Complaint

In the Matter of

CONSOLIDATED FOODS CORPORATION

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

Docket 7000. Complaint, Dec. 18, 1957—Decision, Mar. 22, 1963

Order requiring a large integrated Chicago processor and distributor of a broad line of food products, to divest itself of a Los Angeles manufacturer of dried food seasonings—including onions, garlic, chili pepper, and paprika—acquired in April 1951, which had occupied a position of dominance in the onion and garlic dehydrating and processing industry; and to restore it as a going concern as in the order below in detail set forth.

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 (15 U.S.C. Title 15, Sec. 18), as amended and approved December 29, 1950, hereby issues its complaint charging as follows:

Paragraph 1. Respondent Consolidated Foods Corporation is a corporation organized in 1941 and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 135 South La Salle Street, Chicago, Illinois.

Respondent Consolidated Foods Corporation, hereinafter referred to as Consolidated, is engaged, among other things in the business of processing, distributing, and retailing a broad line of food products. Its food operations are completely integrated in that it handles a wide variety of products from the raw stage in the field to retailing to the ultimate consumer.

During the period from July 1, 1950, to June 30, 1951, Consolidated's net sales were $174,006,801. Its net sales for the period from July 1, 1955, to June 30, 1956, totaled $268,252,695. As of June 30, 1951, Consolidated's assets totaled approximately $60,000,000 and by June 30, 1956 its total assets increased to more than $99,000,000.

The distribution of food products constitutes a principal part of Consolidated's operations. In connection with this distribution Consolidated purchases a substantial volume of food products from various suppliers, many of which use, or can use, the type of dried food seasonings produced by Consolidated's Gentry Division.

Prior to and since April 12, 1951, Consolidated has been and is now engaged in the purchasing, processing and distribution of food products. Consolidated purchases, processes, and distributes such products in commerce, as "commerce" is defined in the Clayton Act and offers to sell, sells, and distributes said products in said commerce in several of the States of the United States to purchasers located in several of the States of the United States.

PAR. 2. Gentry, Incorporated, prior to April 1951, was a corporation organized in 1946 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 837 North Spring Street, Los Angeles, California. Gentry, Incorporated, hereinafter referred to as Gentry was engaged in the business of manufacturing dried food seasonings including, among others, onions, garlic, chili pepper and paprika.

Gentry, prior to April 1951, in the regular course and conduct of its business, sold or offered for sale, and distributed products hereinabove described, in commerce, as "commerce" is defined in the Clayton Act.

PAR. 3. On or about April 12, 1951, the stockholders of Gentry approved the sale of Gentry to Consolidated. In accordance with this approval Consolidated acquired Gentry by exchanging one share of Consolidated stock for each five shares of Gentry stock.

Since its acquisition by Consolidated, Gentry has been operated as a division of Consolidated. Gentry's net sales for 1950 were $2,629,-910. For the period from July 1, 1954, to June 30, 1955, net sales for the Gentry Division amounted to $5,061,989.

Prior to and at the time of the acquisition Gentry was one of the few firms of consequence and occupied a position of dominance in the onion and garlic dehydrating and processing industry. Subsequent to the acquisition the Gentry Division of Consolidated has maintained and now maintains a position of dominance in said industry.

PAR. 4. The effect of the aforesaid acquisition by Consolidated of Gentry may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce, as "commerce" is defined in the Clayton Act, in which Gentry was engaged and in which Consolidated's Gentry Division is now engaged.

More specifically the aforesaid effects include, among others, the actual or potential lessening of competition or a tendency to create a monopoly in that the acquisition of Gentry by Consolidated:

1. May substantially lessen competition in the nation as a whole or in various sections of the country by reason of the utilization of Consolidated's purchasing power in such a manner as to coerce or attempt to coerce food suppliers to purchase dried food seasonings from its Gentry Division by withdrawing or threatening to withdraw its patronage.

2. May substantially lessen competition or tend to create a monopoly in the nation as a whole or in various sections of the country by the increase of the dominant position of Consolidated's Gentry Division in the dried food seasonings industry resulting from the utilization of Consolidated's purchasing power in such a manner as to coerce or attempt to coerce food suppliers to purchase dried food seasonings from its Gentry Division by withdrawing or threatening to withdraw its patronage.

PAR. 5. The foregoing acquisition, acts and practices of respondent Consolidated, as herein alleged, 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. Raymond L. Hays, *Mr. Theodor P. von Brand*, and *Mr. Richard B. Smith* for the Commission.

Hopkins, Sutter, Owen, Mulroy & Wentz by *Mr. Anderson A. Owen*, *Mr. Daniel Walker*, and *Mr. Edward W. Rothe*, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

DECEMBER 29, 1961

This proceeding is based upon a complaint charging the respondent, Consolidated Foods Corporation, a corporation, with violation of Section 7 of the Clayton Act, as amended and approved December 29, 1950, by reason of its acquisition of Gentry, Incorporated, a corporation. This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence and proposed findings of fact and conclusions of law, together with briefs and reply briefs presented by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions of law submitted by both parties and briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner being now fully advised in the premises makes the following findings of fact, conclusions drawn therefrom, and order:

1. Respondent, Consolidated Foods Corporation (hereinafter referred to as Consolidated), is a Maryland corporation with its office and principal place of business located at 135 South La Salle Street, Chicago, Illinois. It was originally incorporated as Consolidated

Grocers Corporation and changed its name to Consolidated Foods Corporation in February 1954.

2. Respondent was incorporated September 4, 1941, to take over C. D. Kenny, a wholesale grocery house. Subsequent to that time, there has been a series of acquisitions accounting for the rapid and steady growth of Consolidated, until it is now composed of a variety of divisions and subsidiaries engaged in producing and selling food products at wholesale and retail.

3. As of December 31, 1958, Consolidated had eight divisions and subsidiaries engaged in processing food products as follows:

(a) Coastal Foods Division, a processor of canned soups and vegetables at Cambridge, Maryland.

(b) Columbia Foods Division, a processor of vegetables, coffee, pickles, dressings and some fruits at plants in West Chicago, Illinois; Ellsworth, Michigan; Grundy Center, Iowa; Sugarland, Texas; Cambria, Wisconsin; Baltimore, Maryland; and Los Angeles, California. (Baltimore and Los Angeles packed coffee only and are now closed.)

(c) Kitchens of Sara Lee, Inc., which produced bakery goods at Chicago, Illinois.

(d) Ocoma Foods Company, a processor of frozen foods at six plants located in Nebraska, Iowa, and Arkansas.

(e) Orchard Hill Farms, Inc., a processor of frozen foods at Red Hook, New York.

(f) Union Sugar Division which produced beet sugar at Betteravia, California.

(g) U.S. Products Corp. Ltd., a processor of canned fruits and vegetables at San Jose and Santa Clara, California, and Salem, Oregon.

(h) Gentry Division, which produced dehydrated onion, dehydrated garlic and capsicums at Gilroy and Oxnard, California.

4. As of December 31, 1958, Consolidated had 12 units which sold products of Consolidated and other food processors at wholesale as follows:

(a) River Grove Division, which sold grocery products in the Chicago, Illinois, area.

(b) International Division, San Francisco, California, which sold grocery products to customers outside the United States.

(c) Lee Foods Division, which sold grocery products to institutional users in the Kansas City, Kansas, area.

(d) Morey Mercantile Division, which sold grocery products to independent retailers in the Denver, Colorado, area.

(e) Dannemiller Grocery Division, which sold grocery products out of branches in Canton, Cleveland and Akron, Ohio, to retailers and institutional users in the vicinity of each of those cities.

(f) E. A. Aaron and Bros., Inc., a wholesale frozen food distributor in Chicago, Illinois, which has since been liquidated.

(g) Western Grocer Division, which operated out of headquarters in Marshalltown, Iowa, with branches in Albert Lea, Minnesota; Davenport, Des Moines and Mason City, Iowa; and Manhattan, Kansas, and which sold to retailers and voluntary groups in the immediate area of each branch.

(h) Monarch Foods Division, which operated limited line branches in Minneapolis, Minnesota; Los Angeles and San Francisco, California; Houston, Texas; Jacksonville, Florida; and Somerville, Massachusetts, and which sold private label products of Consolidated almost exclusively to retailers and institutional users.

(i) Separate Monarch Foods branches, which operated independently of the Monarch Food Division and which were located at Roanoke, Virginia; Baltimore and Cumberland, Maryland; and Columbus, Ohio. These branches were not limited to Consolidated's private label products and sold to retailers, institutional users and voluntary groups.

5. As of December 31, 1958, Consolidated had three units which were engaged in the operation of retail stores as follows:

(a) Piggly-Wiggly Midwest Co., which operated about 50 retail supermarkets in northern Illinois, southern Wisconsin and eastern Iowa.

(b) Klein Supermarkets, Inc., which operated about 25 retail supermarkets in Minneapolis and St. Paul, Minnesota.

(c) Lawson Milk Division, which processed dairy and bakery products and sold them at retail with a very small line of other groceries, through small dairy-type stores in Akron, Canton and Cleveland, Ohio.

6. During the period from July 1, 1950, to June 30, 1951, the net sales of Consolidated were $174,006,801. Its net sales for the period from July 1, 1955, to June 30, 1956, totaled $268,252,695. As of June 30, 1951, the assets of Consolidated totaled approximately $60,000,000 and by June 30, 1956, its total assets increased to more than $99,000,000.

7. Prior to April 30, 1951, Gentry, Incorporated, was a California corporation with its office in Los Angeles, California. It was principally engaged in the production and sale of dehydrated onion and garlic. It also produced and sold capsicum spices, such as paprika, chili pepper, chili powder and hot peppers. Gentry was organized

in 1919 and was, successively, a sole proprietorship, a partnership and a corporation and its early business was that of a jobber, of chili and paprika and later dehydrated onion and garlic. In 1940, Gentry built a new plant in Gilroy, California, which it has used since that time for production of dehydrated onion and garlic. In 1946, Gentry built a plant in Oxnard, California, to which it transferred its capsicum operations.

8. On April 30, 1951, Consolidated acquired the assets of Gentry, Incorporated, in exchange for 66,546 shares of the common stock of Consolidated, having a market value of approximately $1,000,000. At the time of said acquisition both Consolidated and Gentry were engaged in interstate commerce. The assets so acquired had a net value at that time of $1,600,000. Gentry distributed Consolidated stock to its shareholders and was dissolved. Its business was thereafter operated as a division of Consolidated.

9. At the time of its acquisition in 1951, Gentry had three domestic competitors engaged in the production and sale of dehydrated onion and garlic:

(a) Basic Vegetable Products, Inc., which has its plant in Vacaville, California, and has been engaged in the processing of dehydrated onion and garlic since 1933;

(b) Puccinelli Packing Company, which has plants at Turlock and Livingston, California, and has been engaged in the processing of dehydrated onion and garlic since 1946; and

(c) J. R. Simplot Company, Boise, Idaho, which has its processing division in Caldwell, Idaho. Simplot was engaged in the processing of dehydrated onion from 1940 to 1956 when all onion dehydration equipment was removed and the entire plant was converted to the production of frozen french fried and dehydrated potatoes.

10. Gentry, Basic, Puccinelli and Simplot comprised all of the processors of dehydrated onion and garlic in the United States at the time of the acquisition in 1951. Since that date, as noted above, one company has withdrawn from competition in the processing and sale of dehydrated onion and garlic, and a new company, Gilroy Foods, Inc., began production of dehydrated garlic in 1959 and dehydrated onion in 1960. In 1961, Gilroy was acquired by McCormick & Company of Baltimore, Maryland, a processor and distributor of a variety of spices, seasonings, condiments and other products.

11. Sales in pounds of dehydrated onion and dehydrated garlic by Basic, Gentry, Puccinelli and Simplot and their market shares in the domestic market for the period from 1948 through 1958, are as shown in the following tables:

Sales of Dehydrated Onion by Members of American Dehydrated Onion and Garlic Association (1948–58)

Calendar year	Pounds sold					Percentage of total			
	Basic	Gentry	Puccinelli	Simplot	Total	Basic	Gentry	Puccinelli	Simplot
1948	4, 495, 697	1, 737, 641	202, 954	824, 678	7, 260, 970	62	24	3	11
1949	3, 048, 532	1, 742, 643	506, 530	235, 941	5, 533, 646	55	31	9	5
1950	4, 693, 360	2, 158, 880	523, 971	425, 948	7, 802, 159	60	28	7	5
1951	8, 071, 202	3, 610, 313	662, 977	1, 276, 851	13, 621, 343	59	27	5	9
1952	6, 976, 146	3, 253, 113	894, 107	726, 293	11, 849, 659	59	27	8	6
1953	6, 160, 254	4, 222, 718	832, 552	520, 486	11, 736, 010	52	36	7	5
1954	7, 154, 546	3, 135, 354	500, 047	55, 774	10, 845, 721	66	29	4	1
1955	7, 812, 785	3, 914, 770	1, 150, 883	823, 079	13, 701, 517	57	29	8	6
1956	8, 474, 046	4, 840, 238	1, 262, 155	36, 190	14, 612, 629	58	33	9	------
1957	8, 780, 710	6, 485, 052	1, 771, 199	------	17, 036, 961	52	38	10	------
1958	10, 420, 944	6, 259, 171	1, 467, 092	------	18, 147, 207	57	35	8	------

NOTE: Percentages rounded off to nearer whole.

Sales of Dehydrated Garlic by Members of American Dehydrated Onion and Garlic Association (1948–58)

Calendar year	Pounds sold				Percentage of total		
	Basic	Gentry	Puccinelli	Total	Basic	Gentry	Puccinelli
1948	457, 177	772, 061	No data	1, 229, 238	No data	No data	No data
1949	575, 038	790, 495	120, 495	1, 486, 028	39	53	8
1950	652, 059	922, 073	225, 386	1, 799, 518	36	51	13
1951	832, 030	972, 553	223, 323	2, 027, 906	41	48	11
1952	878, 879	1, 172, 308	289, 987	2, 341, 174	38	50	12
1953	1, 165, 629	1, 252, 876	222, 609	2, 641, 114	44	47	9
1954	1, 324, 951	1, 346, 701	249, 376	2, 921, 028	45	46	9
1955	1, 765, 204	1, 698, 176	413, 806	3, 877, 186	46	44	10
1956	1, 900, 149	1, 753, 211	385, 844	4, 039, 204	47	43	10
1957	1, 876, 214	2, 103, 000	537, 657	4, 516, 871	42	47	11
1958	2, 575, 041	1, 979, 834	572, 167	5, 127, 042	50	39	11

NOTES:
1. Percentages rounded off to nearer whole.
2. Simplot did not produce dehydrated garlic.
3. Since Puccinelli data for 1948 is not available, the total for that year includes only Basic and Gentry.

12. The lines of commerce involved in this proceeding are the production and sale of dehydrated onion and dehydrated garlic. The parties to this proceeding are in agreement that the production and sale of the above designated products comprise the lines of commerce and testimony and other evidence were introduced by both parties on this assumption. Since the processors and distributors of dehydrated onion and garlic sell their products nationally, the area of effective competition to be considered in this proceeding is the entire United States. Foreign imports of dehydrated onion and garlic comprise a very small percentage of the total sales of these products, averaging less than 5% annually.

13. The acquisition of Gentry has not only created a protected market for Consolidated, insofar as suppliers who are already purchasing dehydrated onion and garlic from its Gentry Division are concerned, but in addition has served as an inducement for concerns to buy onion and garlic from the Gentry Division of Consolidated where such concerns were desirous of becoming suppliers of Consolidated. An example of this is the Phillips Packing Company which placed an order for 1,000 pounds of white onion powder with the Gentry Division of Consolidated in the hope that it could in time sell its products to Consolidated.

14. The acquisition of Gentry gave Consolidated the opportunity to use express or implied buisness coercion to induce suppliers purchasing dehydrated onion and garlic from other sources to purchase some or all of their requirements from the Gentry Division of Consolidated. There is ample evidence in the record that both Gentry and Consolidated have exercised pressure and have attempted to influence, by affirmative action, some of Consolidated's suppliers to purchase a substantial part if not all of their dehydrated onion and garlic requirements from Gentry. Consolidated was successful in some instances, even though objections had been raised as to the quality of Gentry's products as compared with the products of its competitors. This indicates the value of the so-called reciprocity policy, when used as a competitive weapon.

15. Prior to the acquisition, Gerber Products Company did not purchase any of its requirements from Gentry as it considered Gentry products as not being satisfactory. Gerber was a substantial supplier of baby food to the various divisions of Consolidated, including its retail outlets. Joseph Farrell of Gentry, for the purpose of obtaining Gerber's business, on July 14, 1952, wrote Gerber offering to manufacture white onion powder according to Gerber's specifications and asked for a statement of Gerber's requirements of this product. In

order to remind Gerber of the purchases being made by Consolidated from Gerber, Farrell stated in this letter:

Be assured of the fact that we want to work very closely with your company. We feel very close to your merchandise, for the obvious reason that it is to be found in all of our various divisions for sale to the buying public. We, in Gentry, realize that Gerber's Baby Food Products are a wonderful line and we are happy to see them selling exclusively in the divisions of our Consolidated Grocers Corp. (CX 20-C)

On the same date, Farrell wrote L. C. Bellisime, vice president of the Gentry Division, concerning the Gerber account informing him that he was taking this matter up with John Sarther, president of the Sprague Warner Division, and S. M. Kennedy, president of Consolidated:

* * * to get us a better "shake of the dice" than we have gotten from this company. After all, as you know, Sprague Warner, as well as many of the other divisions, we believe, use Gerber's baby food products exclusively, so there should be no reason at all why Gerber Food Products should not use Gentry's material exclusively and we don't mean up to 50%, as has been tentatively promised us. We mean 100%. (CX 20-A)

Daniel Gerber, president of Gerber Products, testified in this proceeding that some time back, he had had a conversation with Nathan Cummings, chairman of the board of Consolidated, who informed him that Consolidated had acquired Gentry and that they would like to have consideration. Thereafter, Gerber made purchases from Gentry.

16. Gentry had never been able to sell J. J. Gielow & Sons, Inc., a processor of pickles located in Detroit, Michigan. Gentry requested Emil Kohut, of the Consolidated Buying and Purchasing Offices, to assist it in obtaining business from Gielow in view of the substantial sales it was making to Consolidated. Later, L. C. Bellisime, vice president of the Gentry Division, was informed by Bischmann, vice president of Reid Murdoch, a division of Consolidated, that Murdoch had placed an order with Gielow for 200,000 cases of pickles. Bellisime passed this information on to Martin Kraham of Gentry who wrote W. W. Kearney of Gentry on July 13, 1953:

You might tell Les Gielow that we have discussed the situation with Mr. Bischmann, president of Reid Murdoch, and Gielow knows that back in April he received an order for 200,000 cases of pickles. Half of that quantity is for Kosher Dill. Let him know, in no uncertain terms, we are not happy at the switch and do not expect the old "Viennese Waltz" with reference to the order he placed with me in good faith. (CX 27)

In 1953, Gielow purchase, 1,100 pounds of dehydrated onion and 450 pounds of dehydrated garlic from Gentry and beginning in 1954, Gielow purchased all of its dehydrated onion and garlic from Gentry replacing Basic as a supplier altogether. The following are the purchases by Gielow for dehydrated onion and garlic from Gentry and Basic for the years 1952 through 1958:

Year	Gentry		Basic	
	Onion	Garlic	Onion	Garlic
1952	225	450	13, 380	12, 078
1953	1, 100	450	10, 200	10, 692
1954	14, 937	12, 261	----------	----------
1955	18, 200	19, 160	----------	----------
1956	4, 635	2, 870	----------	----------
1957	11, 490	13, 910	----------	----------
1958	3, 000	7, 500	----------	----------

17. In 1951, Joe Sarther, president of Sprague Warner Division of Consolidated, called Clarence Brickman, vice president and manager of the Illinois Meat Company, and asked that he give the Gentry Division some business. As a result, Brickman gave Gentry some orders and thereafter purchased more from Gentry and less from Basic, until 1953 when he bought exclusively from Gentry. Basic never regained this business, although the Illinois Meat Company did later purchase dehydrated onion from Simplot and Puccinelli.

18. The Morgan Packing Company is an example of the use of pressure to induce a supplier of Consolidated to purchase Gentry products at a time when it considered Gentry's products inferior and did not want to purchase them. Morgan purchased its requirements of dehydrated onion and garlic from Basic from the time it began using these products. Its laboratory considered the Gentry products inferior to Basic onion and garlic. Gentry's salesman, Sherrod, reporting on April 25, 1952, that the buyer from Morgan could do nothing because of the laboratory report, stated:

We have brought pressure here through the medium of C. D. Kenny Division Columbus, Ohio branch and these people have been very helpful with us in an effort to assist us in obtaining business from Morgan. You will have in mind Morgan Packing Company does a great business and they freely admit this with C. D. Kenny. (CX 72-B)

On November 7, 1952, Joe Farrell of Gentry wrote letters to S. M. Kennedy, president of Consolidated Grocers Corporation, and Emil Kohut of Consolidated Buying and Purchasing Division, describing the difficulties in trying to sell Morgan Packing Company and asked for their assistance.

Thereafter, on November 24, 1952, Carl Sherrod, Gentry's salesman, reported that he had sold a small order to Morgan Packing Company for experimental purposes. He also stated:

We have everyone of any consequence connected with Morgan Packing Company literally jumping up and down, especially their sales department in an effort to assist us in selling their production and purchasing department on using our products. This is unquestionably the result of Mr. Kennedy's assistance, as we have been unable to do much of anything with this user in the past. (CX 76 A–C)

On December 2, 1952, Sherrod also wrote G. E. Clausen, president of Gentry, with reference to the trial order, stating in part as follows:

There is no question in the world but what the trial order which I received this week was obtained as the result of Mr. Kennedy's efforts in our behalf through Morgan's broker, Earl Roll of Chicago. (CX 77)

On December 11, 1952, George Clausen, president of Gentry, wrote Carl Sherrod, stating in part as follows:

Carl, when I was in Chicago about three weeks, I talked with Mr. Kennedy about this account. He mentioned the large amount of business that Consolidated Grocers is doing with Morgan Packing Company and that the Morgan Packing Company expressed appreciation of their business and would like to reciprocate in buying onion and garlic products from Consolidated Grocers Corporation. (CX 78 A–B)

On March 19, 1954, Carl A. Sherrod wrote Martin Kraham of Gentry with reference to Morgan Packing Company, stating:

After we received some help from Consolidated Foods office we did begin to sell them some material.

He also informed Kraham for some reason Morgan did not want to buy from Gentry and further said:

Another thing which you should have is the fact that the only time that I have ever received a really cordial reception at Morgans was after some assistance from Con Grocers in Chicago and at that time I contacted Mr. Ben Williams, a vice president of this company. At that time I was taken into his office and invited to sit down. He in turn called in Mrs. Eversole and we had a lengthy discussion. The result of that visit with the vice president in the company of Mrs. Eversole was a little onion and garlic.

Marty. I believe that will give you a rather complete picture in as far as Morgan Packing Company is concerned and it will greatly appreciated (*sic*) if you will present the facts to the proper people in Con Grocers and solicit there for their assistance in obtaining more business from Morgan to which certainly our company is entitled. (CX 80 A-B)

As a result of this continued pressure, Morgan was finally induced to purchase a substantial portion of its requirements from Gentry.

19. In the matter of the F. H. Snow Canning Co., on March 2, 1953, Joe Farrell wrote Emil Kohut, Consolidated Buying and Purchasing Offices, with reference to the F. H. Snow Canning Co., as follows:

Snow Canning Co., Pine Pt., Maine—With the exception of one order that we received a couple of years ago, we have never done business with this company before or since. They buy two cars of Onion and Garlic products per year from our direct competitor and we see a very dim outlook in the future for us relative to changing this situation. I understand that considerable canned soups are bought from this firm by Consolidated Grocers' eastern division and here in the middle-west, also. Any help that you can give us will be appreciated. (CX 12 A–B)

On the same date, Farrell wrote S. M. Kennedy, president of Consolidated Grocers Corporation, giving substantially the same information and asking his assistance with this supplier. Thereafter, the F. H. Snow Canning Co., began purchasing a substantial portion of its requirements from the Gentry Division, as follows:

	1954	1955	1956	1957
Onion	----------	36,125	48,600	69,900
Garlic	----------	600	1,620	600

20. In the matter of the George F. Hormel Company, on August 31, 1953, L. C. Bellisime, vice president of Gentry, wrote Martin Kraham of Consolidated as follows:

I agree with you that in view of the letter that we now stand to gain nothing by waiting, and I think that now would be the time to start moving.

