference to Section 7 of the Clayton Act, the court held (290 F. 2d at 333–334):

It is to be noted that the plain language of the statute is to prohibit the acquisition by one corporation of the capital stock or assets of another corporation "where in any line of *commerce in any section of the country*, the effect of such acquisition * * * may be substantially to lessen competition, or to tend to create a monopoly." (Italics added). The purpose in the enactment of Section 18 was to cope with monopolistic tendencies in their incipiency, which were beyond the reach of the Sherman Act as judicially interpreted.* * * We recognize that the general language of the Sherman Act and of the Clayton Act was designed by Congress to exercise its powers under the Commerce Clause of the Constitution, U.S. Const. art. 1, § 8, cl. 3, to the fullest extent, nevertheless, *it must be interstate commerce which feels the pinch, or competition in interstate commerce which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in interstate commerce*, before the provisions of said sections become applicable.

In our view, the language of Section 18 in no way indicates that Congress intended to apply the provisions of that Act to purely local activities wholly directed to a local intrastate market and relating to a product not in the flow of interstate commerce and where the effects of interstate activities in which the parties engage are in substantial, inconsequential and fortuitous, if not non-existent. (Emphasis added.)

However, even assuming that adverse competitive effects in interstate commerce must be established, this appears to be imputed from a defendant's or respondent's engagement in interstate commerce under the concept enunciated in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954). In that case not involving a Section 7 viola-

[17] Cf. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

tion of the Clayton Act, but which involves Sections 2(a) and 3 violations, the Supreme Court stated as follows:

We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business.

Although the subject matter of the Moore case involves price discrimination and does not involve the acquisition of assets of other companies or mergers, which may tend to substantially lessen competition or may tend to create a monopoly, the legal theory enunciated by the court in the Moore case is not unlike that presented in the within case. The ultimate purpose of the antitrust laws, including Section 7 of the Clayton Act, is to prevent companies engaged in interstate commerce from using their position in intrastate business to more effectively exercise their economic power in interstate commerce. A pursuance of a pattern devised to substantially control an intrastate market by a company engaged in interstate business such as the respondent, places them in a better position to exercise economic or monopolistic power in every State in which they do business, even though they may be competing in each State locally and the product which is the subject of competition may not be sold across State lines. As stated in the Moore case, if this method of competition were approved, the pattern for growth of a monopoly would be simple.

8. Therefore, the acquisitions of Chester Materials Company and W. E. Johnson, Inc., by respondent may be to substantially lessen competition or tend toward monopoly within the meaning of amended Section 7 of the Clayton Act, not only in the intrastate geographical areas in which respondent and the two acquired companies operated in selling ready-mixed concrete but also in interstate commerce. How-

ever, as reflected by the findings, the evidence does not support such a conclusion with regard to the sale of sand used as an ingredient of concrete.

Although the evidence as regards the sale of ready-mixed concrete is inconclusive in establishing that the acquisitions have actually resulted in Warner's substantial market power and actual elimination of competition, there is substantial evidence that the acquisitions have threatened to ripen into an effect prohibited by Section 7 of the Clayton Act. The competitive pattern evidenced in Appendices A, B and C coupled with other evidence indicative of the respondent's ability to control the relevant market and assumption of price leadership in reducing prices as the largest competitor in the relevant market area must necessarily lead one to conclude that there is a reasonable inference to be drawn therefrom that there is a tendency toward a monopoly, or threat that may lead to a restraint of commerce even though such restraint or substantial lessening of competition may not have actually occurred.[18] This concept is clearly enunciated in the Supreme Court in the case of *U.S.* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), in which the court states as follows:

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. * * *
>
> We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.
>
> A monopoly involves the power to * * * exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary * * * to find that * * * [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly

[18] See *Foremost Dairies, Inc.*, Commission majority opinion, Docket No. 6495 at p. 44 to the following effect:

"Amended Section 7 is designed to prevent the development of monopoly in its incipiency. The test is not intended to be mergers *resulting* in substantial market power and actual elimination of competition but rather mergers which *may* tend to lead to this end result. This distinction between proof as to *actual* injury required under the Sherman Act, and *potential* injury under Section 7 is well documented in decisions involving horizontal and vertical mergers. Applying this distinction to market extension mergers leads to a logical inference that under Section 7, the necessary proof of violation of the statute consists of types of evidence showing that the acquiring firm possesses significant power in some markets or that its over-all organization gives it a decisive advantage in efficiency over its smaller rivals".

in the bud. Since by definition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. Accordingly in order to determine the existence of a tendency to monopoly in * * * any * * * line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined * * * .

* * * * * * *

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition". Substantiality can be determined only in terms of the market affected. * * * The Clayton Act was intended to supplement the Sherman Act. (*Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346). Its aim was primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case. The Senate declared the objective of the Clayton Act to be as follows:

" * * * Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trust, conspiracies, and monopolies *in their incipiency and before consummation* * * * " S. Rep. No. 698, 63d Cong., 2d Sess. 1. (Emphasis added)

"Incipiency" in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. See *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, 166. To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.

SCOPE OF THE ORDER

Although the hearing examiner is of the view that a remedy less drastic than divestiture could perhaps accomplish the purposes of this proceeding, in preventing a continued violation of Section 7 of the Clayton Act, Section 11 of the Act appears to require divestiture if a Section 7 violation is established. It is required therein that a person violating Section 7 be ordered "to cease and desist from such violations *and* divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of Section 7 * * *". Nevertheless, there seems to be a valid question as to whether or not the foregoing portion of Section 11 should be strictly construed. Justice Brennan in rendering the majority opinion of the United States Supreme Court in *United States* v. *E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316 at page 328, Footnote 9 states as follows:

We reject the Government's argument that the Federal Trade Commission and other administrative agencies charged with the duty of enforcing the statute are required by § 11 of the Clayton Act to order divestiture whenever they find a violation of § 7, and that therefore courts acting under § 15 must give the same relief. Even if the administrative agencies were so limited, a question which we do not decide, Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944).[10]

A further question is presented also, as to whether or not remedial relief without divestiture would be appropriate in the absence of a charge under Section 5 of the Federal Trade Commission Act. In the *Foremost Dairies* case, Docket No. 6495, for example, the Commission included charges of violating Section 5 of the Federal Trade Commission Act, as well as Section 7 of the Clayton Act. This would have made relief other than divestiture possible. However, the only charge in the within case is a violation of Section 7 of the Clayton Act. Although the foregoing issue has not been decisively resolved by the courts, it appears to have been the policy of the Federal Trade Commission, to grant divestiture in all cases when a violation of Section 7 has been established, without exception. The hearing examiner therefore must conclude that Section 11 should be construed literally and that the establishment of a violation under Section 7 of the Clayton Act requires divestiture under Section 11 of that Act. Thus possible consideration of alternative relief without divestiture preventative of the assumption of price leadership in reducing prices as a means of controlling the market coupled with continued surveillance and jurisdiction of the Commission even if adequate, would appear to be precluded.

Commissioner Elman has pointed out in his partly dissenting opinion in the *Foremost* case, Docket No. 6495, at page 8, that "Although a court may be reluctant to enter an order requiring continuing future supervision over industry practices and conditions, an administrative

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[10] See dissenting opinion of Justice Frankfurter in *U.S.* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 at page 364 as follows:

"Partly on the basis of these views, the Attorney General's National Committee to Study the Antitrust Laws recommended that divestiture 'not be decreed as a penalty,' that it 'not be invoked where less drastic remedies will accomplish the purpose of the litigation,' and that possible disruption of industry and markets as well as effect on the public, investors, customers, and employees be taken into account. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 355–356. This statement fairly reflects the views of this Court, to the effect that a decree must not 'impose penalties in the guise of preventing future violations,' *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409; that the least harsh of available measures should be adopted when the Court is satisfied that they will be effective, e.g., *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603 (concurring opinion); and that injunctive relief may well be an adequate sanction against continued wrongdoing, *id.*, at 604 (concurring opinion), and *Standard Oil Co.* v. *United States*, 221 U.S. 1, 77. Add to this that we have recognized a sound basis in reason for distinguishing palpably illegal activity from conduct that was arguably permissible, and for dealing with the latter less severely than the former. See *Federal Trade Comm'n* v. *National Lead Co.*, 352 U.S. 419, 429; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89–90."

agency is not restrained by such inhibitions and indeed the exercise of continuing administrative oversight is one of this Commission's primary responsibilities." In this connection, Commissioner Elman also points out that in addition to the divestiture, the most effective form of relief would be to impose on respondent the specific obligation to submit any future acquisitions to the Commission for scrutiny and approval before consummation.[20] The majority opinion by Chairman Dixon does not appear to disagree with this as a concept. Such relief is therefore deemed appropriate in the within case.

