Complaint

IN THE MATTER OF

HUNECK'S, INC., ET AL.

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

Docket C-763. Complaint, June 17, 1964—Decision, June 17, 1964

Consent order requiring retail furriers in San Diego, Calif., to cease violating the Fur Products Labeling Act by labeling fur products with fictitious prices; failing in advertising, invoicing and labeling, to show the true animal name of fur, and when fur was "natural"; failing to disclose in advertising and labeling when fur was artificially colored, and to show the country of origin of imported furs in advertising; invoicing mink as "Ermine"; failing to keep proper records as a basis for pricing claims; substituting non-conforming labels for those originally affixed to fur products; and failing in other respects to comply with requirements of the Act.

COMPLAINT

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

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

Respondent Frank A. Huneck is an officer of the corporate respondent and formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 8th Avenue and C Street, city of San Diego, State of California.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribu-

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

PAR. 3. Respondents have removed and have caused and participated in the removal of, prior to the time fur products subject to the provisions of the Fur Products Labeling Act were sold and delivered to the ultimate consumer, labels required by the Fur Products Labeling Act to be affixed to such products, in violation of Section 3(d) of said Act.

PAR. 4. Certain of said fur products were misbranded in violation of Section 4(1) of the Fur Products Labeling Act in that they were falsely and deceptively labeled or otherwise falsely and deceptively identified in that labels affixed to fur products, contained representations, either directly or by implication that the prices of such fur products were reduced from respondents' former prices and the amount of such purported reduction constituted savings to purchasers of respondents' fur products. In truth and in fact, the alleged former prices were fictitious in that they were not actual, bona fide prices at which respondents offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and savings were not afforded purchasers of respondents' said fur products, as represented.

PAR. 5. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranding of fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 6. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

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

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

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

PAR. 8. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Ermine" when in fact, the fur contained in such products was "mink".

PAR. 9. 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) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

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

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

PAR. 10. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appeared in issues of the San Diego Union, a newspaper published in the city of San Diego, State of California.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To show the country of origin of imported furs contained in fur products.

PAR. 11. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that certain of said fur products were falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

Among such falsely and deceptively advertised fur products, but not limited thereto, were fur products advertised as Broadtail Lamb, when the fur contained in such fur products was entitled to the designation "Dyed Broadtail-processed Lamb" but not the designation "Broadtail Lamb".

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

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

(c) All parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder were not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of the aforesaid Rules and Regulations.

PAR. 13. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented either directly or by

implication that prices of such fur products were reduced from respondents former prices and the amount of such purported reduction constituted savings to purchasers of respondents fur products. In truth and in fact, the alleged former prices were fictitious in that they were not the actual, bona fide prices at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 14. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 15. Respondents, in introducing, selling, advertising, and offering for sale, in commerce, and in processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which had been shipped and received in commerce, have misbranded such fur products by substituting thereon labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor and to Section 4 of said Act in violation of Section 3 of said Act.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

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

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

1. Respondent Huneck's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 8th Avenue and C Street, city of San Diego, State of California.

Respondent Frank A. Huneck is an officer of the corporate respondent and his address is the same as that of the corporate respondent.

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

ORDER

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

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form on labels affixed to fur products.

3. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations pro-

mulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artifically colored.

4. Failing to completely set out information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on one side of the label affixed to fur products.

5. Representing, directly or by implication on labels, that any price, when accompanied or not by descriptive terminology is the respondents former price of fur products when such amount is in excess of the actual, bona fide price at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business.

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

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

B. Falsely or deceptively invoicing fur products by:

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

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

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

5. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artifically colored.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or

notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur product, and which:

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

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

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

4. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Fails to set forth all parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other.

6. Represents directly or by implication, that any price, when accompanied or not by descriptive terminology is the respondents former price of fur products when such amount is in excess of the actual, bona fide price at which respondents offered the fur products to the public or a regular basis for a reasonably substantial period of time in the recent regular course of business.

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

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

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

It is further ordered, That respondent Huneck's, Inc., a corporation, and its officers and respondent Frank A. Huneck, individually and as an officer of said corporation, and respondents' representatives, agents

and employees, directly or through any corporate or other device, do forthwith cease and desist from removing or causing or participating in the removal of, prior to the time any fur product subject to the provisions of the Fur Products Labeling Act is sold and delivered to the ultimate consumer, any label required by the said Act to be affixed to such fur product.

It is further ordered, That respondent Huneck's, Inc., a corporation, and its officers and respondent Frank A. Huneck, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

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

IN THE MATTER OF

MOORE BUSINESS FORMS, INC.

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

Docket 7086. Complaint, Mar. 13, 1958—Decision, June 18, 1964

Order dismissing—failure to establish a prima facie case—complaint charging the largest producer of business forms in the United States with manufacturing plants in 10 States, with discriminating in price between competing purchasers in violation of Sec. 2(a) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act

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

PARAGRAPH 1. Respondent, Moore Business Forms, Inc., a subsidiary of Moore Corporation, Ltd., 350 University Avenue, Toronto, Ontario, Canada, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. It operates its business in the United States through three Divisions: (1) Eastern Division at 900 Buffalo Avenue, Niagara Falls, New York, which is its principal place of business in the United States; (2) South-Central Division, 601 E. Hickory Street, Denton, Texas; and (3) Pacific Division at 2624 Yates Street, Los Angeles, California. The general sales policy in each of these Divisions is the same. Respondent recently formed a new Division, Stock Forms Company, with offices at 4300 Forest Park Road, St. Louis, Missouri; 491 South Dean Street, Englewood, New Jersey; and 425 Brannon Street, San Francisco, Califorina, to engage in the purchase and sale of stock forms primarily on a mail order basis.

PAR. 2. Moore Business Forms, Inc., hereinafter sometimes referred to as Moore or as respondent, is engaged in the manufacture, distribution and sale of various classes, types or descriptions of business forms products. It has 18 manufacturing plants and in excess of 150 sales offices throughout the United States and in Hawaii.

Moore Business Forms, Inc., is the largest producer of business forms products in the United States, with a total sales volume in 1955 substantially in excess of $78 million. Approximately 93% of respondent's business forms products are sold by respondent through its salesmen directly to the users. About 7% are sold through dealers or jobbers.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent is now, and for a number of years past has been engaged in commerce, as "commerce" is defined in the aforesaid Clayton Act, having sold its business forms products from its several plants located in the States of New York, Maryland, Texas, Iowa, Kentucky, Missouri, Alabama, California, Oregon and Wisconsin, and transported or caused the same to be transported from its plants or other places of business in said states, to purchasers that are users thereof located in other states of the United States, or in other places under the jurisdiction of the United States.

PAR. 4. In the course and conduct of its business, as aforesaid, Moore Business Forms, Inc., is now and for a number of years past has been in substantial competition with others engaged in the manufacture, sale or distribution of business forms products in commerce

between and among the various states of the United States, or other places under the jurisdiction of the United States.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent Moore has discriminated in price between different purchasers of its business forms products of like grade and quality by selling to some of its user customers at higher prices than to other of its user customers.

Various methods were employed to effectuate the discriminations practiced by respondent. Some of these were:

1. When the "Regular Method" of pricing is used, favored customers are allowed a concession or a cut from the computed list price. The unfavored customer is charged the regular list price without any concession or cut therefrom.

2. When the "Special Estimate" system is used, those customers who are favored by having their purchases priced according thereto are caused to pay a lower price than is charged to unfavored customers buying according to the "Regular Method" without a price concession.

Examples of the discrimination in price alleged are as follows:

1. During 1954 respondent sold several kinds of forms of varying characteristics to GMC Truck and Coach Division of General Motors Corporation at $17.82 per M, $13.54 per M, and $26.33 per M, whereas during the same period it sold to other customers similar forms of like grade and quality at higher prices, thereby resulting in concessionary differentials in price in excess of 20% in each instance in favor of the said GMC Truck and Coach Division.

2. During 1954 respondent sold certain of its forms to White Owl Express, Inc., at $19.75 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 15% in favor of the said White Owl Express, Inc.

3. During 1954 respondent sold certain of its forms to Allis-Chalmers Manufacturing Co. at $47.02 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 20% in favor of the said Allis-Chalmers Manufacturing Co.

4. During 1955 respondent sold certain of its forms to Jamaica Water Supply Company at $4.92 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 30% in favor of the said Jamaica Water Supply Company.

The foregoing examples are typical of many price discriminations in transactions wherein respondent Moore sold its business forms products of like grade and quality in commerce to different customers, favoring some with substantial price concessions and selling to others at list prices as computed from respondent's own price books.

Respondent Moore's reduced prices and the consequent discriminations in price to its favored customers were sufficient to and did divert business from its competitors. Furthermore, such price reductions by respondent in these and other instances are sufficient to divert business from respondent's competitors to respondent in the future.

Said price concessions by respondent have been extremely harmful and injurious to respondent's competitors who have quoted prices according to their respective price books and have been thus foreclosed from opportunities to compete for the business on which respondent quoted concessionary prices substantially under respondent's own list prices and under the prices quoted by competitors.

PAR. 6. The effect of respondent's said discriminations in price as hereinabove alleged may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy, or prevent competition with respondent.

PAR. 7. The discriminations in price, as hereinabove alleged and described, are in violation of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended by the Robinson-Patman Act.

Miss Ida I. Kloze for the Commission.

Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y. by *Mr. Milton Handler* and *Mr. Stanley D. Robinson;* and

Fish, Richardson & Neave, New York, N.Y., by *Mr. William J. Barnes* and *Mr. Stephen H. Philbin* for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

APRIL 30, 1964

The Commission's complaint in this matter, issued March 13, 1958, charges the respondent, Moore Business Forms, Inc., a corporation, with discriminating in price in the sale of its products (business forms) in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13). The hearing examiner to whom the case was originally assigned was the late Frank Hier. Upon Mr. Hier's death in June 1959, the case was reassigned to the present examiner. There have also been several changes in complaint counsel since the complaint was issued.

This is exclusively a "primary line" case. The only competitive injury charged is in the line of commerce in which respondent itself is engaged.

At the conclusion of the case-in-chief in support of the complaint, respondent on May 9, 1963, filed a motion to dismiss the complaint on the ground that a prima facie case had not been established. The hearing examiner's ruling on the motion was deferred pending the Commission's decision in a companion case, *Uarco, Inc.*, Docket No. 7087 [64 F.T.C. 924].

On February 24, 1964, the Commission issued its final order in the *Uarco* case, holding that a prima facie case had not been established and dismissing the complaint. After a review of the record in the present case in light of the Commission's decision in the *Uarco* case, complaint counsel has informed the hearing examiner that the motion to dismiss is not opposed.

The *Uarco* case and the present case are very similar on the facts, and the legal question as to competitive injury presented in the *Uarco* case is identical with that presented in the instant case. Unquestionably the Commission's decision in *Uarco* is controlling here.

It is concluded that a prima facie case in support of the complaint has not been established and that the motion to dismiss should be granted.

ORDER

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

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice effective August 1, 1963, the initial decision of the hearing examiner shall, on the 18th day of June, 1964, become the decision of the Commission.

IN THE MATTER OF

BRITE MANUFACTURING CO. ET AL.

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

*Docket 8325. Complaint, Mar. 15, 1961—Decision, June 18, 1964**

Order requiring Providence, R.I., distributors of expansion watchbands to jobbers and wholesalers and retail stores, to cease falsely marking metal watchbands

*Reported as modified by an order of the Commission dated Sept. 25, 1964.

that contain expansion segments imported from Japan, "Made in U.S.A." without clearly disclosing on display cards and on the watchbands themselves the country of origin of the products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Brite Manufacturing Co., a corporation, Brite Industries, Inc., a corporation, B.M.C. Trading Corp., a corporation, and Samuel Friedman and Theodore Levy, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Brite Manufacturing Co., Brite Industries, Inc., and B.M.C. Trading Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of Rhode Island with their offices and principal place of business located at 50 Aleppo Street, Providence, Rhode Island. Individual respondents Samuel Friedman and Theodore Levy are officers of said corporations. They formulate, direct and control the practices of the corporate respondents. The address of the individual respondents is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution of expansion watchbands to jobbers and wholesalers and to retail stores for resale to the public. Respondents' said watchbands are principally sold under the trade name "Brite."

In the regular and usual course and conduct of their said business, respondents cause, and have caused, said products, when sold, to be transported from their place of business in the State of Rhode Island to purchasers located in various other states of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said expansion watchbands in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Many of respondents' expansion watchbands are imported from Japan, while others contain expansion segments which have been imported from Japan and then joined to end pieces made in the United States. Prior to distribution respondents attach their said watchbands

to cardboard strips and to counter display cards for display and sale to the public. Various words and statements such as "Brite," "Brite Brands," "Brite Manufacturing Co., Providence 9, Rhode Island," and "Brite, Providence 9, R.I." are printed, and have been printed, on the said display cards and cardboard strips. Respondents' watchbands, which contain the expansion segments imported from Japan, have been, and are now, marked "Made in USA." At no place on the cardboard strips or display cards, or on the watchbands assembled in the United States which contain the imported expansion segments, as aforesaid, is the country of origin of the said imported watchbands or the imported expansion segments disclosed. As a result thereof, the purchasing public is not informed, prior to the purchase, of the country of origin of said imported bands, or the country of origin of the expansion segments contained in said bands. The use of the aforesaid words, statements and representations, in the absence of such disclosure, tends to lead the public to believe that said expansion watchbands in their entirety are of domestic origin.

PAR. 4. There are among the members of the purchasing public a substantial number who have a preference for products originating in the United States over products originating in foreign countries, including expansion watchbands originating in Japan.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their said products, respondents have caused to be printed on the cardboard strips to which their watchbands are attached the word "Guaranteed", thereby representing that the said watchbands are unconditionally guaranteed.

PAR. 6. Said representation was and is false, misleading and deceptive. In truth and in fact said watchbands were not, and are not, unconditionally guaranteed in that the so-called guarantee provides for the payment of a service charge. The terms, conditions and extent to which said guarantee applies, and the manner in which the guarantor will perform thereunder are not disclosed in respondents' advertising matter.

PAR. 7. Respondents, in the course and conduct of their business, have been and are in substantial competition in commerce with corporations, firms and individuals likewise engaged in the sale and distribution of expansion watchbands.

PAR. 8. The use by respondents of the foregoing false and misleading statements, representations and practices and their failure to disclose the country of origin of their watchbands has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that said products are of domestic origin and said statements, representa-

tions and implications were and are true, and to induce a substantial portion of the purchasing public, because of said mistaken and erroneous belief, to purchase said product. As a result thereof, trade in commerce has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

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

Mr. Garland S. Ferguson supporting the complaint.
Mr. I. H. Wachtel, Washington, D.C., for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER
OCTOBER 25, 1963

This proceeding was commenced by the issuance of a complaint on March 15, 1961, charging the above-named corporate respondents and the individual respondents, their officers, with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act by (a) falsely marking metal watch bands, which contain expansion segments imported from Japan, "Made in U.S.A." without disclosing on the cardboard strips upon which the watch bands are mounted or display cards to which the mounted bands are attached, or on the watch bands themselves the country of origin, Japan; and (b) making misleading and deceptive statements as to guarantees imprinted on the cardboard strips to which their watch bands are attached thereby representing that said watch bands are unconditionally guaranteed, when the terms, conditions, and extent to which said guaranty applies and the manner in which the guarantor will perform thereunder were not disclosed in respondents' advertising matter.