It would be my thinking that we bring no pressure direct on Hormel through Gentry. I think that pressure should come from Con Grocers and I suggest that at the very first opportunity you discuss the entire Hormel matter with Kennedy and Gifford, showing them Murphy's letter and getting an idea how much Con Grocers buys from Hormel, with the thought in mind that pressure be applied from that end of it. (CX 121)

While the record does not definitely prove that any pressure that may have been brought against Hormel was effective, this correspondence does prove a policy on the part of Consolidated to use pressure or force suppliers to purchase dehydrated onion and garlic from Gentry. That this was a continuing policy is indicated by statement appearing in letter of March 17, 1955, from Joseph D. Farrell, of Gentry, to Robert H. Perlitz, vice president, Sales and Advertising, Consolidated Foods Corporation, as follows:

I want to thank you, Bob, for your letter of March 10th and your comments relative to your meeting with Messrs. R. D. Arnay, Sales Manager for Hormel, Ralph Keller, General Manager Chicago Sales Operation and Ken Forbes. Many thanks for your efforts in our behalf. (CX 50 A–B)

21. The lengths to which respondent would go to pressure a supplier of Consolidated to buy Gentry products is typified by the transactions

with the Grocery Store Products Company, a supplier of Consolidated who did not purchase and did not want to purchase dehydrated onion and garlic from Gentry. As early as September 28, 1951, Gentry requested the assistance of Consolidated and Mr. Kennedy, the president of Consolidated, to sell Grocery Store Products Company. After some correspondence, it was decided to have G. K. Wetzell, buyer for Sprague Warner Division, write Jack Ross, president of the Grocery Store Products Company, which he did on January 11, 1952. Although Gentry's salesman reported a cordial reception, he received no order. This situation continued through 1953 and 1954 and was summed up by Joseph D. Farrell in his letter of March 17, 1955, to Robert H. Perlitz, vice president, Sales and Advertising:

> You will recall, when I had the pleasure of talking with you in Kansas City, that one of the companies on which I solicited your generous help was the Grocery Store Products Company with headquarters in West Chester, Pa.
>
> Quite frankly, Bob, this is a company that gives us no end of annoyance on every call that we make on their buyer. Every so often there is a change in purchasing agents and now they have a Mr. J. F. Gilmour. Despite the fact that we have received a multitude of promises from this company that they would split the business between their present source of supply and Gentry, it seems that their promises have all been in vain.
>
> Our latest report from our salesman covering this situation states as follows: The last order went to the Basic Vegetable Company and the buyer stated that even if we had an equal price Basic would have obtained this business because they have been doing business with that account for many years, even though they fully recognize that our merchandise is easily as good or it may even be better.
>
> It is understood that Consolidated Foods buys huge quantities of materials from the Grocery Store Products Company and, therefore, I wonder whether or not it would be at all possible for us to give these people the same sort of treatment when they call on us? We would very much appreciate your cooperation and any comments that you would care to make would be sincerely appreciated by the writer. (CX 50 A–B)

Perlitz discussed this matter with Frank Lamarche, vice president of the Grocery Store Products Company, who later wrote Perlitz on April 25, 1955, as follows:

> Confirming our conversation of last week, as I stated then I was not familiar with the buying of dehydrated vegetables as my efforts are confined entirely to sales. However, I have had an opportunity to check up with the purchasing department, and the story seems to be that for years Basic have worked very closely with our production department—in fact, made it possible for us to get several of the vegetables which had previously not been available, with the result that as long as Basic is completely competitive and able to give us the quality and service they have been, it is felt that due to the help they have been to the production department, they should continue to get the business. (CX 54–B)

Upon receipt of this information, Joseph Farrell of Gentry wrote Robert Perlitz of Consolidated attempting to refute the contents of the letter of Lamarche and further stated:

> * * * So, I would frankly say that it would help us immeasurably if it could be told to this company that if they don't feel that our merchandise is good enough for them, then, frankly speaking, their merchandise is not good enough for us.
>
> This is one company that has absolutely gone out of its way to adulterate the truth with a lot of distortions and as men engaged in sales, such as you and I, we both do not like this type of treatment. If a company does not want to buy from us, they should tell us such, but when they give us a lot of promises from the President on down and then go out of their way, right up until the last moment, to keep us in suspense and finally give this business to our competitor, I think that you will appreciate the situation that we have with the Grocery Store Products Company.
>
> Needless to say, any further cooperation that you can give us relative to this company to remind them of the facts as outlined in this letter will be sincerely appreciated. (CX 56 A–B)

As requested, on May 17, 1955, Perlitz of Consolidated asked Frank Lamarche, vice president of the Grocery Store Products Company, to call upon him when in Chicago. Thereafter, an order was received from the Grocery Store Products Company for 10,000 pounds of white onion chips which was reported to Perlitz by Joseph Farrell in his letter of June 30, 1955:

> I take pleasure in letting you know that because of your efforts we were instrumental in being able to sell the Grocery Store Products Company in West Chester, Penna. about 10,000 pounds of our White Onion Chips.
>
> All I can say, Bob, is many, many thanks. We truly appreciate what you have done for us and without your help we might have gone on for the next few years without any business from this company.
>
> Since I am unable to shake your hand and thank you in person, would you be good enough to accept the sentiments expressed in this letter until we meet again. (CX 60)

22. In the matter of the P. J. Ritter Company, after intervention of Nathan Cummings, chairman of the board of Consolidated, with William H. Ritter, Jr., president of the P. J. Ritter Company, Gentry was selected as a regular second source of supply for dehydrated onion and garlic, although the Ritter chemists had objected to the quality of the Gentry products and expressed the opinion that Basic had consistently maintained a higher quality than Gentry.

CONCLUSIONS

1. The lines of commerce involved in this proceeding, as hereinbefore found, are the production and sale of dehydrated onion and the pro-

duction and sale of dehydrated garlic, and the section of the country involved is the entire United States.

2. The type of acquisition in this proceeding has been designated as a conglomerate merger which implies the absence of premerger competition or supply relationships between the acquired and acquiring concerns. The record does show that there were several divisions of Consolidated Foods Corporation who used dehydrated onion and garlic but the amount supplied by Gentry after the acquisition was not sufficiently substantial to require consideration as a vertical merger.

3. Section 7 of the Clayton Act, as amended, applies to conglomerate as well as horizontal and vertical mergers where the effect may be substantially to lessen competition or tend to create a monopoly.

4. The record is clear that the conglomerate merger in this proceeding has the required effect of substantially lessening competition and tending to create a monopoly.

5. The respondent, Consolidated Foods Corporation, is a financially powerful and aggressive commercial organization which purchases large quantities of canned and processed food products from independent suppliers of food products for resale, both at wholesale and retail through its various divisions. This volume of purchases has permitted Consolidated to place pressure upon these suppliers and unfairly induce them to purchase all or a substantial portion of their requirements of dehydrated onion and garlic from the Gentry Division of Consolidated as opposed to the competitors of the Gentry Division in the dehydrated onion and garlic industry.

6. The acquisition of Gentry by Consolidated created a substantial change in the dehydrated onion and garlic industry and resulted in the replacement of Gentry by a substantially stronger over-all competitive unit in an industry composed of relative equals. It created a gross disparity between the total competitive strength of Consolidated Foods Corporation and the three small competitors, which indicates a serious industry imbalance, the effect of which may be to substantially lessen competition and tend to create a monopoly.

7. The competitive position or share of the market enjoyed by Gentry, under respondent's control, in the production and sale of dehydrated onion and garlic, has been enhanced to the detriment of actual and potential competition.

8. The acquisition of Gentry, Incorporated, by Consolidated Foods Corporation has the effect of substantially lessening competition and tending to create a monopoly in the relevant lines of commerce in violation of Section 7 of the Clayton Act, as amended.

9. As the injury to competition in this proceeding is primarily based upon the activity of Consolidated Foods Corporation in the dehy-

drated onion and garlic industry, any order of divestiture will effectively remove the opportunity and power of Consolidated to interfere in and lessen competition in this industry. Any order of divestiture which may be issued in this proceeding should not preclude officers, directors and employees of the original Gentry, Incorporated, from purchasing the Gentry Division, if they are not at the time of purchase officers or directors of Consolidated Foods Corporation.

ORDER

It is ordered, That the respondent, Consolidated Foods Corporation, a corporation, and its officers, directors, agents, representatives and employees, within six (6) months from the date this order becomes final, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible or intangible, including but not limited to, all plants, equipment, trade names, trademarks and goodwill acquired by Consolidated Foods Corporation as a result of the acquisition by Consolidated Foods Corporation of the assets of Gentry, Incorporated, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Gentry, Incorporated, so acquired, in such manner as to restore it as a going concern in the production and sale of dehydrated onion and garlic and other products in which said Gentry, Incorporated, was engaged at and immediately prior to the time of said acquisition by respondent Consolidated Foods Corporation.

It is further ordered, That by such divestiture none of the stocks, assets, rights, or privileges, tangible or intangible, acquired or added by respondent, shall be sold or transferred, directly or indirectly, to anyone who is at the time of the divestiture a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with, or under the control, direction, or influence of respondent or any of respondent's subsidiary or affiliated corporations.

Provided, however, That nothing herein contained shall prohibit the purchase of the assets of the Gentry Division upon divestiture by Consolidated Foods Corporation by any officer, director, or stockholder of the original Gentry, Incorporated, prior to its acquisition by Consolidated Foods Corporation, who is not an officer or director of Consolidated Foods Corporation at the time of such purchase.

It is further ordered, That the respondent, Consolidated Foods Corporation, shall, within sixty (60) days from the date upon which this order becomes final, submit its plan of compliance in writing for approval by the Federal Trade Commission.

OPINION OF THE COMMISSION

NOVEMBER 15, 1962

By Elman, *Commissioner:*

This is an appeal from an initial decision of the hearing examiner that the acquisition by respondent, Consolidated Foods Corporation, a large diversified processor and seller of food products, of the assets of Gentry, Incorporated, a company primarily engaged in the production of dehydrated onion and garlic, was proscribed by Section 7 of the Clayton Act (38 Stat. 731, as amended, 15 U.S.C. 18).[1] The examiner determined that the acquisition of Gentry by Consolidated "has the effect of substantially lessening competition and tending to create a monopoly in the relevant lines of commerce in violation of Section 7 of the Clayton Act, as amended." (Initial Decision, p. 944.) By way of remedy, his proposed order would require Consolidated to divest itself of Gentry within six months from its effective date.

I

Many of the facts, as found by the hearing examiner, are not in dispute. Respondent, a Maryland corporation with its office and principal place of business in Chicago, Illinois, was incorporated in 1941 as a wholesale grocery house. Subsequently, it expanded by merger to encompass a wide variety of food industry enterprises. As of December 31, 1958, respondent operated eight manufacturing divisions or subsidiaries engaged in processing canned soups, pickles, dressing, fruits, bakery goods, frozen foods, beet sugar, dehydrated onion, dehydrated garlic, and capsicum spices in plants located in eleven different States scattered across the continent. In addition, it sold food products at wholesale through twelve units in an equal number of States, and at retail through three units, including the well-known midwestern chains, Piggly-Wiggly Midwest Co., and Klein Supermarkets, Inc.

Respondent has exhibited a capacity for vigorous growth. Its net sales from July 1, 1950, to June 30, 1951, were $174,006,801. For the period July 1, 1955, to June 30, 1956, they had risen to $268,252,695. On June 30, 1951, respondent had assets of approximately $60,000,000. By June 30, 1956, the figure was more than $99,000,000.

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[1] Section 7 provides in pertinent part:

"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."

Respondent's acquisition of Gentry, Incorporated, took place on April 30, 1951. Both before and since that date Gentry has been a manufacturer of dehydrated onion and garlic and of assorted capsicum spices. By comparison with Consolidated, Gentry is a small concern. At the time of acquisition, it operated two plants and had assets valued at $1,600,000.

This case involves only Gentry's dehydrated onion and garlic business, which comprises the bulk of its trade. When Gentry was acquired by Consolidated it had only three domestic competitors in the production and sale of dehydrated onion and two in dehydrated garlic. Since that time, one firm has left the onion field but another has entered both, so that four firms constitute the entire industry.[2] The domestic processing and sale of both dehydrated onion and dehydrated garlic are dominated by Gentry and one principal competitor, Basic Vegetable Products, Inc. In 1950, immediately prior to the Consolidated-Gentry merger, Basic accounted for 60% and Gentry 28% of dehydrated onion sales. By 1958, these figures were 57% and 35%, respectively. In dehydrated garlic sales, Basic had 36% of the market in 1950 and 50% in 1958, while Gentry's shares were 51% and 39% for the same years.

The industry as a whole is burgeoning due to the development in recent years of new foods, such as dehydrated soups, containing its products. In 1950, total industry sales of dehydrated onion equalled 7,802,159 pounds, of which Basic sold 4,693,360 and Gentry 2,158,880. By 1958, industry sales were 18,147,207 pounds, with Basic accounting for 10,420,944 pounds of this total and Gentry 6,259,171. The industry produced 1,799,518 pounds of dehydrated garlic in 1950; by 1958, the total was 5,127,042 pounds. During the corresponding period Basic's sales moved from 652,059 pounds to 2,575,041, and Gentry's from 922,073 pounds to 1,979,834.

II

Under Section 7 of the Clayton Act a merger is unlawful if its likely effect would be to lessen competition substantially in the relevant product and geographical markets. It is agreed that Consolidated and Gentry were not competitors prior to this merger and that sales by Gentry to Consolidated were insubstantial. Thus, the acquisition did not involve the kind of competitive effects usually associated with "horizontal" or "vertical" mergers in the ordinary usage of those terms. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

[2] Competition from foreign imports has not been great in the years under consideration. For example, in 1958 imported onion sales equalled less than 4 percent of sales of domestically produced onion, and imported garlic only a little more than 2 percent of domestic garlic.

The gravamen of this proceeding was that the merger was illegal under Section 7 of the Clayton Act because it created the serious danger that Gentry would acquire a protected market, in which fair competitive opportunities would be denied to other sellers of dehydrated onion and garlic, as a result of the trade practice known as "reciprocity". Section 7 is designed, of course, to "nip in the bud" such changes in the structure of an industry, produced by corporate acquisitions, as are likely to bring about substantial lessening of competition. It must be emphasized at the outset that in a Section 7 case (as distinguished from a Sherman Act case or a proceeding under Section 5 of the Federal Trade Commission Act), the inquiry does not focus on overt anticompetitive trade practices as such, but rather on changes in market or industry structure that are effected by the challenged merger and that may have anticompetitive consequences. Thus, in this case the inquiry must focus on the likely effect of the Consolidated-Gentry merger on the competitive forces at play in the dehydrated onion and garlic industries.

As generally understood, reciprocity describes the practice whereby firms, overtly or tacitly, make concessions to one another in order to promote their own business interests. Perhaps the most common form of reciprocity is the type involved in this case—reciprocal buying. In this context it involves nothing more than the simple idea that "I will buy from you if you will buy from me", or the unspoken "If I buy from him, he will buy from me".

The situation before us here, for example, is relatively straightforward. As a wholesaler and retailer of food, Consolidated buys the products of many food processors. A substantial number of these processors require dehydrated onion and garlic in packing their foods. It can be readily understood that food processors who use dehydrated onion or garlic and are anxious to sell or to continue to sell their products to Consolidated will, to say the least, consider Gentry's connection with Consolidated in selecting a source of supply of onion and garlic. Indeed, complaint counsel contends, and the hearing examiner found, that Consolidated relied on the influence generated by its buying power to induce these processors to purchase onion and garlic from its Gentry Division. The examiner's conclusions in this regard were as follows:

> The acquisition of Gentry gave Consolidated the opportunity to use express or implied business coercion to induce suppliers purchasing dehydrated onion and garlic from other sources to purchase some or all of their requirements from the Gentry Division of Consolidated. There is ample evidence in the record that both Gentry and Consolidated have exercised pressure and have attempted to

influence, by affirmative action, some of Consolidated's suppliers to purchase a substantial part if not all of their dehydrated onion and garlic requirements from Gentry. Consolidated was successful in some instances, even though objections had been raised as to the quality of Gentry's products as compared with the products of its competitors. This indicates the value of the so-called reciprocity policy, when used as a competitive weapon. (Initial Decision, p. 937.)

III

While contending that the reciprocity aspect of the Consolidated-Gentry merger is less restrictive of competition than a vertical merger, respondent does recognize an analogy between the two types of merger. In a vertical merger the danger to competition lies in the likelihood that the union of previously independent supplier and customer companies will foreclose their share of the market to competitors who previously had an equal opportunity either to buy from the supplier company or to sell to the customer company. So too with reciprocity resulting from a conglomerate or diversification merger. Here competition will be adversely affected if the reasonable likelihood arises that Gentry's competitors will be to some degree foreclosed by the Gentry-Consolidated merger from having the opportunity of selling to that portion of the market composed of Consolidated's suppliers. Consequently, the extent of potential foreclosure greatly exceeds that resulting from the slight vertical relationship existing between Gentry and Consolidated.

To satisfy the requirements of Section 7, it must be shown that the effect of the acquisition may be *substantially* to lessen competition. Respondent asserts that proof of such substantiality is not only lacking here but that the contrary has been affirmatively demonstrated. Respondent's evidence on this point consists principally of (a) a statistical presentation indicating that Gentry has not come to dominate the industry in the years since the merger, and (b) the testimony of a number of witnesses who stated that they began buying Gentry products only for valid business reasons, *e.g.*, because Gentry had improved its manufacturing process, or because the buyer decided that he preferred having at least two sources of supply.

These contentions, coupled with the requirements of Section 7, appear to necessitate resolution of three separate questions if the examiner's finding of violation is to be upheld. First, is business reciprocity, as it is presented here, anticompetitive in its effect? Second, if the answer to this question is in the affirmative, did Consolidated's acquisition of Gentry transform sufficiently the market structure of this industry to create an environment conducive to anticompetitive reciprocity? Third, if both answers are yes, is the threat to competition sufficiently substantial to bring the merger within the prohibitions of Section 7? [3]

IV

The anticompetitive effect of business reciprocity is made clear by three cases in which the Commission held that overt and coercive implementation of reciprocity is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. § 45). In the first of these, *Waugh Equipment Co.*, 15 F.T.C. 232, high officials of the large meat packing concern, Armour & Co., acquired stock in the Waugh Equipment Co., a minor manufacturer of draft gears, and commenced to use Armour's vast power as a major rail shipper to induce railroad companies to buy draft gears from Waugh. Although Waugh's gear was practically unknown in 1924, when the reciprocity campaign commenced, the company was enabled to vault from obscurity to industry leadership in only six years. Its share of the market for draft gears for new freight equipment rose from less than 1% in 1924 to approximately 35% in 1930.

In finding a violation of Section 5, the Commission pointed out that other draft-gear manufacturers made their sales presentations to the mechanical, operating, and purchasing departments of the railroads, rather than to their traffic departments, and that the factors ordinarily considered by the railroads were price, quality, and salesmanship. The Commission further found that the efforts of the Armour officials on Waugh's behalf resulted, in many instances, in railroads purchasing Waugh gears contrary to the recommendations of their mechanical officials and in disregard of the bids of competitors. Those competitors had no appreciable traffic to offer the railroads and were therefore unable to meet Waugh's competition.

[3] The answer to a fourth question, whether the market affected is substantial (see, *e.g.*, *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 595), is not open to doubt. The geographic market is the entire United States. The product markets encompass all dehydrated onion and garlic, of whatever price, quality, or characteristics, produced in this country. And the dollar volume of business is significant, as the following table, taken from figures compiled by respondent, indicates.

	Dehydrated onion	Dehydrated garlic
Basic, 1950	$2,320,067	$438,679
Gentry, 1950	1,139,033	621,403
Industry, 1950	3,905,830	1,200,197
Basic, 1958	5,913,521	1,947,723
Gentry, 1958	3,547,338	1,536,508
Industry, 1958	10,145,606	3,831,099

The Commission concluded that Waugh and the Armour officials had "taken advantage of a competitive weapon, oppressive and coercive in nature", which tended unduly to suppress competition by preventing customers "from exercising their free will and judgment in determining which device is the most efficient and will best serve their needs at the lowest net cost over a period of time". (15 F.T.C., at 246, 247) The respondents had "thus injected an element in the competitive field" which was "unfair and abnormal" and tended "to reduce the efficiency and economy in the production and sales methods of competing manufacturers and [give] to the concern that control[led] the largest volume of freight traffic an unfair advantage that [would] more than offset the higher efficiency in the production and sales methods of competing concerns which control[led] no such traffic * * * ." (*Id.*, at 247)

Mechanical Manufacturing Co., 16 F.T.C. 67, was a similar case. There important employees of the large packer, Swift & Co., along with the Swift Estate and members of the Swift family, controlled Mechanical Manufacturing Co., a maker of such railroad equipment as draft gears, bumping posts, and coupler centering devices. As in the *Waugh* case, railroads were persuaded to buy Mechanical's products by promises of future Swift & Co. freight traffic and threats of withdrawal of existing traffic. When necessary, Swift shipments actually were diverted from railroads that failed to comply and to railroads that did buy from Mechanical. Again the Commission found that the Federal Trade Commission Act had been violated.[4]

In *California Packing Corp.*, 25 F.T.C. 379, as in the case before us, the practitioner of reciprocity, California Packing Corporation, was a large diversified processor and distributor of many different kinds of food products. One of its subsidiaries was Encinal Terminals, a corporation operating wharves, sheds, warehouses, and switch tracks on San Francisco Bay for the purpose of handling rail and steamship freight at the waterfront. By promising, or threatening, to shift their purchases of raw and manufactured materials, California Packing and its officers and subsidiaries placed pressure on their suppliers to divert their freight shipments from other terminal companies

[4] The problem of reciprocity in rail-traffic routing is also considered in *In the Matter of Reciprocity in Purchasing and Routing*, 188 I.C.C. 417. The Interstate Commerce Commission found the practice "burdensome" to the public transportation system in that "it succeeds only in making the handling of existing traffic more expensive." (188 I.C.C., at 433, 434.) The Commission also noted the unfair and anticompetitive aspect of the practice:

"The manufacturer of railway materials or supplies who has little traffic to offer as an inducement is at a serious disadvantage although its product may be superior and its prices comparable. The smaller carriers with limited purchasing power are likewise at a disadvantage in securing traffic although their services are prompt and efficient, and their rates on a parity with those of their larger competitors." (188 I.C.C., at 433.)

to Encinal. Similarly, steamship companies were coerced into diverting freight tonnage to Encinal Terminals, even when the move was uneconomical for them, by the employment of California Packing's power as an important shipper. Even California Packing's competitors were exploited by the device of soliciting their customers and suppliers to induce them to divert shipments through Encinal Terminals.

The Commission found that the "principal consideration" for California Packing's purchases from its suppliers became "the volume of tonnage routed by said industrial concerns through the said Encinal Terminals * * * instead of the usual and normal competitive considerations such as quality, service, and price * * *." (25 F.T.C., at 398–399) The practices disclosed were held unfair methods of competition.

These decisions represent specific applications of the general principle that abuse of large buying power to restrict competitive market opportunities is illegal. As the Supreme Court has held:

Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. *Nor * * * may it be used to stifle competition by denying competitors less favorably situated access to the market.* (*United States* v. *Griffith*, 334 U.S. 100, 108, emphasis added.)

This is precisely the vice of reciprocity as manifested in the cases mentioned above. It transforms substantial buying power into a weapon for "denying competitors less favorably situated access to the market". It distorts the focus of the trader by interposing between him and the traditional competitive factors of price, quality, and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of a circumstance extrinsic to the worth of his product. In this situation, it is the relative size and conglomeration of business rivals, rather than economic efficiency, that may determine firm growth and success, and, ultimately, the allocation of resources. Obviously, this practice strikes at one of the basic premises of a free enterprise economy. And it is clear that these anticompetitive effects are likely to occur, given a corporate structure similar to that of respondent in this proceeding, without the crudities involved in the three cited cases or indeed without any action whatsoever on the part of the parent corporation. It is certainly obvious, to use an example based on the facts of this case, that a food processor who uses dehydrated onion or garlic and who seeks to curry Consolidated's business will tend to prefer Gentry as his source of supply, and the advantages accruing to him from so favoring Gentry would not have to be pointed out by Consolidated.

In many respects, reciprocal buying bears a close resemblance to the unlawful business practice of entering into tying arrangements, *i.e.*, agreements by one party to sell one product only on condition that the buyer also purchase a different product. The latter product is said to be "tied" to the former.

Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 305, 306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. * * * *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 6.

Similarly, reciprocal buying may also enable one seller to succeed over another not on the basis of "a better product or a lower price, but because of his power or leverage in another market", *viz*, the market in which the seller is an influential buyer of other products. A frequent condition, express or implied, of his purchase of goods from his supplier is that the supplier also buy from him. The prospective customer "ties" the sale of his product to his purchases from his supplier and "competition on the merits with respect to the tied product is inevitably curbed."

It is for these reasons that the Commission held in the *Waugh Equipment*, *Mechanical Manufacturing*, and *California Packing* cases that coercive exercise and reliance on business reciprocity is an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act. And, in view of respondent's coercion, were this a proceeding under Section 5 an order to cease and desist would be entirely justified. However, this proceeding was brought not under Section 5 but under Section 7 of the Clayton Act, and the order issued by the hearing examiner calls not for termination of anticompetitive conduct but for divestiture of the acquired firm. We must therefore proceed to consider, in the context of Section 7, whether the merger here has brought about a change in the structure of the industry whose effect—in relation to reciprocity—may be substantially to lessen competition.

V

It is elementary that the effect of a merger, rather than its technical label, determines its validity. An acquisition of one corporation by another need not be of an orthodox horizontal or vertical nature for Section 7 to apply. The legislative history of amended Section 7 makes it clear "that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly." (H.R. Rep. No. 1191, 81st Cong., 1st Sess., p. 11) As the Supreme Court has recently stated, "by the deletion of the 'acquiring-acquired' language in the original text, [Congress] hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country." *Brown Shoe Co.* v. *United States*, 370 U.S., 294, 317.

The adverse effect which reciprocal buying may have upon competition has already been demonstrated. The way in which a conglomerate merger may enhance the likelihood that reciprocity may be practiced to stifle competition is equally clear.

A single-line corporation is far less likely to both buy from and sell to another corporation than one that is diversified—*i.e.*, if it deals in a variety of product or service lines. A glance at the cases discussed in Part IV, *supra*, makes this apparent. The officials of Armour & Co. and Swift & Co. could not exercise reciprocal buying power over the railroads so long as their companies produced only meat products, which the railroads did not consume. But once they established relationships with firms that produced railroad equipment, they could employ Armour and Swift power as shippers of meat products to force the railroads to buy the equipment from the sources in which they were interested. It was precisely the lack of diversification that prevented other equipment manufacturers from meeting the reciprocity competition generated by Armour and Swift. Similarly, California Packing Corp's. use of reciprocity depended upon linking the purchase of supplies and transportation for its food products to the operation of a wholly unrelated terminal business. In sum:

> The large diversified firm has better opportunities for using reciprocal buying than the single-line producer * * *. A firm that makes many products can more readily find a supplier that is also a potential buyer of what it makes. And, if it is a large purchaser, it may readily persuade its supplier to buy from it. If a mere suggestion is not adequate, a threat to withhold patronage may do the trick * * *.
>
> Diversification not only increases the number of opportunities for reciprocal buying; it increases their magnitude. A single-line producer, even though a near-monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying—making other products requiring the same input—a firm may so enlarge its buying as to give it the power to increase its sales * * *.
>
> * * * The large diversified firm producing for sale to other industries has an advantage in the strategy of reciprocal dealing. (Stocking and Mueller, Business Reciprocity and the Size of Firms, *The Journal of Business of the University of Chicago*, Vol. XXX, pp. 73,76–77 (1957)

Hence, to the extent that a diversification, or conglomerate, merger produces an industry structure that facilitates and furthers reciprocal buying, it is likely to lead to the most serious of anticompetitive consequences, *viz*, to confer upon large, diversified corporations a crushing weapon against small, single-line competitors. The potential practical consequences are dramatically illustrated in the *Waugh* case, discussed earlier. The danger of such consequences, we must find, also exists here as a practical reality.