Accordingly, since the Federal Trade Commission has jurisdiction in this proceeding, the following order shall issue:

ORDER

It is ordered, That respondent, Warner Company, a corporation, and its officers, directors, agents, representatives and employees, shall divest itself, absolutely, in good faith, of all stock and assets, properties, rights and privileges, tangible or intangible, including, but not limited to, all plants, machinery, equipment, trade names and good will acquired by said respondent as a result of the acquisitions of the stock and assets of Chester Materials Company and W. E. Johnson, Inc., together with so much of the plants, machinery, buildings, improvements, equipment and other properties of whatever description that has been added to them, as may be necessary to restore effective competitors in the lines of commerce in which the former Chester Materials Company and the former W. E. Johnson, Inc., were engaged.

It is further ordered, That in such divestitures hereinbefore mentioned, none of the said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestitures or within a year prior thereto, was a stockholder, officer, director, employee or agent of, or otherwise, directly or indirectly, connected with, or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That for a period of five (5) years from the date of the issuance of this Order by the Federal Trade Commission, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, by merger, consolidation, or purchase, the assets, stock, share capital, or any other interest whatsoever in any plant or company producing ready-mixed concrete without the approval of the Commission.

It is further ordered, That the charges that the effect of the acquisi-

[20] See page 8 of Commissioner Elman's partly dissenting opinion re *Foremost Dairies, Inc.*, Docket No. 6495, dated April 30, 1962.

tions alleged in the complaint was substantially to lessen competition or tend to create a monopoly in the sale of sand used as an ingredient of concrete in the relevant market areas, is herein and hereby dismissed.

Order Dismissing Complaint

This matter is before the Commission upon respondent's appeal from the initial decision of the hearing examiner. The Commission, while satisfied that it has jurisdiction with respect to respondent's acqusition of the assets of the Chester Materials Company, does not consider it necessary to decide the question of the legality, and need for divestiture, of such acquisition under Section 7 of the Clayton Act, as amended. The public interest will be adequately served by exercising close scrutiny of any similar future acquisitions made by respondent, which would raise most serious questions under Section 7. Our disposition of this matter makes it unnecessary to consider whether an order to cease and desist should now be entered. Accordingly,

It is ordered, That the initial decision be, and it hereby is, vacated, and that the complaint be, and it hereby is, dismissed.

Commissioner Dixon dissenting for the reason that he believes an order should be entered requiring the respondent to divest itself of the assets of the former Chester Materials Company, and Commissioner MacIntyre not concurring.

In the Matter of

FULLER TOOL CO., INC., ET AL.

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

Docket C-499. Complaint, May 17, 1963—Decision, May 17, 1963

Consent order requiring Whitestone, N.Y., importers of a complete line of hand tools manufactured in foreign countries, including Japan, England, Holland, Italy and Portugal, to cease selling the tools so packaged or otherwise assembled as to obscure or conceal the mark of foreign origin, thus failing to give the public adequate notice that the tools were not made in the United States; to cease using in catalog advertisements of hand tools and on tool packages such statements as "Guaranteed", "Unconditionally guaranteed", etc., when the guarantees contained limitations; and to cease representing falsely that their hammer was "100% drop forged" when only the head was drop forged.

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 Fuller Tool Co., Inc., a corporation, and Bernard Fuller, Harrison Fuller, John W. Weil, and Lillian Sasanow, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fuller Tool Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 152–35 Tenth Avenue, Whitestone, New York.

Respondents Bernard Fuller, Harrison Fuller, John W. Weil and Lillian Sasanow are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the importation, advertising, offering for sale, sale and distribution of a complete line of hand tools, including but not limited to wrenches, pliers, hammers, and screw drivers. Respondents sell their tools primarily to wholesalers and jobbers who in turn sell to others for resale to the public.

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

PAR. 4. Certain of the hand tools sold and distributed by respondents are manufactured in and imported from foreign countries, including Japan, England, Holland, Italy and Portugal. Certain of said tools are packaged in plastic pouches and others are packaged in cardboard boxes. In some instances, said foreign-made tools are so packaged or otherwise assembled so as to obscure or conceal the mark of foreign origin, in which case there is not adequate notice to the public that such tools are not made in the United States.

PAR. 5. In the absence of an adequate disclosure that a product, including hand tools, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure clearly and conspicuously to disclose the country of origin of said articles of merchandise is, therefore, to the prejudice of the purchasing public.

PAR. 6. Through the aforesaid practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead the public as to the country of origin of said tools.

PAR. 7. In their catalog advertisements of hand tools and on their tool packages respondents have used such statements as "Guaranteed", "Unconditionally guaranteed" and "Fully guaranteed", thereby representing that said products are guaranteed in every respect.

PAR. 8. In truth and in fact, said guarantees contain limitations and respondents fail to set forth the nature and extent of the guarantee, the manner in which the guarantor will perform and the identity of the guarantor. Therefore, the quoted statements in Paragraph 7 are false, misleading and deceptive.

PAR. 9. In the course and conduct of their business, respondents have made the representation that their hammer is "100% drop forged", thereby representing that the entire hammer is drop forged.

PAR. 10. In truth and in fact, only the head of the hammer is drop forged. The metal handle of the hammer is not drop forged. Therefore, said statement that respondents' hammer is "100% drop forged" is false, misleading and deceptive.

PAR. 11. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of hand tools of the same general kind and nature as those sold by respondents.

PAR. 12. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Decision and Order

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the 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 Fuller Tool Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 152–35 Tenth Avenue, Whitestone, New York.

Respondents Bernard Fuller, Harrison Fuller, John W. Weil, and Lillian Sasanow are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, Fuller Tool Co., Inc., a corporation, and its officers, and Bernard Fuller, Harrison Fuller, John W. Weil, and Lillian Sasanow, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hand tools, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing any product which is in whole or in part of foreign origin without clearly and con-

spicuously disclosing on such product the country of origin thereof, and if said product is enclosed in a package or container or mounted on a card, without also clearly and conspicuously disclosing on such package, container or card the country of origin of such product, in such manner as to be readily visible on or through the front of any package or container in which the product is to be displayed for consumer resale, and in such manner as to be readily visible on the front or face of any card on which said product is mounted for such resale;

2. Placing in the hands of others any means or instrumentalities by or through which they may mislead the public as to the country or place of origin of respondents' products;

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

4. Representing that any of respondents' products, including hammers, are "100% drop forged", unless all the metal in such products has been so processed; or otherwise misrepresenting the composition of their products or the method by which they have been processed.

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

BERKELEY'S OF FRESNO, 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-500. Complaint, May 17, 1963—Decision, May 17, 1963

Consent order requiring Fresno, Calif., retail furriers to cease violating the Fur Products Labeling Act by affixing to fur products labels bearing fictitious prices, represented thereby as usual selling prices; by failing on invoices, to show the true animal name of furs and the country of origin of imported furs, to disclose when furs were artificially colored and to use terms "Broadtail", "Dyed Broadtail-processed Lamb", and "natural" as required; by representing prices on invoices as reduced from regular prices which were fictitious; by advertising in newspapers, etc., which failed to show the true animal name of fur, and represented falsely that their "Pre Christmas Fur

Sale" offered "20% to 30% Savings"; by failing to maintain adequate records as a basis for pricing claims; and by failing in other respects to comply with requirements of the Act.

COMPLAINT

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

PARAGRAPH 1. Respondent Berkeley's of Fresno, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California.

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

Respondents are retailers of fur products with their office and principal place of business located at 887 Fulton Street, Fresno, California.

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

PAR. 3. Certain of said fur products were misbranded in that labels affixed thereto represented that prices of fur products had been reduced from regular or usual prices of such fur products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the represented savings were not thereby afforded to purchasers, in violation of Section 4(1) of the Fur Products Labeling Act.

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

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

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

(a) To show the true animal name of the fur used in the fur product.

(b) To disclosure that the fur contained in the fur product was bleached, dyed or otherwise artificially colored, when such was the fact.

(c) To show the name of the country of origin of the imported furs used in fur products.

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

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

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

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

PAR. 6. Certain of said fur products were falsely or deceptively invoiced or otherwise falsely and deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act. Among such misbranded fur products, but not limited thereto, were fur products invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they are not entitled to such designation.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in that invoices relating thereto represented that prices of fur products had been reduced from the regular or usual prices of such fur products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the represented savings were not thereby afforded to purchasers, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 8. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were signs, circulars, labels, and other advertisements of respondents, the latter of which appeared in issues of the Fresno Bee, a newspaper published in the City of Fresno, State of California.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show the true animal name of the fur used in the fur product.