Upon being served with the complaint Respondents appeared by counsel and thereafter filed their joint answer (a) admitting the allegations of Paragraph One of the complaint, but denying the portion thereof which alleges that respondents Friedman and Levy formulate, direct, and control practices of corporate respondents, and (b) denying the allegations of Paragraphs Two, Three, Four, Five, Six, Seven, Eight, and Nine of the complaint but admitting as to the corporate respondents so much of said paragraphs as alleged that said respondents sell expansion watch bands.

A prehearing conference was held in this matter on March 7, 1962, pursuant to which certain uncontested facts were agreed to, lists of exhibits and witnesses were exchanged and certain admissions were made by respondents. In addition, complaint counsel by motion dated February 28, 1962 requested the hearing examiner to take official notice of the following facts:

1. That there are among the members of the purchasing public a substantial number who have a preference for products originating in the United States over products originating in foreign countries.

2. That when the country of origin of merchandise offered for sale in the United States is not marked or if so marked, the markings are concealed, the purchasing public or a substantial segment thereof understands and believes such products to be wholly of domestic origin.

By order dated April 23, 1962, the hearing examiner took official notice of the matters hereinabove set forth, but in doing so, pointed out that such matters could be rebutted by respondents by evidence adduced at the hearing. Respondents, at the hearing, did not avail themselves of this opportunity and in the absence of any such evidence the aforesaid matters officially noticed by the examiner are herein now adopted as findings of fact.

Hearings on the complaint were held at Providence, Rhode Island, on July 29 and 30, 1963, at which testimony and other evidence were offered in support of the complaint. The respondents, at the close of the Commission's case, presented no evidence and moved to dismiss the complaint on the grounds that the Government had failed to prove or establish the facts alleged in the complaint.

Proposed findings of fact, conclusions of law, and brief were filed by counsel supporting the complaint and by counsel for respondents on September 19, 1963.

Consideration has been given to proposed findings of fact, conclusions of law and briefs submitted by the parties and all proposed findings of fact hereinafter not specifically adopted are rejected. Based upon the entire record and his observation of the witnesses the hearing examiner makes the following findings as to facts, conclusions and order.

FINDINGS OF FACT

1. Brite Manufacturing Co., Brite Industries, Inc., and B.M.C. Trading Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of Rhode Island with their offices and principal place of business located at 50 Aleppo Street, Providence, Rhode Island. All of the respondent corporations sell expansion watch bands (Answer paragraphs 1 and 2).

2. Since its inception in 1955, B.M.C. Trading Corp., hereinafter referred to as B.M.C., has imported expansion watch bands and substantial segments thereof (Tr. 104, 111, 226, and 227). Approximately 50% of such goods imported by B.M.C. comes from Japan (Tr. 226).

3. Since its inception in 1955, Brite Industries, Inc., hereinafter referred to as Brite Industries, has done the assembling, finishing, alteration, polishing and plating work on the imported expansion watch bands or imported segments thereof (Tr. 111).

4. Since its inception in 1955, Brite Manufacturing Co., hereinafter referred to as Brite, has acted as the sales agent and distributor of "Brite" expansion watch bands including the imported and partially imported watch bands which are the subject of this complaint (Tr. 111). Said watch bands are sold and distributed by Brite in the United States to approximately one thousand wholesale and retail outlets for resale to the public under the name of "Brite" (Tr. 112). In connection with its sale and distribution of said watch bands, Brite uses and issues to such wholesalers and retailers "loose leaf" catalogs and catalog sheets depicting the watch bands and counter display cards or racks upon which they are shown to the public (Tr. 119, CX 1, 2, 3, 4, 5, 6, 9, 10, 14, 17, and 19). The display cards or racks are used as point of sale advertising tools (Tr. 237).

5. Prior to the incorporation of B.M.C., Brite Industries and Brite in 1955, the entire business and functions of these three corporate entities were carried on as Brite Manufacturing Co. (Tr. 224).

6. The respondent corporations since 1955 have operated out of the same premises, each corporation was assigned different complementary functions in connection with the over-all business and prior to 1955 the business was essentially an individually owned and singly operated affair. In their joint answer all three respondent corporations admit that they sell expansion watch bands. Under these circumstances the business affairs of the three corporate respondents are so interwoven as to make them responsible, if proved, for the acts and practices charged in the complaint. See *Delaware Watch Company, Inc.*, Docket 8411, August 15, 1963 [63 F.T.C. 491].

7. The individual respondents Samuel Friedman and Theodore Levy are officers of the respondent corporations. Respondent Friedman has served as president of all of the corporate respondents since their incorporation in 1955 and Respondent Levy has held the position of secretary for the three corporate respondents during the same period of time (Tr. 102, 235). The individual respondents Friedman and Levy managed and controlled the affairs and policies of the respondent corporations up to August 21, 1958 and no evidence has been adduced to show that this situation has undergone any change since that date

(CX 38b). Affirmative evidence of record shows that Respondent Friedman acted as any other executive might act in the position of president of the corporations, and that he hired and fired important personnel, and made decisions for the corporations (Tr. 103).

8. It is conceded and the hearing examiner finds that all of the corporate respondents maintain, and for some time last past have maintained, a substantial course of trade in imported expansion watch bands and partially imported expansion watch bands in commerce, as "commerce" is defined in the Federal Trade Commission Act (Tr. 109, 110).

9. It is also conceded and the hearing examiner finds that respondents have imported and continue to import completed expansion watch bands and substantial segments of watch bands such as center expansion segments which are then joined to end pieces (Tr. 110). All of the aforesaid imported and partially imported expansion watch bands are sold and distributed as completed watch bands by respondents under the trade name "Brite".

10. Prior to the distribution of the aforesaid watch bands respondents attach said watch bands to cardboard strips. In 1956 and 1957 the bands mounted on the cardboard strips were encased in a cellophane bag (Tr. 239, CX 12 and CX 13), but in 1960 a plastic cover or shell was affixed to the front of the cardboard strips (Tr. 240, CX 20 and CX 32). The individual bands on their cardboard holders so packaged are then attached to or hung on counter display cards or racks which serve to hold a group, or assortment, of several, or at times large numbers, of watch bands (Bands CX 12 and CX 13 were hung on Card CX 10; Band CX 20 was hung on Card CX 19). On the face of the cardboard strips holding the six watch bands put into evidence the word "Brite" appears (CX 12, 13, 20, 32, 33, and 37a). On the back of the cardboard strip in conjunction with the instructions for attaching the band to the watch the words "Brite Manufacturing Co., Providence 9, Rhode Island" appears (CX 12, 13, and 33) and in conjunction with the guarantee provisions the words "Brite, Providence 9, R.I." (CX 20 and 32.) The display cards or racks at the bottom also carry the words "Brite Manufacturing Co., Providence 9, R.I." (CX 9, 10, 14, 17, and 19).

11. Respondents concede that the cardboard strips and packaging do not state the foreign country of origin of the watch bands or segments thereof (Tr. 232). Similarly the display cards or racks do not state the foreign country of origin.

12. In support of the allegations in the complaint, a total of six watch bands were received in evidence. Although the gravamen of the complaint charges that respondents marked their watch bands, which contain expansion segments imported from Japan, "Made in U.S.A.",

not one of the six watch bands insofar as the hearing examiner is able to detect is so marked and complaint counsel in his proposed findings has failed to point out any such watch band in evidence that is so marked. On the contrary, an inspection by the hearing examiner of the six watch bands in evidence discloses that they are all marked either "Made in Japan" or "Japan" on the linkage (CX 12, 13, 20, 32, 33, and 37a). The uncontradicted testimony of Respondent Friedman shows that since at least August 21, 1958 [the date of a "Stipulation as to the Facts and Agreement to Cease and Desist" entered into by respondents and approved by the Commission covering among other things this type of violation (CX 38)], all expansion watch bands sold by Brite to retailers and wholesalers have been marked thereon "Made in Japan" or the appropriate country of foreign origin, whether it was imported entirely, or contained one part, or was made completely of parts of foreign origin (Tr. 229). This marking procedure or practice was adopted by Brite prior to August 21, 1958, and has been continued in force and effect until the present (Tr. 230). Accordingly, the hearing examiner finds that the charge in the complaint alleging that respondents mismark imported watch bands as "Made in U.S.A." is not supported by even so much as a scintilla of evidence, and as a matter of fact the Commission's exhibits affirmatively establish without exception that such watch bands are all marked on the linkage "Made in Japan" or "Japan".

13. In seeking a Cease and Desist Order complaint counsel relies on the "Stipulation as to Facts and Agreement to Cease and Desist" entered into by respondents and approved by the Commission August 21, 1958 to establish the marking of respondents' watch bands "Made in U.S.A." (CX 38c). Said Stipulation and Agreement is admittedly only evidence of prior acts and practices and expressly states that it is entered into "without prejudice to its [the Commission's] right to issue a complaint and institute formal proceedings against the said parties, or any of them, if at any time the Commission shall deem that such action is warranted." The hearing examiner believes the latter to be a representation by the Commission that in the absence of evidence of subsequent acts in violation of the Stipulation and Agreement the issuance of a formal complaint would not be warranted. As a corollary, it would seem to follow that should a complaint issue, mere reliance on the "Stipulation and Agreement" without evidence of subsequent acts as alleged in the complaint in violation thereof would not be in keeping with the spirit and intent of such agreements, particularly where the acts and practices have long since been discontinued. Accordingly, the hearing examiner specifically rejects complaint counsel's proposed finding that respondents mark their imported watch

bands "Made in U.S.A." where the only evidence to support this is contained in a 1958 "Stipulation".

14. In order to buttress his case, complaint counsel seeks to shift the thrust of the complaint from a charge of *mismarking* the country of foreign origin to a charge of *concealing* the marking of the correct country of foreign origin by the packaging, without disclosing on the packaging or display cards the country of foreign origin. In effect complaint counsel without specifically so stating seeks to liberally construe the charges in Paragraph Three of the complaint so as to cover the charge of *concealment*. Paragraph Three of the complaint reads as follows:

PAR. 3. Many of respondents' expansion watch bands are imported from Japan, while others contain expansion segments which have been imported from Japan and then joined to end pieces made in the United States. Prior to distribution respondents attach their said watchbands to cardboard strips and to counter display cards for display and sale to the public. Various words and statements such as "Brite," "Brite Brands," "Brite Manufacturing Co., Providence 9, Rhode Island," and "Brite, Providence 9, R.I." are printed, and have been printed, on the said display cards and cardboard strips. Respondents' watchbands, which contain the expansion segments imported from Japan, have been and are now, marked "Made in USA." At no place on the cardboard strips or display cards, or on the watchbands assembled in the United States which contain the imported expansion segments, as aforesaid, is the country of origin of the said imported watchbands or the imported expansion segments disclosed. As a result thereof, the purchasing public is not informed, prior to the purchase, of the country of origin of said imported bands, or the country of origin of the expansion segments contained in said bands. The use of the aforesaid words, statements and representations, in the absence of such disclosure, tends to lead the public to believe that said expansion watchbands in their entirety are of domestic origin.

15. The purpose of a complaint is to give respondents reasonable and fair notice of the acts or practices with which they are charged. Paragraph Three can be summarized as follows:

(1) Many of the respondents' expansion watch bands are imported from Japan.

(2) Others contain expansion segments which have been imported from Japan and then joined to end pieces made in the United States.

(3) Respondents attach said watch bands to (a) cardboard strips and (b) display cards.

(4) Various words and statements, such as "Brite", "Brite Bands", "Brite Mfg. Co., Providence 9, Rhode Island", and "Brite, Providence 9, R.I.", have been printed on the said display cards and cardboard strips.

(5) Respondents' watch bands, which contain the expansion segments imported from Japan, have been and are now marked "Made in U.S.A."

(6) At no place on (a) the cardboard strips, *or* (b) the display cards, *or* (c) the watch bands assembled in the United States containing imported expansion segments is the country of origin of the imported watch bands or imported segments disclosed. [Emphasis Supplied.]

(7) The use of the aforesaid words, statements and representations in the absence of *such* disclosure, tends to lead the public to believe that said expansion watch bands in their entirety are of domestic origin. [Emphasis Supplied.]

16. The various statements contained in Paragraph Three as summarized above in items (1) to (7) must be read in relation to each other. Consequently, reading the paragraph as a whole, the principal element of the charge, as summarized in item (5), is that respondents mismark their watch bands "Made in U.S.A." All of the rest of the statements in the paragraph are reasonably related to and must be read in conjunction with this principal charge. Items (1), (2), and (3) supra state certain basic facts. Item (4) setting forth the use of the words "Brite Mfg. Co., Providence 9, Rhode Island", or variations thereof, when read in conjunction with item (5), serves to further the impression that the watch bands are manufactured in the United States. However, item (4) adds no new element to the charge, but merely indicates a compounding of the mismarking. Parenthetically it should be noted that the words "Brite Mfg. Co., Providence 9, Rhode Island" actually are imprinted on the back of the cardboard strips under the guarantee provisions to inform the purchaser where to mail the watch band in case of a defect. (CX 20 and 32.)[1]

Again reading items (6) and (7) in conjunction with item (5) we find that item (6) is worded in the alternative, and a reasonable interpretation thereof would be that marking the country of origin on either the cardboard strips, display cards or watch band would suffice. Finally item (7) read in the context of item (6) states that absent "*such*" disclosure, the public would be deceived. The word "such" can refer only to the marking of either the cardboard strips, display cards or watch bands.

As so interpreted, Paragraph Three reasonably places respondents on notice that they are charged with deception in mismarking their watch bands as "Made in U.S.A." without disclosing on either the cardboard strips, display cards, or watch bands the foreign country of origin. There is no reasonable basis for reading into Paragraph Three language that puts respondents on notice that they are charged

[1] CX 12 and CX 13 also carry these words on the back side in conjunction with the instructions for attaching to the watch, but both of these exhibits were in use prior to the 1958 "Stipulation" discussed in finding No. 13 *supra*.

with concealing the correct foreign country of origin marked on the watch band by virtue of their packaging. Without such unequivocal notice to respondents, it would be manifestly unfair and a denial of due processes to enlarge the scope of the complaint to include these charges. It should be noted that complaint counsel at no time sought to amend the complaint to include a charge of concealment and it is now too late to correct this deficiency.

17. Complaint counsel in support of his position in this matter relies primarily on the decision of the Commission in *Manco Watch Strap Co., Inc.*, Docket No. 7785, March 13, 1962 [60 F.T.C. 495, 496]. Reference to the complaint in that matter shows that the pertinent paragraph in that complaint reads as follows:

PAR. 4. Respondents import their watch bands from Japan and Hong Kong. After receipt of said watch bands they are packaged or mounted for retail sale by respondents. The packaging and mounting takes various forms depending upon the retail customer outlet. Some of the bands are mounted on individual cards and enclosed in separate cellophane envelopes. These are affixed to large counter display cards and are sold primarily to drug stores and other retailers who utilize this method of offering merchandise to the public. Other bands are packaged in individual containers for sale primarily through chain stores. Some are attached to cards and enclosed in boxes having a clear plastic "window"; others are enclosed in a clear plastic tube with a card inserted; while others are mounted on cards under a clear plastic "bubble". At no place on the packaging, container, or cards is the fact disclosed that respondents' bands are imported from Japan and Hong Kong. Stamped into the metal on a link on the inside of the bands is the word "Hong Kong" or "Japan" as the case may be. In many instances these words are so small, indistinct or made unnoticeable because of other impressions, that they do not constitute adequate notice that the bands are imported. Further, the manner of packaging conceals the inside of the band so that the words stamped thereon cannot be seen prior to purchase except by destroying or damaging the container or packaging.