Consolidated's acquisition of Gentry presented it with an opportunity, previously unavailable, to reap a profit from sales in one product area, dehydrated onion and garlic, on the sheer strength of its buying power in other markets, and not on the basis of "a better product or a lower price". Furthermore, Consolidated did, again admittedly, overtly exert this power on occasion with success. The evidence shows that other established onion and garlic producers, basic Vegetable Products, Inc., and Puccinelli Packing Co., lack Consolidated's size and diversification, and are thus ill-equipped to respond in kind. It is in the context of just such an industry structure that a reciprocal buying policy has the greatest chance of success and therefore poses the most serious threat to competition.

Since Consolidated acquired the power to extort or simply attract reciprocal purchases from suppliers when it acquired Gentry, the causal relationship between the merger and the injury to competition implicit in reciprocal buying is patent. While respondent has admitted the overt exercise of the power inherent in its corporate structure, expressly conditioning purchases from processors on their purchases from Gentry, it seems clear that merely as a result of its connection with Consolidated, and without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made.

Section 7 is the appropriate statute for dealing with the problem of eliminating anticompetitive effects directly attributable to a merger in their incipiency. Respondent's argument that the Commission should rely on Section 5 of the Federal Trade Commission Act as an exclusive remedy in this case is without merit. Congress did not consider it sufficient to provide *post hoc* procedures to enjoin anticompetitive behavior. Rather, Section 7 was designed to abort such changes in industry structure that would have anticompetitive effects, a concept that is not in any sense confined to unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act. Though neither the absence of competition between two arms of the single corporation nor intra-corporate sales might be unfair methods of competition, in a Section 7 proceeding the inquiry frequently focuses on the anticompetitive effect of anticipated business practices that would be immune from legal attack had the structure of the merged corporation been developed by growth rather than acquisition. Therefore, in this case, it might be agreed that a cease and desist order would eliminate such overt reliance on reciprocity by Consolidated as might be proved, but it would do nothing to eliminate the anticompetitive effect inherent in the corporate structure created by the merger.

VI

Is the anticompetitive potential of the Consolidated-Gentry merger sufficiently, substantial to render the merger unlawful?[5] In considering this question, we are aware that Congress did not intend Section 7 to apply only to the "mere possibility" that competition may be substantially lessened. Conversely, "A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 6)

Congress used the words "*may be* substantially to lessen competition" (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act. (*Brown Shoe Co.* v. *United States, supra,* at p. 323)

What then are the "probabilities" here? Once again, the *Brown Shoe* opinion is illuminating. In discussing the vertical aspects of the merger between Brown Shoe Co. and G. R. Kinney Co., the Court described a spectrum of types of restraints on competition that may result, in varying degrees, in foreclosing a share of a market to competitors. It distinguished in particular between exclusive-dealing contracts and tying agreements. The former, it said, "are frequently negotiated at the behest of the customer who has chosen the particular supplier and his product upon the basis of competitive merit", and under certain circumstances "may escape censure * * *." (370 U.S., at p. 330)

Tying agreements, on the other hand, "can rarely be harmonized with the strictures of the antitrust laws * * *." (*Ibid.*) The Court explained:

The usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. Because such an arrangement is inherently anticompetitive, we have held that its use

[5] It is agreed that dehydrated onion and dehydrated garlic constitute the lines of commerce involved in this proceeding and that the relevant market area is the whole United States.

by an established company is likely "substantially to lessen competition" although only a relatively small amount of commerce is affected * * *. (*Ibid.*)

As stated earlier, tying agreements and reciprocal buying are closely analogous in anticompetitive effect. In the latter, the customer is forced "to take a product or brand he does not necessarily want" in order to make a sale. That the similarity between a merger and a tying agreement is an appropriate consideration under Section 7 is also apparent from *Brown Shoe*, since the resemblance between one aspect of Brown's relationship to Kinney and a tying clause was mentioned by the Court as a consideration supporting a finding of violation. (*Id.*, at p. 337.) By acquiring Gentry, Consolidated has provided itself with a basis on which to "tie" sales to its supplier to purchases from them.

Certainly the area of competition threatened by the Consolidated-Gentry merger greatly exceeds the "relatively small amount of commerce" the Court has considered necessary to invalidate a tying agreement. This is revealed by examining Gentry's sales to suppliers of Consolidated. In 1958, to cite the most recent year for which figures are available, Gentry held 35% of the market for dehydrated onion and 39% for dehydrated garlic. Its sales of each, in pounds, were 6,259,171 and 1,979,834, respectively. Respondent has undertaken to tabulate (Respondent's Proposed Findings of Fact and Conclusions of Law, pp. 99–101) Gentry's sales to major customers—defined as customers that purchased 10,000 pounds of onion and garlic from Gentry in any year from 1946 to 1958—that were also suppliers of Consolidated. For 1958, these sales came to 4,617,145 pounds of onion and 1,263,690 pounds of garlic. Translated into market shares, firms that both supplied Consolidated and bought in volume from Gentry purchased more than 25% of the onion produced by the industry and not quite 25% of the garlic.

Hence, in both the onion and garlic product lines approximately one-fourth of the available market stands to be influenced by the possibility that Consolidated will withdraw patronage unless Gentry is in turn patronized. But this is only the most conservative calculation of the potential scope of reciprocity at Consolidated's command. Certainly many other prospective purchasers from Gentry could be influenced by the expectation or promise of reciprocal purchases of their products by Consolidated. The latent force of Consolidated's buying power therefore undoubtedly exceeds one-fourth of both markets by a substantial margin. The area of prospective market foreclosure is thus not merely significant, but exceptionally large.

Because, again, Section 7 requires us to deal in "probabilities", potential foreclosure of a major share of the market weighs strongly against the lawfulness of a merger—especially a merger that threatens consequences like those of a tying agreement. But there are other factors, mentioned in *Brown Shoe* as appropriate for consideration, which point in the same direction.

First, the Court indicated that past behavior of the merging firms may be significant in showing potential market foreclosure. (370 U.S., at p. 332) Here, past behavior reveals actual use of reciprocity by Consolidated in pushing Gentry's products. Respondent argues, however, that the record discloses that reciprocal buying was employed only sporadically and with limited success. We think this contention misconceives both the point of Section 7 and the significance of the reciprocity evidence of record. That respondent has not chosen to systematize and vigorously enforce its reciprocal buying policy is of far less significance than that it obtained the *power* to do so by merger, and that by actually using its power on occasion to disadvantage competitors unfairly, respondent demonstrated that its possession of such power posed a real and substantial, and not merely abstract or theoretical, threat to competition.

Section 7 reads "may be", not "has". The evidence may show that respondent has not thus far severely impaired competition in the industry by reciprocity but it does not show that respondent may not do so when it chooses or that it will not so choose in the future. In other words, respondent's proof on this point reveals, at best, only past internal irresolution in implementing reciprocity rather than solid and effective external limitations on the power to exercise it.

Any suggestion that such power cannot effectively be exploited fails to account for clear-cut historical instances when it has been. Consider, for example, the dramatic effect of reciprocity in *Waugh Equipment Co.*, discussed earlier, where the acquired firm was enabled to leap from insignificance to control of 35% of the market and industry leadership in only six years.[6] Respondent has given us no reason to believe that industry conditions preclude its achieving similar results. Indeed, as we pointed out in Part V, *supra*, the industry structure seems tailor-made to the exploitation of reciprocal buying power.

Second, the Supreme Court attached importance in *Brown Shoe* to the trend of concentration in the industry. (*Id.*, at p. 37) Here, no such trend appears, but the industry is already so highly concentrated that there is hardly room in which a "trend" could develop.[7] With two firms accounting for better than 85% of both product lines for 11 successive years, maximum concentration short of monopoly

[6] For other instances in which reciprocal buying by large diversified firms may seriously hamper small single-line competitors, see Stocking and Mueller, "Business Reciprocity and the Size of Firms," XXX *The Journal of Business of the University of Chicago* 73 (1957).

[7] One "trend", however, is highly possible. Other diversified food firms may follow Consolidated's lead and seek to acquire the remaining industry members for reciprocity purposes. This development would stifle fair competition on an industry-wide basis.

has already been achieved. If it is desirable to prevent a trend toward oligopoly [8] it is *a fortiori* desirable to remove, so far as possible, obstacles to the creation of genuinely competitive conditions in an oligopolistic industry. Respondent's reciprocal buying power, obtained through acquisition of Gentry, is just such an anticompetitive obstacle.

This conclusion is buttressed by the peculiar nature of the dehydrated onion and garlic industry. In the first place, the record shows that Gentry's leading competitor, Basic Vegetable Products, Inc., has been the innovator and leader in the field. Gentry has recently made technical strides narrowing, although probably not closing, the gap between them. There is also evidence that the third firm, Puccinelli Packing Co., is not only much smaller—commanding only about 10% of each product market—but is considered by many buyers to offer an inferior product and inferior service.

Coupled with this industry structure is the fact, well-documented by respondent, that many buyers have determined that their source of supply may best be protected by a policy of buying from two suppliers. When the inducement of reciprocal buying is added as a third ingredient, the probable result becomes clear. Buyers are likely to lean toward Basic on the ground of quality, but, in seeking a second, protective supply channel, to purchase from Gentry in the belief that this will further their sales to Consolidated. Not only does Gentry thus obtain sales that might otherwise go to Basic or Puccinelli, but the two-firm oligopoly structure of the industry is strengthened and solidified and new entry by others is discouraged.[9]

Third, and closely related to the problem of oligopoly, is the matter of maintaining competitive vigor in the industry. Respondent seems to think that it cannot be found to have violated Section 7 since it has not driven competitors from the field or sharply curtailed their sales. But we have already indicated that our inquiry must focus on *probable* effect, and that one such probable effect of respondent's acquisition of Gentry is the discouragement of new competition. This could occur even if Gentry does not drive competitors from the field or attain unilateral industry dominance. If reciprocal buying creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality, or service, competition is lessened

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[8] See *Brown Shoe Co.* v. *United States*, 370 U.S., at pp. 332–333.

[9] Neither the departure from the industry of J. R. Simplot Co., nor the entry of Gilroy Foods, Inc. (later purchased by McCormick & Co.). appears particularly significant here. Simplot seems to have switched to another field for reasons extrinsic to the competitive picture in the onion and garlic industry. Gilroy's entry is too recent to permit assessment of its probable role, especially in view of its acquisition by McCormick, a large user of both onion and garlic.

whether or not Gentry can expand its market share.[10] And if, as we find to be true here, the share of the market that may be insulated from the effective interplay of fair competitive forces is substantial, and the likelihood of such foreclosure is considerable, the merger cannot stand.

The Supreme Court has said that "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." (*Brown Shoe Co.* v. *United States*, *supra*, at p. 333.) Nor can it "immunize a merger" if pre-existing oligopoly is thereby significantly reinforced or more firmly entrenched. "Vigor" of competition is diminished, rather than increased, by a merger that adds an anticompetitive element to an already overwhelmingly concentrated industry. Of course, a merger escapes the proscription of Section 7 if its likely effect is to promote, rather than hinder, competition. This might be true, for example, if the acquired corporation were a "failing company" being purchased by a newcomer to the industry, or if two small companies must combine in order to compete effectively with larger corporations dominating the industry. (See *Brown Shoe Co.* v. *United States*, 370 U.S., at pp. 319, 331.) But no such procompetitive effects can be discerned in the merger here. Indeed, it is difficult to see how the quasi-tying-agreement effect of reciprocal buying fostered by the union of Consolidated and Gentry can be anything but anticompetitive.[11]

In *Brown Shoe*, the Court concluded that the Brown-Kinney merger was likely substantially to lessen competition:

> because the trend toward vertical integration in the shoe industry, when combined with Brown's avowed policy of forcing its own shoes upon its retail subsidiaries, may foreclose competition from a substantial share of the markets for men's, women's, and children's shoes, without producing any countervailing competitive, economic, or social advantages.

So here, we must conclude that the acquisition of Gentry by Consolidated has conferred upon the latter the power to foreclose competition from a substantial share of the markets for dehydrated onion

[10] It is for this reason that we reject respondent's argument that the decline in its share of the garlic market proves the ineffectiveness of reciprocity. We do not know that its share would not have fallen still farther, had it not been for the influence of reciprocal buying. This loss of sales fails to refute the likelihood that Consolidated's reciprocity power, which it has shown a willingness to exploit to the full, will not immunize a substantial segment of the garlic market from normal quality, price, and service competition.

[11] Respondent has suggested that reciprocity business gained by its acquisition of Gentry is offset by business Gentry has lost due to competitors of Consolidated not wishing to patronize one of its divisions. But this hardly establishes that the "vigor of competition" has been preserved. Instead it shows that the merger has lent additional rigidity to the market by establishing a class of customers immune to Gentry's sales efforts. The free play of competitive forces is thus further curbed.

and garlic, thereby jeopardizing the competitive opportunities of its small, relatively undiversified competitors and tending to lend further rigidity to an already heavily concentrated industry and to discourage the entry of new competitors, all "without producing any countervailing competitive, economic, or social advantages." [12]

VII

The final question concerns the appropriate relief to be ordered. The hearing examiner directed respondent to divest itself within six months of all assets obtained through acquisition of Gentry, together with subsequent additions thereto, in such a manner as to restore Gentry as a going concern in the production and sale of dehydrated onion, garlic, and other products. The examiner's order would prohibit distribution of the stock or assets of Gentry to any officer, director, stockholder, employee, or agent of Consolidated. Respondent objects (a) that there is no reason to prevent a "spin-off" of Gentry to existing shareholders of Consolidated, and (b) that the six-month time limit imposes an unreasonable burden. Significantly, respondent does not argue that divestiture, in whatever form, is not here, as it normally is, the proper remedy. That proposition we take to be conclusively established by *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, which held that divestiture, "that most drastic, but most effective, of antitrust remedies," is "peculiarly appropriate in cases of stock acquisitions which violate § 7." 366 U.S., at 326, 328.

In this case, divestiture is indeed peculiarly appropriate. As we have pointed out, a cease and desist order would prevent further overt effort by respondent to obtain business for Gentry through reciprocity, but it could not remove the attraction, implicit in the Consolidated-Gentry relationship, which is now well-known in the industry, for suppliers or prospective suppliers of Consolidated to purchase from Gentry solely or principally in the hope of maintaining or enhancing their sales position with Consolidated.

However, we find substance in both of respondent's contentions concerning the details of the order of divestiture which should be issued. Respondent points out that its stock is publicly held by

[12] *Cf., Reynolds Metals Co.* v. *Federal Trade Commission,* 309 F. 2d 223 [7 S. & D. 527] (D.C. Cir., Sept. 27, 1962):
"Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market for florist foil. The power of the 'deep pocket' or 'rich parent' for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition."

thousands of investors. Their simultaneous ownership of Gentry and Consolidated shares is not likely to have an adverse effect on competition. An order prohibiting transfer of stock in a new, independent, reconstituted Gentry corporation to officers, directors, executive employees, and major shareholders (*e.g.*, owners of more than 2% of the stock) of Consolidated might therefore suffice. Further, a six-month deadline for divestiture of Gentry's entire business may be unnecessarily abrupt. However, on these and other aspects of the proposed order we are without adequate information at this time to determine what would be the most appropriate and effective provisions to be included.

In addition, we are of the opinion that the hearing examiner's order is, in one important respect, inadequate and incomplete. Since respondent has admittedly engaged in a practice which we have found to be an unfair method of competition, protection of the public interest requires that it be specifically ordered to desist from any future resumption of that practice. Cases such as *Waugh Equipment Co.* and *Mechanical Manufacturing Co.*, Part IV, *supra*, show that anticompetitive reciprocity relationships between firms may be established not only through a clear-cut, parent-subsidiary connection but also through ownership or control of one company by important officials of another. For this reason, no relief will be adequate unless it prohibits Consolidated and Gentry from having common officers, directors, and executive employees and precludes stock ownership in each firm by officers, directors, and executive employees of the other.

Preparation of a sound and equitable order embodying these provisions requires that the matter be explored more fully by the Commission and the parties than has yet been done here. The controversy up to now has centered on the issue of violation. Now that it has been determined that Section 7 has been violated, we believe it would be useful and desirable to follow a procedure here analogous to that provided in Rule 4.22(c). Within twenty days after service of this decision, counsel supporting the complaint shall file with the Commission a proposed form of order appropriate to our decision, together with a supporting memorandum. Counsel for respondent may, within twenty days thereafter, file an alternative form of order, together with a supporting memorandum; and counsel supporting the complaint may, within ten days thereafter, file a statement in reply thereto. The Commission will, upon consideration of the materials submitted, enter its final order.

Commissioner Anderson dissented to the decision in this matter and Commissioner Higginbotham did not participate.

Findings of Fact; Conclusions; and Order Providing for the Submission of Proposals for Final Order

NOVEMBER 15, 1962

FINDINGS OF FACT

The Commission adopts findings "1" through "12" of the hearing examiner's initial decision as its own. The Commission's other findings of fact are set forth in the accompanying opinion.

CONCLUSIONS

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

2. Section 7 of the Clayton Act, as amended, prohibits any merger—horizontal, vertical, conglomerate, or otherwise—where the effect may be substantially to lessen competition or to tend to create a monopoly.

3. The effect of the acquisition of Gentry, Incorporated, by Consolidated Foods Corporation may be substantially to lessen competition in the domestic production and sale of dehydrated onion and garlic in violation of Section 7 of the Clayton Act, as amended.

ORDER PROVIDING FOR THE SUBMISSION OF PROPOSALS FOR FINAL ORDER

This case having been heard by the Commission upon respondent's appeal from the initial decision, and the Commission having determined that an appropriate divestiture and cease and desist order should be issued to conform with its decision as set forth in the accompanying opinion:

It is ordered, That counsel supporting the complaint shall, within twenty (20) days after service of this order, file with the Commission a proposed form of order appropriate to the decision, together with a supporting memorandum; that counsel for respondent may, within twenty (20) days after service of said proposed order and memorandum, file an alternative form of order, together with a supporting memorandum; and that counsel supporting the complaint may, within ten (10) days after service of said alternative order and memorandum, file a statement in reply thereto. The Commission will thereafter enter its final order.

Commissioner Anderson dissenting and Commissioner Higginbotham not participating.

MEMORANDUM ACCOMPANYING FINAL ORDER

MARCH 22, 1963

By the Commission:

On November 15, 1962, the Commission determined that respondent had violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18 (1958)), by acquiring the assets of Gentry, Incorporated. Adopting a procedure analogous to that described in Section 4.22(c) of the Commission's Rules of Practice, on the same date we entered an order providing for the submission by counsel on both sides of proposals concerning the form and substance of the final order to be entered.

There are no substantial differences in the proposed orders submitted by the parties. Both would allow respondent the alternatives of an outright sale of the business and assets of its Gentry Division or a "spin-off", whereby a new Gentry corporation would be formed and the stock in the new corporation distributed to existing shareholders of Consolidated. Because, for the reasons stated in our opinion, either plan of divestiture would result in reestablishing Gentry as a viable competitive entity, the Commission has determined to accept this alternative form of order of divestiture, and thus afford respondent a degree of flexibility in formulating a plan to divest itself of the illegally acquired assets.

The differences in the orders submitted by complaint counsel and counsel for the respondent are confined to the details of divestiture. The Commission has decided to adopt the form of order submitted by counsel for the respondent with certain modifications discussed below.

The order submitted by complaint counsel would allow respondent one year after the effective date of the order in which to complete divestiture. Counsel for respondent argue that this period should be extended to two years in order to allow respondent sufficient time for deciding which method of divestiture is most appropriate, in light of Consolidated's financial position at the time the order becomes effective, the trend of Gentry's sales and profits, and the relevant tax considerations. It is pointed out that Consolidated may wish to assess the possibility of an outright sale by approaching and negotiating with possible purchasers before resorting to a spin-off. Additionally, respondent notes that considerable time will be required to implement whichever plan is adopted.

On the basis of the facts now before the Commission, it is not clear that respondent will not be able to complete the necessary actions within one year. Accordingly, our order will require divestiture within one year after the date upon which it becomes effective. If divestiture should not be accomplished within that time, the Commission will then take such further action as may be necessary to effectuate the objectives of the order.

Respondent also contends that it cannot reasonably comply with a provision requiring submission within sixty days after the order becomes final of a plan for carrying out the provisions of this order. While it is certainly true that respondent cannot be expected to have completed plans for divestiture within that period, it is essential that respondent keep the Commission informed of its progress towards compliance at periodic intervals. The order will therefore require respondent to file such a progress report within sixty days after its effective date and periodically, every ninety days thereafter, until divestiture is finally effected.

It is agreed that, whether Gentry is sold or spun-off, certain limitations must be placed on the persons acquiring control of a divested Gentry so that separation will be real in fact as well as in form. It is agreed that no officer, director, employee or agent of respondent should be among the purchasers of Gentry in the event of a sale and that no officer, director or executive employee of respondent should be among the officers or shareholders of a new Gentry corporation in the event of a spin-off. There is some disagreement concerning the limitations that should be placed on respondent's shareholders.

In the case of an outright sale, complaint counsel would absolutely prohibit sale to any shareholder, no matter how small his holding. Respondent recommends that sale be permitted to a shareholder owning not more than two percent of its stock. The Commission does not believe that the absolute prohibition recommended by complaint counsel is necessary to insure complete separation and independence of Gentry from respondent. However, since an owner of two percent of respondent's stock would have an investment in the company of several million dollars and would undoubtedly be one of its largest and most influential stockholders, we are not inclined to accept respondent's alternative. Rather, we will prohibit sale of the Gentry Division in whole or in part to a holder of more than one percent of respondent's stock. In addition, we have added a provision prohibiting sale to any purchaser who is not approved in advance by the Commission. We have done so to insure that the purpose of the order of divestiture is not defeated by sale to a purchaser whose relationship to Gentry may also tend to lessen competition in the dehydrated onion and garlic industries.

In the event of a spin-off, complaint counsel would prohibit any of respondent's shareholders to serve as an officer, director or executive employee in the new Gentry corporation, but would allow stockholding in that corporation by persons owning no more than two percent of respondent's stock. Respondent recommends that the two-percent limit apply to both situations. Again, the Commission does not believe an absolute prohibition is necessary. We have, consequently, accepted respondent's proposal of allowing small holders of its stock to assume office in a new Gentry corporation as well as hold stock in that corporation but we have, for the reasons stated above, applied the exemption only to persons holding no more than one percent of respondent's stock.

The parties disagree as to whether a purchaser of the Gentry Division must be free of any of the proscribed relationships to respondent at the time of the sale or whether the order should merely require that any such relationship be severed within six months after the divestiture. The Commission has concluded that in the event of a sale of respondent's Gentry Division it is in the public interest for the separation of Gentry from Consolidated to be complete at the time of divestiture, rather than to permit joint management for any period thereafter. We have left undisturbed, however, the proposed provision which, in the event of a spin-off, allows holders of more than the allowable limit (one percent) of respondent's stock six months in which to reduce their holdings below that level or disassociate themselves from the new Gentry corporation.

In all other respects respondent's proposed order is accepted and, with the modifications indicated in this opinion, will be adopted as the final order of the Commission.

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

Final Order

MARCH 22, 1963

Pursuant to the Commission's order issued November 15, 1962, complaint counsel having filed a proposed form of order appropriate to carry out the Commission's decision, together with a supporting memorandum, and respondent having filed an alternative proposed form of order, together with supporting memorandum, and complaint counsel having filed a statement in reply thereto; and the Commission having determined that respondent's proposed form of order should be adopted with certain modifications described in the accompanying memorandum of the Commission:

I

It is ordered, That the respondent, Consolidated Foods Corporation, a corporation, and its officers, directors, agents, representatives and employees, within one (1) year from the date this order becomes final, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and good will acquired by Consolidated Foods Corporation as a result of the acquisition by Consolidated Foods Corporation of the assets of Gentry, Incorporated, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Gentry, Incorporated, so acquired, in such manner as to restore it as a going concern in the production and sale of dehydrated onion and garlic and other products in which said Gentry, Incorporated, was engaged at and immediately prior to the time of said acquisition by respondent Consolidated Foods Corporation.

II

It is further ordered, That by such divestiture none of the stocks, assets, rights or privileges, tangible or intangible, acquired or added by respondent, shall be sold or transferred, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls more than one (1) percent of the outstanding shares of common stock of Consolidated Foods Corporation, nor to anyone who is not approved as a purchaser in advance by the Federal Trade Commission.

III

It is further ordered, That if the respondent divests the assets, properties, rights and privileges, described in paragraph I of this order, to a new Gentry corporation, the stock of which is wholly owned by Consolidated Foods Corporation, and if respondent then distributes all of the stock in said wholly owned new Gentry corporation to the stockholders of Consolidated Foods Corporation, in proportion to their holdings of Consolidated Foods Corporation stock, then paragraph II of this order shall be inapplicable, and the following paragraphs IV and V shall take force and effect in its stead.

IV

No person who is an officer, director, or executive employee of Consolidated Foods Corporation, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of Consolidated Foods Corporation, shall be an officer, director or executive employee of the new Gentry corporation, or shall own or control, directly or indirectly, any stock of the new Gentry corporation.

V

Any person who must sell or dispose of a stock interest in Consolidated Foods Corporation or the new Gentry corporation in order to comply with paragraph IV of this order may do so within six (6) months after the date on which distribution of the stock of the new Gentry corporation is made to stockholders of Consolidated Foods Corporation.