PAR. 9. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented that prices of such fur products had been reduced from regular or usual prices of such products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the represented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 10. In advertising fur products for sale as aforesaid respondents represented through such statement as "Pre Christmas Fur Sale Offering 20% to 30% Savings", that prices of fur products were reduced in direct proportion to the percentage of savings stated and the amount of said reductions afforded savings to the purchasers of respondents' products when in fact such prices were not reduced in direct proportion to the percentage of savings stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 11. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products, in violation of the Fur Products Labeling Act, in that said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder, in that the term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 12. In advertising fur products for sale as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 13. 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 Berkeley's of Fresno, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 887 Fulton Street, Fresno, California.

Respondent Gilbert C. Berkeley is an officer of said corporation, and his address is the same as that of said corporation.

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

ORDER

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

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying such products by any representation that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so represented was usually and customarily sold at retail by the respondents unless such merchandise was in fact usually and customarily sold at retail by respondents at such prices in the recent past.

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

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

B. Falsely or deceptively invoicing fur products by:

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

2. Falsely or deceptively invoicing any fur product with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

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

4. Failing to set forth the term "Natural" as part of the information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

6. Representing that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the fur products so represented were usually and customarily sold at retail by respondents unless such fur product was in fact usually and customarily sold by respondents at such price in the recent past.

7. Misrepresenting in any manner on invoices the savings available to purchasers of respondents' fur products.

8. Falsely or deceptively representing, directly or by implication, on invoices that prices of respondents' fur products are reduced.

C. 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 any fur product and which:

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

2. Represents, directly or by implication, that any price, when accompanied or unaccompanied, by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by respondents in the recent past.

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

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

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

6. Fails to set forth the term "natural" as part of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

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

IN THE MATTER OF

CHURCH OF RELIGIOUS SCIENCE TRADING AS COMMERCIAL TRADES INSTITUTE ET AL.

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

Docket C-501. Complaint, May 17, 1963—Decision, May 17, 1963

Consent order requiring a church corporation in Los Angeles, Calif., advertising and selling a correspondence course at a Chicago address under the name "Commercial Trades Institute", and the director of such "Institute", to cease representing falsely through their sales agents responding to inquiries, that they would obtain employment for persons completing their courses, when the only assistance they provided was to write letters of commendation to prospective employers and to furnish printed suggestions for obtaining a better job, etc.; to cease representing that their said Institute was "non-profit", when the prices charged included a provision for profit; and to cease representing to purchasers that delinquent accounts had been referred to the independent "Imperial Collection Agency", which was actually a fictitious name used by them in collecting delinquent accounts.

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 Church of Religious Science, a corporation, trading and doing business as Commercial Trades Institute, and Roy C. Anderson, individually and as director of Commercial Trades Institute, 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 Church of Religious Science is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3251 West Sixth Street, in the city of Los Angeles, State of California. Corporate respondent trades and does business under the name Commercial Trades Institute, with the principal place of business thereof being located at 1400 W. Greenleaf Avenue, in the city of Chicago, State of Illinois.

Respondent Roy C. Anderson directs the activities of Commercial Trades Institute. He participates in the formulation, direction and control of the acts and practices of Commercial Trades Institute, including the acts and practices hereinafter set forth. His address is 1400 W. Greenleaf Avenue, Chicago, Illinois.

Par. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of courses of study and instruction to members of the public. Said courses are pursued by correspondence through the United States mails.

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

Par. 4. Respondents sell their courses by and through the following method and means. Respondents publish, or cause to be published, advertisements in magazines of national circulation, in newspapers sent through the United States mails to subscribers thereof located in States other than the State of Illinois, in the form of postcards, circulars and other printed matter sent through the mails to prospective purchasers in such other States, and in other media. Said advertisements invite responses from interested members of the public. Respondents cause such members of the public to be visited by respondents' commission sales agents or representatives for the purpose of selling respondents' courses of study and instruction or respondents send or cause to be sent to such members of the public, brochures, circulars and other items of advertising material pertaining to respondents' courses.

Par. 5. In the course of their solicitation as aforesaid, respondents' sales agents or representatives have represented, directly or by implication, for the purpose of inducing, and which has induced, the sale of respondents' courses to purchasers and prospective purchasers of respondents' courses that respondents would obtain employment for such persons upon completion of respondents' courses.

In truth and in fact, respondents do not obtain employment for persons completing respondents' courses. The only assistance in this regard respondents provide for persons completing their courses is to write letters of recommendation to prospective employers upon and at the request of the person completing respondents' course and to furnish printed material containing suggestions as to how an individual should proceed to obtain a better job or establish himself in business.

Therefore, the aforesaid statements and representations were and are false, misleading and deceptive.

PAR. 6. Respondents represent, and have represented, by means of statements or representations made in advertisements published in magazines of national circulation and by means of statements or representations made in printed matter sent through the United States mails to prospective purchasers of respondents' said courses located in States other than the State of Illinois, that Commercial Trades Institute is "non-profit" and therefore is not organized or operated for the purpose of achieving profit. Respondents thereby represent, directly or by implication, that the prices charged for respondents' courses do not include any provision for profit.

In truth and in fact, respondent Church of Religious Science conducts the business of Commercial Trades Institute for the purpose of achieving a profit and such profits as do accrue are utilized by respondent Church of Religious Science for purposes other than in connection with the business of Commercial Trades Institute. The prices charged for respondents' courses include a provision for profit.

Therefore, the aforesaid statements and representations are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, respondents sent or cause to be sent, or have sent or have caused to be sent, through the United States mails, letters, forms and other printed matter from respondents' place of business in the State of Illinois to purchasers of respondents' courses located in States other than the State of Illinois whose accounts have become delinquent. Such letters, forms and printed matter indicate that the material is from the "Imperial Collection Agency, P.O. Box 3307, Chicago, Ill." Respondents thereby represent, directly and by implication, that such delinquent accounts have been referred to an independent organization engaged in the business of collecting delinquent accounts.

In truth and in fact, the accounts in question have not been referred to an independent organization engaged in the business of collecting delinquent accounts. "Imperial Collection Agency" is a fictitious name used by respondents in collecting delinquent accounts.

Therefore, the aforesaid statements and representations were and are false, misleading and deceptive.

PAR. 8. At all times mentioned herein, respondents have been, and are now, in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of courses of study and instruction covering the same or similar subjects as are covered by respondents' courses.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices as set forth in Paragraphs 5 and 6 hereof 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' courses of study and instruction by reason of said erroneous and mistaken belief.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices as set forth in Paragraph 7 hereof constitutes a scheme or device to coerce and intimidate purchasers of respondents' courses of study and instruction and has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that Imperial Collection Agency is an independent organization entirely separate from Commercial Trades Institute.

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 the respondents named in the caption hereof with violation of the Federal Trade Commission 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 Church of Religious Science is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 3251 West Sixth Street, in the city of Los Angeles, State of California.

Respondent Church of Religious Science trades and does business as Commercial Trades Institute with the principal place of business thereof located at 1400 W. Greenleaf Avenue, in the city of Chicago, State of Illinois.

Respondent Roy C. Anderson is a director of Commercial Trades Institute and his address is the same as that of Commercial Trades Institute.

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

ORDER

It is ordered, That respondents Church of Religious Science, a corporation, trading as Commercial Trades Institute or under any other name or names, and its officers, and Roy C. Anderson, individually and as director of Commercial Trades Institute, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of courses of study and instruction, or in connection with the collection of delinquent accounts, 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:

    (a) Respondents will obtain employment for persons completing respondents' courses of study and instruction, or misrepresenting in any other manner the assistance offered by respondents to such persons in securing employment.

    (b) Commercial Trades Institute is not operated for the purpose of achieving a profit, or misrepresenting in any other manner the character or nature of any business enterprise operated by respondents.

2. Using the name "Imperial Collection Agency" or any other

name or names of similar import or meaning or representing in any other manner that any account not referred to an independent organization engaged in the collection of past due accounts has been so referred.

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

FOREMOST DAIRIES, INC.

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

Docket 7475. Complaint, Apr. 13, 1959—Decision, May 23, 1963

Order requiring a large national dairy, operating 59 processing plants in 24 States, and 182 distribution facilities in those and 5 additional States, to cease discriminating in price among competing purchasers in the sale of fluid milk by such practices as giving a 5 percent discount to an Albuquerque, N.M., grocery chain but not to retailers in competition with the chain.

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 (a) of Section 2 of the Clayton Act (U.S.C.A. Title 15, Sec. 13) as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent named herein is Foremost Dairies, Inc. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondent's principal office and place of business is located at 2903 College Street, Jacksonville, Fla.