18. The *Manco* complaint clearly and concisely spells out the deception alleged as concealment of the country of origin on the watch band by packaging. The respondents in that matter were placed on full notice of the acts and practices with which they were charged. Furthermore, the *Manco* complaint was issued over a year before the complaint in this matter and the charges in *Manco* could have been easily incorporated into the subject complaint. In the absence of such charges, they may not be read in by the hearing examiner.

19. Complaint counsel in support of his position also relies on the decision of the Commission in *Baldwin Bracelet Corp.*, Docket No. 8316, October 2, 1962 [61 F.T.C. 1345]. Inspection of the complaint and decision in that matter reveals that it was alleged and proved that respondents therein failed to make any affirmative disclosure of foreign origin on the watch bands in issue (see page 1365 of the

Decision). Having proved this charge, the order, in addition to requiring respondents to properly mark their watch bands, contained an additional paragraph requiring a disclosure on the packaging. There is no doubt that once the charges in a complaint have been proved, the Commission may issue an order sufficiently broad to cover all forms of the deceptive acts or practices. That is not the case here.

20. In a recent decision, *Sacks Woolen Co., Inc.*, Docket No. 8436, November 27, 1962 [61 F.T.C. 1226], the Commission refused to enter an order due to the substantial variance of the pleadings from the evidence. In that case the complaint alleged respondents misbranded its wool products by understating the wool fiber content and the evidence adduced at the hearing demonstrated that they misbranded wool products by overstating the wool fiber content. Although the Commission found the latter to be equally false and deceptive within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act, it determined that "it would be inappropriate to enter a cease and desist order as to this charge on this record." It is submitted that the *Sacks* case is perhaps a weaker case than the one at hand, since that complaint put the respondents on notice of misbranding which in fact was proved. In the instant case respondents were put on notice of mismarking which was in fact not proved.

21. Respondents from 1956 to 1960 for the purpose of inducing the purchase of their watch bands have on the front of the cardboard strips to which the watch bands are attached used the words "Guaranteed" and "Fully Guaranteed" with no words of limitation, condition or qualification in close conjunction therewith. (CX 12, 13, 20, and 32). In 1960 respondents placed the following legend on the back side of the cardboard strip: (CX 20 and 32)

THIS WATCH BAND IS GUARANTEED BY BRITE. It is the product of expert craftsmen, working with quality materials. Brite's faith in its performance is expressed by this guarantee * * * to repair or (at its option) replace for any manufacturing defect without charge, within thirty days of purchase.

In 1960 respondents placed the following legend on the bottom of one of its display cards: (CX 17)

This watch band is the product of expert craftsmen, working with fine materials. BRITE'S faith in its performance is expressed by this Guarantee to repair or replace for any mechanical defect, provided the band is returned with this Guarantee, plus 50¢ for postage and handling.

22. No evidence was adduced by complaint counsel that respondents have in the course and conduct of their business ever charge a single purchaser of their watch bands a service charge for the handling, service and repair of their bands or that respondents have ever en-

forced the 30 day guarantee period.[2] Accordingly, the hearing examiner specifically rejects any such finding.

23. Affirmative uncontradicted testimony in the record shows that respondents established prior to August 21, 1958 a policy and practice of no charge whatsoever in connection with their guarantee (Tr. 284); that the respondents do not presently charge a mailing fee or any other charge in connection with their guarantee; that they do not enforce the 30 day limitation of the guarantee, and that any watch bands which are returned are replaced without charge (Tr. 283).

24. Complaint counsel in his brief argues: (Brief, page 19)

> In the matter of *Baldwin Bracelet Corp.*, Docket 8316, decided December 18, 1962, the Commission found that the words of condition and limitation appeared on the back of the individual watchband holders to which respondents' watchbands were attached while the guarantee representation "unconditionally guaranteed" and "fully guaranteed" appeared on the counter display cards or racks to which said watchbands were attached. The Commission in discussing this question stated:
>
> *These limitations, although they do not appear on the display placards or racks, are set out on the reverse side of the cards to which the bracelets are attached. They are not visible to the prospective purchaser unless he removes the "carded" bracelet from the placard or rack and examines the back side of the card.* [Undescoring Supplied.][3]

What complaint counsel overlooks and fails to quote is the sentence immediately preceding the quoted portion from the *Baldwin* case which reads:

> In fact, however, consumers attempting to avail themselves of the guarantee must pay the sum of 35¢ (prior to 1960 the amount was 25¢) to respondents, and the guarantee period is limited to one year.

No such finding can be made here and as pointed out above there is affirmative evidence in the record to support and a finding has been made that no such service charge or guarantee period is in fact imposed by respondents. Accordingly, there is no substantial evidence establishing that respondents' watch bands are not "Fully Guaranteed."

25. In the sale and distribution of "Brite" watch bands including those imported from Japan, and those containing substantial seg-

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[2] Complaint counsel relies solely on the "Stipulation as to Facts and Agreement to Cease and Desist" executed August 21, 1958, but as set forth in Finding No. 13 *supra*, this stipulation without evidence of subsequent acts in violation thereof is not sufficient to sustain the allegations of the complaint.

[3] The complaint alleges that the terms and conditions of respondents' guarantees are not disclosed in their "advertising matter." No advertising matter was placed in the record in support of this charge and consequently proof of statements on the back of display cards is at variance with the allegations of the complaint. However, in view of the failure of complaint counsel to prove that respondents' bands are not in fact fully guaranteed, this variance in the pleadings is not material.

ments which have been imported from Japan, respondents have been in substantial competition in commerce with corporations, firms and individuals likewise engaged in the sale and distribution of expansion watch bands.

CONCLUSIONS

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

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. The reliable, probative and substantial evidence in this record does not sustain the allegations of the complaint.

ORDER

Accordingly,

It is ordered, That the complaint in this matter be, and hereby is, dismissed.

OPINION OF THE COMMISSION

JUNE 18, 1964

By Reilly, *Commissioner:*

Respondents herein have been charged with violation of Section 5 of the Federal Trade Commission Act.

This case is before us on appeal from dismissal of the complaint by the hearing examiner at the close of the Commission's case-in-chief.

The case breaks down into a number of separate considerations including: the question of guarantee; the sufficiency of the complaint as far as failure to disclose is concerned; whether, assuming the complaint sufficiently charges failure to disclose as distinguished from mismarking, a prima facie case has been made out by complaint counsel, and finally whether, if complaint counsel has made a prima facie case, the matter should be finally disposed of at this juncture or whether it should be remanded to the hearing examiner for further proceedings.

The hearing examiner found that although respondents' display cards said "guaranteed" and "fully guaranteed" the cards on which the watch bands are mounted indicate that respondent will replace defective watch bands only if claim is made within 30 days of purchase and is accompanied by a 50¢ payment. The record contains no proof and the hearing examiner accordingly found that respondents have never insisted upon either the 30-day or 50¢ requirement. More than this, the hearing examiner found affirmative evidence that respondents honor the guarantee without qualification.

We concur in the hearing examiner's dismissal of the complaint to the extent it relates to a guarantee.

The hearing examiner found that the gravamen of the complaint set forth in paragraph three is that respondents *misrepresented* their products to be domestically manufactured through the device of marking them "Made in U.S.A." and by suggesting domestic manufacture through prominent indication of the location of the place of manufacture as being Providence, Rhode Island.

The hearing examiner found and the record supports the proposition that there is no evidence that respondents mark any of their products "Made in U.S.A." and, further, that the indication of the place of manufacture being Providence, Rhode Island, is entirely innocuous. The hearing examiner rejected complaint counsel's argument that a stipulation executed by respondents in 1958 contained admissions as to mismarking and can therefore be used to make up any deficiency in the proof in this regard. The hearing examiner took the position that the stipulation was an implied agreement by the Commission not to use it or introduce evidence of pre-stipulation violations in subsequent proceedings in the absence of some indication that there have been post-stipulation violations.

We reject the reasoning of the hearing examiner as obligating the Commission in this connection, particularly in light of the Commission's Rules adopted May 1957, which prevailed at the time of the stipulation and which provided at § 1.55:

> Effect of stipulation: When an executed stipulation is approved by the Commission the matter is closed without prejudice to the right of the Commission to reopen if and when warranted by the facts. The agreement does not constitute an admission by the parties that they have engaged in any method, act or practice violative of the law *but it shall, if relevant to the issues, be admissible as evidence of the prior use of the acts or practices set forth therein in any later formal proceeding.* (Emphasis added.)

While we disagree with the hearing examiner that the Commission is bound to find post-stipulation violations before it can employ the stipulation or pre-stipulation evidence, nevertheless, we feel that where there is no suggestion of post-stipulation violation, the Commission, as a matter of policy, should not resurrect a stipulation such as that here involved. Thus, to the extent that complaint counsel relies on the stipulation to prove *mismarking*, we think that his argument should be rejected, since the record contains no hint that respondents, since 1958, have mismarked their products as being "Made in U.S.A."

Apart from the question of mismarking, the examiner explicitly rejected complaint counsel's argument that either the principal or a subsidiary charge was failure to disclose.

The pertinent paragraph of the complaint, paragraph three, has elements of both mismarking and failure to disclose. We think a fair reading of the paragraph reveals that the references to domestic manufacture were intended to provide counterpoint to the central charge of failure to disclose. We think the nub and charging sentence of the complaint is "At no place on the cardboard strips or display cards, or on the watch bands assembled in the United States which contain the imported expansion segments, as aforesaid, is the country of origin of the said imported watch bands or the imported expansion segments disclosed."

Paragraph three then goes on to spell out the ultimate deception upon the public brought about by the failure to disclose "country of origin of said imported watch bands."

The correlative of failure to disclose foreign origin is the implied assertion of domestic origin and thus we find it entirely reasonable for a charging paragraph to contain elements of both. We consider failure to disclose the principal charge and mismarking a subsidiary make-weight. For this reason we are entirely out of sympathy with the rationale of the hearing examiner's Findings 14, 15 and 16.

Once it is established that the complaint charges failure to disclose, the question arises whether complaint counsel has made out a case. On appeal respondents argued that no prima facie case had been made because there had been no showing that *foreign made* products were in fact displayed on the cards and in the packages which respondents admit bore no disclosure as to foreign origin. Respondents admit that some of their products are made in Japan and that none of their display cards or packages bear a disclosure as to foreign origin. They deny, however, that complaint counsel has tied in watch bands proven to be of foreign origin with display cards and packages containing no disclosure. In short, respondents state that there is no proof that the watch bands in evidence, which are on display cards which admittedly do not disclose foreign origin, came from a foreign country. *Even though all of the watch bands in evidence are marked Japan*, respondents argue, correctly, we think, that this is not proof that they are of foreign origin.

We are satisfied from our examination of the record that complaint counsel has adduced the necessary elements of proof to support the complaint's charge of non-disclosure.

A large number of display cards, catalog sheets, watch bands, and invoices, as well as a considerable amount of testimony, are in the record, but it has been difficult to find all of these elements related to an identifiable watch band in the record which was sold in commerce and demonstrated to have been of foreign origin, and shown to have been

displayed on a display card and in a package whereon foreign origin was not shown.

Respondents concede that there is no marking as to foreign origin on any of their catalog sheets, display cards or watch band packages.

There is in evidence a 1960 memorandum of an officer of respondents [1] wherein various then current assortments of respondents' watch bands are described and wherein it is indicated that they are wholly or partly of foreign origin.

The assortments described in the memorandum in question are depicted on catalog sheets included in the record.[2]

These catalog sheets also depict the display cards on which the watch bands are mounted and there is testimony that these pictures on the catalog sheets are reproductions of the display cards.[3]

There is in evidence a number of invoices showing the sale in commerce of assortments depicted in the catalog.[4]

Furthermore, assortment No. 166, identified as partly Japanese in the 1960 memorandum [5] was hung on a display card depicted on a catalog sheet [6] which display card is in evidence.[7] The display card includes watch bands manufactured in part in Japan. Finally, there is in the record an invoice [8] representing sale in commerce of assortment No. 166.

We think this adequately supports a charge of nondisclosure.

At the conclusion of complaint counsel's case in chief respondents' counsel stated "We have no evidence to present * * * the respondent rests * * *".[9]

Thereafter, the hearing examiner closed the record but indicated that respondents might have the record note that they wanted to file a motion to dismiss.[10] Thereafter respondents filed their "Request to Hearing Examiner for Findings and Motion to Dismiss."

We think the record is sufficient for issuance of a decision and final order by the Commission, and we see no necessity for remanding the matter to the hearing examiner.

Respondents chose not to introduce evidence by way of defense either to a charge of mismarking or failure to disclose foreign origin. In so choosing, it cannot be said that respondents were misled into be-

[1] CX 22(a), (b) and (c).
[2] CX 5(a) to 5(w).
[3] Tr. 237 to 240.
[4] CX 5(a) to 5(w).
[5] CX 22 (a) to (c).
[6] CX 5(c).
[7] CX 19.
[8] CX 28.
[9] Tr. 285.
[10] Tr. 288.

lieving that the charge to which they were required to answer was one of mismarking and that consequently they had had no opportunity to present a defense as to failure to disclose foreign origin. There is nothing in the record which would lead respondents to believe that mismarking was the gravamen of the complaint. Indeed the record indicates that respondents affirmatively believed that the charge was failure to disclose foreign origin. In their Motion for a More Definite Statement and Extension of Time, respondents in speaking of the complaint stated "The 'illegal' conduct detrimental to the public interest and asserted in broad terms is: (1) the failure to disclose the country of origin * * *".

Furthermore, it was not until issuance of the initial decision that respondents learned that the hearing examiner was of opinion that the gravamen of the complaint was mismarking rather than failure to disclose foreign origin.

The appeal of complaint counsel is granted in part and denied in part.

The Findings and Conclusions of the hearing examiner to the extent they conflict with this opinion are overruled. The hearing examiner's order is overruled. An appropriate order will be entered.

Final Order

JUNE 18, 1964

This matter having been heard by the Commission upon complaint counsel's appeal from the hearing examiner's initial decision and upon briefs and oral argument in support thereof and in opposition thereto and the Commission having rendered its decision granting in part and denying in part the appeal of complaint counsel.

It is ordered, That respondents Brite Manufacturing Co., a corporation, Brite Industries, Inc., a corporation, and B.M.C. Trading Corp., a corporation, and their officers, and Samuel Friedman and Theodore Levy, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of expansion watch bands, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products in packages or containers in such a manner that the name of the country or place of origin on the product is concealed without clearly disclosing the country or place of origin of the product in a conspicuous place on the package or container.

2. Offering for sale, selling or distributing said products mounted or affixed to cards in such a manner as to conceal the name of the country or place of origin without disclosing on such cards the name of the country or place of origin.

It is further ordered, That the hearing examiner's initial decision to the extent it is in conflict with the accompanying opinion be, and it hereby is, modified, and as modified is adopted as the decision of the Commission.

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

Order Modifying Order To Cease and Desist

SEPTEMBER 25, 1964

Respondents having filed a motion pursuant to § 3.25 of the Commission's Rules of Practice for reconsideration of the final order entered by the Commission on June 18, 1964, and further requesting that the Commission furnish guide lines for compliance with its order and the Commission having determined that guide lines for compliance should not be provided in the present instance but should be more properly sought under § 3.26(b) of the Commission's Rules of Practice, and the Commission having determined that clarification of its order is in the public interest.