VI

As used in this order, the word "person" shall include all members of his immediate family.

VII

It is further ordered, That respondent, Consolidated Foods Corporation, shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a written and detailed report of its plans and progress in carrying out the provisions of this order.

Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

IN THE MATTER OF

REVLON, INC., ET AL.

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

Docket 7175. Complaint, June 16, 1958—Decision, Mar. 22, 1963

Order requiring Revlon, Inc., three competing cosmetic companies and two manufacturers of lipstick containers, to cease conspiring to fix and maintain prices and conditions of sale of lipstick containers and refills, but excluding from such prohibition agreements independently arrived at between sellers of such products and their customers, intra-corporate agreements between officers or employees of a respondent's separate business or between a corporate respondent and its subsidiaries, and resale price maintenance contracts lawful under the McGuire Act.

COMPLAINT

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

Trade Commission, having reason to believe that the parties named in the caption and hereinafter referred to as respondents, have violated the provisions of Section 5 of the said Federal Trade Commission 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 Revlon, Inc., is a corporation, organized and existing under the laws of the State of Delaware with its principal office and place of business located at 745 Fifth Avenue, New York 22, New York.

Respondent The Eyelet Specialty Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at 50 State Street, Waterbury, Connecticut.

Respondent The Plume & Atwood Manufacturing Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at Thomaston, Connecticut.

Respondent The Risdon Manufacturing Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at Naugatuck, Connecticut.

Respondent Scovill Manufacturing Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at 99 Mill Street, Waterbury, Connecticut.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, are individuals trading as copartners under the firm name and style of Nethercutt Laboratories with their principal office and place of business located at 9130 Bellanca Avenue, Los Angeles 45, California.

Respondent Merle Norman Cosmetics, Inc., is a corporation, organized and existing under the laws of the State of Nevada with its principal office and place of business located at 9130 Bellanca Avenue, Los Angeles 45, California.

Respondent Helena Rubinstein, Inc., is a corporation, organized and existing under the laws of the State of New York with its principal office and place of business located at 655 Fifth Avenue, New York 22, New York.

PAR. 2. Respondent Revlon has been engaged for many years in the business of manufacturing and selling cosmetics, beauty aids and toilet preparations, referred to as cosmetic products. Said respondent is the successor to the business of Revlon Products Corporation, which was organized under the laws of the State of New York, with the respondent Revlon, Inc., being incorporated in 1955 in the State of Delaware and carrying on the business formerly conducted under the name of Revlon Products Corporation.

Respondents The Eyelet Specialty Company, The Plume & Atwood Manufacturing Company, The Risdon Manufacturing Company and Scovill Manufacturing Company are and have been severally engaged, in addition to other things, in the manufacture and sale of lipstick and other cosmetic containers. These four respondents are sometimes hereinafter referred to collectively as respondent "container manufacturers."

Respondents Jack B. Nethercutt and Dorothy Nethercutt, trading under the firm name and style of Nethercutt Laboratories, are individuals engaged as a partnership in the business of producing cosmetics for sale and distribution, through and under the name of Merle Norman Cosmetics, Inc. The said respondents Jack B. Nethercutt and Dorthy Nethercutt, trading under the firm name of Nethercutt Laboratories, are affiliated with respondent Merle Norman Cosmetics, Inc.

Respondent Merle Norman Cosmetics, Inc., is now and has been engaged in the business of the sale and distribution of cosmetics, beauty aids and toilet preparations, referred to as cosmetic products.

Respondent Helena Rubinstein, Inc., is now and has been engaged in the business of the manufacture, sale and distribution of cosmetics, beauty aids and toilet preparations, referred to as cosmetic products.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, trading as Nethercutt Laboratories, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., are sometimes hereinafter referred to collectively as respondent "licensees".

PAR. 3. Respondents Revlon, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they ship, or cause to be shipped, cosmetic products from their respective places of business to customers located in states other than the state of origin of shipment and there is now and has been a constant course and current of trade and commerce in such products throughout the United States.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, trading under the firm name and style Nethercutt Laboratories, are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act in that they produce cosmetic products for sale and distribution through respondent Merle Norman Cosmetics, Inc., and such products are shipped from the state of origin to customers located in states other than the state of origin of shipment and there is now and has been a constant course and current of trade and commerce in such products throughout the United States.

Respondents The Eyelet Specialty Company, The Plume & Atwood Manufacturing Company, The Risdon Manufacturing Company and Scovill Manufacturing Company are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they ship, or cause to be shipped, various products including lipstick containers from their respective places of business in the states where each is located to customers located in states other than the state of origin of shipment and there is now and has been a constant course and current of trade and commerce in such products throughout the United States.

PAR. 4. Respondents in the course and conduct of their said businesses are now, and have been in competition with other corporations, partnerships and individuals in the production, sale and distribution of lipstick containers and cosmetic products.

PAR. 5. In 1954 respondent Revlon acquired ownership of United States Letters Patent Numbers 2,565,346 and 2,609,092, sometimes called the Braselton patents and which purport to cover cosmetic applicators and cartridge-type lipstick containers.

Since in or about the latter part of 1955 or early 1956, respondent Revlon and the respondent container manufacturers have entered into a combination, conspiracy, understandings and agreements to restrain trade and eliminate competition in the production, sale and distribution of refillable lipstick containers or cases and the nonpatented cosmetic lipstick paste.

PAR. 6. Pursuant to the combination, conspiracy, understandings, and agreements referred to in Paragraph 5 hereof, respondent Revlon and the respondent container manufacturers have done, among others, the following acts or things:

(1) They have entered into agreements whereby each of the container manufacturers has been appointed an "agent-manufacturer" of respondent Revlon and is thereby authorized to manufacture refillable lipstick containers or cases and refills purportedly in accordance with the claims of the aforesaid Braselton patents held by respondent Revlon.

(2) They have discussed and negotiated among themselves and with others not parties hereto and have agreed upon the provisions of the written agreements and have made suggestions which have been adopted into such agreements, which were executed in 1956 as formal agreements by each of the respondent container manufacturers and respondent Revlon.

(3) They have agreed that the respondent container manufacturers would issue nonexclusive licenses to cosmetic manufacturers for the

sale of refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste, purportedly under the claims of the licensed patents.

(4) They have agreed upon the prices at which cosmetic manufacturers would resell the refillable lipstick cases and refills, including the nonpatented cosmetic lipstick paste, such being applicable to sales to consumers as well as to retail dealers.

(5) They have agreed upon the terms of royalty to be paid by the cosmetic manufacturers as licensees to the container manufacturers for payment over to respondent Revlon, basing such payments upon the retail selling price of the refillable lipstick cases and the nonpatented cosmetic lipstick paste inserted therein.

(6) They have agreed upon the prices at which not only the refillable lipstick containers or cases and refills have been resold, but also, the prices at which the nonpatented cosmetic lipstick paste has been resold.

PAR. 7. In furtherance of the combination, conspiracy, understandings, and agreements referred to in Paragraph 5 herein, respondent licensees together with respondent Revlon and respondent container manufacturers have agreed and conspired to sell and distribute refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste, and to pay or collect royalty thereon, and to resell such products at prices fixed and agreed upon and adhered to.

PAR. 8. Pursuant to the combination, conspiracy, understandings, and agreements referred to in Paragraph 7 hereof, said respondents have done, among others, the following acts or things:

(1) They have agreed to execute license agreements whereby the respondent container mannufacturers would grant nonexclusive licenses to cosmetic manufacturers for the production of refillable lipstick containers or cases on order of said cosmetic manufacturers for completion by the addition of the nonpatented lipstick paste and sale by said manufacturers under the terms of the license agreement.

(2) They have agreed to the resale of such products, including the nonpatented cosmetic lipstick paste, at fixed minimum resale prices and have agreed upon and adhered to such prices and they have agreed that all including respondent Revlon would be bound to sell at the prices fixed and established.

(3) They have agreed that the payment of royalty should be based upon the retail selling price of the refillable lipstick containers or cases and refills plus the nonpatented cosmetic lipstick paste, with the cosmetic manufacturers paying royalty to the container manufacturers on behalf of respondent Revlon.

(4) Formal license agreements were executed in 1956 between two

of respondent container manufacturers, namely respondents Risdon and Scovill and respondent licensees, whereby the latter were purported to have been granted nonexclusive licenses to sell the refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste, at minimum resale prices fixed and agreed upon and adhered to.

PAR. 9. Respondent Revlon as a cosmetic manufacturer and the licensee cosmetic manufacturers named as respondents herein, together with the container manufacturers also named as respondents herein, have all combined to enter into and carry out the conspiracy, understandings, and agreements as aforesaid to eliminate competition in the manufacture, sale and distribution of refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste. By means of the agreements between and among the various respondents and also by means of the various patents heretofore referred to, said respondents have brought about and participated in a combination and conspiracy to fix minimum resale prices, and to enhance prices, and to otherwise restrain trade in the production, sale and distribution of refillable lipstick cases or containers and refills, including the nonpatented cosmetic lipstick paste.

PAR. 10. The acts and practices of said respondents, as herein alleged, have been to the prejudice of the public and to competitors of said respondents, have a dangerous tendency to hinder and prevent, and have actually hindered and prevented, competition in the sale in commerce of refillable lipstick containers or cases and refills, including the cosmetic lipstick paste, within the meaning of the Federal Trade Commission Act, and constitute unfair methods of competition in commerce, or unfair or deceptive acts or practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lewis F. Depro for the Commission.

Mr. Philip Blumenthal, of New York, N.Y., and *Davies, Richberg, Tydings, Landa & Duff*, by *Mr. James T. Welch*, of Washington, D.C., for respondent Revlon, Inc.;

Gager & Henry, by *Mr. William W. Gager*, of Waterbury, Conn., for respondent The Eyelet Specialty Company;

Shepherd, Murtha & Merritt, by *Mr. Henry L. Shepherd*, of Hartford, Conn., for respondent The Plume & Atwood Manufacturing Company;

Chadbourne, Park, Whiteside & Wolff, by *Mr. Edward R. Neaher*, of New York, N.Y., for respondent The Risdon Manufacturing Company;

Mr. Heminway Merriman, of Waterbury, Conn., for respondents Scovill Manufacturing Company, Nethercutt Laboratories, and Merle Norman Cosmetics, Inc.; and

Sherman & Goldring, by *Mr. Rosalind Kramer* and *Mr. Albert M. Kaufman*, for respondent Helena Rubinstein, Inc.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

FEBRUARY 28, 1962

This proceeding involves the charge that all of the respondents have violated the provisions of § 5 of the Federal Trade Commission Act by entering "into a combination, conspiracy, understandings and agreements to restrain trade and eliminate competition in the production, sale and distribution of certain patented refillable lipstick containers or cases, and the nonpatented cosmetic lipstick paste" used therein, by agreeing upon the retail prices at which such commodities were to be sold to consumers and to retail dealers, and also that respondents have participated in carrying out such conspiracy. Respondents all deny such charge; and some claim, in substance, that the individual agreements which furnished the alleged basis for the charge were substantially modified about May 1957, and were terminated about October 1957, long prior to the issuance of the complaint; that the agreements and practices complained of have been discontinued and abandoned; and that they will not be resumed.

In this initial decision it is determined that respondents did violate § 5 of the Federal Trade Commission Act by agreeing upon fixed and unanimous retail prices for cartridge-type lipstick containers and refills therefor. But it is found that they have discontinued and abandoned the practices complained of to such an extent, and under such conditions, that there is no reasonable likelihood that further such violation will occur, and the complaint is therefore dismissed without prejudice as to all respondents who still engage in the manufacture or sale of lipstick containers and refills therefor. The complaint is also necessarily dismissed as to those respondent corporations which either have been dissolved or have withdrawn entirely and permanently from such business.

The complaint herein was issued June 16, 1958, and after service upon each of the respondents on or after June 30, 1958, in due course they filed their several separate answers during September 1958. On December 18, 1958, respondent The Eyelet Specialty Company, hereinafter usually referred to as Eyelet, filed its motion to dismiss the complaint as to it upon the basis of its corporate dissolution. Shortly after the complaint was issued, counsel for all parties, after and pursuant to tentative agreement reached at an informal conference with the hearing examiner, began negotiating a stipulation of facts and additional testimony, which document was at length finally executed on August 1, 1960. This document and all the exhibits attached thereto, designated "Appendix", were received in evidence as Commission's Exhibit 1 on September 7, 1960 (R. 10). Since another exhibit also bears identification as Exhibit 1, for clarity this document itself will be referred to herein as the stipulation.

Hearings had been deferred pending the negotiation and execution of such stipulation. Pursuant to a provision of said stipulation that counsel might adduce testimony or other evidence not covered thereby, counsel supporting the complaint presented additional evidence at hearings held in New York, N.Y., September 7 and 8, 1960, and in Washington, D.C., on September 9, 1960. He thereupon rested his case-in-chief. All respondents other than Eyelet then filed their respective motions to dismiss the complaint, with supporting briefs. Eyelet also supplemented its earlier motion to dismiss with a supporting brief. Counsel supporting the complaint filed his answer opposing all the motions to dismiss other than that of Eyelet, and filed his brief in support of such answer. Requested oral argument by all counsel except Eyelet's was delayed by reason of fully warranting circumstances, but was finally heard on September 5, 1961, whereupon respondents waived their privilege of presenting further evidence, as reserved in said stipulation, and the reception of evidence was thereupon closed. The stipulation provided, in effect, that the facts presented and the legal principles enunciated in the numerous decisions cited in the respective briefs of counsel might be considered as proposed findings and conclusions; hence no others were submitted. Therefore, upon careful consideration of the facts and the arguments and briefs of counsel, and thorough study of the cases cited, as well as other pertinent decisions, said briefs have been taken as formal proposals of the respective parties. All proposed findings and conclusions, presented in such briefs, which have been accepted are herein set forth, either verbatim or in substance; and all proposals not so incorporated herein are hereby rejected.

The evidence in this proceeding consists of the said "Appendix", more specifically entitled "Stipulation As To The Facts" and "Stipulation As To Additional Testimony", together with the attached photostatic copies and other documents described and referred to as exhibits therein, a subsequent stipulation on the record (R. 8–10), referring to further documents and physical exhibits, and the testimony of eight witnesses, together with the exhibits received in evidence during the taking of their testimony. While not formally offered and received in evidence, the affidavit of Philip Blumenthal, secretary and counsel for respondent Revlon, attached to said respondent's motion to dismiss complaint, the counter-affidavit of the Commission's Attorney-Examiner, Ernest G. Barnes, filed with the brief of counsel supporting the complaint, and the several affidavits and statements on behalf of other parties, relating to abandonment, are also all considered, with other relevant evidence, in accordance with the Commission's administrative practice relating to any issue of abandonment. There is no dispute as to the basic facts, but only as to the inferences drawn therefrom, and the ultimate conclusions to be reached.

In finding the facts in this proceeding upon the whole record, as required by law, the hearing examiner has given full, careful and impartial consideration to all the reliable, probative and substantial evidence and to all the fair and reasonable inferences to be drawn therefrom. From such consideration of the whole record, and from his personal observation of the conduct and demeanor of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACT

Respondent Revlon, Inc., hereinafter referred to as Revlon, is a corporation organized in 1955, and still existing, under the laws of the State of Delaware, with its principal office and place of business now located at 666 Fifth Avenue, New York 22, New York. It is, and at all times material hereto has been, engaged in the business of manufacturing and selling cosmetics and cosmetic products. Upon its incorporation, it succeeded to such business, which had theretofore been carried on by its predecessor, Revlon Products Corporation, which had been organized under the laws of the State of New York.

Respondent The Eyelet Specialty Company, herein referred to as Eyelet, at the time the complaint was issued and long prior thereto, was a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at 50 State Street, Waterbury, Connecticut. On December 11, 1957, however, its stockholders had instituted appropriate legal action to liquidate the corporation, which program was finally completed and the corporation dissolved on November 22, 1958. Eyelet, for over 20 years, had been engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics. Upon its liquidation all of its operations ceased, and will not be resumed in any manner. Its motion for dismissal of the complaint as to it is therefore hereinafter granted, and counsel supporting the complaint and all counsel representing other respondents herein have clearly stated upon the record that they have no objection to such dismissal as to respondent Eyelet. In the subsequent recitation of the facts out of which this proceeding arose, however, the actions of respondent Eyelet relating to such facts are stated for clarity and completeness.

Respondent The Plume & Atwood Manufacturing Company, hereinafter referred to as Plume & Atwood, is, and at all times material hereto was, a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at Thomaston, Connecticut. For some years prior to 1956 this respondent was engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics. On May 25, 1959, it sold its Fabricating Division to another corporation, Landers, Frary & Clark, a Connecticut corporation located in New Britain, in that State, covenanting against ever resuming such business, which included its manufacture and sale of cosmetic containers. Its motion for dismissal of the complaint, while opposed by counsel supporting the complaint, is also granted.

Respondent The Risdon Manufacturing Company, hereinafter referred to as Risdon, is now and at all times material hereto has been a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at Naugatuck, Connecticut. This respondent is now, and has been for more than 25 years, engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics.

Respondent Scovill Manufacturing Company, hereinafter referred to as Scovill, is now and at all times material hereto has been a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at 99 Mill Street, Waterbury, Connecticut. This respondent is now, and for over 40 years has been, engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, hereinafter referred to as Nethercutt, are now, and at all times material hereto have been, individuals trading as copartners under the firm name and style of Nethercutt Laboratories, with their principal office and place of business located at 9130 Bellanca Avenue, Los Angeles 45, California. These respondents, at all times material hereto, were and still are engaged in the business of manufacturing and selling cosmetics and cosmetic products. Respondent Merle Norman Cosmetics, Inc., hereinafter referred to as Norman, was at all times material hereto, and still is, a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal office and place of business also located at 9130 Bellanca Avenue, Los Angeles 45, California. Until November 8, 1957, respondent Jack Nethercutt was a director of Norman, and is related to

Merle Norman, one of the principals of respondent Norman. But neither of the respondent partners Nethercutt, who are husband and wife, is affiliated presently with respondent Norman through stock ownership or membership on Norman's board of directors, although located in the same building as respondent Norman. Respondents Nethercutt purchase lipstick containers from container manufacturers, fill them with lipstick paste, and then sell such filled containers to respondent Norman, which was at all times material hereto, and still is, a distributor of such completed lipsticks to various retailers. Since the only connection of these two respondents with this case has been through the joint license granted to them by Scovill, they will now usually be referred to as Nethercutt and Norman.

Respondent Helena Rubinstein, Inc., hereinafter referred to as Rubinstein, was at all times material hereto, and still is, a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 655 Fifth Avenue, New York 22, New York. This respondent was at all times material hereto, and still is, engaged in the business of manufacturing and selling cosmetics aund cosmetic products. It does not manufacture lipstick containers, but buys them from container manufacturers, fills them with lipstick paste, and sells them on the market. This respondent's original connection with the issues involved in this proceeding was by and through the activities of its subsidiary, H. R. Laboratories, Inc., a corporation which is not a respondent herein.

In the course and conduct of their respective businesses, all respondents have, at various times material hereto, been in competition in interstate commerce with other corporations, partnerships and individuals, and in some instances with each other. The products here involved have been likewise sold in interstate commerce at times material hereto, and the transactions whereon this proceeding is based occurred in interstate commerce. All respondents, with the exception of Eyelet, are now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. But also, as elsewhere herein more specificially pointed out, Plume & Atwood, since May 29, 1959, has no longer manufactured or engaged in commerce with respect to the products here involved.

In addition to the named respondents, another corporation not made a respondent herein also took an active part in some of the transactions involved herein: Bridgeport Metal Goods Manufacturing Company, hereinafter referred to as Bridgeport, of Bridgeport, Connecticut. This concern was also engaged, among other things, in the manufacture and sale of containers and refill cartridges for lipsticks and other cosmetics. This company and the respondents Eyelet, Plume &

Atwood, Risdon and Scovill comprised the major producers of such products in the United States during 1956 and prior thereto, although vague reference is briefly made to several small companies then so engaged. The connection of Bridgeport with such transactions is stated more in detail hereinafter. None of these five major producers manufactured or sold lipstick paste.

The record is replete with statements and documents which pertain either to a number of preliminary acts which preceded the execution of the several contracts in 1956 which furnish the basis for this proceeding, or to the subsequent performance of such contracts or other activities of the participants allegedly done pursuant to such contracts. For the purpose of determining the issue of the alleged violation of § 5 of the Federal Trade Commission Act, however, some of these prior and subsequent activities, while relevant, are not material. Some of such activities, however, are both relevant and material to the question of abandonment, and are therefore hereinafter discussed in connection therewith.

In 1954 Revlon acquired ownership of United States Letters Patent No. 2,565,346, issued August 21, 1951, and No. 2,609,092, issued September 2, 1952, from the inventor of the devices so patented, one C. H. Braselton. For brevity these patents have been referred to in the record, and are now referred to herein, as the Braselton patents. They are shown in the record as Exhibits 1 and 2 of the appendix to the stipulation. The various documents attached to and referred to in the stipulation of August 1, 1960, are referred to herein simply as exhibits by their respective numbers, for brevity and to distinguish them from the duplicitous numbering of Commission's Exhibits 2 to 7, inclusive, and 35-A through -D, which were received at the hearings.

These Braselton patents, in substance, relate to cartridge-type lipstick containers having a particular combination of structural elements whereby the refill or cartridge container of lipstick paste, when placed in such device, rests upon a base which turns on a swivel. This swivel can raise or lower the container of the paste and its contents by the user turning the outside base of the case. As stated in the patents, this new type of retractable lipstick container has a number of advantages over the conventional type of such containers, therefore used, including avoidance of soiling the case or the fingers of the user or objects which might otherwise come into contact with the lipstick paste; improved appearance of the case or container; and the convenience and versatility of its use by reason of the replaceable cartridge which contains the lipstick paste or other cosmetic material. The patents themselves, and the advantages of using the device, are not in question in this proceeding, and the record amply attests the very substantial popularity of the device and its immediate and growing success in the market since its introduction to the public. The refill cartridges, when sold to the public, include the lipstick paste, which is made and inserted by the cosmetic manufacturers and not by the container manufacturers. Such refill cartridges, containing paste, can be, and often are, sold and used as complete lipsticks, without the external containers or cases.

In 1955, following its acquisition of said patents, Revlon began to have made for itself the cartridge-type lipstick containers and refills therefor under said patents. Since about 1956 it has gradually tended to confine its lipstick business to the cartridge-type lipstick containers and refills therefor, under the trade name of "Futurama." Apparently more fully realizing the economic value of the patents it had acquired, Revlon also began, late in 1955, to meet separately and individually, but never together, with the five above-named major manufacturers of lipstick containers. Their various discussions concerned the issuing of licenses under the Braselton patents, and the licensing of cosmetic manufacturers by such container manufacturers acting as Revlon's agents; the method of calculating royalties payable to Revlon thereunder; and the marketing of the cartridge-type lipsticks. Revlon met separately with Scovill at various times late in 1955, and also met separately at other times in 1955, and during the first 7 months of 1956, with Eyelet, Plume & Atwood, Risdon, and Bridgeport.

Following and as a result of the said several meetings, separate nonexclusive license agreements under the Braselton patents were entered into during the forepart of 1956 between Revlon and each of these five major container manufacturers. Revlon contracted with Risdon for the manufacture of Revlon's own cartridge-type lipstick containers. And Revlon also authorized Risdon to manufacture such products for the cosmetic manufacturers, which was done by a nonexclusive agreement finally executed on February 15, 1956. The text of this agreement, Exhibit 13, except for the manufacturer's name and the date, is identical with that of the other 1956 nonexclusive agreements made, respectively, with the remaining four major container manufacturers. The agreements with Risdon and Scovill were amended by riders as to the arbitration clause to meet certain objections thereto by Scovill, but this amendment was typed into the body of the other agreements, which were apparently prepared by Revlon at a later date than those of Risdon and Scovill (see Exhibits 12 to 16, inclusive). By these five separate nonexclusive agreements, each of the container manufacturers was authorized to issue nonexclusive licenses to any of Revlon's competitors in the cosmetic-manufacturing business, for their respective use and sale of said patented device, with certain restrictions. Revlon particularly reserved to itself, as was its legal right, certain specific sizes and types of the containers, to protect its individuality in the sale of its own products, and to prevent the interchange of such sizes and types by any of its competitors. Revlon also required that the containers be of high quality, for the stated purpose of preserving the value of the licensed patents. The agreements with Bridgeport and Scovill were finally executed on February 24, 1956; the agreement with Eyelet on March 5, 1956; and that with Plume & Atwood on July 18, 1956. Each of the five manufacturers knew that the others had the same type of agreement with Revlon, and none of them expressed any interest in anything in the proposed agreements before their execution, except matters relating either to the validity of the patents, to how royalties might be computed, or to the arbitration clause.

After some futile neogtiations with Bridgeport for a license to use and sell the lipstick containers and refills under the Braselton patents, respondent Rubinstein, through its subsidiary, H. R. Laboratories, Inc., finally received such a nonexclusive license from Risdon on December 27, 1956. This agreement is Exhibit 34, which was confirmed and interpreted by letter, Exhibit 35. Scovill already had issued a nonexclusive license, Exhibit 33, to Nethercutt and Norman, jointly, on June 22, 1956. No other licenses under said patents were issued to any other cosmetic manufacturers by Risdon, Scovill or any of the other three container manufacturers under their said respective agreements with Revlon executed in 1956. And there is no evidence that Revlon ever met with Rubinstein, Nethercutt and Norman, or any of Revlon's competitors in the business of manufacturing cosmetics.