PAR. 2. Respondent is extensively engaged in the business of purchasing, processing, manufacturing, distributing, and selling fluid milk and other dairy products throughout the United States and in other places under the jurisdiction of the United States. Respondent's net sales for 1957 were $415,141,110.

PAR. 3. Respondent sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout the United States and in other places under the jurisdiction of the United States for use, consumption, or resale therein.

Respondent owns, maintains, and operates a large number of receiving stations, processing, and manufacturing plants and distribution depots located in various States of the United States and in other places under the jurisdiction of the United States from which it sells and distributes its said products to purchasers.

PAR. 4. In the course and conduct of its business respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported from dairy farms and other points of origin to respondent's receiving stations, processing, and manufacturing plants and distribution depots located in other States of the United States and in other places under the jurisdiction of the United States.

Respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported from the State or States where such products are processed, manufactured, or stored in anticipation of sale or shipment, to purchasers located in other States of the United States and in other places under the jurisdiction of the United States.

Respondent also sells and distributes its said fluid milk and other dairy products to purchasers located in the same States and places where such products are processed, manufactured, or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales, and distribution by respondent of its said fluid milk and other dairy products, as hereinbefore alleged, were performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 5. Respondent sells its fluid milk and other dairy products to distributors, retailers, and consumers.

Respondent's distributors resell to retailers and consumers to the extent that such purchasers do not buy directly from respondent. In many instances respondent's distributors act as its agent in making deliveries to some of respondent's retailer-purchasers. Respondent's retailer-purchasers resell to consumers. Many of respondent's distributor and retailer-purchasers are respectively in competition with other distributor and retailer-purchasers of respondent.

Respondent, in the sale of its fluid milk and other dairy products to distributors, retailers and consumers is in substantial competition with other manufacturers, processors, distributors and sellers of said products.

PAR. 6. In the course and conduct of its business in commerce, respondent has discriminated in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, respondent has discriminated in price in the sale of its said products to retailers located in Dallas, Waco, Fort Worth, Houston, Corpus Christi and in other cities, towns and places in the State of Texas, and between favored retailers located in each of said cities, towns, and places and unfavored retailers located in each of the others.

Respondent has further discriminated in price in the sale of its said products to consumers located in Dallas, Waco, Fort Worth, Houston, Corpus Christi and other cities, towns, and places in the State of Texas, and between favored consumers located in each of said cities, towns, and places and unfavored consumers located in each of the others.

PAR. 7. The effect of such discriminations in price by respondent in the sale of fluid milk and other dairy products has been or may be substantially to lessen, injure, destroy, or prevent competition:

1. Between respondent and its competitors in the processing, manufacture, sale and distribution of such products.

2. Between retailers paying higher prices and competing retailers paying lower prices for respondent's said products.

PAR. 8. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. William H. Smith supporting the complaint.

White & Case, New York, N.Y., by *Mr. Edgar Barton*, *Mr. Macdonald Flinn*, and *Mr. Thomas B. Leary;* and

Milam, LeMaistre, Ramsey & Martin, Jacksonville, Fla., by *Mr. George Milam*, for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

AUGUST 30, 1962

The Federal Trade Commission issued its complaint against the respondent on April 13, 1959, charging that respondent has violated subsection (a) of Section 2 of the Clayton Act, as amended, by discriminating in price between purchasers located in different areas and between purchasers located in the same areas. The answer denied that its sales were in commerce, denied that it had discriminated in price, and denied that the requisite injury to competition had occurred or was reasonably probable. The answer pleaded that any differences in price to customers in competition with each other represented a good faith meeting of competition and were cost justified. The answer further pleaded that any order premised on the allegations of the complaint would seriously injure Foremost since its competitors would not be so bound.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint and oral argument thereon. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

Respondent Foremost Dairies, Inc., is a New York corporation with its executive offices located at 2903 College Street, Jacksonville, Florida, and its administrative operating offices at San Francisco, California.

Respondent is engaged in the business of purchasing, processing, manufacturing, distributing, and selling fluid milk and other dairy products throughout the United States and in other places under the jurisdiction of the United States. Respondent's net sales were $415,141,110 in 1957; $416,447,923 in 1958; $440,090,281 in 1959; and $437,706,220 in 1960.

Respondent sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout the United States and in other places under the jurisdiction of the United States for use, consumption, or resale therein.

As of June 30, 1959, respondent owned and operated 59 processing plants located in 24 States of the United States. These are the States of Alabama, Florida, Georgia, Virginia, West Virginia, North Carolina, South Carolina, Tennessee, California, Pennsylvania, Michigan, New York, New Jersey, Minnesota, North Dakota, South Dakota, Washington, Kansas, Missouri, Arkansas, New Mexico, Texas, Louisiana, and Hawaii. In addition respondent owned and operated 182 sales, receiving, and distribution facilities located in the States just named and in the States of Kentucky, Delaware, Maryland, Iowa, and Oklahoma from which it distributes and sells its said products to purchasers.

Many of respondent's business operations, including its intrastate sales of fluid milk and other dairy products, were in the course of interstate commerce.

Respondent sells its fluid milk and other dairy products to distributors, retailers, and consumers. Respondent's distributors resell to retailers and consumers to the extent that such purchasers do not buy directly from respondent. Respondent's retailer-purchasers resell to consumers. Many of respondent's retailer-purchasers in the States of Texas and New Mexico are in competition with other retailer-purchasers of respondent.

Respondent, in the sale of its fluid milk and other dairy products to distributors, retailers, and consumers is in substantial competition with other manufacturers, processors, distributors, and sellers of said products.

Respondent sells fluid milk of like grade and quality to its various wholesale customers at various places, including those located in Dallas, Fort Worth, Waco, San Antonio, Corpus Christi, Abilene, Lubbock, Midland, Odessa, El Paso, and in other cities, towns and places in the State of Texas; and in Albuquerque, New Mexico.

The Dallas processing plant purchases the bulk of its milk from the North Texas Producers Association and from the Producers Creamery Division of the Missouri Farmers Association. The North Texas Producers Association has some member producers located in the State of Oklahoma. A substantial portion of the milk processed in Dallas by Foremost originates out-of-state. When milk arrives at the Dallas processing plant it is sampled and pumped into storage tanks. After it is placed in the tanks it is tested and standardized to a uniform butterfat content. The milk is then pasturized and bottled. After bottling it may be loaded directly onto trucks or stored in a vault until it is needed. There was a constant flow of milk originating outside the State of Texas which was processed by the Dallas plant and which was in interstate commerce from its point of origin until delivered by respondent to its wholesale customers in Dallas and elsewhere.

A substantial portion of the milk processed in Santa Fe, New Mexico, originated outside the State of New Mexico, and there was a constant flow of such milk processed by the Santa Fe, New Mexico, plant which was in interstate commerce from its point of origin until delivered by respondent to its wholesale customers in Albuquerque and elsewhere.

The mixing of this out-of-state milk with local milk at Dallas and at Santa Fe, and its pasteurization or heating, did not change its interstate character or change it from milk into something other than milk.

There were also sales of milk which was flowing in interstate commerce to and from other plants of respondent in San Antonio and

Fort Worth, Texas, and to and from respondent's Santa Fe, New Mexico, plant into Texas which was sold at prices substantially higher than the Dallas price.

Many of the respondent's business operations, including the sales of fluid milk referred to above, were in the course of interstate commerce.

All of the milk processed in the Dallas plant is sold to customers within the State of Texas.

In the course and conduct of its business in interstate commerce, respondent, during a milk price war in Dallas and Fort Worth, Texas, beginning on or about November 29, 1957, and ending on or about December 23, 1957, and subsequently, beginning May 22, 1959, discriminated in price in the sale of fluid milk of like grade and quality by selling fluid milk to wholesale purchasers in Dallas and Fort Worth at prices below respondent's cost; and during the same period of time, and at the same times, respondent sold fluid milk at substantially higher prices to other wholesale purchasers located in other areas, cities and towns in the States of Texas and New Mexico.

The following are the changes in the wholesale list prices for the regular one-half gallon paper container of Foremost milk in Dallas, Texas, from November 5, 1956, through June 8, 1959:

Price list date	*½ gal. list price*
Nov. 5, 1956	$0.50
Mar. 4, 1957	.44
Nov. 29, 1957	.32
Nov. 30, 1957	.30
Dec. 4, 1957	.26
Dec. 17, 1957	.32
Dec. 23, 1957	.36
Jan. 20, 1958	.46
Sept. 15, 1958	.48
Mar. 2, 1959	.46

All of the above listed prices, except those of November 29, 1957, November 30, 1957, December 4, 1957, December 17, 1957, and December 23, 1957, were subject to a 10 percent trade discount and an additional 5 percent discount to certain customers. (This additional discount appears theoretically to be an unlawful discrimination between competitors, but the record does not show sufficient details of its use to warrant a finding that it was unlawful.)