It is ordered, That the final order of the Commission entered June 18, 1964, is modified to read as follows:

It is ordered, That respondents Brite Manufacturing Co., a corporation, Brite Industries, Inc., a corporation, and B.M.C. Trading Corp., a corporation, and their officers, and Samuel Friedman and Theodore Levy, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of expansion watch bands, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale, selling or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of con-

sumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

It is further ordered, That the hearing examiner's initial decision to the extent that it is in conflict with the Commission's opinion accompanying its order of June 18, 1964, be, and it hereby is, modified and as modified is adopted as the decision of the Commission.

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

IN THE MATTER OF

LEO LISKER TRADING AS ANTWERP DISTRIBUTORS, ETC.

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

Docket C-764. Complaint, June 18, 1964—Decision, June 18, 1964

Consent order requiring an individual in New York City, engaged in the sale and distribution to retailers of set and unset diamonds which he imported or obtained from other New York City importers and wholesalers, to cease representing falsely in advertising and other promotional material and by use of his trade name that his company was organized and did business under the laws of Belgium and that he operated its New York branch and maintained an office in Antwerp from which he sold diamonds direct to retailers without incurring shipping costs or middleman's profit.

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 Leo Lisker, an individual, trading as Antwerp Distributors, and as Antwerp Distributors of Belgium, 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 Leo Lisker is an individual trading as Antwerp Distributors and as Antwerp Distributors of Belgium with his principal office and place of business located at 30 West 47th Street, in the city of New York, State of New York.

PAR. 2. Antwerp Distributors is the trade name registered by respondent Leo Lisker in the State of New York. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of set and unset diamonds to retailers and others located throughout the United States. Respondent obtains the majority of such diamonds from importers and wholesalers located in the city of New York; and the balance respondent imports himself or obtains from other sources.

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

PAR. 4. In the course and conduct of respondent's business, and for the purpose of inducing the sale of said diamonds, respondent has made numerous statements and representations with respect to the location and nationality of respondent's business and the savings available. Such statements and representations have been made in advertisements sent through the mails to prospective customers and in other kinds of promotional material. Among and typical of the statements and representations contained in such advertisements, but not all inclusive thereof, are the following:

MONEY SAVING TIPS

Take advantage of the red carpet treatment you receive when you deal with Antwerp Distributors in New York. Let us show you how you can eliminate shipping expenses and unpleasant complications. You will be pleased with our rapid and reliable delivery. * * *

* * * * * * *

The New York Office of Antwerp Distributors has been established to offer the most convenient and economical way for you to select and buy the quality diamonds you need. By dealing with the New York Office of this internationally respected firm, you save the time and money you'd normally spend corresponding with Europe's diamond centers. You eliminate the middleman and his share of your profits, avoid prepayment of imported merchandise and cut through annoying red tape. Antwerp Distributors offers an outstanding selection of diamonds in a wide variety of grades and prices. * * *

* * * * * * *

BUY DIRECT THROUGH antwerp distributors

ANTWERP OFFICE	NEW YORK OFFICE
78 Pelikaanstraat	30 West 47th St.,
Antwerp, Belgium	New York 36, N.Y.

During this Holiday Season you won't have to share your profit with a middleman. You won't have to put up with unreliable deliveries. You won't have to lose sales because of time consuming, long distance correspondence with overseas diamond centers. You won't because you can buy direct from the European market when you buy from Antwerp Distributors in New York. And you buy best when you buy direct . . . buy from Antwerp Distributors in New York.

HOW?—By selling direct. . . . Antwerp Distributors of New York is the New World office of the internationally respected firm, Antwerp Distributors of Belgium.

Want to save money? Want to pocket what you usually pay to a middleman? . . .

If this is what you want, then Antwerp Distributors of New York is the firm you are looking for. For Antwerp Distributors of N.Y. is the New World office of the internationally respected European firm of Antwerp Distributors of Belgium. . . .

PAR. 5. Through the use of the trade name Antwerp Distributors of Belgium and through the use of the aforesaid statements and representations, and others similar thereto but not specifically set forth herein, respondent has represented, directly or by implication, that:

(a) Antwerp Distributors of Belgium is a company organized, existing and doing business under the laws of Belgium.

(b) Antwerp Distributors is the New York office of a Belgian company.

(c) Respondent maintains an office at 78 Pelikaanstraat, Antwerp, Belgium, in which respondent conducts a substantial amount of business.

(d) Respondent sells and distributes from the European diamond market direct to retailers located in the United States without the use of any importer, wholesaler or other middleman.

(e) No shipping expenses are incurred in connection with the importation of respondent's diamonds into the United States of America; and the resulting savings are passed on to respondent's customers.

(f) No importer, wholesaler or other middleman earns or makes a profit on respondent's diamonds; and the resulting savings are passed on to respondent's customers.

PAR. 6. In truth and in fact:

(a) Antwerp Distributors of Belgium is not a company organized, existing and doing business under the laws of Belgium. In fact, such trade name is fictitious as such company does not exist.

(b) Antwerp Distributors is not the New York office of a Belgian company.

(c) Respondent does not maintain an office at 78 Pelikaanstraat, Antwerp, Belgium, in which respondent conducts a substantial amount of business.

(d) Respondent does not sell or distribute from the European diamond market direct to retailers located in the United States without the use of any importer, wholesaler or other middleman.

(e) Shipping expenses are incurred in connection with the importation of respondent's diamonds into the United States of America; and the savings claimed by respondent are not passed on to respondent's customers.

(f) An importer, wholesaler or other middleman does earn or make a profit on respondent's diamonds; and the savings claimed by respondent are not passed on to respondent's customers.

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

PAR. 7. In the course and conduct of his business, and at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of set and unset diamonds of the same general kind and nature as those sold by respondent.

PAR. 8. The use by the respondent of the aforesaid false, misleading and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's diamonds by reason of said erroneous and mistaken belief.

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

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 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 Leo Lisker is an individual trading as Antwerp Distributors and as Antwerp Distributors of Belgium with his principal office and place of business located at 30 West 47th 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 respondent Leo Lisker, an individual, trading as Antwerp Distributors, and as Antwerp Distributors of Belgium, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of set or unset diamonds in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "of Belgium" or any other word or words of similar import or meaning as part of respondent's trade or business name.

2. Representing, directly or by implication, that respondent is a Belgium or European business, firm or company; or misrepresenting, in any manner, the nationality or location of respondent's business.

3. Representing, directly or by implication, that respondent has an office in Antwerp, Belgium or at any other location or place outside of the United States of America; provided, however, that it shall be a defense in any enforcement proceeding instituted for violation hereof for respondent to establish affirmatively that respondent owns, operates or controls an office at such location or place wherein a substantial amount of respondent's business is conducted.

4. Representing, directly or by implication, that respondent sells or distributes from the European diamond market direct to retailers located in the United States or that respondent eliminates any importer, wholesaler, or other middleman from such transactions.

5. Using the words "* * * eliminate shipping expenses, * * *" or any other word or words of similar import or meaning; in advertising or in any other manner; or representing, directly or by implication, that purchasers from respondent save the amount of the shipping expenses incurred in connection with the importation of such diamonds.

6. Using the words "* * * eliminate the middleman and his share of your profits * * *" or any other words or word of similar import or meaning, in advertising or in any other manner; or representing, directly or by implication, that purchasers from respondent save the amount of profits made or earned by any importer, wholesaler or other middleman.

7. Falsely representing, directly or by implication, that any savings are available to purchasers of such diamonds; or misrepresenting, in any manner, directly or by implication, any savings available to purchasers of such diamonds.

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

O. K. RUBBER WELDERS, INC., ET AL.

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

Docket 8571. Complaint, May 15, 1963—Decision, June 19, 1964 *

Consent order requiring a Littleton, Colo., corporation engaged in the manufacture, leasing, and sale of tire recapping and repairing machinery and supplies and in the sale of tires under its own brand name (O.K.), and a major tire manufacturer headquartered in Akron, Ohio, to cease entering into or continuing any agreement between O.K. and its dealers whereby the dealers would promote the sale of products of any supplier which O.K. has a sales commission agreement, and to cease preventing or attempting to prevent any O.K. dealer from exercising his independent choice of tires he wishes to handle in addition to products sold by the respondent.

*Order granting leave to reopen consent order negotiations page 1312 herein.

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 respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges as follows:

PAR. 1. Respondent O. K. Rubber Welders, Inc., hereinafter referred to as "O.K.", is a corporation organized under the laws of Colorado with its principal office and place of business located at 551 Rio Grande Avenue, Littleton, Colorado. O.K. is a successor to O. K. Rubber, Inc., and O. K. KO-OP Rubber Welding System in carrying on a business established some 25 years ago.

PAR. 2. Respondent, The B. F. Goodrich Company, hereinafter referred to as "Goodrich", is a corporation organized under the laws of New York with its principal office and place of business located at 500 South Main Street, Akron, Ohio.

PAR. 3. Respondent O.K. is engaged in the manufacture, leasing and sale of tire recapping and repairing machinery and supplies, and in the sale of new tires under O.K.'s own private brand, all of which are hereinafter referred to as "O.K. products." O.K. promotes, leases and sells the aforesaid O.K. products to independent tire repair dealers, hereinafter referred to as "O.K. dealers," who also sell new tires and do tire recapping and repairing. These O.K. dealers have entered into written contracts with O.K., designated as Operator's Auto Float Franchises, under which an O.K. dealer is granted an exclusive right to operate a tire repair store under O.K. trade marks, trade names, O.K. advertising, merchandising, and related service programs in a specified territory. The O.K. dealers, numbering over 1,000 and located in various states of the United States, comprise the largest organization of franchised independent tire repair dealers in the United States. O.K.'s sales to these dealers for the year ended June 30, 1960, were more than eight million dollars.

PAR. 4. Respondent Goodrich, one of the four leading manufacturers of rubber products in the United States, is engaged in the manufacture and sale of a great variety of rubber and associated products, including tires and inner tubes. Goodrich sells its various products directly to the consuming public through more than 500 company-owned and operated retail outlets, and to other retailers and wholesalers having

places of business located in the various states of the United States. Its total sales in 1960 were more than seven hundred million dollars.

PAR. 5. In the course and conduct of their business, respondents are now and for many years have been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they ship said products, or cause them to be shipped, from the states in which said products are manufactured or warehoused to purchasers thereof located in other states of the United States.

PAR. 6. In the course and conduct of their said business in commerce, respondents are now and for many years have been engaged in competition with other corporations, partnerships, individuals and firms, except to the extent that such competition has been restrained, lessened or eliminated by the unlawful acts and practices hereinafter alleged.

PAR. 7. Goodrich sells new tires directly and through wholesalers to many classes of customers, including tire repair dealers who purchase for resale to consumers for replacement use on their automobiles. Tire repair dealers, by the nature of their business, are particularly well adapted to be outlets for the sale of new tires to the consuming public. They constitute a large and increasingly important market for new tires.

PAR. 8. In connection with Goodrich's sales of tires in commerce, it has entered into a contract with O.K. whereby O.K. agrees to promote the sale of Goodrich tires, for which Goodrich pays O.K. a commission, ranging from 5% to 10%. Respondent O.K., in various ways, persuades, influences, and causes its O.K. dealers to purchase said Goodrich tires. O.K. dealers have agreed between and among themselves and with respondent O.K. to approve the contract between Goodrich and O.K. Said O.K. dealers do not receive any part of the commission paid by Goodrich to O.K. on these sales.

Said O.K. dealers are independently-owned and would be operated as independent business enterprises were it not for the unlawful acts and practices of respondents, as hereinafter set forth.

Respondent O.K.'s control of the O.K. dealers is inherent in the types of leases, mortgages, options and other agreements between them, as well as the Operator's Auto Float Franchise, and in the action by O.K. in enforcing these agreements by various acts and practices, including surveillance of the dealers' compliance coupled with termination or threats of termination of the dealer's franchise where the dealer refuses or fails to carry out or cooperate with respondent O.K. in the promotion and sale of Goodrich tires. The dealer is aware that such termination can result in great financial loss and irreparable

harm, such as the loss of his business, customer goodwill, sales and profit.

By virtue of these circumstances, O.K. is in a position to influence and control the purchasing and marketing activities of said O.K. dealers. Such influence and control have been and are now exercised by O.K. over its O.K. dealers in such a manner as to cause them to purchase substantial quantities of tires from Goodrich, the seller designated by O.K.

PAR. 9. By virtue of said contract between Goodrich and O.K., Goodrich has sold and is now selling substantial quantities of tires in commerce to said O.K. dealers. In the year ended June 30, 1960, O.K. received $364,357 in commissions from Goodrich under this contract.

PAR. 10. Among the effects of the adoption by respondents of the said sales commission contract under the circumstances and in the matter hereinabove alleged are the following:

1. Foreclosed a large and substantial amount of business to manufacturers, wholesalers and other distributors who compete with Goodrich in the sale of tires.

2. Increased substantially the amount of tire business done by Goodrich.

3. Prevented a substantial number of independent tire repair dealers from obtaining commissions and other price savings they otherwise would have received in the absence of such an arrangement.

4. Deprived a substantial number of tire repair dealers of their right to act as independent businessmen by denying them freedom of choice as to the tires which they may purchase and stock for resale.

5. Deprived the consuming public of the opportunity to purchase tires from competitors of Goodrich and such other advantages as would result from the natural and unobstructed flow of commerce in said products under conditions of free competition.

PAR. 11. The acts and practices of respondents, as alleged above are all to the prejudice of the public, have a dangerous tendency to and have actually hindered, suppressed, lessened and eliminated competition in the sale and distribution of tires, and constitute an unfair method of competition and unfair acts and practices, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued a complaint on May 15, 1963 charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion thereafter filed that in the circumstances presented the public interest would be served by waiver here of the provision of Section 2.4(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; and

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

The Commission, having considered the agreement, hereby accepts same, makes the following jurisdictional findings, and enters the following order:

1. Respondent O.K. Rubber Welders, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Colorado with its office and principal place of business located at 551 Rio Grande Avenue, Littleton, Colorado.

Respondent The B. F. Goodrich Company is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 500 South Main Street, Akron, Ohio.

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

ORDER

I

It is ordered, That respondent O.K. Rubber Welders, Inc., a corporation, its officers, representatives, agents, employees, subsidiaries, successors and assigns, directly or through any corporate or other device, in connection with the promotion, offering for sale, sale or distribution of tires, tire repair or recapping machinery or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

1. Entering into or continuing any agreement between or among respondent O.K. and any O.K. dealers whereby such dealers are obligated to handle, or commit themselves to handle, products which are sponsored, recommended, promoted or approved by said respondent pursuant to a sales commission arrangement between respondent O.K. and any supplier.

2. Entering into or continuing any condition, agreement, or understanding in connection with any lease, mortgage, option, franchise, loan or other agreement with any O.K. dealer, that such dealer shall distribute any products which are sponsored, recommended, promoted or approved by said respondent O.K. pursuant to a sales commission arrangement between respondent O.K. and any supplier, or that such O.K. dealer not handle products of any competitor of a supplier with which respondent O.K. may have a sales commission arrangement.

3. Entering into or continuing any agreement or understanding with any present or prospective O.K. dealer or imposing any condition upon any such dealer which interferes with the independent choice of such dealer as to the products he will handle in addition to the products sold by respondent O.K.

4. Refusing to enter into, discontinuing or threatening to discontinue any lease, mortgage, franchise, loan, or other agreement or exercising or threatening to exercise any option with any O.K. dealer, in whole or in part, because such dealer refuses to handle products which are sponsored, recommended, promoted or approved by said respondent O.K. pursuant to a sales commission arrangement between respondent O.K. and any supplier, or because such dealer handles products of any competitor of a supplier with which respondent O.K. may have a sales commission arrangement, or in any way interfering with any right of the dealer to independently decide as to any such products he may desire to handle.