The conspiracy issue in this case involves primarily minimum retail price provisions of the 1956 agreements between Revlon and the five container manufacturers, and the 1956 licenses granted by the two container manufacturers, Risdon and Scovill, respectively, to Rubinstein and to Nethercutt and Norman. All such agreements and licenses expressly provide for the minimum prices (less each licensee's normal discounts to its customers) whereat the lipstick cases and cartridge refills therefor were to be resold to the public. The royalties to Revlon fixed in the agreements with the five container manufacturers, who were designated as "agents" of the principal, Revlon, were based (in paragraph 1 of each of said agreements) upon scales of various retail prices of the cases with the refill containers. Paragraph 3 of each of the agreements set forth specifically certain minimum-price-fixing provisions, as follows:

In order that the value of the licensed patents shall not be destroyed or depreciated by low grade articles made thereunder and to give commensurate protection to both Principal and Licensees, the licensed articles are required to be of high quality. Accordingly, to assure the foregoing, the minimum prices of the licensed articles sold by each Licensee to its customers, less however Licensee's normal discount to such customers, shall be as follows:

Lipstick case with refill	$1.75
Lipstick case without refill	$1.25
Refill	$ .90

Provided, however, that with respect to the hour-glass shaped case, which involves special skills and increased manufacturing costs, the foregoing minimum prices shall be as follows:

Lipstick case with refill	$3.00
Lipstick case without refill	$2.50.

In the license issued June 22, 1956, by Scovill to Nethercutt and Norman jointly, and also in the license issued by Risdon on December 27, 1956, to Rubinstein, Paragraph 1 is materially but a copy of Paragraph 3 of the agreements between Revlon and each of the five container manufacturers hereinabove quoted verbatim. In each of these two licenses Scovill and Risdon, respectively, were referred to as "Agent-Manufacturer", and Nethercutt and Norman, and Rubinstein, respectively, were referred to as "Licensee". Revlon was an unnamed principal in each of said licenses, being referred to therein merely as the "Principal". It is clear from the record and from inferences fairly drawn therefrom, however, that Nethercutt and Norman, and Rubinstein, knew that their competitor Revlon was the owner of the Braselton patents, specifically identified by their official patent numbers in each of the said licenses, and was the "Principal" referred to in its license. All respondents knew with whom they were dealing in the several separate transactions leading up to the execution of said agreements and licenses. All the container manufacturers definitely knew that each of their four major competitors was also getting a nonexclusive agreement with Revlon. Nethercutt and Norman, and Rubinstein, it must be inferred, were experienced concerns in the cosmetic field in dealing with various manufacturers of containers for their products; and as such, must have known what container manufacturers, other than their own suppliers, also had agreements with Revlon.

There is no substantial dispute upon the law governing this conspiracy phase of the case. All respondents have failed even to discuss the law of conspiracy in its application to the facts, and Revlon, speaking for all respondents by reason of their express or substantial adoption of Revlon's presentation of the case, frankly states, "[We] decline to argue the legality or illegality of the inclusion of such provision [fixing minimum retail prices] in the agreements. The question is moot. * * *". The basic factual contention of respondents made directly on this phase of the case is the claim that they never met or corresponded all together as a group, but each dealt only with the other party to its own specific agreement or license.

Revlon's counsel and secretary, Blumenthal, originally contended, on May 22, 1957, in a conference with Barnes, the Commission's attorney-examiner, in Revlon's office, that it had been his opinion, based on an examination of the decision in the *General Electric* case [*U.S.* v. *General Electric Co.* (1926), 272 U.S. 476], that Revlon had a right to control the minimum resale price of the patented products in question, in order to assure that the lipstick containers would be of high quality. He also told Barnes that Revlon's officials, as a matter of business judgment, had also been considering the advisability of eliminating all provisions of that character from its said license agreements with the container manufacturers, and also from the said licenses issued by such manufacturers to their customers, the cosmetic manufacturers. Blumenthal and Barnes only disagree upon whether Revlon's officials had already decided to eliminate the price-fixing provisions. The contention that the price-fixing provisions are legal is not presented by respondents in their briefs and arguments, doubtless because further study of the *General Electric* decision itself, and many later decisions such as *U.S.* v. *Univis Lens Co., Inc.* (1942), 316 U.S. 241, 247–252, and *U.S.* v. *Masonite Corporation, et al.* (1942), 316 U.S. 265, 274–283, has convinced all respondents' counsel herein that since Revlon dealt directly with independent manufacturers and indirectly through them with Revlon's competitors in the cosmetic field by licensing the use of the patented products by others, with certain reservations, Revlon could not legally extend its patent rights by further controlling the prices at which its patented lipstick containers were sold or were to be sold to the consuming public by Revlon's competitors.

Counsel supporting the complaint has correctly cited and quoted from many controlling judicial decisions which establish beyond any question that minimum-price-fixing agreements such as those involved here are contrary to both the Sherman Act and the Federal Trade Commission Act, and are illegal *per se;* and that simultaneous joint action or express agreement on the part of all those charged as conspirators is not essential to establish a conspiracy if each of those so charged enters separately into a price-fixing arrangement, even without direct dealings with all of the others and at different times, which arrangement, if carried out, is sufficient to restrain commerce. It serves no useful purpose to analyze herein any of the multitudinous cases supporting these undisputed basic legal principles applicable to this phase of the case.

In the present proceeding we have definite written agreements and licenses thereunder which expressly fix minimum retail prices, tying all other respondents in with Revlon as the principal. Such express written agreements are rare indeed, and no better *per se* case could be established. It is deemed unnecessary to discuss further the other pre-agreement or post-agreement facts to determine that all respondents, by reason of the agreements and licenses alone, have violated § 5 of the Federal Trade Commission Act, as charged in the complaint.

The issue of abandonment of the practices complained of is now considered. This issue has been thoroughly covered in brief and argument by counsel for all the parties. It serves no useful purpose to analyze herein the decisions in numerous abandonment cases, *pro* and *con*, cited, quoted from and fully discussed by counsel, as the basic governing principles of law on the subject are clear, and each case, of course, must be decided upon its own particular merits. The controlling principles to be deduced from the many leading cases may be briefly stated:

The propriety of issuing a complaint or an order in any proceeding depends upon the existence of a specific and substantial public interest. *FTC* v. *Klesner* (1929), 280 U.S. 19, 28–30 [1 S. & D. 1166]; *FTC* v. *Raladam Co.* (1931), 283 U.S. 643, 648–649 [2 S. & D. 116]; *FTC* v. *Royal Milling Co., et al.* (1933), 288 U.S. 212, 216 [2 S. & D. 217]; and *FTC* v. *National Lead Co.* (1957), 352 U.S. 419, 428 [6 S. & D. 193]. While the Commission exercises broad discretion in the issuance of complaints, whenever in the course of the proceeding the facts show that the proceeding is not in the public interest, the complaint should be dismissed. *FTC* v. *Klesner, supra*, 283 U.S. at pages 28–30. Several fairly recent orders of the Commission clearly and succinctly state the general rules under which any issue of abandonment shall be determined, and cite many of the leading decisions supporting them. See, for example, *Ward Baking Co.*, Docket 6833 (1958), 54 FTC 1919, and *Sheffield Merchandise, Inc., et al.*, Docket 6627 (1958), 55 FTC 2027. The Commission's broad discretion must be a sound, reasoned discretion, based upon the facts and circumstances of record. The proceeding does not become moot merely by reason of the discontinuance of a practice found by the Commission to constitute a violation of law. When discontinuance by respondents only reluctantly follows action by the Commission, dismissal is rarely warranted. Dismissal on the ground of abandonment should not be granted unless there is a clear showing that, in the interest of the public, unusual circumstances require it. But when the practice has been voluntarily and surely stopped by the offender, so that the purpose of the proceeding has already been accomplished, no cease-and-desist order should issue;

and dismissal should certainly be granted when the practice has been long abandoned, and the circumstances which gave rise to such practice have so changed as to render a resumption thereof highly unlikely.

In the proceeding at bar there has been such a clear showing of unusual circumstances culminating in absolute and early abandonment of the price-fixing provisions in the 1956 agreements and licenses, which generated and were the gist of the Commission's complaint, and which provisions have hereinabove been found to have constituted, *per se*, a price-fixing conspiracy violative of § 5 of the Federal Trade Commission Act. The attitude of respondents, and whether the practice has been actually stopped and, in all reasonable likelihood, will not be renewed by respondents, are the necessary considerations here.

It is conceded by all parties that Revlon is the central and controlling figure, by reason of whose activities this case orginated. It owned the Braselton patents upon which the agreements and licenses in question were based. Had Revlon not desired to profit, in addition to its own sales, from its ownership of said patents by making the new type of lipstick container and refill covered thereby available to others in the field of cosmetic manufacture and sale, it could well have kept those devices entirely to itself, and sold them to the consumer solely through its own distributors during the life of the Braselton patents. Its business motive of increasing its profits by so offering the patented devices for use by its competitors was perfectly legal, except for its incorporation into its dealings of the far-reaching and unlawful price-fixing clauses in the said several 1956 agreements and licenses.

It is contended in substance by counsel supporting the complaint that Revlon, and the other respondents as well, did not show good faith, and lacked any intent to abide by the law in the negotiation of such agreements and licenses and in related conduct, which facts negate any good faith on their part now. Certainly, as far as Revlon is concerned, any contention that its officials ever believed the inclusion of the price-fixing provisions in its said contracts was legal, under any rational interpretation of the decision in *U.S.* v. *General Electric Co.*, *supra*, is untenable. And all of the negotiations prior to the execution of the respective agreements with the container manufacturers, insofar as recorded, disclose that no question as to the legality of such price-fixing provisions was ever raised, either verbally or in writing, by any of the manufacturers or by their licensees. Various revision of the original agreements resulted from a number of suggested changes proposed by Scovill, before the final draft of the agreement was approved after some 3 months of bargaining. Scovill wanted an exclusive agreement, which Revlon would not grant. But Scovill's only references to prices were that the prices at which the products were to sell at retail should be known in advance, and that royalties should be included in the sales prices, a suggestion not finally adopted. Apparently the other four container manufacturers raised no material objections to the proposed agreements, but simply signed them. It is found that none of such container manufacturers were at all concerned with the legality or illegality of the price-fixing provisions. As for the respondents Rubinstein and Nethercutt and Norman, neither of them objected to such price-fixing provisions prior to the execution of their respective licenses.

But the 1956 agreements and licenses did not prove to be successful. During the remainder of the year of 1956, following the execution of the said several agreements and licenses, and during early 1957, the business thereby obtained was far from monumental, and apparently was a cause of great dissatisfaction and disappointment to all concerned. Scovill had procured no such business at all except a negligible amount from the comparatively small business of respondents Nethercutt and Norman, its sole licensees under the joint license it had issued to them on June 22, 1956. This amounted to a total volume of only slightly over $30,000 in the 11-month period from August 1, 1956, to June 30, 1957. This gave Revlon a total, from such licenses, of only $1,724.07 in royalties. Nethercutt and Norman's total sales of the cartridge-type lipstick containers and refills in 1956 were only about $60,000, and were slipping. They only amounted to $47,000 in 1957 and $38,000 in 1958, while apparently these licensees not only maintained but substantially increased their business volume in the older, nonpatented type of lipstick containers. Scovill noted in its incipiency this decline in business and its own inability to interest other cosmetic manufacturers in taking such licenses, and therefore, after some correspondence setting forth complaints with respect to Revlon's selling prices (Exhibits 20–21), Scovill conferred with Revlon's executives on October 2, 1956. It is to be observed that at this time Rubinstein had not yet received its license from Risdon, and no licenses at all had been issued during this period by any of the other three container manufacturers, despite their efforts to obtain licenses.

At this interesting meeting on October 2, 1956, held in Revlon's office in New York between representatives of Revlon and of Scovill, it was urged by Scovill that the negotiation of new agreements was essential, since Scovill was unable to interest cosmetic houses in licenses authorizing them to market the Revlon patented cartridge-type lipstick containers and refills therefor, because, among other things, of the minimum retail resale price provisions of such agreements. This condition of things, as stipulated by the parties, was confirmed by the testimony of the witness William H. Harris, called by counsel supporting the complaint at the hearing held in New York on September 7, 1960. Harris was Scovill's product manager of its cosmetic container division, and one of Scovill's two representatives at the October 2, 1956, meeting with Revlon. He also had carried on the subsequent correspondence with Revlon (Exhibits 22 and 25), in which Scovill continued to object to several matters relating to said agreement, among them the difficulty of negotiating with prospective customers because, despite its agreement to be bound with the others by the price-fixing clause, Relvon, on short notice, could act unilaterally to reduce its own minimum prices, leaving inadequate time to Scovill and its licensees and prospective licensees for any readjustment of their costs and prices, particularly the time and expense involved in retooling. On October 5, 1956, after the said conference, Harris, by letter to Revlon, again strongly pressed for the execution of new agreements, proposing to delete therefrom any type of control over retail prices, as well as other matters (Exhibit 22).

On November 15, 1956, Blumenthal reported to Relvon that both Scovill and Bridgeport had claimed they could have gotten business, except for the price restrictions in the contract and Revlon's own change of prices, and urged, among other things, "the elimination of the minimum retail prices" (Revlon interoffice memo, Exhibit 23). Harris of Scovill credibly testified, in response to inquiry from counsel supporting the complaint at the said hearing of September 7, 1960, regarding this correspondence (R. 62–63):

> Well, I think this correspondence pretty well explains what the situation was. If you want me to summarize it, it amounted to this: when we negotiated with any potential customer, there is a relationship between what they can afford to pay for a cosmetic container, a lipstick container, and what they can retail it for ultimately. In other words, they have to accumulate their costs and that determines what they can sell it at. Now, with an agreement which said that such and such type containers were to be sold not below certain minimum retail prices, they might negotiate with us for a particular type of container which would cost "X" number of cents each. If in the meantime Revlon, who were the licensing company, the owners of the patent, decided, without saying anything, as they did, that instead of having a certain minimum they were going to come out with one at less than that price, at retail, it meant that our customers might be three-quarters of the way through a program involving a case that we were going to sell them at such and such a price, suddenly to find that the Revlon Company was on the market with one at a price lower than they could then afford to sell the one they had expected to sell at a higher price. That was an insurmountable objection, one of the insurmountable objections on getting anybody to buy lipstick containers from us when that first license agreement existed.

This witness remarked that Revlon had actually reduced its own minimum retail prices without notice. This was one of the reasons

Rubinstein's subsidiary, H. R. Laboratories, Inc., had held up signing a license (Letter, Exhibit 28, dated May 2, 1956). Bridgeport also, in May, 1956, had questioned such action of Revlon, as hereinafter more fully stated.

Since about February 1957, Scovill had been promoting its own cartridge-type lipstick container and refill therefor, on which it had applied for a patent. On April 8, 1957, Scovill ran one advertisement simultaneously in several drug and cosmetic trade journals, stating that it was prepared to furnish such containers and refills on a royalty-free basis. It shortly thereafter booked orders for such items, under its pending patent application, from five substantial cosmetic manufacturers who were competitors of Revlon.

Bridgeport, in May 1956, had written Revlon that some of its customers had questioned the minimum-price provisions in the licenses offered them, on the ground that Revlon itself might not be bound thereby (Exhibit 26). Since Revlon had theretofore reduced its own prices on the products without notice, even Revlon's responsive letter (Exhibit 27) assuring Bridgeport that it was bound by such price provisions the same as were all the other parties to the agreements and licenses, quite evidently did not assuage the fears of any of Bridgeport's prospective-licensee customers, so none of them accepted the tendered licenses. Rubenstein was included in this group. It had broken off negotiations with Bridgeport after Bridgeport, in happy contemplation of a still-unexecuted license, had begun to tool up for its performance. Bridgeport, after trying vainly for nearly a year to get licensees in accordance with its agreement with Revlon, finally cancelled such agreement on February 6, 1957, effective as of April 8, 1957, stating in part (Exhibit 30):

In view of supervening events and the fact that no third parties have requested and/or accepted a license for us as your agent, we have determined to cancel the aforesaid agreement.

And the president of Bridgeport, Herman K. Beach, testifying on September 8, 1960, as a Commission's witness, Bridgeport not being involved as a respondent in this proceeding, explained the reasons for the cancellation of this agreement as follows (R. 118–119):

For two reasons. One, we had never come to an agreement on whether we were free to make lipsticks for a customer who did not want to take a license agreement, as I explained earlier, provided they would indemnify us for it. We disagreed with Revlon on just what that clause meant. The second reason was that we had no customers at that time and we had no prospect of getting any and we thought, as long as the thing was in the air a little bit, we would be better off without it. Another possibility that did enter our minds if we came up with an invention related to it that we might be able to use was that we would be freer to use it if we didn't have the agreement.

Revlon's general situation in late May 1957, was then as follows: It had had five original licensee manufacturers, but one, Bridgeport, had cancelled its agreement. Only two of the remaining four had been able to license any cosmetic manufacturers. Scovill had issued just one joint license to Nethercutt and Norman, and Risdon, Revlon's own manufacturer, had issued only one license, that to Rubinstein. Nethercutt and Norman were "relatively small" concerns (Exhibit 23), and their business with Scovill, never large, was steadily dwindling toward the vanishing point. There is no indication in the record of the amount, if any, of Nethercutt's and Norman's business in cartridge-type lipstick containers after 1958. Such business, in 1958, was $38,000, or about 15% of their total 1958 lipstick-container sales, which, however, showed a substantial gain over prior years. The resulting royalty to Revlon from Nethercutt's and Norman's sales was only $1,724.07, as before stated, for the 11 months from August 1, 1956, through June 30, 1957, and evidently too small thereafter to warrant stipulating it herein. Rubinstein had not yet sold any containers or refills under its license, although it had purchased $76,714.41 worth of such articles in March and April 1957, on which the royalties due Revlon from Risdon for those 2 months amounted to, at most, $4,718.72, and with all of the May 1957, royalties added, only totaled $10,827.12 (Exhibit 38 and 39). It is inferred that all royalties had been promptly paid by Scovill and Risdon. Revlon, by May 22, 1957, had received a total not exceeding, and probably somewhat less than $10,827.12 in royalties from sales by Nethercutt and Norman and by Rubinstein, as a result of the 1956 contracts containing the objectionable price-fixing provisions. While Revlon's manufacturers were not permitted to advise Revlon what cosmetic manufacturers had been licensed, Revlon knew of Scovill's license to Nethercutt and Norman, and it would be naive to believe that Revlon did not know by May 1957, from the small amount of its royalties and its knowledge of the trade, just how few licenses had been issued to its competitors in the cosmetic field, and who such licensees were: namely, Nethercutt and Norman, and Rubinstein.

Since October 4, 1956, Revlon's officials, of course, had had before them the report of Scovill's and Bridgeport's several objections to the price-fixing provisions of the agreements and licenses. By May 1957, one of these two objectors, Bridgeport, had already cancelled its license in February 1957, no doubt due to Revlon's unwarranted delays in providing it with an acceptable and workable agreement. And now, of the other four manufacturers, only two were producing, and one of them, Scovill, was suddenly becoming Revlon's threatening competitor with its new lipstick cartridge-type container device, and getting valuable business therewith from numerous cosmetic companies.

Even the slumber of the slothful must sometime end in awakening, and Revlon's management was most certainly aware, by May 1957, that it faced, not a theory of possible increased profits, but an actual condition requiring prompt and effective action by Revlon to salvage any of its anticipated royalty business from licenses issued under its Braselton patents. But before it had actually moved, however, the Commission's Attorney Examiner, Barnes, came to its offices on May 22, 1957. He informed Revlon's attorney, Blumenthal, that the Commission was making an investigation to determine if Revlon's said 1956 agreements licensing the products to be made and sold under the Braselton patents were violative of the Federal Trade Commission Act as agreements to fix minimum resale prices. While there is disagreement between Barnes and Blumenthal as to whether Blumenthal told Barnes that Revlon's officials had already decided to delete the price-fixing provisions from its agreements, or whether he merely left the impression with Barnes that they were only considering taking such action, it is clear that Barnes' visit emphatically jarred Revlon, and sparked the action taken by it the following day, May 23, 1957. The close timing of Barnes' visit and Revlon's action may or may not have been a mere coincidence, since Scovill's representatives conferred with Revlon's patent counsel early the next day, but that is immaterial. Action was promptly taken by Revlon, and its nature and the results thereof, long before the complaint herein was issued, and more than 13 months before it was served on respondents, are clear in the record.

At any rate, on May 23, 1957, after Revlon's patent counsel announced that pursuant to a conference and agreement with Scovill earlier that date, Revlon would cancel immediately the price-fixing provisions in the agreements with all of the container manufacturers, Blumenthal wrote, on that day, to each of Revlon's four remaining container-manufacturer agents, Eyelet, Risdon, Plume & Atwood, and Scovill, advising them that paragraph 3 of the agreements between them and Revlon (hereinbefore quoted) was amended by striking out everything contained therein following the first sentence; that is, all matter referring to the minimum resale prices. These letters requested confirmation (Exhibit 45), which Risdon promptly gave on June 8, 1957 (Exhibit 46), and the same day, in turn, deleted the provisions from Rubinstein's license.

Scovill and others, during this period, were settling several independent patent controversies with Revlon, which involved alleged infringements of the Braselton patents.

There were several other patent controversies, involving Revlon, with one Gruska, an inventor of a foreign patent, and Revlon with

Coty, Inc., another cosmetic manufacturer, which had acquired Gruska's foreign patent for refillable lipstick containers, which it proposed Scovill should manufacture for it. Gruska and Revlon, in August 1955, agreed not to challenge each other's patents, and in March 1957, Coty, Inc., and Revlon dismissed actions against each other and agreed that Revlon might use Coty's Gruska foreign patent, and that Coty could handle products made under the Braselton patents without paying royalties to Revlon. These transactions have no relevancy whatsoever to any other respondent than Revlon.

Scovill's controversy with Revlon involved a competing invention developed by Scovill about February 1957, on which Scovill filed application for a patent on February 27, 1957. It finally obtained U.S. Letters Patent No. 2,872,034 on February 3, 1959. Scovill, however, had finally settled its patent infringement dispute with Revlon during 1957 by agreeing to pay Revlon royalties on all products manufactured under the application then pending for a patent for Scovill's device. No respondent other than Revlon and Scovill had any part in this controversy and its settlement. The pendency of the controversy between Revlon and Scovill caused some months' delay in the preparation and execution of new formal agreements between Revlon and the said four remaining container manufacturers. But the activities of all respondents after the said letters from Revlon dated May 23, 1957, with reference to matters material herein took place under the amended agreements and licenses from about May 23, 1957, to October 24, 1957. Scovill did not notify its joint licensees, Nethercutt and Norman, of Revlon's May 23, 1957, excision of the price-fixing provisions, as they then had no outstanding unfilled orders with Scovill. There is no evidence that Nethercutt and Norman ever bought any cartridge-type containers or refills after May 21, 1957, and their 1957 purchases thereof only totaled $1,226.75, with resulting royalty to Revlon of but $100.74 (Exhibit 38). Neither Eyelet nor Plume & Atwood had ever acquired any licensees to notify.

Finally, on October 24, 1957, Revlon formally cancelled its earlier license agreements with Scovill, Risdon, Eyelet and Plume & Atwood, as amended on May 23, 1957, by said excision, and issued to them new nonexclusive license agreements, all identical except for the manufacturer's name and the date of execution. Exhibit 49, Scovill's new agreement, exemplifies the precise form used by Revlon with all four of its manufacturers. Under these new agreements the container manufacturer does not license its cosmetic manufacturers or distributors, but merely sells them on order. Hence Risdon cancelled its amended license to Rubinstein on October 26, 1957, effective as of

October 1, 1957, and Scovill's joint license to Nethercutt and Norman was cancelled at about the same time.

At this point Revlon's new type of agreement, made on and after October 24, 1957, with the various container manufacturers, did not, and does not now provide for the granting of licenses to the cosmetic manufacturers or distributors, to whom they sell on order only. These new license agreements provide for a royalty to Revlon to be paid by the container manufacturers, based upon the ultimate retail price of the refillable lipstick containers or cases, expressed in price brackets of $6 per thousand on retail prices up to $2 each; of $12.50 per thousand on retail prices of $2.01 to $5 each; and of $20 per thousand on retail prices of $5.01 and up each. Royalty on refills is fixed at $5 per thousand, which is without regard to retail prices. These new agreements contain no provision as to fixed minimum or any other retail prices, leaving such matters entirely to the business judgment of the individual cosmetic manufacturers and distributors, and also ultimately to the retail store operators, except where manufacturers are legally permitted too, and do, fix resale prices in "Fair Trade" jurisdictions, as provided by § 5 of the Federal Trade Commission Act, as amended. Careful examination of Exhibits 49 and 50, which exemplify all such agreements, reveals no provision from which any illegal price-fixing agreements or understandings may be inferred. The basis for the complaint herein, the minimum-price-fixing provision of the original agreements, has been entirely eliminated by the modification of May 23, 1957, and the new agreements made on and shortly after October 24, 1957. None of respondents' acts since that time indicate that they have the slightest reason or desire for a restoration of the original agreements. To the contrary, a return to the former *status quo* would not only be completely irrational, but economically disastrous; and respondents have solemnly promised on the record to refrain from any price-fixing practice in the future.

Since the execution of the new agreements in October 1957, all respondents have done well in business with the Braselton-patent types of products, with the exception of Nethercutt and Norman, and Eyelet. Nethercutt and Norman had evidently dropped such products after May 15, 1957. Eyelet, whose officers and stockholders, for undisclosed reasons immaterial hereto, had decided to go out of business entirely and dissolve the corporation, began proceedings for such dissolution on December 11, 1957, which culminated November 22, 1958. Eyelet never manufactured any lipstick containers or refills under the Braselton patents.

Risdon continued as before to manufacture such products for Revlon itself. Under its new manufacturer's license agreement with Revlon, it has continued its business with Rubinstein on an order basis. Rubinstein has concentrated on its "Convertible" type of lipstick containers and refills, made under the Braselton patents, and has shown a very considerable overall increase of lipstick business, so that, by July 30, 1958, about 90% of its total lipstick business was the "Convertible" type. Since October 24, 1957, Risdon has also manufactured lipstick containers and refills under the Braselton patents for Lambert-Hudnut Manufacturing Laboratories, Inc., another substantial cosmetic manufacturer.