Jere Dairy commenced business and began to sell milk only in glass gallon jugs in the Dallas market on April 26, 1957, at a net price of 68.4 cents to wholesale customers. At the time the only other gallon-jug supplier in the market was the Beverly Hills Dairy which sold to wholesale customers at a price of 70 cents. Beverly Hills cut its jug price to 65 cents in May 1957.

On June 27, 1957, Jere adopted a quantity discount ranging up to 5 percent, and the wholesale price to the largest volume customer dropped to 64.98 cents. After adopting this discount, Jere first began to sell to the Wyatt stores, a large chain in Dallas. Jere milk, selling out of the Wyatt stores at 75 cents a gallon, made deep inroads in the sales of Wyatt's other suppliers, Cabell's and Borden, whose milk sold out of the store for 86 to 90 cents for two half-gallon cartons.

On November 28, 1957, Jere dropped the price of its milk to 59.85 cents a gallon. On the next day Jere dropped the price to 54 cents a gallon. On December 5, Jere's price was dropped again to 46 cents a gallon. Beverly Hills, however, never sold its gallon jugs for less than 65 cents and its home delivery retail business held firm, but it temporarily lost almost all of its wholesale business and, as a result, lost money.

At least 12 dairies were selling in the Dallas market at the time of the hearing. Two of them (Jere and Vandervoorts) had entered the market within the previous three years; one of them (Beverly Hills) had only recently expanded into the wholesale business.

Foremost did not lower its prices in Dallas because of the competition of gallon-jug operators. Between March 4 and November 29, 1957, the price of Foremost half gallons remained the same despite the fact that Jere entered the market with a lower priced jug in April. Beverly Hills cut its price in May, and Jere further cut its price and sold a major store chain in July. Gallon jugs had been sold in the neighboring Fort Worth market for several years without affecting Foremost's prices.

On November 27, 1957, Mr. Earl Whitten, purchasing agent for the A & P stores in Dallas, told Mr. Lindsley Waters, then Foremost's division sales manager, that Cabell's, Metzger, Oak Farms and Borden had advised him their prices would be 32 cents a half gallon. He asked what price Foremost was going to quote to the A & P stores it was then supplying. Later on in the day Mr. Waters heard of reports on the radio that prices had been reduced in approximately 100 "7–11" stores served by Oak Farms. The following morning the Dallas Times Herald stated that the new price out of the "7–11" stores was 38 cents a half gallon. Foremost then notified the A & P stores and its other customers that it would offer the 32-cent price effective November 29.

On November 29, Mr. Waters was notified by the A & P stores, and the Dallas plant manager was notified by other customers, that Metzger, Oak Farms, Borden and Cabell's were offering half gallons at 30 cents for delivery on the 30th. Again Foremost met the price which had been reported to it. On November 30, the Dallas Morning News carried an advertisement by the Wyatt chain offering two half-gallon cartons of Borden's or Cabell's milk for 69 cents.

On Tuesday, December 3, Mr. Waters was told by his Dallas plant manager and sales personnel that customers were reporting offers of 26 cents a half gallon from Metzger Dairy. Later in the day the Foremost plant manager reported to Mr. Waters that the A & P's store supervisor had notified him that Oak Farms and Borden had met the Metzger price. On the basis of this information, Foremost reduced its price as of December 4 to 26 cents for a half gallon.

On December 13, Foremost took the initiative and announced to all customers that prices would be increased to 32 cents a half gallon, effective December 17. On December 17, two or three competitors posted the same higher price and by December 19 all of the milk companies had moved prices up.

Foremost, on December 19, announced an increase to 36 cents a half gallon effective December 23. This price went into effect on December 23, and, within a day or two, the other companies followed.

The price level was still below that prevailing before the price war, and in the meantime raw milk prices had increased. While Mr. Waters and the then division manager, Mr. Hughes, were discussing a further price increase, a newspaper reporter called and said he had been informed that effective January 20, 1958, Schepps was raising its price to 46 cents a half gallon with a 10 percent trade discount. On its price list of January 20, Foremost raised its price to 46 cents which was comparable to its prices in other areas in Texas.

Competition was not adversely affected by the low prices of respondent in Dallas. Respondent joined other dairies selling in Dallas in demoralizing the market which caused some, if not all of them, to lose money until respondent took the lead in raising prices toward their former level. The gallon-jug sellers, whose prices were the cause of the general price reductions, have continued their operations, and one of them, Jere Dairy, has increased its business substantially. Instead of continuing to fight the gallon-jug sellers with low prices, several of the larger competitors, including respondent, commenced marketing gallon jugs.

Price wars of long duration and recurring price wars, during which sales are made at or below cost, adversely affect competitors who must rely upon profits in that area to remain in business. Their ability to compete can be reduced, but the extent that this has occurred in Dallas cannot be traced to respondent who endeavored to restore profitable price levels.

It appears from all the evidence that respondent did not initiate any of the price reductions in this market during this period but believed it was meeting prices other dairies were quoting. Price reductions were frequent and were made by the dairies generally to all buyers in this market. In this situation respondent concluded, on the basis of the information received from some of its customers, that its competitors were making these reductions to all customers in the market. The evidence shows that respondent believed its price reductions were defensive, but it cannot be found that it was meeting an equally low price of a competitor because its competitors' prices were not established by competent evidence. Although the prices of the dairies selling gallon jugs were shown, respondent does not contend that it was meeting those prices but rather that it was meeting the prices of those dairies selling half gallons, and those prices were not shown.

There is evidence of price reductions in Corpus Christi, Texas, but it is not contended, and cannot be found, that these reductions constituted unlawful price discriminations as charged in the complaint.

It is concluded and found that the record herein does not establish that the effect of respondent's discriminations in price between the Dallas, Texas, market and other markets, as hereinabove found, has been or may be substantially to lessen, injure, destroy or prevent competition.

Discriminations in Albuquerque

In the course and conduct of its business in interstate commerce, respondent discriminated in price in the sale of fluid milk of like grade and quality by selling fluid milk at different prices to different competing wholesale purchasers located in Albuquerque, New Mexico.

Foremost operates a distributing branch in the Albuquerque, New Mexico, market which supplies customers in the City of Albuquerque, in a contiguous area to the south just outside the city limits, and in the Town of Los Lunas, which is 21 road miles south of Albuquerque. The Albuquerque branch does not supply any customers outside of the State of New Mexico.

The milk sold through the Albuquerque branch is trucked to Albuquerque from the Foremost processing plant in Santa Fe, New Mexico. The Santa Fe processing plant ships some milk to a Foremost distributing branch in the El Paso, Texas, market for sale to customers there, among them stores of the Furr's chain.

The evidence of discounts in Albuquerque, which is the only area where there is significant evidence of competition between favored and non-favored customers of respondent, is limited to three discounts to grocery stores which were an 11 percent discount to Furr's, and a 5 percent discount to Barber's and to Speedway. There is evidence that restaurant customers in Albuquerque were granted quantity discounts. These customers were not named, although some of them can be identified from a customer list, and the amount of the discounts is not disclosed.

During the period November 1959 through April 25, 1961, total Foremost sales to the eight Barber's stores then located in Albuquerque were $153,361.16. The bulk of these sales were sales of fluid milk. During the period November 1959 through April 1961, discount checks to these Barber's stores totaled $7,627.11.

During the week of December 4, 1961, respondent's sales to six Speedway stores were $706.60 and to nine Barber's stores were $862.36. The record does not show the length of time during which the discount was granted to Speedway nor the volume purchased during such period of time.

During the period November 1959 through April 1961, total Foremost sales of milk to the Furr's stores then located in Albuquerque was $63,141.33, and the discounts paid Furr's on these purchases was $6,562.85. For most of the period indicated only three Furr's stores were located in Albuquerque; the total sales to the fourth store were $22.20 in the month of April 1961.

During the period December 1959 through April 1961, total Foremost sales of milk to the 38 Furr's stores and 5 cafeterias located in various towns in Texas and New Mexico, including Albuquerque, was $1,156,952.61, and the total of the discount checks paid Furr's on these purchases was $164,165.89.

There are five milk companies selling in the Albuquerque market—Creamland, Valley Gold, Foremost, Thatcher and Crusader. Foremost is in third place with approximately 7 percent of the market.