5. Intimidating or coercing or attempting to intimidate or coerce any O.K. dealer to purchase any particular brand of tires or other products.

6. Preventing or attempting to prevent any O.K. dealer from exercising his own independent choice in purchasing, reselling, merchandising, or displaying tires or other products he will handle in addition to the products sold by respondent O.K.

7. Offering to sell or lease, or selling or leasing, tire recapping or repairing machinery or related equipment to any person conditioned upon an agreement or understanding that such person shall purchase any other product from O.K. or from any source designated by O.K.

8. Employing any method of inspecting, reporting, or surveillance of, O.K. dealers' purchases for the purpose or with the effect of enforcing O.K.'s recommendation to handle any sponsored product.

9. Cooperating or agreeing to cooperate in any way with any manufacturer or supplier of tires or other products, by any of the foregoing acts or practices, to prevent or attempt to prevent any O.K. dealer from stocking or selling any product in addition to the products sold by respondent O.K.

10. Exercising any option to repurchase any equipment prior to the termination of the O.K. franchise to any dealer. Any such termination of a franchise shall not be inconsistent with, or in violation of, any of the terms of this order. This proscription shall not prevent an agreement of sale wherein the O.K. dealer promises to relinquish such machinery to O.K. upon default in payment, so long as such agreement provides that the purchaser may accelerate payment for such machinery.

II

It is further ordered, That within ninety (90) days of the effective date of this order, respondent O. K. Rubber Welders, Inc., shall amend any present, and thereafter incorporate into any future lease, mortgage, option, franchise, loan or other written agreement with any O.K. dealer a condition assuring such dealer that under such agreement he is not required to purchase any product sponsored, recommended, promoted or approved by said respondent pursuant to a sales commission arrangement between O.K. and any supplier.

III

It is further ordered, That within sixty (60) days of the effective date of this order, respondent O. K. Rubber Welders, Inc., shall:

1. Inform all O.K. dealers by certified or registered mail, return receipt requested that they are not under any restriction, requirement, restraint or limitation to handle or sell products sponsored, recommended, promoted or approved by said respondent pursuant to a sales commission arrangement between O.K. and any supplier.

2. Serve by certified or registered mail, return receipt requested, upon each O.K. dealer a true copy of this order, and thereafter deliver the same to each person who becomes an O.K. dealer at the time of his affiliation with respondent O.K.

3. Collect and thereafter keep a file of each such return receipt provided for in paragraphs 1 and 2 above so long as such dealer continues to be affiliated with O.K. and for a period of not less than five (5) years thereafter.

4. Furnish all present O.K. officers, agents, representatives and employees, having business dealings or contacts with O.K. dealers,

and hereafter, at time of employment or affiliation, all such subsequent officers, agents, representatives and employees of O.K. with the information and order specified in paragraphs 1 and 2 above, and obtain a written receipt therefor from each such individual and keep a file thereof so long as such person is an employee or representative of O.K. and for five (5) years thereafter.

IV

It is further ordered, That respondent B. F. Goodrich shall:

1. Within sixty (60) days after entry of this order, serve upon any B. F. Goodrich officer, employee, agent or representative having business dealings or contacts with respondent O.K. or O.K. dealers, a true copy of this order and require that each such officer, employee, agent or representative, during the continuance in effect of any sales commission arrangement with respondent O.K., upon learning or having reason to believe that respondent O.K. may have violated or may be violating the order against it, shall forthwith notify in writing the Secretary of B. F. Goodrich thereof at the Company's offices in Akron, Ohio. Upon receipt of any such notice the Secretary of B. F. Goodrich shall promptly, in writing, notify respondent O.K.'s chief executive officer, setting forth all information known concerning the asserted violation; if within sixty (60) days of the mailing of such notification respondent O.K. fails to advise respondent B. F. Goodrich in writing that it has investigated all the circumstances, giving its assurances either that the asserted violation did not in fact occur or that it has eliminated any such violation, then respondent B. F. Goodrich shall promptly advise the Federal Trade Commission of all information known to it pertinent to such asserted violation.

2. Cease and desist from cooperating or agreeing to cooperate in any way with respondent O.K. to interfere, by any of the means prohibited in this order, with the independent choice of any O.K. dealer as to the products which he will handle in addition to the products sold by respondent O.K.

V

It is further ordered, That respondent O. K. Rubber Welders, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the provisions of Parts I and III of this order.

It is further ordered, That respondent O. K. Rubber Welders, Inc., shall, within ninety (90) days after service upon it of this order,

file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the provisions of Part II of this Order.

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

IN THE MATTER OF

TILLIE LEWIS FOODS, INC., ET AL. FORMERLY FLOTILL PRODUCTS, INC.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(C) AND 2(d) OF THE CLAYTON ACT

Docket 7226. Complaint, Aug. 6, 1958—Decision, June 26, 1964

Order requiring Stockton, Calif., canners of various fruits and vegetables to cease paying or granting to any buyers of its products, or to anyone acting in their behalf or subject to their control, anything of value as brokerage in the sale of respondent's products to such buyers, and to cease granting promotional allowances to certain customers without making such payments available on proportionally equal terms to other purchasers competing with such favored customers.

COMPLAINT

The Federal Trade Commission having reason to believe that the respondents named above have violated, and are now violating, the provisions of Sections 2(c) and 2(d) of the amended Clayton Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint as follows:

Count I

PARAGRAPH 1. Respondent Flotill Products, Inc., is a California corporation with its principal office and place of business located at Fresno and Charter Way Street, Stockton, California.

Respondents Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser are individuals, principal stockholders, and officers of respondent Flotill Products, Inc. These individual respondents maintain their office and place of business at the same address as that of the corporate respondent. As officers and principal stockholders, the individual respondents exercise authority and control over the corporate respond-

ent and its business activities, including the direction of its sales and distribution policies referred to in this complaint.

PAR. 2. Flotill is principally engaged in the processing, canning and sale of various fruit and vegetable items such as peaches, fruit cocktail, and tomatoes, in a variety of sizes under 12 or more company-owned and numerous private labels.

PAR. 3. These products are sold by respondents for use, consumption or resale within the United States and respondents cause them to be shipped and transported from the state of location of their principal place of business to purchasers located in states other than the state wherein shipment or transportation originated.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce in such products, among and between the states of the United States.

PAR. 4. Respondents maintain and operate the plants in Stockton and one plant in Modesto, California. From these plants they ship and sell throughout the United States directly to large chain groceries and through brokers to smaller wholesale and retail grocers.

Flotill's annual volume of sales for the year ending December 31, 1956, was in excess of $21,000,000.

PAR. 5. In the course and conduct of their business in commerce, respondents make substantial sales direct to certain favored buyers without utilizing the services of their brokers, and on these direct sales respondents have granted or allowed, and are now granting and allowing, discounts in lieu of brokerage, or have made sales to these direct buyers at reduced prices which reflect brokerage. In other instances respondents have made sales to at least one favored buyer through brokers on which sales the favored buyer was granted a discount in lieu of brokerage, or a lower price which reflects brokerage, which discount or lower price was partially offset by reducing the amount of the brokerage the respondents usually pay their brokers.

Among and including the methods or means employed by respondents in so doing are the following:

(a) Granting or allowing to certain buyers discounts or allowances of approximately 2½%, or by granting lower net prices by this amount, where the services of brokers are not utilized.

(b) Granting or allowing to at least one favored customer on certain sales through brokers a discount or allowance of approximately 2 percent on which sales the amount of brokerage the respondents usually granted amounted to 2½ percent.

PAR. 6. The foregoing acts and practices of respondents, as alleged, violate Section 2(c) of the amended Clayton Act (U.S.C. Title 15, Sec. 13).

Count II

PAR. 7. Each of the allegations contained in Paragraphs One through Four of this complaint are now realleged and incorporated in this Count as if they were set forth in full.

PAR. 8. Respondents, in the course and conduct of their business in commerce, have been paying advertising and promotional allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of their products.

For example, respondents have given special promotional allowances to certain of their purchasers which in some instances amounted to one percent of the purchase price. Such allowances were not made available on proportionally equal terms by respondents to other purchasers competing in the resale of respondents' products with those receiving the allowances.

PAR. 9. The acts and practices of respondents, as alleged, violate Section 2(d) of the amended Clayton Act, (U.S.C. Title 15, Sec. 13).

Mr. Basil J. Mezines and *Mr. John H. Brebbia* for the Commission.

Howrey, Simon, Baker & Murchison, Washington, D.C., by *Mr. William Simon* and *Mr. J. Wallace Adair;* and

Mr. Jefferson E. Peyser, San Francisco, Calif., for respondents.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

MARCH 25, 1963

The Federal Trade Commission on August 6, 1958, issued and subsequently served its complaint charging the respondents named in the caption hereof with violations of subsections (c) and (d) of Section 2 of the Clayton Act, as amended. Answers were filed on November 17, 1958, denying the violations alleged in the complaint.

Subsequent to motions and orders with respect to subpoenas and other matters, the initial hearing was held in San Francisco, California, on July 7, 1959, at which time the respondents refused to comply with a subpoena duces tecum. Thereafter the proceedings were in abeyance during litigation for enforcement of the subpoena, which was concluded on December 12, 1960, by the Supreme Court's denial of respondents' petition for certiorari.

The present hearing examiner is the third to be assigned to this proceeding. On September 12, 1961, he was substituted for the hearing examiner then presiding. On February 23, 1962, a pre-hearing conference was held in Washington, D.C., the transcript of which, by agreement of counsel, was made a part of the public record herein. No ob-

jection was made to the substitution of the hearing examiner, and at the pre-hearing conference counsel agreed that the record theretofore made in this proceeding may be considered a part of the record for consideration by the present hearing examiner.

Hearings were thereafter held in support of the complaint in San Francisco, California, on April 16, 17 and 18, 1962, and in Boston, Massachusetts, on June 18 and 19, 1962. Defense hearings were held in San Francisco, California, on November 13, 14 and 15, 1962. A final hearing was held in Washington, D.C., on January 2, 1963, at the conclusion of which the record was closed for the reception of evidence. The transcript of testimony, including the pre-hearing conference, covers 1,293 pages. Almost 300 exhibits offered by counsel supporting the complaint, and 17 exhibits offered by respondents, were received in evidence, and the record also contains numerous motions and orders disposing of them. Proposals and replies thereto have been timely filed by the parties.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing examiner issues this Initial Decision. Findings proposed by the parties, which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Flotill Products, Inc. (now Tillie Lewis Foods, Inc.) is a California corporation, with its principal office and place of business located at Fresno Avenue and Charter Way, Stockton, California. The name of the corporate respondent was changed to Tillie Lewis Foods, Inc. in June 1961, but since the evidence relates essentially to its operations under its original name, it will be referred to herein as Flotill or Flotill Products, Inc.

2. Respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser are individuals and are stockholders and officers of Flotill. These individual respondents maintain their office and place of business at the same address as that of the corporate respondent. The complaint alleges, in effect, that these individual respondents are responsible for the acts and practices of Flotill which are challenged in the complaint. Counsel supporting the complaint contend that each of them should be included in their individual capacities in any order to cease and desist which may be entered herein. The responsibility of the individual respondents is discussed more fully below.

3. Flotill is principally engaged in the processing, canning and sale of various fruit and vegetable items, such as peaches, fruit cocktail,

asparagus and tomatoes, in the standard grades and in a variety of sizes. Its products are sold under a number of company owned labels and numerous private labels owned by its customers or by brokers. Approximately 75% of its sales of labeled canned goods are packed under such private labels. The company also packs a line of dietetic foods, but no question is raised with respect to Flotill's practices in connection with such products. References herein to Flotill products are intended, therefore, to exclude its line of dietetic foods except as otherwise specifically noted.

4. Its products are sold by Flotill for use, consumption or resale within the United States, and it causes them to be shipped and transported from the state of location of its principal place of business to purchasers located in states other than the state wherein shipment or transportation originated. Flotill maintains, and at all times mentioned herein has maintained, a course of trade in commerce in such products, among and between the states of the United States.

5. Respondent Flotill maintains and operates plants in Stockton and one plant in Modesto, California. From these plants it sells and ships throughout the United States, directly or through brokers, to approximately six hundred buyers, including chain groceries and retail grocers. Flotill's volume of sales for the year ending December 31, 1956, including its sales of dietetic foods, was in excess of $21,000,000.

Responsibility of Individual Respondents

6. Respondent Mrs. Meyer L. Lewis, also known as Tille Lewis, owns 94.5% of the stock of the corporate respondent and, as its President and executive officer, she sets its policies and controls its general management. She started the company in 1935, and until the early 1940's she personally participated in the details of all of its affairs, including its sales and pricing policies and practices. During the years 1956 through 1958, to which period the evidence relates, she had delegated to Albert S. Heiser full authority for the sales practices, programs, prices, allowances, and similar activities of the corporation, and did not actively participate in those matters. She was, however, fully responsible for the conduct of those affairs by Albert S. Heiser on behalf of the corporation.

7. Respondent Albert S. Heiser owns 2.744% of the stock of the corporate respondent and is its Vice President in charge of sales. He has responsibility for, and exercises active direction and control of the sales program of the company and of its advertising and pricing policies. He has had such duties and responsibilities continuously since some time prior to 1956.

8. Respondent Arthur H. Heiser owns 2.748% of the stock of the corporate respondent and is its Vice President in charge of production. He does not participate in determining or effectuating the sales, advertising or pricing policies of the corporation. Such responsibility as he has in those matters derives only from his position as an officer of the corporate respondent.

9. The respondent corporation is closely held, and its activities are directed and controlled by the three individual respondents. Albert S. Heiser has primary responsibility for the activities of the corporation challenged in this proceeding, and Mrs. Meyer L. Lewis is also fully responsible for those activities, although she does not actively participate in them personally. Arthur H. Heiser does not participate in the challenged activities of the corporation, and his only responsibility for them is by virtue of his position as a corporate officer. In these circumstances, counsel supporting the complaint contend that all three of these officers should be included in the order to cease and desist in their individual capacities.

10. In support of this contention, reliance is placed primarily upon *F.T.C.* v. *Standard Education Society*, 302 U.S. 112, 119 (1937). In that case, the Supreme Court pointed out that the Commission had properly found that the corporation was organized by the individual respondents for the purpose of evading any order which might be issued, and said:

> Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

11. The quoted language provides the standard which, expressly or by implication, appears to have been followed by the Commission and the courts since that decision. The January 17, 1963, decision of the United States Court of Appeals for the Fourth Circuit in *Patiport, Inc., et al.* v. *F.T.C.* [7 S.&D. 639], which relies upon the *Standard Education Society* case, adopts the same reasoning and reaches essentially the same result.

12. In 1956, the Commission sustained dismissal of a complaint against an individual respondent who was Chairman of the Board and Treasurer of the respondent corporation. In doing so, it stated, *inter alia:*

> There is no showing, moreover, of any special circumstances which would indicate a likelihood that Joseph Shapiro would cause an evasion of the order against the corporation. He is, in any event, bound by the order as a corporate officer. In the absence of some special reason for naming Joseph Shapiro personally, the order against the corporation, and its officers, representatives,

agents, and employees would seem to be adequate (*In the Matter of Maryland Baking Company, et al.*, Docket 6327, 52 F.T.C. 1679, 1691.)