Scovill increased the number of its customers in the United States, as well as some in Canada, who were now willing to buy the Braselton-patent cartridge-type containers and refills therefor. By June 1, 1959, Scovill's business had increased from the five buyers it had in the spring of 1957, due to pushing its own competitive invention, to a total of 21 such customers, in addition to Nethercutt and Norman, whose business of this type, as already stated, had steadily declined to nothing. The list of these other 21 customers of Scovill (Exhibit 55), including the 5 it had in early 1957, however, reads almost like a "Who's Who" of the American cosmetic business, since, except for Revlon, Rubinstein, Coty, and several other leaders, it comprehends the major cosmetic manufacturers of the United States and Canada. Among Scovill's purchasers of cartridge-type lipstick containers and refills are such renowned names as Daggett & Ransdell, Lehn & Fink, Macy's and Schiaparelli.

Plume & Atwood produced only refills for these cartridge-type containers, and these for Revlon alone after the execution of the said new agreements. Plume & Atwood never produced any containers or refills under the Braselton patents for any other customer at any time prior to its sale of its Fabricating Division to Landers, Frary & Clark on May 25, 1959. By this sale it not only disposed of this division, which manufactured, among other things, lipstick containers and refills, but expressly covenanted with said purchaser never to engage in such manufacturing operations again (paragraph 60, page 18, of the stipulation, and Exhibit 54), and Landers, Frary & Clark ultimately became, and is now, known as Dorset-Rex, Inc. (R. 96–98), which corporation continued, and still continues, to carry on the same business with Revlon that Plume & Atwood did prior to May 1959, as well as to manufacture certain other products for Revlon. Plume & Atwood is now entirely and permanently out of that type of manufacturing business, and Dorset-Rex, Inc., is not a respondent herein.

While Eyelet did not manufacture any lipstick containers or refill cartridges under the Braselton patents, however, beginning in 1960 such products have been manufactured under those patents for Dana

Perfumes, a well-known cosmetic manufacturer, by the Eyelet Specialty Division of the International Silver Company, which has carried on the same general type of business of manufacturing cosmetic containers as Eyelet had previously carried on, among other things. While it must be inferred that International has had a nonexclusive license agreement from Revlon to do so, this is immaterial here, as Eyelet has been dissolved and International is not a respondent herein.

On November 28, 1958, Revlon entered into a new license agreement with Bridgeport, identical to those entered into in late 1957 with the four respondent container-manufacturers. Apparently Bridgeport, with an eye to some profitable business, and then unhampered by the unlawful minimum-price-fixing provisions and licensing requirements contained in Revlon's original agreements, desired to manufacture Braselton-patent cartridge-type lipstick containers and refills for two of its cosmetic manufacturer customers, Frances Denney of Philadelphia, Pennsylvania, and Rilling Dermatics, of Bridgeport, Connecticut. Since its new agreement with Revlon, Bridgeport has sold such products to these two customers, and paid royalties thereon to Revlon, basing all such royalties on the lowest bracket of prices, $2.00 and under (R. 116).

There is no specific evidence as to the amount of sales, either separately or in their totality, that these numerous cosmetic manufacturers have made of the Braselton-patent type of lipstick containers and refills since the new agreements were executed between Revlon and the various container manufacturers. But the total industry sales of all types of lipstick containers, Revlon's market share thereof, and other statistics set forth in paragraph 66 (pages 20–21) of the stipulation, Exhibit 1, clearly indicate, among other things, the stupendous growth of sales of the products made under the Braselton patents in the period from 1956 through 1959. Nearly all the major cosmetic manufacturers of North America are now buying such products through one or the other of the major container-manufacturers which have agreements with Revlon for such manufacture. Although Revlon's own share of the entire lipstick market grew from 23.7% in 1956 to 32.3% in 1959, the business of the other 25 or more major or substantially large cosmetic manufacturers identified in the record necessarily has amounted to a very substantial part of the remaining 67.7% of the entire lipstick container market. This market grew from a total of $64.8 millions in 1956 to a total of $88.9 millions in 1959. Of such total business in each of these years, the market share of all cosmetic manufacturers other than Revlon was based in some part on their sales of the old-type nonrefillable lipstick containers, and what portion of the total business of the cosmetic manufacturers other than Revlon, Rubinstein and Nethercutt and Norman consisted of cartridge types manufactured under Braselton-patent license agreements between Revlon and the container-manufacturers is therefore not clear in the record. Nor is Revlon's total gross income from royalties under the said agreements ascertainable with certainty, since the price structure of retail sales in the business varies from year to year, and differs as well between manufacturers, and as to each manufacturer's various styles and sizes of lipstick containers manufactured and sold under the Braselton patents. One fact emerges with certainty from these statistics, however, and that is, that Revlon's gross income from its royalties under the Braselton patents has increased each year, from only a few thousands of dollars early in 1957, before the original agreements were superseded, to increasingly substantial amounts evincing a steady growth from late 1957 through 1959.

A considerable part of the record involves alleged but unproven violations of law by reason of the maintenance of "Fair Trade" prices in nonfair trade jurisdictions. But Nethercutt and Norman never "fair-traded" their products, although Rubinstein and Revlon did in jurisdictions where so permitted by law. Revlon's order blanks and invoices (Exhibits 62 and 72–A through 75–D) all clearly say or otherwise indicate that these goods must be sold at the stated prices only "in states where fair trade is in effect". Rubinstein's order blanks (Exhibit 71), however, indicate such prices without any such stated limitation. Counsel supporting the complaint, therefore, did not strongly attack Revlon on this particular issue, but endeavored to prove that Rubinstein violated the law by fixing minimum retail resale prices in nonfair trade jurisdictions, apparently in an effort to establish on its part a continuation of the "fixed minimum price" conditions existing during the life of Rubinstein's license from Risdon in early 1957, or at least to show bad faith in Rubinstein's claim of abandonment of such practices. This attempt wholly failed when buyer representatives of several leading retail department stores in the District of Columbia, a nonfair trade jurisdiction, when called as Commission's witnesses, testified that Rubinstein's printed prices were always treated by their stores and by Rubinstein only as suggested prices, and were never considered by any of them as fixed minimum retail prices, such retailers always being free to sell to the public at their own prices.

Counsel supporting the complaint attempts to bypass, in large part, these undisputed facts which have occurred subsequent to the issuance of the complaint. He argues, in substance, that the new agreements themselves are illegal, and that the respondents, by their past and present conduct, have not demonstrated that good faith which is necessary to a successful defense of abandonment.

Counsel claims that the language in paragraph 1 of Revlon's present agreements with the manufacturers, that the licensed articles are required to be of high quality in order to protect the value of the Braselton patents, constitutes a restraint of trade. He does not point out, however, just how this is accomplished. Scovill's executives testified that this language merely meant that the outside case itself, which was to be used over and over again, should be finished in a manner to outlast the refill cartridges and not become shabby, for it would receive hard wear in a woman's purse with other articles contained therein (R. 47 and 67). This language of the agreement was originally inserted by Revlon in the superseded 1956 agreements and licenses upon the recommendation of Scovill's vice president, and was retained in the new agreements, freed from the alleged price-fixing provisions. Pride of workmanship and lasting quality and utility of the product, both on the part of the patent holder and the manufacturer, is beneficial rather than damaging to the consumer. These factors reduce the cost to the consumer of repeated buying of containers, and also enhance the article's chances of meeting competition in the market.

It is contended by Commission's counsel that the general price floor-level of lipsticks has increased since the advent of the refillable type because the prices of this new type were about 40% above the prices of the old-style lipsticks, and that it was the plan of respondents to enhance prices and to increase the price structure of the whole lipstick market. In making this contention he disregards the fact that the cost of lipstick containers of the new type varies from one cosmetic manufacturer to another, and also varies greatly as to styles. He also disregards the fact that while refill prices have been slightly increased by Revlon and Rubinstein, container costs have been substantially cut. He also fails to consider the right of the public to prefer the new refillable type of lipstick over the old-fashioned type, and the fact that the costs of making the two types are quite evidently not comparable, even though such specific manufacturing costs do not appear in the record.

It is further contended that the provisions of paragraph 2 of the new agreements, providing for the calculation of royalties in a bracketed range of retail prices, tends to produce prices to the consumer in the higher brackets of the price range. There is, however, evidence refuting this speculative contention, in that Bridgeport computed its royalty payments to Revlon upon the *lowest* bracket of prices (R. 116). Of course, there had to be some rational basis for computing the royalties, and counsel supporting the complaint has not suggested how a better one could be devised, nor has he specified anything illegal about the method of computation which he challenges.

Neither of the foregoing contentions as to illegality of the present agreements sustains the claim that respondents are now fixing, or since May 1957, have fixed retail minimum prices. There was never any agreement as to the manufacturer's prices either with Revlon or among the manufacturers themselves. And the manufacturer cannot, and does not attempt to, force upon the distributor or retailer any higher price than the market will support.

On the issue of respondents' good faith in their discontinuance of the objectionable practices, counsel supporting the complaint first contends that respondents are not in good faith because they have denied consistently throughout the litigation, and still deny, that they have ever engaged in any illegal conduct. Such an attack upon respondents' good faith was held irrelevant in *Stokely-Van Camp, Inc., et al.* v. *FTC*, C.A. 7 (1957), 246 F. 2d 458, 465 [6 S. & D. 355], and since that decision the Commission's previous policy of viewing any defense on the merits as constituting *prima facie* evidence of bad faith by a respondent has been completely abandoned by the Commission.

Counsel further attacks the respondents' good faith on the ground that the affidavit attesting Revlon's good faith, made by its authorized official, Blumenthal, is too vague. The affidavit states emphatically that Revlon "does not ever intend to resume in the future its former method of licensing such manufacture and sale of such products, as illustrated in the 1956 agreements, which are the subject-matter of the litigation". And further, said affidavit recites that Revlon offers any other assurances which the Commission may desire with respect to the abandonment of that type of agreements, and positively states that Revlon has no intention whatever of ever resuming the practices charged in the complaint. Counsel supporting the complaint does not indicate what more could be offered by Revlon or desired by the Commission than this broad and evidently sincere promise, based upon long-established facts and covering the vital issues of the complaint. This affidavit, and other similar affidavits and statements presented by the other respondents, were timely, having been made appropriately after the Commission's case-in-chief had been completed. And all of them are adequate for their purpose, convincing as to their sincerity, and in full accord with established practice in such matters.

Counsel supporting the complaint further contends, in substance, that the business success of Revlon and other respondents in connection with the production and sale of the products manufactured under the Braselton patents is a further evidence of bad faith because, having succeeded by reason of the original conspiracy in making a substantial

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profit on the Braselton patents, they may, in the future, again attempt to capitalize further thereon through similar violations of law. This is purely conjectural, and not premised upon the actual facts, which demonstrate beyond question that none of the respondents will ever re-engage in such practices, because, far from making any money, they found those practices to be extremely unprofitable, while those respondents continuing in the business under the lawful 1957 agreements have profited substantially.

It is further contended by counsel supporting the complaint that Revlon admitted that the Braselton patent structure was weak, and therefore that Revlon's negotiations with Scovill as well as with Coty and Gruska for a settlement of lawsuits and other disputes over the Braselton and other patents were a part of the alleged conspiracy, and so demonstrate bad faith. These lawful settlement negotiations were never a part of the circumstances leading up to the 1956 agreements and licenses. The Revlon-Scovill settlement occurred early in 1957, during the time that Scovill was insisting upon new agreements, and was a legitimate settlement of a business dispute. No other respondent had anything to do with it, and such settlement has no bearing upon the present good faith of any respondent, all of whom, for many years now, have been doing business under the legitimate 1957 agreements. Certainly the valid settlements between Revlon on the one hand, and Coty and Gruska, at best strangers to this case, on the other, do not involve the other respondents herein, and are therefore irrelevant.

The essence of counsel's attack on respondents' good faith is that the cancellation of the minimum-price provision in the 1956 agreements and licenses was not due to respondents' belief that such provisions were unlawful, but due only to Revlon's desire to increase its royalties from the manufacturers by getting other cosmetic houses to buy from the manufacturers the products made under the Braselton patents. The Commission has not been established by Congress to act "as a censor of commercial morals", nor are the motives of respondents, whatever they may have been in 1956, material in 1960 or now, when the practices complained of have been completely stopped for some years.

In summary, only three of the five manufacturers with which Revlon made its 1956 agreements are still in the lipstick-container and refill business. Two of these are the respondents, Risdon and Scovill. The third present manufacturer, Bridgeport, is not a respondent, although in November 1958, it resumed and still engages in the business of manufacturing the Braselton-patent types of lipstick containers and refills, under an agreement with Revlon identical with those under which Risdon and Scovill have operated since November 1957. While the Commission has discretion in naming respondents in its complaints, since Bridgeport began to manufacture under its current agreement with Revlon shortly after the complaint was served and some twenty months before the stipulation herein was agreed upon, it is difficult to justify the issuance of any cease-and-desist order against the respondents, unless Bridgeport be named a respondent also. If Bridgeport has been operating under a lawful contract with Revlon since November 1958, all respondents, including Revlon, have also been lawfully operating, and for a year longer. Nethercutt and Norman were never more than minor figures, and Rubinstein, since June 1957, has been doing business with Risdon on an order basis. The licenses of Nethercutt and Norman and Rubinstein from the manufacturers, inoperative in fact after mid-May 1957, were cancelled in October 1957.

The record shows plainly that the perfectly legal 1957 agreements were not brought about by any action of the Commission, but by economic pressure. Counsel supporting the complaint has not explained how any order of the Commission to cease and desist, issued at this time, could inhibit an activity on the part of the respondents that now has not occurred for nearly 5 years, and certainly will not be resumed. All that could possibly be accomplished by a cease-and-desist order has long since taken place, by the compulsion of a law more inexorable than any under which the Commission operates: the law of supply and demand. This economic law, unlike those on the statute-books, is self-enforcing. The "insurmountable objections" to the price-fixing provisions of the 1956 agreements arose and were recognized and yielded to by respondents before any complaint was issued. Such objections still effectually bar the respondents from hereafter resuming a practice which has proved to be so financially unrewarding. And the best possible guarantee of their good faith, when they declare they will do so no more, is the fact that if they did, they could not afford to remain in such business very long. Any order to cease and desist issued at this time would be nothing but punitive, and not in the public interest.

The Commission's powers under the Federal Trade Commission Act only "authorize it, after finding an unfair method present" (*FTC* v. *National Lead Co.*, *supra.*, 352 U.S. at page 428 [6 S. & D. 201] to issue a cease-and-desist order. There is no longer any present violation, nor is there the remotest likelihood of any such violation by any respondent in the future. Therefore, upon the facts, the hearing examiner makes the following:

CONCLUSIONS OF LAW

1. In 1956, respondents violated the Federal Trade Commission Act by actually entering into agreements fixing minimum retail prices upon

cartridge-type lipstick containers and refills therefor, manufactured under the Braselton patents.

2. On and after May 23, 1957, all respondents discontinued and abandoned all their minimum-retail-price-fixing agreements, and ever since have operated in accordance with law; such agreements and the unlawful practices thereunder have been completely and finally stopped; and there is no likelihood of their resumption at any future time by any of the respondents.

3. Public interest now requires that this proceeding be dismissed as to each and all of the respondents.

Therefore,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to take such further actions as future facts and circumstances may warrant.

Opinion of the Commission

DECEMBER 18, 1962

By Anderson, *Commissioner:*

The complaint herein charges respondents with violating Section 5 of the Federal Trade Commission Act by entering into agreements fixing minimum resale prices for certain patented and nonpatented products. The hearing examiner in his initial decision held that respondents had engaged in practices violating Section 5, as charged. He further held, however, that respondents had abandoned these practices and ordered that the complaint be dismissed. Counsel supporting the complaint, having been granted a petition for review, have filed exceptions to the initial decision and the matter is now before us for consideration.

Respondents Revlon, Inc., Helena Rubinstein, Inc., Jack B. Nethercutt and Dorothy Nethercutt are engaged in the business of manufacturing and selling cosmetics and cosmetic products. Respondent Merle Norman Cosmetics, Inc., is engaged in the sale and distribution of cosmetic products to the retail trade. The remaining respondents are engaged in the manufacture and sale of containers for lipsticks and other cosmetics. In 1954, Revlon acquired from one Braselton, an inventor, patents for a combination lipstick case and refill. During the first seven months of 1956, Revlon and various manufacturers of lipstick containers, including respondent container manufacturers, entered into agreements whereby the container manufacturers were appointed agents of Revlon to issue nonexclusive licenses for the sale of lipstick cases and refills claimed in the Braselton patents to manufacturers of cosmetic products. Included in each of the agreements was a provision establishing minimum retail, resale prices for the lipstick containers and refills sold by the container manufacturers to the licensee cosmetic manufacturers.[1] Licenses were issued pursuant to the aformentioned agreements to respondent Rubinstein (by Risdon) and jointly to respondents Nethercutt and Norman (by Scovill). Each license expressly provided for minimum prices at which the lipstick cases and refills were to be sold to the public. Revlon contracted with Risdon for the manufacture of Revlon's own lipstick containers and refills. All parties understood that Revlon was bound by the minimum resale price provision in the agreements.

On May 22, 1957, an attorney-examiner of the Federal Trade Commission called on Revlon's counsel and secretary, Blumenthal, and informed him that an inquiry was being made by the Commission to determine whether Revlon's 1956 agreements licensing the products to be made and sold under the Braselton patents were violative of the Federal Trade Commission Act as agreements to fix minimum resale prices. There are conflicting statements in the record as to whether Blumenthal advised the attorney-examiner at that time that Revlon had already decided, as a matter of business judgment, to eliminate the retail, resale price provisions from the aforesaid agreements. In any event, the following day, May 23, 1957, Blumenthal sent notices to respondent container manufacturers informing them that, effective that date, the agreements had been amended by the cancellation of that portion thereof relating to the maintenance of retail, resale prices.[2] As a result of this action by Blumenthal, the agreements in question and licenses issued pursuant thereto were eventually rescinded, and, in October 1957, new agreements were entered into between Revlon and respondent container manufacturers. By the terms of these new agreements, the container manufacturers were licensed under the Braselton patents to manufacture and sell the containers

[1] The following provision was contained in each of the agreements:

"In order that the value of the licensed patents shall not be destroyed or depreciated by low grade articles made thereunder and to give commensurate protection to both Principal and Licensees, the licensed articles are required to be of high quality. Accordingly, to assure the foregoing, the minimum prices of the licensed articles sold by each Licensee to its customers, less however Licensee's normal discount to such customers, shall be as follows:

Lipstick case with refill	\$1.75
Lipstick case without refill	\$1.25
Refill	\$ .90

Provided, however, that with respect to the hour-glass shaped case, which involves special skills and increased manufacturing costs, the foregoing minimum prices shall be as follows:

Lipstick case with refill	\$3.00
Lipstick case with refill	\$2.50."

[2] This unilateral action was taken although the licensing agreement by its terms could "not be altered, modified, amended or discharged except in writing signed by both parties."

and refills claimed thereby. The new agreements did not contain any price-fixing provision similar to that included in the originals.

The hearing examiner found that the minimum retail, resale price provisions in the 1956 agreements between Revlon and the container manufacturers and in the licenses issued pursuant thereto violated the Federal Trade Commission Act, as alleged in the complaint. He specifically ruled that the price-fixing provisions were illegal *per se* and that it was unneccessary "to discuss further the other pre-agreement or post-agreement facts to determine that all respondents, by reason of the agreements and licenses alone, have violated Section 5 of the Federal Trade Commission Act." He held, however, that on and after May 23, 1957, respondents' price-fixing agreements were terminated and that the discontinuance of these illegal practices came about under such circumstances that there is no likelihood that respondents will again attempt to fix prices by agreement. Counsel supporting the complaint have taken numerous exceptions to the initial decision, but the only real issue presented is whether the hearing examiner erred in holding that there has been a good faith abandonment of the practices found to be unlawful.

As stated above, the price-fixing provision in the 1956 agreements was not rescinded until after Revlon had been contacted by a representative of the Commission and had been made aware of the Commission's investigation. We have previously held in this connection that dismissal of a complaint on the ground of abandonment is rarely warranted in cases where the discontinuance of a practice does not occur until after the Commission has acted. *Ward Baking Company*, Docket No. 6833 [54 F.T.C. 1919] (1958); *The Firestone Tire & Rubber Company*, Docket No. 7020 [55 F.T.C. 1909] (1959); *Carter Products, Inc., et al.*, Docket No. 7943 [60 F.T.C. 782] (1962). The reasonable inference to be drawn in such a case is that the practice has been stopped, not on a voluntary basis, but only in anticipation of a Commission proceeding. Under the circumstances, there can be no assurance that the practice will not be resumed when the threat of a proceeding has been removed.

The hearing examiner has held, however, that respondents in this proceeding had planned to do away with the price-fixing provision long before the attorney-examiner's visit and that the discontinuance would have occurred even though an investigation had not been undertaken by the Commission. This holding appears to be based in part, at least, on an affidavit of discontinuance signed by Blumenthal.

The examiner has found, in this connection, that cosmetic houses were reluctant to obtain licenses to sell refillable cartridge-type lipsticks and refills therefor manufactured under the Braselton patents because of the minimum retail, resale price provision in the agreements between Revlon and the container manufacturers and in the licenses issued by the latter. He states in this connection that the objections to the price-fixing provisions of the 1956 agreements were "insurmountable" and that they were yielded to by respondents before any complaint was issued. According to the examiner, "such objections still effectually bar the respondents from hereafter resuming a practice which has proved to be so financially unrewarding".

We think this finding is wrong in several respects. First of all, there were other factors, such as a suit by Coty, Inc., to invalidate the Braselton patents, which tended to deter cosmetic manufacturers from purchasing the Braselton cases and refills.[3] Of greater significance, however, is the fact that the cosmetic manufacturers refused to enter into the licensing agreements, not because of the existence of the price-fixing provision therein, but because Revlon could not be trusted to adhere to such provision. On May 9, 1956, the following letter was written by the law firm representing the Bridgeport Metal Goods Manufacturing Company to Blumenthal, who was then counsel for Revlon, concerning the agreement between the two companies whereby the former was to manufacture Braselton lipstick containers and refills:

Dear Mr. Blumenthal:

I am writing to confirm our telephone conversation of May 8, 1956, with respect to the subject agreement. As I pointed out to you, some of Bridgeport's customers have raised the question of whether Revlon, Inc. is bound by the minimum prices set forth in paragraph 3 of the agency agreement. It was my view that the agreement clearly provided that Revlon was bound by such prices since the preamble to that paragraph indicates that it was designed to give "commensurate protection to both Principal (Revlon) and Licensees (Bridgeport's customers)." You and I agreed that this was clearly the intention of the parties in entering into the aforementioned agreement and that Revlon was bound by such minimum prices.

However, in order to satisfy the prospective licensees, I would appreciate it if you would write me to that effect so that there will be some explicit commitment with respect to this provision of the agreement. In order to prevent any prolonged correspondence with respect to this subject, it is advisable to have Mr. Revson either write you a letter to that effect or endorse your letter * * *.

Mr. Blumenthal sent the following response to the above-quoted letter on May 22, 1956:

I have your letter of May 9, 1956, with respect to the above captioned agreement and patents.

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[3] The following comment was made by Blumenthal in a memorandum dated November 15, 1956: "Another bearing on the absence of licenses is the current suit by Coty to invalidate the Braselton patents. Our feeling is that the various cosmetic houses are standing by for the outcome of this action." This suit was eventually settled and Coty received a license under the Braselton patents.

Your interpretation of the agreement is in accord with mine and I am authorized by client to inform you that for the purpose of giving commensurate protection to both Principal (Revlon) and Licensees (Bridgeport's licensed customers), *all parties, including Revlon, are bound by the minimum prices set forth in the agreement.* [Italic supplied.]

The minimum price for the lipstick case with refill fixed by the agreement between Revlon and the container manufacturers was $1.75. Approximately two months after giving assurance that Revlon would be bound by the minimum prices fixed by agreement, Blumenthal announced that Revlon would sell the case and refill combination for $1.25. In this connection, Blumenthal sent the following letter to the Scovill Manufacturing Company on July 26, 1956:

On or about September 6, 1956, Revlon, Inc. will commence marketing a cartridge-type lipstick container under the Braselton patents with refill at a total combination price of $1.25.

Will you, therefore, be good enough to advise our licensees that commencing with such date their licenses should be deemed to be amended accordingly.

In response to this letter, the sales manager of Scovill Manufacturing Company made the following observations to Revlon's attorneys on August 6, 1956:

It would be our opinion that where this license agreement establishes prices, on the theory that certain minimum prices are essential to maintain certain standards of quality, it is hazardous to progressively reduce these prices, thereby weakening the original premise.

We further find it very difficult to negotiate with prospective customers under this agreement, only to find, in the midst of such negotiations, that Revlon has changed their thinking as to price limitations, which may necessitate a completely changed approach to the container design originally conceived on the basis of prices as set up in the original agreement.

The same individual later commented to Revlon that "It is to be hoped that your company and your attorneys will give serious consideration to a revised licensing arrangement along the lines of the above inasmuch as the present license agreements are obviously unsatisfactory and have caused considerable lost time and money for various of the licensed container manufacturers *through at least two violations of the agreement on the part of Revlon* * * *." (Italic supplied.)

We are also in disagreement with another phase of the examiner's decision. Both the decision and the affidavit of discontinuance signed by Blumenthal suggest that Revlon had decided to amend the 1956 agreements with container manufactures prior to May 22, 1957, and that the agreements as amended would not contain any price fixing provisions. On page 3 of his affidavit, Blumenthal states:

5. That he actively participated and was primarily responsible for conducting the negotiations carried on in 1956 and the early part of 1957 between Revlon, Inc. and respondent Scovill and also with Bridgeport with respect to a modifica-

tion of the 1956 license agreements *for the purpose of eliminating all reference therein to the maintenance of retail, resale prices for the products manufactured and sold under the claims of the Braselton patents.*

6. That on November 15, 1956 he recommended the elimination of the provision in the agreements with the container manufacturers to the effect that their customers must execute license agreements and must maintain minimum retail resale prices for the products involved in such agreements *which recommendation was later accepted and approved by Revlon, Inc.* (Italic supplied.)