Barber's was first granted a discount after Foremost's Albuquerque sales manager was notified that Foremost was not selling at a competitive price. Foremost was not advised of a specific offer from a competitor, but had good reason to believe that one had been made because it was dropped as one of the suppliers of the Barber's stores. An offer of a 5 percent discount was made by Foremost and accepted, and Foremost regained Barber's as a customer. There are no details shown regarding the granting of the discount to Speedway. It is concluded that respondent has not shown by this evidence, which is all there is on this subject, that the discriminatory discounts granted to Barber's and Speedway were granted in good faith to meet an equally low price of a competitor.

In November 1961 Foremost's Albuquerque branch manager learned through testimony of Valley Gold and Creamland officials that these companies had stopped giving discounts to their customers in Albuquerque. Acting under the instructions of the Foremost division manager in New Mexico, he notified all Albuquerque customers who had been receiving discounts, including Barber's, Furr's and Speedway, that discounts would be discontinued, and they were.

Respondent's Dealings with Furr's

Furr's is a regional customer with outlets located in many markets other than Albuquerque. The discount to Furr's, like that of other regional customers, was negotiated by the Foremost division office in Dallas, Texas, and discount checks were forwarded directly from the Dallas office.

Foremost began to serve some Furr's stores when it acquired Tennessee Dairies in September 1952. Tennessee had been supplying the Furr's stores in West Texas since 1946 through a distributor, Mr. Russell Glenn. At that time Tennessee brand milk had a reputation for quality superior to its competition in West Texas and commanded a higher price than competitive brands both into and out of the Furr's stores. This price premium disappeared in time, but the Furr's stores always paid the full list price for Tennessee milk, and continued to pay full list prices for a time after Foremost's acquisition of Tennessee. In the dairy industry it is unusual for one company to have a list price different from its competitors in the same market.

Late in 1954 Russell Glenn, who was then distributing his own Gold Star brand milk, began to supply the Furr's stores in the Midland area. About this time, Mr. Lindsley Waters, then Foremost's division sales manager, was notified by the owner of the Sears' stores in Odessa that he had been given a 15 percent discount from Oak Farms, a Texas company with four plants selling milk throughout most of the state. Foremost lost most of its space in the Sears' stores. Since the Sears' stores were smaller than the Furr's stores in the market, Mr. Waters believed that a similar offer had been made to Furr's, and Mr. Boverie of Furr's later confirmed this.

Almost all of the Foremost space in the Piggly Wiggly stores in Big Spring, Texas, was lost to the Bell milk company of Lubbock, and the general manager of the Piggly Wiggly stores told Mr. Waters that he was getting Bell milk at a lower price. In the Brooks stores of Midland, Texas, Foremost lost all of its space to Cabell's, a Dallas dairy which also operates a chain of its own drive-in stores. The Wooten stores in Abilene, Texas, switched from Foremost to Oak Farms. The Newsom stores in Big Spring replaced most of Foremost's space with Metzger's milk and sold Metzger's at a lower out-of-store price than Foremost. Metzger is a family-owned dairy with plants in Dallas and San Antonio, Texas. In the United Food Markets in Lubbock, Texas, and the Everybody's Markets in Odessa, Foremost was replaced by Oak Farms. In each case Mr. Waters' local managers reported that they had been told that the changes were the result of lower prices.

After experiencing these losses in West Texas generally, and losses in the Furr's stores specifically, Mr. Waters and the Foremost division manager went to see Mr. Clem Boverie, vice president of Furr's, in Lubbock late in 1954. Mr. Boverie stated that competition had dissipated the stronger public acceptance Foremost once had and that therefore he could not justify paying more for Foremost milk than competitive brands. He stated that he had been offered milk at prices lower than Foremost's price, and he mentioned the 15 percent discount he was receiving from Gold Star which had been offered to all Furr's stores. At this meeting Foremost offered Furr's an 11 percent discount on sales to all the Furr's stores, and Mr. Boverie accepted the offer. After the discount was granted, Foremost milk was sold out of the Furr's stores at the same price as other brands. The discount to Furr's in Albuquerque remained at the 11 percent figure until it was discontinued late in 1961.

Foremost, which does sell to Piggly Wiggly in Lubbock, has never been able to sell these stores in Albuquerque, even after offering the same discount as that granted to Furr's.

Mr. Russell Glenn, who later worked for the Crusader Dairy in Albuquerque, offered to sell Crusader milk to Furr's at a better price than they were receiving from any other supplier, but the offer was not accepted.

In 1960, Oak Farms began to sell to the Furr's stores in the Midland-Odessa area at a $17\frac{1}{2}$ percent discount, which adversely affected Foremost's volume of sales to Furr's in the area. Foremost was notified of this discount, and raised its discount in this area to 13 percent and later to $17\frac{1}{2}$ percent.

In 1962, the two largest Foremost customers in the Midland-Odessa area, Furr's and Food Fair, received a $17\frac{1}{2}$ percent discount; all other customers received a 15 percent discount.

In the Lubbock market Oak Farms was also giving a $17\frac{1}{2}$ percent discount. Carnation was offering a 15 percent discount and was being sold in the market at a lower out-of-store price than Furr's was retailing Foremost. Mr. Boverie notified Mr. Waters that Furr's was reluctant to change suppliers but would feel compelled to do so unless Foremost offered a lower price. Foremost first granted a 13 percent discount and later a 15 percent discount on sales to Furr's in the Lubbock market.

In El Paso the principal Foremost customers were Furr's and Food

Mart. In 1960, Foremost was put out of the Food Mart stores and was notified that the reason was a 15 percent discount from Price's Creamery. The Furr's people stated that they had gotten the same offer. Foremost granted Furr's a 15 percent discount and retained its space in the Furr's stores. Later the discounts to all customers in El Paso moved to 15 percent, then to 18 percent, and finally to 21 percent.

It is concluded that the respondent's discriminations in favor of Furr's in all areas referred to in this record were made in good faith to meet an equally low price of one or more competitors and were not unlawful as charged in the complaint herein.

Competitive Effects in Albuquerque

Milk is a staple, highly standardized food item sold by virtually all food retailers, and the grocery stores in Albuquerque which received discounts from respondent competed to some degree with stores which did not receive any discount. Profits made by Albuquerque grocers on milk are low. At least one grocer grossed 4 cents, or 8.16 percent, per half-gallon profit; the list price was 45 cents and later 43 cents and a 5 percent discount was therefore significant. Competition is keen among retailers, and margins of profit and mark-ups are small. A lower price to some but not all competing retail stores in this city would normally be expected to hinder competition between them. At least two of the chains shown to have been favored did not resell milk below their competitors' prices, but the discounts were sufficiently large to give them a competitive advantage. As found above, the discounts to Barber's totaled more than $7,000 from November 1959 to April 1961, and the dollar amount of the discounts to Speedway was not disclosed. It is therefore found that the effect of the 5 percent discount respondent granted to Barber's and Speedway may have been substantially to lessen competition in the retailing of fluid milk in Albuquerque or to injure, destroy or prevent competition with these favored purchasers.

Respondent's Cost Study

Respondent contends that the discounts granted in Albuquerque are justified on the basis of the cost saving of delivering larger quantities at one stop and that these cost differences more than justify the discounts that were granted.

In computing its costs, certain costs were allocated to produce "units" and others were allocated to what was designated as "route day" costs. The costs allocated to "units" were the same for each "unit" regardless of the volume of delivery at a stop, and those allocated to "route day" costs were computed for each minute of delivery time. The "route day" costs were then determined on the basis of time required for each size delivery.

Respondent has grouped purchasers into certain average, delivery-volume brackets, and while it may be reasonable to permit grouping or averaging of groups by delivery-volume size when there is a great disparity in volume between all of those averaged and the volume of the favored purchaser, where, as here, the volume, per delivery, of some purchasers exceeds the volume of the favored purchaser to be compared and the volume of the majority of those averaged is far smaller, such averaging cannot be done to justify price differences between the favored purchaser and the non-favored purchasers. Although the respondent's cost study was prepared primarily in an effort to show a justification for the 11 percent discount to Furr's, it has assumed that it would also justify a 5 percent discount to Barber's. Since the 11 percent discount to Furr's has been found herein to have been made in good faith to meet the equally low price of a competitor, the cost defense evidence is only considered to determine whether the 5 percent discount to Barber's and Speedway can be justified by it. Since several of respondent's customers in Albuquerque took deliveries in larger quantities than did Barber's, and in about the same quantities as Speedway, the discount granted Barber's cannot be justified on the basis of this evidence which shows respondent's costs to be less in serving those customers than in serving Barber's and about the same as that of serving Speedway.