13. On the basis of similar reasoning, the Commission reached essentially the same results *In the Matters of Wilson Tobacco Board of Trade, Inc., et al.*, 53 F.T.C. 141, 190 (1956); *Newville, Inc., et al.*, 53 F.T.C. 436, 444–445 (1956); and *Kay Jewelry Stores, Inc., et al.*, 54 F.T.C. 548, 560–561 (1957). In the latter case, in a *per curiam* opinion, the Commission stated in pertinent part:

The Commission has wide discretion in determining the necessity of attaching individual liability to insure the full effectiveness of an order to cease and desist. But where there is no record evidence showing justification and where "no other circumstances appear pointing to the necessity of directing the order against these parties in their individual as distinguished from their official capacities" (citing *Wilson Tobacco Board of Trade, Inc., et al., supra*), their inclusion as individuals should not be approved (citing *Newville, Inc., et al.* and *Maryland Baking Company, et al., supra*).

14. In *Clinton Watch Co., et al.* v. *F.T.C.*, 291 F. 2d 838, 841 (7th Cir., 1961), the Court affirmed the authority of the Commission to bind two officers "in their capacities as corporate officials". The decision of the Commission in that case specifically held that the circumstances justified "dismissal of the complaint as to these persons in their individual capacities". (57 F.T.C. 222, 231.)

15. Careful consideration has been given to the other cases cited by counsel supporting the complaint in support of their position. Those cases do not, however, alter or materially affect the principle followed by the Commission in the exercise of its "wide discretion in determining the necessity of attaching individual liability to insure the full effectiveness of an order to cease and desist" (*Kay Jewelry Stores, Inc., et al., supra*). That principle, whether expressed or implied, is that persons will not be included in orders to cease and desist in their individual as distinguished from their official capacities, except upon a showing of special circumstances which would indicate a likelihood that failure to do so may cause an evasion of the order against the corporation.

16. No circumstances warranting attaching liability to the individual respondents are present here. The corporate respondent is a stable organization which has long been engaged in its present line of business. It is not a sham corporation, and there is no history of corporate reorganizations or of any disposition to use the corporate form as a device to evade legal responsibility. There is no showing and no suggestion of any special circumstances which would indicate a likelihood that the individual respondents would cause an evasion of any order which may be entered herein against the corporation. In these circum-

stances, an order "against the corporation and its officers, representatives, agents and employees, would seem to be adequate." (*In the Matter of Maryland Baking Company, et al., supra.*)

17. The complaint will accordingly be dismissed as to the officers of the corporation in their capacities as individuals, but they will, of course, be bound by the order as officers of the corporation.

Section 2(c) of the Clayton Act

18. Briefly stated, Count I of the complaint charges that Flotill violated Section 2(c) of the Clayton Act by granting discounts in lieu of brokerage to direct buyers. Counsel supporting the complaint contend that the evidence with respect to this charge discloses that Flotill made sales to certain parties described as field brokers, "and on such sales granted brokerage or an allowance or discount in lieu thereof"; and that it made sales to a favored customer, Nash-Finch Company, on which it "granted brokerage, labeled as an advertising allowance", and on which it paid brokerage to a broker "acting for Nash-Finch in arranging pool car shipments of merchandise from Flotill". The transactions with field brokers and with Nash-Finch have distinctly different characteristics which require separate consideration.

Transactions With Field Brokers

19. There is little dispute concerning the basic facts with respect to the operations of field brokers, but there is wide disagreement concerning the significance of those facts and the application of the law to them. On this phase of the case, the evidence relates to transactions of Flotill involving three field brokers, A. M. Beebe Company, Harcourt-Greene Company, and Walter M. Field & Company, all located in San Francisco, California. On these transactions, which were substantial, Flotill paid brokerage to the field brokers. Although the specific evidence relates to 1956 and 1957 transactions, the testimony of the witnesses indicates that the same type of transactions have continued to the present time.

20. Counsel supporting the complaint contend that these field brokers were acting as buyers and resellers for their own accounts, and that the transactions constituted sales to them for their own accounts. Counsel for respondents contend that the field brokers operate as nation-wide sales agents for canners and are compensated on a commission basis, that they invoice the buyers for the "convenience of", as an "accommodation to", or as "agents for" the canners, and that they do not purchase for their own accounts, but act solely as brokers for and on behalf of canners.

21. Food brokers who may be generally referred to herein as local brokers, and who have also been variously referred to in this record as direct, regular, traditional, or conventional brokers, or as sub-brokers, deal directly with the buyers, usually wholesale grocers or large retail grocers such as retail chain stores. They are usually located in the same general areas as the buyers to whom they sell and at considerable distances from the areas in which the canners are located. They are in close touch with the buyers in their areas, and are in position constantly to know, and often to anticipate, their requirements.

22. Because of the distances involved, however, the local brokers are not in as close contact with the canners as with the buyers, and in many instances have found it advantageous to deal with the canners through intermediaries who are generally designated in the trade as field brokers. The local brokers, whether they negotiate sales to the buyer directly by the canner or through the intervention of a field broker, perform the functions and operate in the manner customarily associated with brokers, and ordinarily receive a brokerage commission of 2½% on canned fruits and asparagus, and 2% on other canned vegetables.

23. There is some indication in the record, which is far from conclusive, that there are as many as 150 field brokers in the United States. It appears, however, that only about four or five are now operating in California, and it is the operations of the field brokers in California with which this proceeding is concerned. Representatives of three of the California field brokers, Beebe, Harcourt-Greene and Field, referred to above, appeared as witnesses in this case, and all of them had dealt with and received brokerage payments from Flotill. This discussion of field brokers is, accordingly, based entirely upon the characteristics of the operations of those three field brokers.

24. These field brokers are located in San Francisco in proximity to the California canners of fruits and vegetables. All of them deal to some extent with all of the California canners, and to a very limited extent they also deal with canners in nearby states. The field brokers are in close touch with the California canners and keep informed concerning their current and potential stocks and the availability of particular items from each of them.

25. The familiarity of the field brokers with conditions of supply and demand among the California canners accounts for a substantial volume of their business in the form of inter-canner sales. In these transactions, they assist canners to dispose of items with which they may be over-supplied, and to obtain items to complete or supplement their packs or sales requirements. These are quantity sales which re-

quire relatively little sales effort and in which sub-brokers do not participate, and on these transactions the field brokers ordinarily receive a commission of 1%. Inter-canner sales, and the payment of brokerage to the field brokers on such sales, are not challenged in this proceeding. Reference is made to them, however, as one of the important activities of field brokers, and one which contributes to their effective performance of the functions for which they receive the challenged brokerage payments.

26. On sales which they make to wholesale grocers or large retail grocers such as chain stores, the field brokers ordinarily receive from the canners generally, and from Flotill specifically, brokerage commissions of 5% on fruits and asparagus, and 4% on other vegetables. In such sales the field brokers function primarily as intermediaries between the California canners and local brokers, and the local brokers ordinarily receive from the field brokers half of the brokerage commission paid by the canners. In some instances, apparently quite limited, the field brokers sell directly to the purchaser without the intervention of local brokers, and in these instances the full brokerage commission is retained by the field brokers.

27. The record shows in considerable detail the nature and course of Flotill's transactions with field brokers. Typically, orders are obtained by a field broker from a local broker, and to a less extent directly from wholesale or large retail grocers. The merchandise is then ordered by the field broker from Flotill. In many instances, Flotill does not at that time know the identity of the customer of the field broker, or the identity of the local broker, and does not necessarily know whether or not a local broker is involved in the transaction. When it receives shipping instructions, however, Flotill can usually determine the identity of the ultimate purchaser. The merchandise is invoiced by Flotill to the field broker. Flotill looks to the field broker for payment, and not to the ultimate purchaser.

28. Respondent Albert S. Heiser testified that a field broker always takes title to the merchandise, that it is his understanding that the sale is made to the ultimate purchaser in the name of the field broker, and that the field broker competes with Flotill's traditional broker (Tr. 310–11). He said that the field broker does not want the customer to know who the packer is because the packer may go directly to the customer; and that Flotill does not want to become known as the packer because it has a local representative who is also trying to get the business (Tr. 315). For the most part, merchandise involved in transactions with field brokers is sold under private labels owned either by the field broker or by the customer (Tr. 315–16). Shipments are made by Flotill directly to the ultimate purchaser, and the field

broker is shown as the shipper (Tr. 318). Other testimony makes it clear that the field broker pays Flotill for the merchandise under the terms of its invoice to him, and his payment to Flotill does not depend upon when or if he receives payment from the ultimate purchaser (Tr. 438–39, 449).

29. The field broker does not have a warehouse, the merchandise is not shipped to him, and it does not come into his possession. He does not purchase from Flotill for speculative resale. Except for a rare situation referred to below, the merchandise is invoiced by the field broker at the same price he pays to Flotill, and he passes on to the purchaser the same discounts and allowances, including cash discounts, label allowances, etc., which he receives from Flotill. Any price adjustments which he receives, due to market fluctuations or other causes, are also passed on to the purchaser.

30. The field broker's total profit or compensation is the brokerage which he receives from Flotill, half of which he passes on to the local broker when one is involved in the transaction. The field broker does not pass on to the ultimate purchaser any part of the brokerage which he receives from Flotill, but retains it all, except to the extent of his payments to local brokers.

31. The evidence disclosed that in a few instances one of the field brokers whose representative testified, Harcourt-Greene Company, invoiced the ultimate purchaser at a price slightly higher than the price at which the merchandise had been billed by Flotill. For example, Flotill's price on a particular item was $1.20, and Harcourt's price was $1.22½. With respect to these instances, the witness stated:

> Yes, on some of the small orders that converge on retail orders, we have increased the price slightly to take care of the additional expense involved, the collection charges, the interest on money outstanding, and so forth. It costs us two or three dollars more just to handle the paper work on something of this type. (Tr. 513.)

32. There is nothing to indicate that these transactions are typical of any substantial portion of Harcourt's business. On the contrary, they appear to be exceptional instances, and there is no contention that there were any in addition to the few specific instances which appear in evidence. It is clear that even these instances did not represent speculative transactions, but represented a genuine effort to cover additional expenses incident to these small sales.

33. There is no evidence and no suggestion that either of the other field brokers whose representatives testified ever invoiced merchandise to ultimate buyers at higher or different prices than those received from Flotill. While these transactions of Harcourt-Greene demonstrate that the field broker may, in rare instances, invoice merchandise

at higher prices than they pay, the record as a whole makes it clear that they do not do so on any significant scale, and that, because of competitive conditions, they would probably be unsuccessful if they attempted to do so. These instances represent sharp departures from the method of operations of field brokers as disclosed by this record, and provide no substantial basis for a conclusion that, in dealing with Flotill, field brokers buy and sell on a speculative basis. They will, accordingly, be disregarded in the further consideration of this issue.

34. Reference should also be made to evidence of another sharp departure from the customary practices of field brokers. Flotill gives the field brokers a discount of 2% for payment in ten days, which discount is passed on to the ultimate purchaser. The witness representing Walter M. Field & Company testified that this cash discount is usually passed on to the ultimate purchaser even if he does not pay the bill within ten days. He was able to recall one instance, however, when "a big New York firm" did not pay Field "quite a large sum of money" for about six weeks, and in that instance the 2% cash discount was not allowed to the purchaser (Tr. 1176–77). The evidence of this instance serves to illustrate by its rarity that cash discounts, even though not always earned, are customarily passed on to the ultimate purchaser by the field brokers.

35. From the record as a whole, the conclusion seems clear that in the transactions here in question Flotill deals with the field brokers and not with the ultimate purchasers. It sells and invoices the merchandise to the field broker, extends credit to him, and looks only to him for responsibility in the transactions. It is believed that in these circumstances title to the merchandise passes from Flotill to the field broker, and that legally the field broker is "the other party" to the transaction. It would seem to follow, therefore, that, as contended by counsel supporting the complaint, in its transactions with field brokers Flotill pays brokerage to the other parties to such transactions in violation of Section 2(c) of the Clayton Act.

36. If this is the legal effect of the transactions, it seems obvious that minimally all of the field brokers with which Flotill deals, and substantially all of the California canners of fruits and vegetables, are also engaged in violations of Section 2(c) because of similar transactions. Respondents urge that this practice has never heretofore been challenged by the Commission, and that it has long been followed by members of the industry confident in the belief that it involved no question of illegality. While not controlling, these considerations warrant a careful examination of the legal and economic consequences of the practice, particularly so in the light of the Commission's recent

decision in the *Hruby* case (Docket 8068, Opinion on Order Dismissing Complaint, December 29, 1962) [61 F.T.C. 1437].

37. What real purpose do the field brokers serve? What advantages or disadvantages accrue to the canners, local brokers, and ultimate purchasers from the activities of the field brokers? Why is the merchandise invoiced by the canners to the field brokers, rather than to the ultimate purchasers? These and similar questions were discussed by various witnesses, and the answers to them are probably fairly summarized by the representative of one of the field brokers on pages 447 through 452 of the transcript.

38. Based on the evidence as a whole, it is apparent that the field brokers perform useful and valuable services to the canners, particularly those not large enough to have their own nation-wide sales and distribution organizations, or to have adequate supplies or complete assortments of canned fruits and vegetables. It is also apparent that they perform equally useful and valuable services to local brokers and ultimate purchasers, particularly those purchasers not large enough to have their own buying organizations or to buy from a single canner in sufficient quantities for carload shipment.

39. Because they are able to combine merchandise from various canners, field brokers are frequently able to secure orders which some of the smaller canners might not otherwise bet because of incomplete lines of products or inadequate supplies of particular items. Without the field brokers, many such orders might go only to the few large canners with sufficiently complete lines to make carload shipments.

40. Most of the merchandise handled through field brokers is sold under private labels, either those owned by the broker or by the ultimate buyer. The field broker can more effectively accomplish the coordinated sale and labeling of such private label merchandise, particularly when various items or quantities of the same item are supplied by several canners.

41. The field brokers perform many of the functions of regular brokers, but, because of their proximity to the California canners and their consequent familiarity with conditions of supply and demand in that area, they afford services to both buyers and sellers which in many instances cannot be efficiently provided by the distantly located local brokers. They are able more effectively to fulfill the demands of the ultimate purchasers from the available supplies of the California canners, and, because of their wide contacts with local brokers, they are able more effectively to sell the merchandise of small canners in distant markets.

42. As stated by one of the field broker witnesses:

* * * we act as an agent to bring all these phases of operations together for the benefit of both the buyer and the canner, and in most cases for a number of canners at a time. (Tr. 448.)

All of these circumstances indicate that the field broker is performing substantial brokerage functions, and raise the question as to why the canner invoices the merchandise to him, rather than to the ultimate buyer. Several reasons for this have been assigned by the witnesses.

43. Canners, including Flotill, are represented by regular brokers on an exclusive basis in various local areas. When orders come to Flotill from those areas through a field broker, it prefers not to bill the buyer directly. It does not desire to become identified as the supplier and raise questions of conflict with its regular broker in the area. The field broker thus provides the canners with alternative local broker representatives in particular areas in competition with the canners' regular brokers.

44. On the other hand, field brokers frequently do not want the canners to know the identity of the ultimate buyers. They desire to avoid, as much as possible, the likelihood of direct dealings between the canner and the buyer which may result in the elimination of the field broker. As stated by the representative of one of the field brokers:

We are trying to keep the customers coming to us instead of bypassing us, * * * (Tr. 451).

45. The small canners sometimes need financing in order to get merchandise released from warehouses where it may be held under collateral loans. By invoicing the field broker and receiving advance or prompt payment from him, instead of waiting for the money from the buyer, these financing needs are frequently met.

46. In the light of the foregoing considerations, it is apparent that the field brokers here occupy "a functional level midway between the producers of foodstuffs and the wholesalers who serve retail grocery stores" (*Hruby* case, *supra*) and, indeed, between the producers and local brokers. They sell to a class of purchasers which ordinarily buys from producers, and they do not sell as wholesalers in competition with those purchasers.