The record shows, however, that Blumenthal in his memorandum of November 15, 1956, recommended "The elimination of the minimum retail prices and *in lieu thereof the fixing of a minimum manufacturer's price both for the case and the refill so as to make certain it will be economically unfeasible for our competitors to sell at depressed prices.*" (Italic supplied.) It appears, therefore, that Blumenthal was proposing that minimum prices for containers and refills be fixed by a multiple licensing arrangement with the principal members of the container manufacturing industry for the purpose of establishing minimum price levels at which the Braselton containers and refills could be sold by Revlon's competitors and their retailer customers. Such a price-fixing provision, if incorporated in the licensing agreements between Revlon and container manufacturers, would, in our opinion, have been unlawful. *United States* v. *New Wrinkle, Inc.*, 342 U.S. 371 (1952), and *Newburgh Moire Company, Inc.* v. *Superior Moire Company, Inc.*, 237 F. 2d 283 (1956). Blumenthal's recommendation is, therefore, signficant in that it demonstrates, contrary to the impression conveyed by the affidavit of discontinuance, that no change was contemplated in Revlon's policy of maintaining by agreement the resale prices of the Braselton containers and refills. It seems, therefore, that what the hearing examiner has found to be a determinaton to abandon an unfair trade practice was at best nothing more than a tentative decision to replace a price-fixing provision which had proven to be unworkable with one which would accomplish virtually the same result.

For the foregoing reasons, it is concluded that the record does not support the hearing examiner's holding that there is no likelihood that the unfair practices engaged in by respondent will not be resumed. To the contrary, we find that the discontinuance of the practices did not occur under circumstances which indicate that the practices have been surely stopped and that an order is, therefore, unnecessary. Consequently, we are of the opinion that the examiner erred in accepting respondents' plea of abandonment.

In arriving at this decision, we are also influenced by the fact that the unfair trade practice involved in this proceeding is price-fixing. We believe, as did the hearing examiner, that Revlon was fully aware that the price-fixing provision contained in the 1956 agreements was illegal *per se* and that neither Revlon nor any of the other respondents was concerned with the legality or the illegality of this provision. The complete indifference to the requirements of the law demonstrated by this record further persuades us that a cognizable danger of a recurrent violation would exist if the complaint were to be dismissed.

Apparently as an afterthought, counsel supporting the complaint contend in their exceptions and briefs that the Braselton refills come within the patent grants only when used or sold in combination with the Braselton container. They argue, therefore, that certain provisions in the 1957 agreements between Revlon and the container manufacturers placing restrictions on the manufacture and sale of such refills by themselves and not in combination are not protected by the patents and are unlawful in that they extend the scope of the patents to control and prevent competition in the sale of an unpatented product. For example, counsel supporting the complaint now contend, in effect, that restrictions imposed by Revlon on the size of refills which may be made by container manufacturers effectively foreclose competition in the sale and distribution of refills which may be used by consumers in containers made by Revlon. These exceptions, however, go beyond the questions stated in the petition for review which, on their face, can reasonably be interpreted as relating only to the issue of abandonment. Moreover, they raise certain issues which, in our opinion, are not reasonably within the scope of the proceeding initiated by the complaint herein. Consequently, whatever merit there may be to these contentions, they are not properly before us for determination at this time and no ruling will be made thereon.

The exceptions of counsel supporting the complaint to that portion of the initial decision holding that the unfair practices engaged in by respondents have been abandoned are granted. Our order providing for appropriate modification of the initial decision is issuing herewith.

Commissioner Dixon dissented from the decision herein for the reason that he would amend the complaint and remand the case to the hearing examiner.

Commissioner Higginbotham did not participate in the decision of this case.

Proposed Final Order

DECEMBER 18, 1962

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and on briefs and oral argument in support thereof and in opposition thereto; and

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

It is ordered, That the initial decision be modified by striking therefrom the findings and conclusions beginning on page 984 with the words "The issue of abandonment" and ending on page 1,000 with the words "and all of the respondents."

It is further ordered, That the initial decision be modified by striking therefrom the order dismissing the complaint and substituting therefor the following:

> *It is ordered*, That respondents, Revlon, Inc., The Risdon Manufacturing Company, Scovill Manufacturing Company, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., all corporations, and Jack B. Nethercutt and Dorothy Nethercutt, individuals, trading as copartners under the partnership name, Nethercutt Laboratories, named as parties respondent herein, their respective successors and assigns, officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of lipstick containers and refills, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any conspiracy, planned common course of action, understanding, combination or agreement between or among themselves to fix, establish, or maintain prices, terms or conditions of sale of lipstick containers and refills or to continue in effect any resale price maintenance contracts, programs or arrangement with respect to such products.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondents, The Eyelet Specialty Company, and The Plume & Atwood Manufacturing Company.

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

Commissioner Dixon dissenting for the reason that he would amend the complaint and remand the case to the hearing examiner; and Commissioner Higginbotham not participating.

FINAL ORDER

MARCH 22, 1963

Respondents having filed, under § 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding, reasons in support thereof and proposed alternative forms of orders, and counsel supporting the complaint having filed an answer in opposition to said exceptions; and

The Commission having determined that the said proposed order to cease and desist should be modified and, as so modified, entered and adopted as the Final Order of the Commission:

It is ordered, That the proposed order issued in this proceeding on December 18, 1962, be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Revlon, Inc., The Risdon Manufacturing Company, Scovill Manufacturing Company, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., all corporations, and Jack B. Nethercutt and Dorothy Nethercutt, individuals, trading as copartners under the partnership name, Nethercutt Laboratories, named as parties respondent herein, their respective successors and assigns, officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of lipstick containers and refills, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any conspiracy, planned common course of action, understanding, combination or agreement between or among themselves to fix, establish, or maintain prices, terms or conditions of sale of lipstick containers and refills or to continue in effect any resale price maintenance contracts, programs or arrangement with respect to such products.

It is further ordered, That nothing contained in this order shall be construed as prohibiting:

1. Any seller of empty lipstick containers or refills therefor from entering into agreements with any of its customers to sell to any such customers lipstick containers or refills therefor at any price or on any terms and conditions of sale independently determined and offered by either such seller or buyer and independently accepted by either such seller or buyer in any bona fide transaction when such agreements are not for the purpose nor have the effect of restraining trade.

2. Any resale price maintenance contracts which any of the respondents may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, Chapter 745, 82nd Cong., 2nd Sess., approved July 14, 1952).

3. The establishment or maintenance of any lawful, bona fide agreements, discussions or other action solely between

the officers, directors, agents, representatives and employees of any corporate respondent relating solely to the carrying on of that corporate respondent's sole or separate business, or between any corporate respondent and any of its wholly owned subsidiaries.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents The Eyelet Specialty Company and The Plume & Atwood Manufacturing Company.

It is further ordered, That the proposed order as modified be, and it hereby is, entered and adopted as the Final Order of the Commission.

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

Commissioner Dixon dissenting and Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

IN THE MATTER OF

JONAS GERSON TRADING AS HAVEN COMPANY

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

Docket 8470. Complaint, Feb. 28, 1962—Decision, Mar. 22, 1963

Order requiring a Chicago distributor of numerous articles of merchandise, including wallets, pens, cameras, carving sets, and umbrellas, to cease supplying purchasers of his merchandise means of selling it by use of a lottery scheme, in that a sales catalog he distributed to them contained a pull card for use in the sale of the articles.

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 Jonas Gerson, an individual, trading as Haven Company, hereinafter referred to as respondent, has 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 Jonas Gerson is an individual trading as Haven Company, with his principal office and place of business located at 849 West Washington Boulevard, in the city of Chicago, State of Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution, through others, of numerous articles of merchandise including wallets, pens, cameras, carving sets, and umbrellas.

PAR. 3. In the course and conduct of his said business, respondent causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has 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 his business, as described above, the respondent sells and distributes said articles of merchandise by means of a lottery scheme. Respondents causes to be distributed to members of the public, representatives and salesmen, and prospective representatives and salesmen, certain advertising literature including a sales catalog. Respondent's merchandise is distributed to the purchasers thereof in the following manner:

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

When the person or representative operating the pull card has succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the amount collected to the respondent, the said respondent thereupon ships to said operator, salesman or representative the merchandise designated on said card, together with a premium as compensation for operating the pull card and selling the said merchandise listed thereon. The said operator of the card delivers the merchandise to the purchasers of tabs from said pull cards in accordance with the list filled out when the tabs were detached from the pull card.

PAR. 5. The persons to whom respondent furnishes the said pull cards use the same in purchasing, selling and distributing respondent's merchandise in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth.

The sale of merchandise by the aforesaid method also constitutes the sale of merchandise by means of a gaming device inasmuch as the identity of the article involved and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the sales catalog or card.

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

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

Mr. DeWitt T. Puckett and *Mr. Thomas J. Whitehead* supporting the complaint.

Mr. Lester P. Schwartz and *Mr. Joseph F. Wagner*, of New York, N.Y., for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

OCTOBER 9, 1962

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on February 28, 1962, charging him with engaging in unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act by the use of a sales plan, in connection with the sale of his merchandise, constituting a lottery or gaming device. A copy of said complaint, with notice of hearing, was duly served upon respondent. Respondent thereafter appeared by counsel and filed answer denying, in substance, having engaged in the illegal practices charged.

Hearings on the charges were thereafter held on May 23, 1962, and July 24, 1962, in New York, New York, and Indianapolis, Indiana, respectively, at which testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, said evidence being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence and pursuant to leave granted by the undersigned, proposed findings, conclusions of law and an order, and/or briefs were filed on August 31, 1962, and September 4, 1962, by counsel supporting the complaint and respondent respectively.

After having reviewed the entire record in this proceeding, and the proposed findings and conclusions and supporting briefs,[1] the undersigned finds that this proceeding is in the interest of the public and, based on the entire record and from his observation of the witnesses, makes the following:

FINDINGS OF FACT

1. Respondent Jonas Gerson is an individual trading as Haven Company, with his principal office and place of business located at 849 West Washington Boulevard, in the city of Chicago, State of Illinois.

2. Respondent is now, and for some time last past has been, engaged in the sale and distribution, through others, of numerous articles of merchandise including wallets, pens, cameras, carving sets, and umbrellas.

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

4. Respondent's merchandise is sold by mail through members of the public whose names are obtained from telephone directories and other directories and lists. Respondent mails to such individuals certain advertising literature, including a sales brochure, inviting them to distribute his merchandise in accordance with the plan therein described, and to receive in return a "free" gift or premium. Typical of the advertising literature used by respondent in the sale of his merchandise is a four-page illustrated brochure, as follows:

The first three pages and a portion of the fourth page contain

[1] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

illustrations of so-called "gifts" or "premiums" which can be obtained by distributing the various articles of merchandise listed on the fourth page. The recipient of the brochure is invited to sell the articles listed on the fourth page to his friends and neighbors, in accordance with the plan therein described, advising him that: "Each article is an outstanding value selected from hundreds of items and its price is clearly printed UNDER THE RED PULL RECEIPT ON PAGE 4". The person acting as sales representative or distributor is advised that upon disposing of all of the articles listed on page 4 he has the option of receiving one of the premiums or gifts listed or, in lieu thereof, the sum of $7.50 in cash.

The fourth page of the brochure contains illustrations of 12 articles, which are stated to be "Outstanding Values", and which "[y]our friends will be delighted to buy * * * as all are WORTH MUCH MORE!" In the lower right-hand corner of the fourth page below the illustrations there appears a device which is commonly called a pull card. This is the device referred to on the first page of the brochure as "THE RED PULL RECEIPT ON PAGE 4". The device consists of a series of 12 separate tabs, arranged in four vertical columns, each column containing three tabs. The tabs are red in color and each contains the legend: "PULL HERE". Underneath each pull tab, and invisible until the perforations are broken and the tab is lifted, is the first name of a person, a price and the name of one of the articles illustrated above the pull card. Thus, under one of the pull tabs the following appears:

ANN—97¢
Pair of Lamps

Each pull tab corresponds to a different one of the 12 articles illustrated on the page.

To the left of the pull card is a list describing each of the articles illustrated on the page. The list is arranged in three vertical columns, with the description of the article appearing in the third column. The first column, which is headed "Price", contains the price of each of the articles described in the third column, the price being preceded by a person's first name. Thus, for the article which is partially described as: "A pair of two-way copperplate Hurricane Lamps", the price column reads: "ANN—97¢". The prices listed vary from a low of 97 cents (Ann) for the Hurricane Lamps, to a maximum of $1.98 (identified as "KEN") for an umbrella. Each of the first name designations and accompanying price corresponds to an identical name and price appearing on the back of each pull tab. Between the first, or "Price" column, and the third column describing each article, is a column headed "Name of Purchaser" which contains blank spaces for writing in the name of the purchaser of each article.

Immediately above the pull-tab device there appears the following note:

NOTE: This is a sales sheet. It is not a punchboard or a gambling device. Do not construe or accept for use as a gambling device.

The list of names on the pull slip and corresponding names on list shown to left are alphabetically arranged and are for the purpose of making it easier for the seller to list customers' names in proper spaces.

Here's how it works. *You may purchase from the list shown on the left where the merchandise is described or you may pull any one of the slips below on the back of which is printed the article and price. If not satisfied with the item you picked you are not obligated to buy it.* All merchandise is fully guaranteed to be as represented, and is sold with a money back guarantee. [Emphasis supplied.]

Immediately above the "NOTE" and between it and the illustrations of the articles there appears the following additional legend:

This sheet is given to you absolutely free. If you wish you can use this as a sales sheet. It can be used with any merchandise. Prospective purchaser is not obligated to pay unless he desires to do so. If you desire to purchase merchandise from us you can do so at any time.

The total price of all 12 articles listed in the brochure is $19.95. The prospective sales distributor is advised, in a further note appearing in connection with the list of articles, that respondent is "able to give these values because our overhead is low based on uniformity of packing." The distributor is therefore requested to "try to sell the 12 useful items" described. While he is also advised that if he is unable to sell all 12 items his order will be filled and that he will receive a 25% allowance for himself on the articles sold, the order blank provided in the brochure is primarily for use in connection with orders for all 12 items as a package.

The record discloses that normally orders received by respondent from his sales distributors are for one each of all 12 items listed in the brochure and that the distributor normally receives a gift or premium for himself. Upon receipt of the articles ordered the distributor undertakes to distribute them to the customers to whom he sold them, having retained a list of such customers on the form provided by respondent.

5. Respondent contends that the sale and distribution of his merchandise in accordance with the plan above described does not constitute the use of a lottery scheme or gaming device since, (a) the "prospective purchaser * * * has the option to buy the merchandise with or without the use of the pull tab", and (b) even where he does make use of the pull tabs there is no game of chance involved since

he "is not obligated to buy what he pulls". Respondent's contentions in this respect are based on the note and explanatory material appearing above the pull-tab device, which purport to give the purchaser these options. In the opinion of the examiner respondent's argument is lacking in merit since, (a) the so-called "sales sheet" is obviously designed for use as a gaming device, and (b) the evidence discloses that it is normally used as a gaming device and that the explanatory material appearing thereon is largely overlooked or ignored in practical operation.

While the sales brochure does contain the relatively obscure statement that the distributor may use it as "a sales sheet", its principal appeal is centered around the pull-tab device. On the very first page the prospective distributor's attention is immediately and prominently directed to "THE RED PULL RECEIPT ON PAGE 4". The distributor is repeatedly encouraged to dispose of the complete assortment of 12 articles for the total price of $19.95, so as to be able to obtain his gift or premium.[2] This would ordinarily be accomplished through the use of the pull-tab device as the simplest expedient for avoiding duplicate orders for some items and a lack of orders for others. The pull-tab device is presented to him as the most obvious way of disposing of the merchandise "in practically no time at all" and of securing a gift for himself, without going through the tedious process of trying to sell it directly item by item.

The testimony concerning the actual use of the brochure by sales distributors discloses that in each instance the sales distributor disposed of the merchandise by having prospective customers pull the tabs. Almost invariably the solicitors approached prospects not as salesmen seeking to sell merchandise, but by exhibiting the pull-tab device and asking the person whether he would like to "take a chance". This uniformity of practice among the distributors is readily understandable in view of the obvious appeal made in the brochure to the use of the pull-tab device. It also reflects the normal reaction to be expected, given the type of solicitor through whom respondent distributes its merchandise and the type of customer to whom it is ultimately sold. Many of the distributors and their customers are factory workers or housewives with a relatively low level of education and sophistication. Frequently, they have either sold or purchased so-

[2] On the first page of the brochure the prospective distributor's attention is referred at least six times to the "12 articles" or "complete assortment of 12 articles" and he is several times informed that he must obtain $19.95 to receive his gift. The order blank on page 2 contemplates the remittance of $19.95, unless the distributor wishes to deduct a cash premium of $7.50 or to pay for the articles C.O.D. The blank spaces for filling in the name of the purchaser on page 4, provide only one blank for each customer per article. The distributor is also advised on page 4 that respondent is able to give such excellent values "because our overhead is low *based on uniformity of packing,*" and the distributor is urged: "Do try to sell the 12 useful articles." [Emphasis supplied.]

called chances through punchboard, push card or similar gambling devices, or have seen such devices in use. Such persons would readily associate respondent's pull-tab device with other gambling devices which they had seen and would be apt to overlook, ignore or not understand explanatory material of the type used in connection with respondent's pull-tab device.[3]

While the note also purports to offer the prospective customer (as distinguished from the solicitor) the option "to purchase from the list shown on the left * * * or you may pull any one of the slips below on the back of which is printed the article or price", it is clear that this option has no practical significance in the context in which the customers are solicited. Given the physical appearance of respondent's pull-tab device and its similarity to other gambling devices, it is inevitable that those interested in using it will do so by pulling the tabs, particularly where they are solicited on the basis of "taking a chance". The fact is that each of the persons to whom respondent's solicitors sold any merchandise did so by using the pull tabs, rather than by selecting an article he wished to purchase. Their reactions are in accord with what would be expected of the average person using the brochure who, according to respondent's own expert witness, Dr. Wladimir G. Eliasberg, "would find the tabs here and would pull one".[4]

Respondent's further contention that even where the pull-tab device is used the customer will not regard it as a game of chance since he "is not obligated to buy what he pulls", is based on the assumption that the statement to this effect, which appears in the note, will invariably come to the attention of the customer. Respondent apparently relies on the testimony of Dr. Eliasberg, who expressed the opinion that after a customer had pulled an article which he could not use he would then read the note to find out what alternatives he had. This opinion was based primarily on Dr. Eliasberg's personal reaction in examining the device and not on any scientific study of persons using such devices. The examiner is satisfied that the reaction of Dr. Eliasberg (who admittedly had never previously used such devices) would not be the same as the average factory worker or housewife, many of whom have had prior experience in "taking a chance" and, generally speaking, lack Dr. Eliasberg's sophistication and perspicacity in looking for alternatives.

[3] One of the solicitors testified that he had not seen the explanatory note, and he instinctively proceeded to use the device in the same manner as other similar devices he had seen "around the shop," by asking fellow employees "to take a chance" and pull the tabs (R. 107). Another solicitor, who had seen the note but had elected to use the pull-tab device in selling the merchandise, when asked why she had not tried to sell the merchandise directly, replied: "It never entered my mind to sell it outright. I just sold it with the tabs." (R. 124.)

[4] R. 49.

Such persons, as the evidence of actual usage discloses, look at the device in a cursory manner and do not take the trouble to read any notes appearing in fine print.[5] Each of the customers who purchased a "chance" from the solicitors who testified in this proceeding, invariably accepted the article which he or she had pulled, even though advised in some instances by the solicitor that he or she was not obligated to do so. The examiner is satisfied that in the latter instances the customers either did not comprehend what they were being told or felt honor bound not to welch after having "taken a chance".[6]

It is clear from the pull-tab device and from the evidence concerning its use that if not for the note and explanatory material the public would regard respondent's sales brochure as involving some type of lottery or gaming device, inasmuch as the identity of the article to be received and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the pull-tab device. This was conceded by respondent's expert witness, Dr. Eliasberg, who testified that anyone looking at the brochure without observing the note would "associate it with some type of lottery divice".[7] The examiner is satisfied from the evidence as a whole, including that discussed above, that generally speaking the public would not notice or understand the explanatory material and would, despite it, regard respondent's so-called sales sheet as a lottery or gaming device. It is, accordingly, concluded and found that respondent sells and distributes articles of merchandise by means of a lottery scheme or gaming device, and that he supplies to and places in the hands of others the means of conducting lotteries or games of chance in the sale of his merchandise.

CONCLUSIONS

1. It is now well settled by controlling decisions too numerous to mention that the practice of selling goods by means of a plan or method which involves the use of a gaming device or lottery is a practice which is contrary to the public policy of the United States, and that where such practice occurs in commerce it is in violation of

[5] One of the solicitors, when asked how long customers looked at the device, testified (R. 142):

"They didn't take too much time. A lot of them were on the job and just looked at it for a second or two. Or they would look at it at home. I would go over and visit the neighbors and sit and talk with them, and they'd take a chance on it."

[6] The attitude of such people is typified by that of one of the solicitors who, upon being asked whether he would give a customer something else if he pulled an article he didn't want, replied (R. 111):

"A. No, it wouldn't be right.

"Q. In what respect?

"A. He pulled a chance here and he had to keep it."

[7] R. 64.

the Federal Trade Commission Act. See, e.g., *FTC* v. *Keppel & Bro.*, 291 U.S. 304 [2 S. & D. 259]; and *Surf Sales Co.* v. *FTC*, 259 F. 2d 744 [6 S. & D. 453] 7th Cir., 1958). It is also well settled that the Commission's jurisdiction is not limited to those directly engaged in conducting the game of chance or lottery in connection with the sale or distribution of merchandise to the ultimate consumer, but also includes those who supply the means or instrumentality for others to conduct same. *Chicago Board Co.* v. *FTC*, 253 F. 2d 78 [6 S. & D. 385] (7th Cir., 1958); *Consolidated Manufacturing Co.* v. *FTC*, 199 F. 2d 417 [5 S.&D. 426] (4th Cir., 1952); and *Modernistic Candies* v. *FTC*, 145 F. 2d 454 [4 S. & D. 288] (7th Cir., 1944). Consequently, it is immaterial that respondent "does not have control over the purchaser or the actual consumer of the merchandise * * * [but] is merely a seller of goods by means of a sales sheet",[8] since he is the author of a plan, and supplies the means or instrumentality, for conducting a game of chance or lottery. Likewise immaterial is the fact that some distributors may have offered prospective customers "the opportunity of buying the merchandise without the use of the pull-tab",[9] since the pull-tab device is clearly "designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods".[10] Its use for that purpose being illegal, it is of no consequence that some distributors may conceivably elect not to use the illegal device. Furthermore, the evidence discloses that in actual practice it is generally used in the manner for which it is designed.

2. The principal feature which purports to distinguish respondent's device from the great bulk of punchboards, pushcards, pull cards and similar devices which have been held to be illegal is the fact that the note appearing above it purports to advise the user that he is not obligated to accept the article designated by the tab pulled by him. As has already been found, such note is overlooked or ignored in practice. In the opinion of the examiner it is a mere subterfuge intended to avoid responsibility for the obvious illegality of the pull-tab device. Similar or identical notes have already been held by the Commission and the courts not to confer a cloak of immunity on an otherwise illegal gambling device. *Wolf* v. *FTC*, 135 F. 2d 564 [3 S. & D. 564] (7th Cir., 1943); *E. & J. Distributing Co.* v. *FTC*, 193 F. 2d 179 [5 S. & D. 349] (2d Cir., 1952), *cert. denied*, 344 U.S. 823.

3. Respondent's defense rests principally on *J. C. Martin Corp.* v. *FTC*, 242 F. 2d 530 [6 S. & D. 251] (7th Cir., 1957), involving a pull-tab device and note similar to that used in the instant proceeding and

[8] Respondent's Brief, p. 4.

[9] Id. at p. 2.

[10] *Globe Cardboard Novelty Co.* v. *FTC*, 192 F. 2d 444, 448 [5 S. & D. 342] (3d Cir., 1951); *Seymour Sales Co.* v. *FTC*, 216 F. 2d 633, 636 [5 S. & D. 700] (D.C. Cir., 1954).

in the *Wolf* and *E. & J. Distributing Co.* cases. The court in the *J. C. Martin* case held that the device there involved did not constitute an illegal lottery, reversing the contrary holding of the Commission. Respondent's brochure and sales plan is admittedly patterned after that in the *J. C. Martin* case.[11] Counsel supporting the complaint contend that the *J. C. Martin* holding is in conflict with that in the *Wolf* and *E. & J. Distributing Co.* cases and should not be followed.

In considering whether to apply the holding in the *J. C. Martin* case to the instant case, it should be noted at the outset that it was not based on the fact that the note purported to give a prospective customer the option of purchasing an article outright, rather than utilizing the tab device, and advised him that he was not obligated to buy the article selected by a tab. The court, agreeing with the holding in the *Wolf case, concluded that:* "The objection to the pull tab scheme cannot be removed by offering the individual an unobjectionable alternative". Its reversal of the Commission's holding was based, rather, on the ground that the device did not constitute a lottery scheme since "every participant * * * will in any event receive the equivalent of the amount contributed by him and he is not under any hazard of pecuniary loss, nor offered the chance of receiving something of more value than the amount contributed by him".

It may be argued, as do counsel supporting the complaint with considerable persuasiveness, that the holding in the *J. C. Martin* case is directly contrary to that in the *Wolf* and *E. & J. Distributing Co.* cases (both of which sustained the Commission's position), and that therefore the *J. C. Martin* case should not be followed here. However, it is the opinion of the examiner that the *Martin* case is, in any event, distinguishable from the other two cases and from the situation in the instant case. The court in the *Martin* case itself distinguished its holding from that in the *Wolf* case on the ground that the examiner had dismissed the following allegations of the complaint:

> Some of [petitioners'] articles of merchandise have purported and represented retail values greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The prices of others of the articles are higher in proportion than the articles first mentioned. The apparent greater values of some of said articles induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of greater value than the designated prices to be paid for same.

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[11] Although a resident of Brooklyn, New York, respondent established his place of business in Chicago in order to take advantage of the Seventh Circuit Court of Appeal's decision in the *J. C. Martin* case. Presumably, he did not do so in New York, where he continues to reside, because of the contrary holding of the Second Circuit in the *E. & J. Distributing Co.* case.