In a cost analysis of this type each store or volume class of store should be considered separately. The fact that some stores are units of a chain does not justify their being considered collectively with their volume, per delivery, averaged. This single ownership would be a consideration if a cost saving were claimed in billing and collecting from one source rather than several sources, but is not a valid consideration in an analysis of time spent for each delivery.

Counsel supporting the complaint has urged that respondent's cost defense is invalid for a number of reasons: it is insisted that while there is not agreement that the manual which was prepared by respondent, entitled "Wholesale Delivery Costs and Pricing Procedures" (RX 12), properly describes procedures for conducting the cost study; nevertheless, such procedures are preferable to what respondent has actually done, and points out that if the manual had been followed the results would have been considerably different. The principal area in which respondent failed to follow the manual is that the item of "Delivery Labor" was not prorated on a per "unit" basis which the manual prescribed. In Albuquerque, "Delivery

Labor" was paid a flat 6 percent commission, and it appears that it should have been prorated on a per "unit" basis because the costs to respondent were the same for each "unit".

In its cost study respondent allocated the sum representing the guarantee made to the delivery salesmen to the "route day" costs. This is incorrect because it is an allocation of costs that respondent did not incur. All of the delivery salesmen earned more than the amount guaranteed them. It appears that certain other items in addition to the guarantee should be allocated to the "unit" cost rather than the "route day" cost—they are, selling expense, sales promotion, payroll taxes and insurance, traveling expense, and corporate expense. These items are applicable to all "units" of sales and should be allocated to the "unit".

Barber's average delivery was 65.6 quarts, and Speedway's average delivery was 123 quarts. There were several other customers who appear to be food retailers who received larger deliveries than Barber's: Modern Way, 67 quarts; Larry's Market, 101 quarts; Central Market, 176 quarts; and Conniff's Market, 72 quarts. There is no showing of any cost justification for the discounts granted Barber's and Speedway as opposed to these named customers or any others taking deliveries larger than Barber's.

Respondent has assumed in its argument that the record shows that all dealers taking deliveries of more than 100 "units" received a discount, but the record does not show this. In addition to the discount to Furr's, it shows that Barber's and Speedway received a 5 percent discount and that restaurants, some of which can be identified, received an undisclosed volume discount per delivery.

There were at least 57 other customers with purchases ranging from 41 to over 300 "units"—quarts per serve. In arriving at the "route day" cost, it was necessary for respondent to determine the time of serving the various customers within each volume range, and it determined this by using "standard times" for various delivery operations rather than actual time studies in Albuquerque. These "standard times" are based on time studies conducted by its own personnel and by the University of California in many markets in California. No check was made to compare these "standard times" against actual Foremost operations in Albuquerque, but they were checked against a 1-day study of Lubbock and Abilene and were shown to be reasonably accurate for those cities. It is not shown why there was no check made in Albuquerque. The burden is on the respondent to show that "standard times" are comparable to actual times, and the record does not show that they were comparable. Since the time of the drivers is divided between different types of customers, such as schools, etc., who buy on a contract basis, restaurants who may buy different products and product sizes, and grocery stores, it is important to respondent's calculations that the time required for delivering each "unit" to each kind of customer be comparable in order for "standard times" to be accepted in lieu of the actual time spent, and it cannot be concluded from this record that such times are comparable. If these deficiencies were corrected, it is believed that the use of "standard times" would be acceptable, because even the actual time required for driving, parking, or delivering would be expected to vary from route-to-route, from day-to-day, and even from driver-to-driver on the same route.

The formula for reducing all products and container sizes to "units" was apparently devised for the purpose of determining the compensation of driver salesmen in some other area or for some purpose other than its use in a cost analysis, because the value and profitability of the product seem to be important factors in the formula. This formula could not be accepted without a further showing of its accuracy.

For the reasons stated above, it is found that respondent has failed to prove that the discriminations in favor of purchasers Barber's and Speedway made only due allowance for differences in the cost of sale and delivery to them.

Milk Products Other Than Fluid Milk

Although the complaint charges discriminations in the sale of fluid milk and other dairy products, the evidence relates principally to fluid milk. The only purchasers who are found herein to have received unlawful discounts are grocers in Albuquerque—Barber's and Speedway; and the only evidence that respondent sold either of them anything other than fluid milk is a stipulation between counsel that the sales to Barber's were "mostly milk". It is therefore concluded that the order herein should apply only to fluid milk sales.

CONCLUSIONS

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

The aforesaid acts and practices of the respondent of granting certain discounts, as herein found, constituted violations of subsection (a) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That respondent, Foremost Dairies, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of fluid milk in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of fluid milk of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price.

Opinion of the Commission

By Elman, *Commissioner:*

This is an appeal from an initial decision of the hearing examiner that respondent Foremost Dairies, Inc., discriminated in price between competing purchasers of its fluid milk in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13(a)). The complaint, filed in April 1959, charged respondent with discriminating in price (1) between retailers in different localities, resulting in "primary line" injury to competition between respondent and its competitors, and (2) between retailers located in the same community, resulting in "secondary line" injury to competition between such favored and disfavored purchasers. The examiner found that the allegations of "primary line" injury were not established by the record, and complaint counsel does not appeal from this finding.

With respect to the "secondary line" allegations, the examiner found unlawful discounts which had been granted by respondent to two retail food chains, Barber's and Speedway, located in Albuquerque, New Mexico, but not to competing retailers in that city. On the basis of this finding of violation, the examiner included in his initial decision an order prohibiting respondent from further discriminating in the price of its fluid milk sold to competing purchasers.[1]

Respondent challenges the examiner's decision on a number of grounds. We agree that the evidence concerning the discounts granted Speedway, which established neither their magnitude nor their duration, was too fragmentary to support a finding of violation. The unlawfulness of the discounts to Barber's, however, is adequately supported by the record.[2] These 5 percent discounts, during the

[1] In addition to the discounts to Barber's and Speedway, complaint counsel urges that the examiner's order is also supported by unlawful discriminatory discounts granted by respondent to Furr's, a large retail food chain with stores located in a number of cities in Texas and New Mexico. The examiner found that these discounts were made in good faith to meet an equally low price of one or more competitors. Complaint counsel challenges this finding as it applies to discounts granted to Furr's stores in El Paso and Albuquerque. In view, however, of the uncontradicted testimony of a Furr's official that Gold Star Dairy offered to sell his company milk at a 15% discount "wherever we had stores" (Tr. 1396), it appears that the evidence of other competitive offers, which is challenged by complaint counsel, was unnecessary to the examiner's finding.

[2] We also find that the record adequately supports the examiner's finding that respondent's sales at discriminatory prices to its Albuquerque customers were in commerce within

period from November 1959 to April 1961, totaled $7,627.11, and were not terminated until November 1961. The probability of competitive injury resulting from such a substantial and continuous discrimination in the price of a major grocery product is manifest. Although respondent challenges the sufficiency of the evidence of competition between its favored and disfavored customers within the city of Albuquerque, the opening, during the period of the discounts, of a new Barber's store in close proximity to its disfavored competitors, and the testimony that one of these competitors drew its customers "from all over Albuquerque", adequately support the examiner's finding of such competition and establish the likelihood of further injury should the discounts be resumed.

Moreover, the price discriminations in favor of Barber's were not shown to be either cost-justified or made in good faith to meet the equally low price of a competitor. Although respondent sought to establish the latter defense at the hearing before the examiner, it has not been urged on this appeal since, as the record shows, the discounts to Barber's were not granted to meet any specific competitive prices.

As to respondent's claim that its discounts to the Barber's, Speedway and Furr's chains were cost-justified, it is clear that the cost study relied upon fails to meet the basic requirements of an adequate cost

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the meaning of the Robinson-Patman Act. Foremost is a large interstate corporation with major offices in Florida and California and with 59 processing plants located in 24 states. Moreover, a substantial portion of the milk processed at respondent's Santa Fe, New Mexico, plant, from which its Albuquerque customers are supplied, originated outside the State of New Mexico.