47. The many cases relied upon by counsel supporting the complaint are discussed at pages 62 through 69 of their proposals and at pages 4 through 6 of their reply brief. Those cases have been carefully considered, and, without undertaking a detailed analysis of each of them in this discussion, the hearing examiner has not been able to find in any of them the crucial factual situation presented for decision here. The contention of counsel supporting the complaint seems to turn essentially upon the factual conclusion contained in their summation

at page 24 of their proposals "that field brokers set their own prices." This is the basic ingredient of speculative buying and selling. It is the opinion of the hearing examiner, however, that the evidence does not support that factual conclusion.

48. The crucial finding on this question which is required by the record in this proceeding, is that the field brokers to whom Flotill sells do no *speculative* buying and selling for their own accounts. They do not buy any merchandise before they have orders for it; they do not operate warehouses and do not take physical possession of the merchandise which they buy; they resell the merchandise at the same prices which they pay to Flotill and pass on to their customers the same terms, discounts, allowances, and price adjustments which are accorded to them; and they take no speculative risks except the limited risk of collecting from their customers. The field brokers do not pass on to their customers any of the brokerage which they receive from Flotill. Their profit or compensation is measured entirely by the brokerage which they are paid by Flotill, half of which they pay to local brokers except in those limited number of instances in which no local brokers are involved and in which they retain the entire brokerage.

49. The only proceedings by the Commission involving payments of brokerage to field brokers on their own purchases, which have been found by the hearing examiner, are six proceedings in 1940 and one in 1941, which were disposed of on admission answers. [*Albert W. Sisk & Sons*, 31 F.T.C. 1543 (1940); *C. F. Unruh Brokerage Co.*, 31 F.T.C. 1557 (1940); *C. G. Reaburn & Co.*, 31 F.T.C. 1565 (1940); *William Silver & Co.*, 31 F.T.C. 1589 (1940); *H. M. Ruff & Son*, 31 F.T.C. 1573 (1940); *American Brokerage Co., Inc.*, 31 F.T.C. 1581 (1940); *W. E. Robinson & Co.*, 32 F.T.C. 370 (1941).] In those cases it was found, *inter alia*, that in sales in which local brokers did not participate the field brokers passed on to the purchasers half of the brokerage fee received from the sellers; and the findings also indicate that in some of the transactions shipments were made by the sellers to the field brokers. Those proceedings are, therefore, clearly distinguishable from the present situation.

50. As indicated by counsel supporting the complaint, the decision of the Supreme Court in *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 176–77 (1960), in substance ratified the 20-year-old administrative interpretation by the Commission that "the practice of brokers who, whether buying and selling on their own account or acting on behalf of the seller sold goods to purchasers who bought through them direct at a reduced price reflecting savings made by the elimination of the services of a local broker" violated Section 2(c) of the Act. That is not

the factual situation presented here, but it is significant that in ratifying the Commission's interpretation the Court said in footnote 19 at page 177:

> We need not view this administrative practice as laying down an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers for here, as we have emphasized, the "savings" in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment.

51. Because of factual differences the Commission's decision in the *Hruby* case (*supra*) is not controlling here, but its reasoning is instructive and must be carefully considered in connection with the circumstances under which the field brokers operate. Applying the rationale of the Commission in that case to the present situation it should be considered that: the field broker does not give any of his customers an advantage over their competitors by passing on to them any of the brokerage received from Flotill; he is an intermediary who serves "a legitimate and useful economic function in the channels of distribution of the particular industry"; he "does not compete at the wholesale level"; and he "performs much the same function that in other transactions is performed by a broker on direct sales from a producer to wholesalers". It is also apparent that none of the possible competitive consequences suggested in the dissenting opinion in the *Hruby* case are present here.

52. In a strict legal sense the field broker is the purchaser or "the other party to such transaction". He is, however, uniformly considered by the parties to "such transaction" to be a broker, and he performs many of the functions of conventional brokers, and additional functions, which are useful and valuable to canners, buyers and local brokers. He is, for all practical purposes, and intermediary rather than a buyer and seller. The field broker functions in a very real sense in this industry as a wholesale broker to local brokers, or as a broker's broker.

53. Based upon the realities of the economic functions performed in this industry, it is concluded that the payments by Flotill to the field brokers are payments of brokerage to intermediaries "acting in fact for or in behalf" of "the person by whom such compensation is granted or paid"—Flotill. The payments by Flotill to the field brokers, therefore, do not constitute violations of Section 2(c) of the Clayton Act.

Transactions With Nash-Finch Company

54. Nash-Finch Company, with its headquarters office in Minneapolis, Minnesota, is a wholesale grocer operating 56 branches in eight midwestern states. Its total annual sales amount to approximately

$125,000,000, about two-thirds of which represent its sales of the "dry line" of grocery products which includes canned goods.

55. The record does not disclose when Nash-Finch started buying Flotill products, but it seems clear that it was buying from Flotill at least as early as 1950. It purchased practically the full line of Flotill products, and from 95% to 99% of its purchases from Flotill were under "Our Family" and "Golden Valley" labels, which were private brands of Nash-Finch. On rare occasions when items did not fit the Nash-Finch label program, they were bought under Flotill labels or other labels.

56. During the period beginning as early as 1950 and continuing through 1957, purchases of canned fruits and vegetables by Nash-Finch from various suppliers on the West Coast were made primarily through Bushey & Wright, Inc., a broker which now operates under the name "Red and White Corporation". Although Flotill made some sales to Nash-Finch through at least one other broker (Tr. 171–72), there is much in the record to indicate that, to the extent that Nash-Finch made purchases from Flotill through a broker during this period, the broker was customarily Bushey & Wright.

57. During the years for which specific figures are in evidence, Flotill's sales to Nash-Finch amounted to $197,910.94 in 1955 (RX–17A); $569,994.43 in 1956; $764,573.75 in 1957; and $734,745.23 in 1958 (CX–61). The record does not disclose what proportion of sales by Flotill to Nash-Finch were made through Bushey & Wright during the period before the last half of 1954. Thereafter, however, through 1956, very small brokerage payments were made to Bushey & Wright by Flotill on its sales to Nash-Finch, such brokerage amounting in the last half of 1954 to $281.20; in 1955 to $226.84; and in 1956 to $358.14 (RX–17A).

58. It is concluded, therefore, as contended by counsel for respondents, that, at least from the last half of 1954 through 1956, the great bulk of Flotill's sales to Nash-Finch were made directly without the payment of brokerage thereon to Bushey & Wright. There is no contention that Flotill granted any brokerage or discount or allowance in lieu thereof on direct sales to Nash-Finch prior to December, 1955.

59. During the 1954–1956 period Nash-Finch was making substantial purchases from other California canners and such purchases were ordinarily made through Bushey & Wright. All California canners who sold to Nash-Finch through Bushey & Wright, or any other broker, paid the customary brokerage commission, usually 2½%, to the broker on such sales.

60. Nash-Finch did a considerable amount of newspaper and other advertising, particularly of products sold under its "Our Family"

private brand. Such products included canned food items purchased from Flotill and other canners, and items not produced by Flotill, such as cake mixes, raisins, coconut, dates, peanut butter, popcorn, etc. (Tr. 834; RX–2 and 3). In 1955 it was spending more in advertising its "Our Family" line than its Board of Directors thought it ought to spend (Tr. 840).

61. The relations of Nash-Finch with Flotill "were friendly as a result of a good many years of business contacts of varying intensities from year to year" (Tr. 836). Those relations were particularly close during the spring of the year when plans were being made for the 1956 year pack. At that time, Flotill was the first choice of Nash-Finch for the items which Flotill supplied. It accounted for the largest volume of purchases by Nash-Finch of such items under the "Our Family" label, but Nash-Finch was also purchasing such items from other packers.

62. Some time prior to December, 1955, the official of Nash-Finch responsible for its canned food purchases discussed with Flotill representatives the amount of money Nash-Finch was spending for advertising, particularly of its "Our Family" brand. He explained that he was receiving promotional allowances on other commodities, particularly from Libby, McNeill & Libby (referred to herein as Libby) and California Packing Corporation (referred to herein as Cal-Pack), and that Nash-Finch was expanding its line under its "Our Family" label on a quality basis. In these circumstances, the Nash-Finch representative said, in effect: "If you are going to continue to enjoy our business and if you are going to be the principal source of our supply, we have got to have some help from you" (Tr. 839–40).

63. Thereafter, the Flotill representative advised the Nash-Finch representative that Flotill would pay to Nash-Finch 2½% of its gross sales to Nash-Finch "as an advertising and promotional allowance" (Tr. 841). The evidence discloses that the payment of this allowance became effective on purchases from December 1, 1955 (Tr. 914; CX–6), and, except to the extent modified by the pool car agreement discussed below, that it continued at least through 1956 and 1957 (Tr. 850; CX–714 and 715). There is no contention that it has been abandoned.

64. Many of the direct purchases by Nash-Finch from Flotill were made in sufficient quantities to permit the shipment of straight carloads directly from Flotill to Nash-Finch. By far the larger volume of Nash-Finch purchases from Flotill, however, was shipped in pool cars (Tr. 904), the organizing and scheduling of which required skilled and specialized service.

65. The Nash-Finch association with Bushey & Wright had covered a great many years, and during that period Nash-Finch had relied upon the skill of the Bushey & Wright personnel in assembling merchandise for pool car shipment and moving it expeditiously. This is a service frequently performed by brokers, and is included in the services for which they receive the customary brokerage fees. The Nash-Finch pool cars frequently included the merchandise of as many as twelve different canners (Tr. 934–45; RX–4), but they were for shipment only to Nash-Finch, and did not include merchandise for any other buyers (Tr. 987).

66. Less than carload quantities of Flotill products which were purchased directly from Flotill by Nash-Finch, and on which no brokerage was paid to Bushey & Wright, were customarily included by Bushey & Wright, without any direct compensation, in pool car shipments of merchandise to Nash-Finch from other canners. Bushey & Wright was willing to provide this service on Flotill products without direct compensation because it received its regular brokerage on the merchandise of other canners (except Cal-Pack) which was included in the pool cars, and because its providing this service created a better relationship with Nash-Finch for potential business in the future (Tr. 958–59, 986–88). Except for these considerations, Bushey & Wright would not have performed this enclosure service in connection with Flotill products without compensation (Tr. 1000–02).

67. Nash-Finch wanted to continue to utilize the Bushey & Wright service of including Flotill products in pool cars, in spite of the fact that it was "giving a great volume of business to Flotill without any reward, without any brokerage, or any other compensation to Bushey & Wright * * *" (Tr. 853). Through 1954 and 1955 Bushey & Wright did a "tremendous amount of work" for Nash-Finch in connection with enclosures of Flotill products in pool cars without much compensation (Tr. 853, 904; RX–17A). This situation pricked the conscience of the Nash-Finch representative responsible for the arrangements with Flotill, particularly so since he considered that the 2½% promotional agreement with Flotill deprived Bushey & Wright of brokerage on the Nash-Finch purchases from Flotill (Tr. 909).

68. Early in 1956 he discussed this with the Flotill representative and said, in effect: "With all the work that this office is doing for us, the convenience, the help involved, we must give them some compensation" (Tr. 853). The Flotill representative proposed to pay Bushey & Wright a fee of 1% for its service of enclosing Flotill products in Nash-Finch pool cars if Nash-Finch would contribute half of this fee by accepting a reduction of one-half of 1% from its allowance of 2½% on Flotill shipments which were made in such cars (Tr. 853).

69. That proposal was accepted, and the agreement was entered into, probably in March or April, 1956 (Tr. 913–14). It was retroactive, however, to all transactions after the first of 1956 (Tr. 857–59; CX–7D). Thereafter, Flotill paid to Bushey & Wright 1% on its sales to Nash-Finch of merchandise enclosed in pool cars by Bushey & Wright, and reduced its allowance to Nash-Finch from 2½% to 2% on such sales. On its sales of straight cars to Nash-Finch, on which sales it did not utilize the pool car service of Bushey & Wright, Flotill continued to grant to Nash-Finch an allowance of 2½%, and no payment was made to Bushey & Wright.

70. This 1% payment to Bushey & Wright did not alter its method of operation or affect the service which it thereafter rendered in connection with enclosing Flotill products in Nash-Finch pool cars (Tr. 960). It did not have this arrangement with any canner other than Flotill or with respect to any buyer other than Nash-Finch (Tr. 1000–02). This service has not been performed, and the 1% payment has not been received from Flotill since approximately the beginning of 1958 (Tr. 933). The reasons for discontinuance of the pool car fee arrangement are not disclosed, however, and the record provides no basis upon which it can be determined that it is not likely to be resumed.

71. Counsel supporting the complaint contends, in effect, that the 2½% allowance, which was granted by Flotill to Nash-Finch, was a discount or allowance in lieu of brokerage in violation of Section 2(c) of the Clayton Act; and that the 1% pool car fee paid to Bushey & Wright represented the payment by Flotill of compensation to an agent acting in behalf of Nash-Finch, also in violation of Section 2(c) of the Clayton Act.

72. Counsel for respondents, on the other hand, contend that the allowance to Nash-Finch was a promotional allowance which was granted in good faith to meet the promotional allowances of Cal-Pack and Libby in connection with the sale of canned goods; and that the service for which the 1% pool car fee was paid was advantageous both to Flotill and to Nash-Finch, and that Bushey & Wright was not acting as a broker for either party in arranging the pool car shipments.

The 1% pool car payment to Bushey & Wright.

73. Consideration should first be given to the contentions of the parties with respect to the 1% pool car payment to Bushey & Wright. It was made by Flotill pursuant to an agreement with Nash-Finch which was subsequent to and collateral with its allowance of 2½% to that customer. Half of it was contributed by Nash-Finch by accepting a reduction to that extent from the allowance which it received from Flotill.

74. The payment to Bushey & Wright of 1% was for a service which was advantageous both to Nash-Finch and to Flotill. It was a type of service frequently performed by brokers which is included in the customary brokerage services for which they are compensated by the regular brokerage fees paid by the canners. Bushey & Wright received its regular brokerage commission, usually 2½%, from all canners whose products were included in the pool cars, except Flotill and Cal-Pack.

75. Bushey & Wright received no brokerage or other compensation from Cal-Pack for this service. Cal-Pack did not require the service because it has its own straight car movements, and can ship its own merchandise in its own cars at any time, but it generally agreed to the arrangement at the request of the buyer (Tr. 1002). Flotill, on the other hand, needed the service and by far the greater part of its sales to Nash-Finch were shipped in the pool cars assembled by Bushey & Wright (Tr. 904; CX–6, 7, 14, 15 and 294D). This was, therefore, a very valuable service to Flotill, which was apparently well worth the one-half of 1% which it contributed to pay for it.

76. Without the pool car enclosure service, it would have been much more difficult for Flotill to sell to Nash-Finch, and the volume of its sales to that account undoubtedly would have been materially reduced. The service was as important to Flotill as it was to the other canners shipping in the pool cars. Bushey & Wright was clearly acting in behalf of the canners from which it received brokerage on merchandise in the Nash-Finch pool cars. It seems equally clear that it was also acting in behalf of Flotill in enclosing its merchandise in those cars, even though the pool cars represented a facility which also benefited Nash-Finch.

77. It is concluded that the 1% pool car fee was a payment by Flotill for services rendered to it by Bushey & Wright in connection with the shipment of its products to Nash-Finch; and that it was not a payment by Flotill to an agent of Nash-Finch in violation of Section 2(c) of the Clayton Act.