Noting that the examiner had "found that there was no evidence supporting these allegations", the court concluded that "the *Wolf* case is not controlling". In the instant proceeding prospective participants were advised in the brochure that the items which were being offered were "WORTH MUCH MORE" and were "OUTSTANDING VALUES". From the manner in which the articles were illustrated in the brochure and the description of them the impression was created that they were worth more than the amounts indicated by the tabs. There is no evidence in the record as to the actual value of these articles, although there is some indication of complaints by customers that upon pricing similar articles in the store they found them to sell for less than the prices charged by respondent. In any event, it seems clear that participants in the scheme were induced to "take a chance" because of the impression that they might receive something having a value greater than the price they paid.

The *J. C. Martin* case may also be distinguished from the situation in the instant case for the reason that the scheme there used by respondents was found to be illegal on the narrow ground that it contsituted a lottery. The examiner there specifically found that respondents' sales methods "involve and contemplate the use of lottery devices", and the Commission affirmed, per curiam, "the hearing examiner['s] holding that the respondents have violated Section 5 of the Federal Trade Commission Act by supplying to others lottery devices for use in the sale of their merchandise". In reversing the Commission, the Court of Appeals considered the scheme solely in terms of whether it contained all of the elements of a lottery in the technical sense, and concluded that it did not.

The complaint in the instant proceeding challenges respondent's practices not merely as constituting a lottery, but as involving a "gaming device". It is clear that a device which is calculated to appeal to the public's gambling instincts may be considered an unfair act or practice, within the meaning of the Federal Trade Commission Act, even though it may not technically be a lottery within the meaning of some penal or other statute. As stated in *Modernistic Candies, Inc.* v. *FTC*, 145 F. 2d 454, 455 [4 S. & D. 291]:

> We think the Commission * * * has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandise by gambling. * * * Merchandise by gambling should not be divided into insulated acts, which appear innocent when examined seperately.

The court in that case held to be illegal the distribution of a punchboard device "designed, intended and conducive to gambling; its use suggests and was intended to encourage gambling". Similarly, in *Seymour Sales Co.* v. *FTC*, 216 F. 2d 633 [5 S. & D. 700] (CA DC, 1954), push card devices were held to be illegal because they were "designed to and in fact are used to suggest and encourage merchandising by gambling". The court in *Globe Cardboard Novelty Co.* v. *FTC*, 192 F. 2d 444 [5 S. & D. 342] (3d Cir., 1951) declared, broadly, that it is "contrary to the public policy of the United States for sellers to market their goods *by taking advantage of the consumer's propensity to take a chance*" (emphasis supplied). Relying on such holdings, it was held in the special concurring opinion in *Calvine Cotton Mills*, 51 FTC 294, that a sales promotional plan which is "intended to appeal to the gambling instincts of purchasers and prospective purchasers [is] contrary to public policy" and therefore is illegal under the Federal Trade Commission Act, not "*because it is a technical lottery, but because it is a method of merchandising which constitutes an unfair trade practice*".

The evolution in the definition of the practices intended to be outlawed by the Federal Trade Commission Act is indicative of a Congressional intent that Section 5 should not be given a grudging or niggardly interpretation. The original bill which became the Federal Trade Commission Act declared "unfair competition" to be unlawful. As finally enacted, this term was changed to read "unfair methods of competition". In referring to this change in terminology, the Supreme Court noted that "it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase 'unfair methods of competition' was substituted" (*FTC* v. *R. F. Keppel & Bro.*, 291 U.S. 304, 311) [2 S. & D. 259, 263]. The court also stated (p. 313) that—

> A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, *even though it is not criminal*, was thought to involve the kind of unfairness at which the statute was aimed. [Emphasis supplied.]

Under the original provision of Section 5, which was limited to outlawing "unfair methods of competition", it was held that Congress intended to vest in the Commission jurisdiction not merely over practices which were considered to be unfair at common law or under the Sherman Act, but "adequate powers to hit at every trade practice then existing [when the law was passed] or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages" (*FTC* v. *Cement Institute*, 333 U.S. 683, 693 [4 S. & D. 765]. Because of the fact that this broad concept of the Commission's jurisdiction was held to be subject to the limitation that the unfair practices must have a substantial effect on competition (*FTC* v. *Raladam*, 283 U.S. 643) [2 S. & D. 116], the Federal Trade

Commission Act was amended in 1938 so as to outlaw not merely "unfair methods of competition", but also "unfair or deceptive acts or practices", in commerce. It seems clear that by thus broadening the Commission's jurisdiction, Congress did not intend to give the Commission any lesser jurisdiction over trade practices which, while not directly related to competition, are unfair because of their effect on the public or on public morals. Consequently, a method of competition which appeals to the public's baser gambling instincts would seem to clearly fall within the Commission's jurisdiction, irrespective of whether it technically constitutes a lottery or otherwise violates the penal laws.

Respondent contends that it makes no difference that the complaint attacks its pull-tab device as constituting a "gaming device", as well as a "lottery" scheme, since it does not fall into either category. It is respondent's position that the two terms "have similar and analogous meanings" and that in both instances the element of chance must be present. Respondent argues that there is no element of chance present here since each participant will receive an article of value equivalent to the amount contributed by him, and he is under no hazard of pecuniary loss nor given a chance to receive something of greater value than he contributed.

In the opinion of the examiner respondent's position is based on erroneous legal and factual assumptions, and is without merit. In the first place, the mere fact that the participant receives an article of value for his contribution does not negate the existence of the element of chance. As stated in *Wolf* v. *FTC*, 135 F. 2d 564, 566 [3 S. & D. 564]:

> * * * there can be no serious doubt that a method of distribution which contemplates the offering to the purchaser of an opportunity to pull a chance to see which article of a list of 20 he may buy constitutes a game of chance, even though each purchaser does receive an article of value for his purchase (*Keller* v. *Federal Trade Commission*, 132 F. (2d) 59) [3 S. & D. 520].

In the second place, there is no record basis for the assumption that each participant will receive an article equivalent in value to what he contributed. As already found, respondent sought to create the impression that the articles were of greater value than the amounts being paid. Furthermore, the articles were being offered at varying prices and had varying values, and the record does not establish that the value of each article necessarily corresponds to the price indicated by the pull tab. Finally, and most important, value is a relative term and must be considered not merely in terms of price, but in terms of its utility to the individual making the pull. For example, while the ash tray and lighter offered by respondent may have a retail value of $1.59 (the price indicated on the pull tab), it may be valueless to a nonsmoker who pulls that tab. Similarly, the costume jewelry may be worth, at retail, its indicated price of $1.79, but it may be worthless to a bachelor with no female entanglements.

Whatever may be the reaction of those trained in legal niceties, it is clear that the public—"that vast multitude which includes the ignorant, the unthinking, and the credulous",[12] would regard respondent's pull-tab device as involving a game of chance. The record establishes that those who did use the pull tabs here did so not because they expected to receive a particular article having a value equivalent to what they paid, but because they wanted to "take a chance". The elements of chance involved in their participation were the article they would receive and the price they would pay. These were unknown to them before they pulled the tabs, and it was this uncertainty which aroused their curiosity and resulted in their participation. This clearly constitutes participation in a game of chance,

4. It is concluded that respondent's sales plan, as above found, involves the use of a lottery scheme or gaming device in connection with the sale of respondent's merchandise. The use of said plan is, accordingly, contrary to the established public policy of the United States and constitutes an unfair act or practice within the intent and meaning of the Federal Trade Commission Act.

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

ORDER

It is ordered, That respondent Jonas Gerson, trading as Haven Company or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of wallets, pens, cameras, carving sets, and umbrellas, or other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

[12] Positive Products Co. *v.* FTC, 132 F. 2d 165, 167 [3 S. & D. 528] (7th Cir. 1942).

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

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

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

Opinion and Final Order

By the Commission:

This case is before the Commission for review of the hearing examiner's initial decision, filed October 9, 1962, finding that respondent engaged in unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, by the use of a sales plan constituting a lottery or gaming device.

The questions raised by respondent on this review are narrow. Respondent makes no substantial attack on the evidentiary basis for the findings of fact made by the examiner; nor does he make specific objection to any provision of the cease and desist order contained in the initial decision. Relying on the decision of the Court of Appeals for the Seventh Circuit in *J. C. Martin Corp.* v. *FTC*, 242 F. 2d 530 [6 S. & D. 251] (1957), respondent argues that his sales plan was patterned upon that upheld by the court in the *Martin* case, and that it follows therefore that his plan is likewise legal. The fallacy in respondent's argument, as the hearing examiner pointed out, is that the proof in this record does not have the deficiencies found by the Seventh Circuit to be present in the *Martin* case. We shall not repeat the detailed respects in which, as the examiner found, the proof established that respondent's pull-tab device was, in the context of actual use, an illegal game of chance. The *Martin* case held only that the device there involved was not a lottery because the element of prize, essential to a lottery scheme, was not sufficiently proved. On the facts of this record, the case is clearly distinguishable from *Martin* and is governed by *Wolf* v. *FTC*, 135 F. 2d 564 [3 S. & D. 564] (7th Cir., 1943), and *E. & J. Distributing Co.* v. *FTC*, 193 F. 2d 179 [5 S. & D. 349] (2nd Cir., 1952), *cert. denied* 344 U.S. 823. Accordingly, the Commission adopts the findings of fact, conclusions of law, and order contained in the initial decision.

FINAL ORDER

It is ordered, That respondent Jonas Gerson, trading as Haven Company or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of wallets, pens, cameras, carving sets, and umbrellas, or other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

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

IN THE MATTER OF

TOM MANGAKIS TRADING AS EXCLUSIVE MINK PLATE CO.

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

Docket C-321. Complaint, Mar. 22, 1963—Decision, Mar. 22, 1963

Consent order requiring a jobber of fur plates in New York City to cease violating the Fur Products Labeling Act by failing, on invoices, to show the true animal name of fur used in fur products, to describe as "natural" fur products which were not artificially colored, and to set forth required item numbers.

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 Tom Mangakis, an individual trading as Exclusive Mink Plate Co., hereinafter referred to as respondent, has 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 Tom Mangakis is an individual trading as Exclusive Mink Plate Co. with his office and principal place of business located at 149 West 27th Street, New York, New York. Respondent is a jobber of fur plates.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is 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 has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 4. 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) Fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artifically colored, were not described as natural, in violation of Rule 19(g) of the said Rules and Regulations.

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

PAR. 5. The aforesaid acts and practices of respondent, 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 in commerce under the Federal Trade Commission Act.

Decision and Order

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

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

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

1. Respondent, Tom Mangakis, is an individual trading and doing business as Exclusive Mink Plate Co. The office and principal place of business is located at 149 West 27th Street, in the city of New York, State of New York.

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

ORDER

It is ordered, That Tom Mangakis, an individual trading as Exclusive Mink Plate Co., or under any other trade name and respondent's 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 fur products; or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which are made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Falsely or deceptively invoicing fur products by:

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

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

C. Failing to set forth on invoices the item number or mark assigned to a fur product.

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

IN THE MATTER OF

HIGH VOLTAGE ENGINEERING CORPORATION

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

Docket C-322. Complaint, Mar. 26, 1963—Decision, Mar. 26, 1963

Consent order requiring absolute divestiture as a going concern, to a purchaser approved by the Commission, of the assets of the second largest domestic producer acquired in June 1960 by the largest—resulting in concentrating 90% of total dollar sales in one concern—in the particle accelerator industry engaged in the research, development, and production of particle accelerator machines for the synthetic production of radiation energy and used for (1) research by universities, public and private research organizations, and government agencies; (2) industrial radiation processing by plastic, drug and electronic manufacturers, among others; (3) radiography by manufacturers of large metal castings and weldments; and (4) medical therapy by hospitals and clinics.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of Section 7 of the amended Clayton Act (15 U.S.C., Sec. 18), hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (15 U.S.C., Sec. 21), charging as follows:

PARAGRAPH 1. Respondent, High Voltage Engineering Corporation, hereinafter sometimes referred to as HVEC, is a corporation organized in 1946 and existing under the laws of the State of Massachusetts, with its principal office at Burlington, Massachusetts.

PAR. 2. Since its formation, HVEC has engaged in research, development, manufacture and sale of particle accelerators which are machines for the synthetic production of radiation energy. HVEC also manufactures other products, principally accessories for its particle accelerator machines, including such items as magnets, beam-handling equipment, particle sources, high vacuum components, particle deflection and analysis devices and components for microwave power generation. Its subsidiary, Electronized Chemicals Corporation, with a plant located at Burlington, Massachusetts, which is engaged in contract radiation processing and holds patents on radiation processing techniques, used in connection with particle accelerators, was acquired by HVEC in 1957. Its subsidiary, Glass Grinding Corporation, with a plant located at Whitman, Massachusetts, manufactures ground glass insulators used by HVEC in the construction of vacuum tubes and accelerators and in grinding various materials for the use of HVEC and for other customers. Its wholly owned subsidiary, HVEC (Europa), operates a manufacturing plant at Amersfoort, The Netherlands, which manufactures machines to produce synthetic nuclear radiations and other products. As of December 31, 1959, HVEC listed total assets of over $8,000,000 and sales for the year of over $8,000,000. As of December 31, 1960, HVEC listed total assets of over $10,000,000 and sales for the year of over $12,000,000. HVEC sells the products it manufactures throughout the United States, and is otherwise engaged in commerce, as "commerce" is defined in the amended Clayton Act.

PAR. 3. On or about June 1, 1960, HVEC acquired substantially all of the stock of Applied Radiation Corporation, hereinafter referred to as ARCO, a corporation organized in 1953 and existing under the laws of the State of California. By an agreement dated April 18, 1960 and "Plan of Reorganization", HVEC and ARCO agreed to an exchange of one share of common stock of HVEC for each 10.75 shares of common stock of ARCO. Under the exchange agreement, HVEC issued common stock to ARCO having a market value in excess of $5,000,000.

Since its formation, and at the time of acquisition, ARCO has engaged in research, development, manufacture and sale of particle accelerators and associated equipment. As of September 30, 1959, ARCO listed total assets in excess of $1,600,000 and sales for the fiscal year 1959 in excess of $1,600,000. As of September 30, 1960, ARCO listed total assets in excess of $1,900,000 and sales for the fiscal year 1960 in excess of $2,400,000. ARCO, prior to and at the time of acquisition, sold the products it manufactured throughout the United States, and was otherwise engaged in commerce, as "commerce" is defined in the amended Clayton Act.

PAR. 4. Prior to June 1, 1960, HVEC and ARCO transacted a sub-

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stantial business in the particle accelerator industry. The particle accelerator industry consists of the research, development, production and sale of particle accelerator machines for the synthetic production of radiation energy. In the industry, such machines are known as lower energy accelerators or higher energy accelerators. Energy refers to the characteristic of each particle as measured in electron volts. Low energy radiation refers to the energy range of 0.5 to 150 MEV (million electron volts). High energy radiation refers to the energy range in excess of 150 MEV. These energies are produced by two basic mechanisms. Direct accelerators build up a high voltage potential between a terminal and ground and this voltage is used to accelerate particles in an evacuated tube. Indirect accelerators do not build up a high voltage. The particles are accelerated to a high energy condition by means of electric and magnetic fields.

Particle accelerators are used for:

1. Low energy research and high energy research, in which machines are used in research, among others, as to nuclear reactions, solid states studies, activiation analysis, metallurgy and radiation chemistry; as to photonuclear effects, bomb radiation simulation, neutron time of flight, very intense neutron fluxes, nuclear research with high energy electrons and dose rate dependency studies.

2. Radiation processing, in which machines are used in industrial processing, among others, to improve properties of plastic materials, to alter the structure of some electronic components, and to sterilize medical and surgical products, and the preservation of foods.

3. Radiography, in which machines are used, among others, to produce X-rays for inspection of metal parts for hidden defects.

4. Medical therapy, in which machines are used for the treatment of cancer by exposure to controlled radiation.

The users for machines in research are universities, public and private research institutions and government agencies. The users for machines in radiation processing are varied manufacturers, such as, plastic, drug and electronic concerns, among others. The users of machines for radiography are manufacturers of large metal castings and weldments, among others. The users of machines for medical therapy are hospitals and clinics, among others.

PAR. 5. The particle accelerator industry is composed of seven manufacturers of particle accelerators. All seven of said manufacturers compete in the research, development, manufacture and sale of particle accelerators, which are machines for the synthetic production of radiation energy. There are two basic categories of particle accelerators. Two machines, namely, Van de Graaff and Cockcroft-Walton, are lower energy electrostatic accelerators. The other types of particle accelerators, including the Linear accelerator, are higher energy accelerators. Each of the several accelerators has certain distinguishing physical characteristics which have certain advantages for particular installations. All of the particle accelerators are involved in competition for the synthetic production of radiation energy.

PAR. 6. The particle accelerator industry is a post-World War II development. The industry is characterized by revolutionary technological advances. Government-supported research and development in the area of national defense and government-supported work of public and private institutions in the field of atomic energy have contributed new developments in the particle accelerator industry. The research, and construction of particle accelerators has been developed by government agencies, university research laboratories which build their own equipment and the seven commercial manufacturers. HVEC and ARCO are two of such commercial manufacturers.

PAR. 7. Proposals for the design, development and production of particle accelerators are solicited from known, qualified manufacturers by the research users, and by the nonresearch users. On the basis of submitted proposals for the design, development and production of particle accelerators, awards are made to that firm considered qualified. The then available technical skills and facilities, managerial ability, financial resources, price and other factors are considered. In response to invitations to bid, HVEC and ARCO competed in the submittal of bids and proposals on a substantial volume of research and nonresearch projects. Competition is keen among the bidders for the money available in the research budget of the three principal funding Agencies, namely, Atomic Energy Commission, Office of Naval Research and National Science Foundation.

PAR. 8. By reason of its capabilities, experience, responsibility, competitive activities, among other factors, HVEC is a major manufacturer in the particle accelerator industry. Since beginning operations in 1947, HVEC has designed and manufactured more particle accelerators than all other manufacturers combined in the industry. Prior to and at the time of the acquisition, HVEC solicited and was solicited by research and nonresearch users, for the design, development and production of Van de Graaff particle accelerators and Linear accelerators. Prior to and at the time of the acquisition, HVEC designed, manufactured and sold Van de Graaff particle accelerators and Linear accelerators. HVEC is the sole manufacturer of the Van de Graaff particle accelerator.

PAR. 9. By reason of its capabilities, experience, competitive activities, among other factors, ARCO is also a major manufacturer in the particle accelerator industry. Since its formation, ARCO has designed, manufactured and sold Cockcroft-Walton particle accelerators and Linear particle accelerators. Since its formation, and to the time of acquisition, ARCO designed and manufactured more Linear particle accelerators than all other Linear accelerator manufacturers in the industry. Prior to and at the time of acquisition, ARCO solicited and was solicited by research and nonresearch users for the design, development and production of Cockcroft-Walton particle accelerators and Linear accelerators.

PAR. 10. In 1960, of the seven companies manufacturing and selling particle accelerators in the United States, HVEC was the largest manufacturer with about 70% of total dollar sales and about 70% of total units. The second largest producer in the industry was ARCO with about 20% of total dollar sales. On the basis of units, ARCO had over 10% of total units sold. During 1960, the total dollar sales of 46 particle accelerators exceeded $11,000,000.

In 1960, HVEC, the sole manufacturer of Van de Graaff particle accelerators, sold 33 Van de Graaff units. ARCO sold one Cockcroft-Walton particle accelerator in 1960.

In 1960, only four companies sold Linear particle accelerators in the United States. HVEC and ARCO, combined, accounted for five of the total of eight units of Linear particle accelerators sold in the United States and accounted for about 78% of the total dollar sales of the eight Linear particle accelerators, which totalled over $3,000,000.

HVEC, in 1960, by virtue of its acquisition of ARCO increased its market share of all particle accelerators to about 80% of total units and over 85% of total dollar sales. In addition to its increase in market share of all particle accelerators, and as a result of the acquisition of ARCO, HVEC substantially increased its market share in the sale of lower energy electrostatic particle accelerators and Linear particle accelerators. As a result of this acquisition, at least 80% of all particle accelerator unit sales are now concentrated in one producer. As a result of this acquisition, about 90% of all lower energy electrostatic particle accelerator unit sales are now concentrated in one producer. As a result of this acquisition, over 50% of all Linear particle accelerator unit sales are now concentrated in one producer.

PAR. 11. The effect of the aforesaid acquisition by HVEC of ARCO may be substantially to lessen competition or to tend to create a monopoly in the design, development, manufacture and sale of (a) particle accelerators generally, (b) lower energy electrostatic particle accelerators, namely, Van de Graaff and Cockcroft-Walton, (c) lower energy Linear particle accelerators, and (d) higher energy Linear particle accelerators, in the United States within the meaning of Section 7 of the amended Clayton Act, in the following ways, among others:

1. Actual and potential substantial competition between HVEC and

ARCO in the design, development, manufacture and sale of the aforesaid particle accelerators will be eliminated.

2. Actual and potential competition in the particle accelerator industry may be substantially lessened.

3. ARCO has been eliminated as a substantial competitive factor in the design, development, manufacture and sale of the aforesaid particle accelerators.

4. The high degree of concentration in the design, development, manufacture and sale of the aforesaid particle accelerators will be further increased.

5. Mergers and acquisitions involving other particle accelerator manufacturers may be fostered, thereby causing a material increase in economic concentration and tendency toward monopoly in the particle accelerator field generally.

6. The acquisition will enhance HVEC's competitive advantage over smaller manufacturers of the products of the particle accelerator industry, including electrostatic and Linear particle accelerators, to the detriment of competition.

PAR. 12. The foregoing acquisition, acts and practices, as hereinbefore alleged, constitute a violation of Section 7 of the amended Clayton Act (15 U.S.C., Sec. 18).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondent, sometimes hereinafter referred to as HVEC, having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. High Voltage Engineering Corporation is a corporation orga-

nized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located in the city of Burlington, State of Massachusets.

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

ORDER

I

It is ordered, That the respondent, HVEC, through its officers, directors, agents, representatives and employees, shall, by December 1, 1964, divest itself absolutely, in good faith, of all of the ARCO assets as a going concern to a purchaser approved by the Federal Trade Commission.

II

Provided however, That, during the first twelve (12) months immediately following the date of service of this Order, HVEC shall make good faith efforts to divest itself of the ARCO assets and may effectuate said divestiture upon the following conditions:

1. That the buyer will complete all contracts existing as of the time of sale for the development and manufacture and testing and installation of linear particle accelerators or components thereof;
2. That the buyer will complete all subcontracts between HVEC and third parties in connection with HVEC's contracts for the manufacture of linear particle accelerators; and
3. That the buyer will accept responsibility for warranties and servicing of any linear particle accelerator contracted for by HVEC prior to the divestiture, but manufactured, completed, or in the process of completion by ARCO: *Provided*, *however*, That if the buyer does not accept responsibility for future warranties and servicing, the buyer will sell to HVEC parts and supplies at reasonable prices, not higher than those charged to others, in order to enable HVEC to meet warranties and servicing obligations on any linear particle accelerator contracted for by HVEC prior to the divestiture.

III

Provided, *further*, *however*, That, if after the expiration of twelve (12) months following the date of service of this Order, no divestiture has been made in accordance with the conditions set forth in Section II above, HVEC shall, in any event, divest itself absolutely, in good faith, of all of the ARCO assets by December 1, 1964.

IV

Provided, further, however, That if the ARCO assets cannot be sold or disposed of entirely for cash, nothing herein contained shall be deemed to prohibit HVEC from retaining, accepting and enforcing a bona fide lien, mortgage, deed of trust, or other form of security on the ARCO assets for the purpose of securing to HVEC full payment of the price at which said assets are disposed of or sold: *Provided, however*, That if, after bona fide disposal pursuant to the divestiture order, HVEC, by enforcing a bona fide lien, mortgage, deed of trust or other form of security regains ownership or control of the ARCO assets disposed of, HVEC shall, subject to the provisions of this Order, divest itself of said assets within twelve (12) months from the time of said reacquisition.

V

It is further ordered, That the ARCO assets shall not be sold or transferred directly or indirectly to anyone who, at the time of divestiture is a stockholder, officer, director, employee or agent of, or otherwise directly, or indirectly connected with or under the control or influence of HVEC or any of HVEC's subsidiaries or affiliated companies.

VI

It is further ordered, That for a period of ten (10) years from the date of service of this Order by the Federal Trade Commission, HVEC shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise the assets, stock or any equity in any particle accelerator manufacturer in the United States.

VII

It is further ordered, That HVEC shall, within sixty (60) days after service upon them of this Order, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they propose to comply with this Order.

Thereafter, respondent shall submit reports to the Commission each ninety (90) days, describing the action that has been taken and the efforts that have been made to sell the ARCO assets. Such reports shall indicate the methods and means employed to effectuate a sale, the results of such actions and efforts and shall set forth the name and address of each person or company contacted, or who has indicated any interest in acquiring said assets, together with copies of all correspondence and summaries of all oral communications with such persons or companies.

VIII

Jurisdiction is retained so that respondent may at any time hereinafter petition the Commission for construction or modification of this Order which the Commission will consider and, upon proper showing by respondent, allow to the extent it finds such construction or modification to be warranted and consistent with Section 7 of the amended Clayton Act.

In the Matter of

HMH PUBLISHING CO., INC.

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

Docket 8516. Complaint, June 29, 1962—Decision, Mar. 28, 1963

Order requiring the Chicago publisher of "Playboy" magazine, among others, with sales for 1960 in excess of $3,500,000, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by making payments to certain operators of chain retail outlets in railroad, airport, and bus terminals, and in hotels and office buildings without making comparable payments available to their competitors, and making the payments to the favored customers on the basis of individual negotiations and not on proportionally equal terms.

Complaint

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

Paragraph 1. Respondent HMH Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business loacted at 232 East Ohio Street, Chicago, Illinois. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Playboy". Respondent's sales of publications during the calendar year 1960 exceeded three and one-half million dollars.

Par. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.