"[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift and Company* v. *United States*, 196 U.S. 375, 398 (1905). As a practical matter, Foremost's Albuquerque sales cannot be separated from its total interstate operations, nor can the fact that milk, shipped from outside the state to meet the day-to-day requirements of Foremost's New Mexico customers, passed briefly through its Santa Fe processing plant negative the interstate character of these transactions, *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363 (8th Cir. 1949), cert. denied 339 U.S. 942; *United States* v. *Universal Milk Bottle Service, Inc.*, 85 F. Supp. 622 (S.D. Ohio 1949), aff'd 188 F. 2d 959 (6th Cir. 1951). As the Supreme Court held with respect to sales of gasoline originating outside the state but delivered from local bulk storage stations, "Such sales are well within the jurisdictional requirements of the Act. Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate business in competition with small local concerns." *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, 237–38 (1951) [5 S.&D. 221, 225–26]. Similarly, the Commission is not deprived of jurisdiction by reason of the fact that out-of-state and in-state milk were commingled prior to delivery, *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393 (1st Cir. 1940) [3 S.&D. 287]; cf. *Currin* v. *Wallace*, 306 U.S. 1 (1939); or that title to the out-of-state milk may have passed to Foremost after it had entered New Mexico. "The Robinson-Patman Act, in speaking about 'purchases' as being in commerce, is not speaking about technical legal passage of title." *Olympia Food Market, Inc.* v. *Sheffield Farms Company, Inc.*, CCH 1955 Trade Cases, ¶ 68,064 (S.D.N.Y. 1955). Cf. *Deep South Oil Company of Texas* v. *Federal Power Commission*, 247 F. 2d 882, 887 (5th Cir. 1957), where, in construing a similar statutory requirement of sales "in interstate commerce", it was held that "* * * * the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the ultimate interstate destination, does not affect the essential interstate nature of the business."

justification defense. Although the study was based upon purported differences in delivery costs between purchasers within designated average delivery-volume brackets, discounts were not granted to all purchasers within the larger volume brackets, but only to the Furr's, Barber's and Speedway chains. Independents whose delivery volumes approached or equalled those of the chain stores received no discounts. Thus, although respondent asserted that the challenged discounts were cost-justified as against the 70 percent of its Albuquerque customers who fell within its 1–40 quart average delivery bracket, Conniff's Market, an independent whose owner testified that he competed with the Barber's stores, averaged 72 quarts per delivery but received no discount.

This is precisely the defect condemned by the Supreme Court in *United States* v. *The Borden Company*, 370 U.S. 460, 469–70 (1962). As the Court observed,

> * * * such a grouping for cost justification purposes, composed as it is of some independents having volumes comparable to, and in some cases larger than, that of the chain stores, created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit.

In view of this obvious defect, there is no need to consider the other asserted deficiencies in respondent's cost justification defense.

Respondent also objects to the order contained in the examiner's initial decision which would prohibit it from discriminating between competing customers in the sale of fluid milk. Respondent contends that the narrow violations found by the examiner—and, *a fortiori*, the even more limited findings of the Commission—together with the asserted fact that the discriminatory discounts granted in Albuquerque were in response to a local competitive situation and were discontinued at its termination, indicate no "pattern of violations" by respondent which require the entry of an order to cease and desist. Complaint counsel, while supporting the examiner's order in his brief, suggested in the oral argument that if the only violation found by the Commission was the discrimination in favor of Barber's, the Commission's order might appropriately be limited to respondent's sales in Albuquerque.

We cannot agree with either of these positions. As pointed out in *Transogram Company, Inc.* (Docket 7978 September 19, 1962) [61 F.T.C. 629, 701]:

> The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place. This does not mean that the Commission is so tightly bound to the facts that it must disregard accumulated experience, or that it must draft its prohibitions so narrowly that only the precise acts previously undertaken by a respondent are proscribed for the future. It does

mean that our objective in drafting orders must be to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435.

The violation which we have found here, although limited in geographic scope, evidences a bland disregard by respondent of the requirements of the Robinson-Patman Act. Respondent's discriminatory discounts to chain stores in Albuquerque were not begun until after the issuance of the complaint in this proceeding. Although there is evidence that these discriminatory prices were made in response to local competitive conditions, the record also indicates that, at least with respect to the discounts granted to Barber's, respondent made no effort to ascertain the precise nature of this competitive challenge or the size of the price reduction which would be required to meet it. Instead, respondent simply instituted a 5 percent discount which, over the period it was in effect, totaled in excess of $7,500. The record makes clear that respondent's discriminations were finally terminated not because of an awareness of their illegality, resulting from this proceeding or otherwise, but only in response to a change in local competitive conditions. In the course of the oral argument, counsel for respondent suggested that should these conditions recur, so might respondent's discriminatory discounts.

In these circumstances, we believe that the protection of the public interest requires the entry of an order to cease and desist. The examiner determined that the order, while limited to respondent's sales of fluid milk, should extend to all geographic markets. We agree. The record reveals nothing peculiar or unique about respondent's operations or competitive conditions in Albuquerque which would justify the limitation of the order to that market alone.

Accordingly, the Commission will enter an order to cease and desist in the terms contained in the initial decision. The Commission recognizes the "necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Federal Trade Commission* v. *Henry Broch & Company*, 368 U.S. 360, 368 (1962) [7 S.&D. 305, 310]. However, while respondent objects to the competitive inequities which it asserts would result from subjecting it to a "sweeping" command not to violate Section 2(a), respondent has not suggested any specific remedies to prevent the recurrence of the violations found or any particulars in which the Commission's order should be made more specific or limited.

The Commission's responsibilty to insure future compliance by a respondent does not end with the entry of an order to cease and desist. The entry of such an order is only the beginning of a "marriage" under which the Commission is obliged to afford the respondent definitive advice as to whether proposed conduct would meet the requirements of the order. As the Court of Appeals for the Second Circuit has pointed out:

> The difficulties respondent foresees in determining whether it is complying with the order seem factitious. The order contains the usual provision for the filing of a report of compliance, 16 C.F.R. § 3.26, and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. § 21(1). If at some future time respondent should desire to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission's offices will still be open for discussion * * *. *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962) [7 S.&D. 583, 592].

Thus, our order here conforms to the rule of the *Broch* case because the precise duty it imposes on respondent, at the outset, is that of formulating a specific plan and program of compliance to be submitted to the Commission for its approval or disapproval. The submission in good faith of such a compliance report is the first step in a meaningful and effective scheme for enforcement of cease and desist orders. It should also be emphasized that such orders, like court injunctions, may be modified or vacated as changing conditions warrant.[3] The essential basis for a cease and desist order is the need for protection of the public against recurrence of the unlawful practices found, and its prime function is to provide the framework and stimulus for a respondent to bring its operations into conformity with the requirements of law. So long as this need exists, an order must be continued in effect. If and when its prophylactic purposes have been accomplished, however, and the need for the order has been removed by changed conditions of fact, law, or public interest, the Commission will take appropriate action.[4] Nothing in the order we are now entering will preclude respondent from making future application to the Commission for modification of the order, upon the

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[3] Cf. *Tobin* v. *Alma Mills*, 192 F. 2d 133 (4th Cir. 1951).

[4] "If after competition is restored any of the respondents can make a proper showing to the Commission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law." *National Lead Co., et al.*, 49 F.T.C. 791, 887 (1953); 352 U.S. 419, 424–25 (1957). See also *Chain Institute, Inc., et al.*, 50 F.T.C. 589, 595 (1953) (concurring opinion of Commissioner Mead); *West-Ward, Inc.* (Dkt. 8141, Order Modifying Final Order, March 16, 1962) [60 F.T.C. 563]; *M. S. Distributing Company* (Dkt. 7745, Order Setting Aside Order to Cease and Desist, Dec. 17, 1962). [61 F.T.C. 1345].

Under the statute the Commission's authority to modify an order may be exercised before or after judicial review. "[A]fter a Circuit Court of Appeals has acted upon a petition for review, there is no reason why the Commission should not modify its order, if modification is warranted by the changed conditions contemplated by the statute." *American Chain & Cable Co., Inc.* v. *FTC*, 142 F. 2d 909, 912 (4th Cir. 1944) [4 S.&D. 186, 190].

basis of such positive and constructive changes in its activities and procedures as will give solid assurance against repetition of the unlawful conduct found here. Unless and until such a showing is made, the public is entitled to the assurance afforded by the order to cease and desist contained in the initial decision.

Commissioner MacIntyre did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard upon respondent's exceptions to the initial decision of the hearing examiner, and upon briefs and oral argument in support of said exceptions and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the hearing examiner's initial decision, as modified by the Commission's opinion, should be adopted as the decision of the Commission:

It is ordered, That respondent, Foremost Dairies, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of fluid milk in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of fluid milk of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price.

It is further ordered, That respondent, Foremost Dairies, Inc., a corporation, 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 of its compliance with this order, and shall thereafter file such further reports of compliance as the Commission may require.

Commissioner MacIntyre not participating.

IN THE MATTER OF

SEAT COVER CHARLIE, INC., ET AL.

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

Docket C-502. Complaint, May 27, 1963—Decision, May 27, 1963

Consent order requiring four chain retailers of seat covers and auto tops in three States, along with their common executive officer, to cease falsely representing sale prices of their products as reduced by such practices as