The 2½% allowance to Nash-Finch.

78. Determination as to whether the 2½% allowance by Flotill on its total sales to Nash-Finch was an allowance made in good faith to meet the advertising and promotional allowances granted to Nash-Finch by competitors of Flotill, or was a discount or allowance in lieu of brokerage, cannot be controlled by the designation given to it by the parties. Careful consideration must be given to the nature, purpose, and characteristics of the allowance and the circumstances under which it was granted.

79. In past years, Nash-Finch had purchased Red and White label products, a private brand controlled by Bushey & Wright, and other products, extensively through Bushey & Wright from various California canners, including Flotill. On such transactions Bushey & Wright had received the regular brokerage commission, usually 2½%, from the canners. By the middle of 1954, Nash-Finch was making the bulk of its purchases of Flotill products directly from Flotill under its own private labels, particularly "Our Family", and on such transactions no brokerage or discount or allowance in lieu thereof was paid or granted to Bushey & Wright or to Nash-Finch.

80. Over the years Nash-Finch lost its enthusiasm for the Red and White brand, and expanded its line under its "Our Family" private brand on a quality basis. Flotill became its first choice for the "Our Family" items which Flotill supplied, and its largest volume of such items were purchased from Flotill. In 1955, Nash-Finch advised Flotill that, if it was going to be the principal source of supply for such items, "we have got to have some help from you" (Tr. 839–40). In response to this prodding, beginning on December 1, 1955, Flotill granted Nash-Finch an allowance of 2½% on its total sales to Nash-Finch, which it designated as a "special promotional allowance" (CX–6A).

81. On sales to wholesalers and retailers through its regular brokers, Flotill paid a brokerage commission of 2½% on fruits and asparagus, and 2% on other vegetables. On sales to Nash-Finch through Bushey & Wright, Flotill and other canners paid the regular brokerage commission to Bushey & Wright, usually 2½%.

82. For some time, at least since the middle of 1954, Flotill had not been paying this commission to Bushey & Wright, or any other broker, on the bulk of its sales to Nash-Finch, but had been making such sales directly without the intervention of a broker. When confronted with the necessity of giving some "help" to Nash-Finch in order to become, or remain, its principal source of supply for items produced by Flotill, it granted an allowance equivalent to the customary brokerage commission on its total sales to Nash-Finch.

83. When this occurred, it disturbed the conscience of the responsible Nash-Finch representative because Bushey & Wright was continuing to provide a valuable pool car enclosure service for the bulk of the Nash-Finch purchases of Flotill products without any direct compensation. In this connection, he stated:

> When we made the advertising and promotional agreement and they were deprived of the brokerage on those goods, then we made the one per cent agreement with Bushey & Wright for the handling of the laborious paper work, maybe within two or three months. (Tr. 909.)

84. The pool car enclosure service on Flotill products had been provided by Bushey & Wright for some time without compensation. It is clear, however, that the Nash-Finch representative, who retired at the beginning of 1958, and who testified from memory, associated the 2½% allowance from Flotill with the brokerage which his experience and memory indicated would, under customary circumstances, be paid to Bushey & Wright.

85. Respondents contend that the allowance to Nash-Finch was made in good faith to meet promotional allowances which Libby and Cal-Pack were granting to Nash-Finch. For a number of years Libby and Cal-Pack had been giving to all of their customers in the Nash-Finch area promotional allowances of a certain amount per case on various items of their nationally-advertised brands, and, in addition, had been supplying promotional help through their sales representatives and in the form of advertising material. There were different scales of allowances for various items under the Libby and Cal-Pack labels, but they did not amount to 2½% unless the undisclosed value of the advertising material and field work supplied by those companies is also considered.

86. Flotill's allowance to Nash-Finch was granted almost wholly upon products under the Nash-Finch private labels. The basis, rate and amount of the allowance, and the circumstances under which it was granted, were wholly dissimilar from the promotional allowances Nash-Finch received from Libby and Cal-Pack. There is no reasonable relationship between them, and no basis is shown in this record on which the Flotill allowance to Nash-Finch may properly be considered as an allowance made in good faith to meet the promotional allowances of its competitors.

87. Counsel for respondents correctly point out that the record indicates that during the period of this agreement Nash-Finch spent greatly in excess of the amounts received from Flotill for advertising and promoting the sale of Flotill products. The record also indicates, however, that Nash-Finch was making very substantial expenditures in advertising its "Our Family" line before it began receiving the allowance from Flotill, and there is nothing in the record to indicate that there was any percentage increase in such expenditures after it began receiving the Flotill allowance. Nash-Finch was expanding its "Our Family" line on a quality basis, and it is clear that this policy required substantial advertising expenditures, regardless of whether the products were supplied by Flotill or by others. Many items sold under the "Our Family" label, which were included in the Nash-Finch advertising expenditures for this line, were not produced by Flotill.

88. Council for respondents also correctly point out that the record discloses that after Flotill began paying the allowances, sales of Flotill products to Nash-Finch increased enormously. This increase was from approximately $198,000 in 1955 to over $764,000 in 1957 (RX–17A; CX–61). The record does not disclose, however, that this increase was due to the fact that Nash-Finch was able to do a more effective job in promoting the "Our Family" line after receiving the allowance from Flotill, as argued by counsel for respondents. On the contrary, the logical inference to be drawn from this increase in the sales of Flotill to Nash-Finch is that the allowance, which had the effect of decreasing Flotill's prices to Nash-Finch 2½% below its regular prices, caused Nash-Finch to divert its purchases from other canners and to concentrate them with Flotill.

89. In the circumstances here presented, it is clear that Flotill, in response to insistence by Nash-Finch, simply agreed to grant a credit to Nash-Finch in an amount equivalent to the brokerage savings which it effected by selling to Nash-Finch directly, rather than through brokers. The designation of such amount as a "special promotional allowance" does not alter its essential characteristics so as to avoid the provisions of Section 2(c) of the Clayton Act.

90. It is concluded that the 2½% allowance by Flotill to Nash-Finch was not a promotional allowance, but was a discount or allowance in lieu of brokerage, in violation of Section 2(c) of the Clayton Act.

Section 2(d) of the Clayton Act

91. Count II of the complaint charges in effect that Flotill paid "advertising and promotional allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of their products," in violation of Section 2(d) of the Clayton Act. It is clear from the complaint and evidence that, as used in this allegation, the word "purchasers" has the same significance as the word "customers" used in Section 2(d) of the Act.

92. The evidence with respect to this charge is limited to Flotill's transactions with customers in the Boston, Massachusetts, area during 1956 and 1957. Counsel for respondents assert that a long investigation was made of Flotill's pricing practices, and emphasize that this was the only evidence offered in support of the Section 2(d) charge. Their position seems to suggest that failure to offer evidence of other transactions carries the implication that the extensive investigation disclosed that those in evidence were the only transactions by Flotill which raised any question under Section 2(d) of the Act.

93. The limitation of the evidence gives rise to no such implication, either for or against Flotill. It means only that counsel supporting the complaint limited their proof to those transactions, and that the Section 2(d) charge must be determined on the basis only of those transactions without regard to whether or not they may be representative of Flotill's pricing practices.

94. The evidence discloses that Flotill paid advertising and promotional allowances to two chain stores located in the Boston area, such allowances being paid to Elm Farm Foods Company in 1956 and 1957, and Stop & Shop, Inc. in 1956. Counsel supporting the complaint contend that these two companies competed with each other and with other customers of Flotill in the distribution of Flotill products; that the allowances were not made available to Elm Farm and to Stop & Shop on proportionally equal terms; and that the allowances were not made available on proportionally equal terms, or on any terms, to other customers of Flotill competing with the favored customers in the distribution of its products.

95. In summary, counsel for respondents contend that Flotill made available a promotional allowance on proportionally equal terms to its only two competing customers in the Boston area. They contend that four of the other five companies, with respect to which evidence was offered, did not purchase canned goods from Flotill in Boston, but purchased on a company basis for national distribution through buying offices in San Francisco, California; and that the fifth company was a wholesale grocer which did not sell at retail, and accordingly did not compete with Elm Farm and Stop & Shop.

96. Elm Farm Foods Company operates retail grocery supermarkets in New Hampshire, Massachusetts and Maine. About 25 or 30 of its stores are in the Boston area. It purchased canned goods from Flotill through a local broker, and such products were under its own private labels and under Flotill's labels. Its purchases from Flotill in 1956 amounted to $194,124, and in 1957 to $249,893 (Tr. 579–80). Flotill products were shipped to the central warehouse of Elm Farm and were stocked in its stores in the Boston area. Elm Farm advertised Flotill products under its own label and under the Flotill label.

97. Elm Farm received a promotional allowance from Flotill of 1% on its total purchases from Flotill during each of the years 1956 and 1957. Pursuant to an agreement of November 21, 1956, it also received an additional payment of $1,000 to promote the products being sold to it by Flotill.

98. Stop & Shop, Inc. operates retail grocery supermarkets in all of New England except Maine and Vermont. During the years 1956 to 1958, it operated approximately 100 stores, of which probably

between 40 and 50 were in the Boston area. Its purchases from Flotill were made through a local broker, and were primarily under the private labels of Stop & Shop, but approximately 25% to 30% were under the Flotill label. The Flotill products, together with products from other suppliers, usually went into the Stop & Shop warehouse, from which they were distributed to the individual stores. No effort was made to keep the products from various suppliers segregated in the warehouse, and they were distributed from the warehouse to the stores on a rotation basis. The Flotill products were purchased for all the Stop & Shop stores, and were probably distributed to all of its stores in the Boston area. In 1956, purchases by Stop & Shop from Flotill amounted to $148,149.17, and in 1957 they were greater (Tr. 618–19).

99. Stop & Shop received a promotional allowance from Flotill of 1% on its total purchases from Flotill during 1956 (CX–52). No additional promotional allowance or payment of $1,000, or any other amount, was given or offered to Stop & Shop by Flotill in 1956; and no promotional allowance of 1% or any other amount was given or offered to Stop & Shop by Flotill in 1957.

100. The 1956 promotional allowance received from Flotill was used by Stop & Shop for assisting the sale of Flotill products under both the Flotill and the Stop & Shop labels, and the amount received was very small compared to the amount spent for promoting the line. It did more promotional work for the line in each of the years 1957 and 1958 than it did in 1956. Whether or not a promotional allowance was received had very little to do with its decision to promote a particular commodity.

101. The Somerville, Massachusetts, Division of First National Stores, which operated about 180 stores in the Boston area during the 1956–1958 period, made very substantial purchases from Flotill during that period, including products under its private label and some under the Flotill label. These purchases were made by the company's San Francisco office. The goods were shipped and invoiced by Flotill to the Somerville Division, and were distributed by that division to its stores in the Boston area. No promotional allowance of 1%, or any other amount, was given or offered for the use of this division of First National Stores by Flotill during 1956 or 1957.

102. The Great Atlantic & Pacific Tea Company operated about 100 to 125 stores in the Boston area during the 1956–1958 period, and those stores were serviced from its warehouse located in Somerville, Massachusetts. During that period very substantial purchases for the Boston area were made by the San Francisco office of A&P from Flotill, and such purchases included products only under the A&P label. They were invoiced by Flotill for shipment to the Somerville warehouse of

A&P. No promotional allowances of 1%, or of any other amount, was given or offered to A&P by Flotill for use in connection with its operations in the Boston area during 1956 and 1957.

103. Star Market Company, during the 1956–1958 period, operated seven stores located respectively in Watertown, Newton, Wellesley, Medford, Somerville, Cambridge and Stoneham, which are outlying areas of Boston. In 1956, its purchases from Flotill amounted to about $15,000, and in 1957 to about $16,000 or $17,000, and included products under the Flotill label and under the private label of Topco Associates. Such purchases were made through Topco, a buying organization with its principle office located in Chicago and with a buying office in San Francisco. Star Market, one of 28 members of that organization, sent its orders for the products of the type here in question to the San Francisco office of Topco, which then purchased the products on behalf of Star Market from Flotill and other canners as, in its judgment, circumstances warranted. During 1956 and 1957 no promotional allowance or payment of any amount was given or offered to Star Market by Flotill, either directly or through Topco.

104. Supreme Markets, Inc. operated four grocery supermarkets prior to 1956, and added one in 1956 and another in 1957. All six of these stores are located in the Boston area, the most distant being in Weymouth, about 30 miles from the center of Boston. In 1956, its purchases from Flotill amounted to $10,428.34, and in 1957 to $11,818.50, and consisted of products only under the private label of Topco Associates. Supreme Markets sent its orders for products of the type here in question to the San Francisco office of Topco, which then purchased the products on behalf of Supreme Markets from Flotill and other canners as, in its judgment, circumstances warranted. Such purchases from Flotill were invoiced and shipped by Flotill to Supreme Markets. During 1956 and 1957 no promotional allowance or payment of any amount was given or offered to Supreme Markets by Flotill.

105. Food Center Wholesale Grocers, Inc., which will sometimes herein be referred to as Food Center, is a wholesale grocer located in Charlestown, Massachusetts. Among its customers are four grocery supermarkets in the Boston area, each of which does business under the name New England Food Fair, and only three of which were operating during 1956 and 1957. Each of those three supermarkets, which will sometimes herein be referred to as the Food Fair stores, was a separate corporation. The officers, directors, and stockholders of Food Center and of each of the Food Fair stores were the same.

106. Each of the Food Fair stores obtained its food supplies from Food Center, and they did not buy any Flotill products from any other source. Food Center also sells to from 500 to 600 retail accounts in ad-

dition to the Food Fair stores, and included in its sales to such accounts are products under the Food Center private label. Although there is no showing as to what proportion of its total sales are made to the Food Fair stores, the record warrants the presumption that such sales represented only a small percentage of the total. Food Center did not promote Flotill products, and the record does not show that the Food Fair stores promoted such products.

107. During 1956 and 1957 Food Center purchased from Flotill through a local broker a variety of Flotill products, both under the Flotill label and under the Food Center private label. The Food Fair stores obtained Flotill products under both labels from Food Center, and resold them in competition with Flotill products sold by Elm Farm and Stop & Shop. No sales were made by Flotill to the Food Fair stores. During 1956 and 1957 no promotional allowance or payment of any amount was given or offered to Food Center or to the Food Fair stores by Flotill.

108. Counsel supporting the complaint contend, in effect, that Food Center was operating at the retail level through the Food Fair stores. They urge that because of the common ownership, control and operation of Food Center and the Food Fair stores, sales by Flotill of products to Food Center which were sold at retail in the Food Fair stores, are equivalent to sales by Flotill to the Food Fair stores. Counsel for respondents contend, on the contrary, that Food Center was not in competition in the retail sale of Flotill products with Elm Farm and Stop & Shop, and that since Flotill made no sales to the Food Fair stores it was under no obligation to grant an advertising allowance on the basis of sales by the Food Fair stores of Flotill products.

109. Although there was a community of ownership, direction and control of Food Center and the Food Fair stores, they did not operate in fact as a single unit. Food Center was a wholesale grocer which sold to many retail grocers, and only a relatively small proportion of its sales were made to the Food Fair stores. The Food Fair stores obtained their "food supplies" only from Food Center, but the record does not disclose to what extent, if any, they obtained other supplies from other sources. The circumstances disclosed by this record do not warrant a finding that the separate corporate organizations may be disregarded, and that Food Center was actually competing at the retail level through the Food Fair stores. Nor does the record disclose that Flotill dealt directly with the Food Fair stores and controlled the terms upon which they bought so as to bring them within the "indirect customer" doctrine discussed by the court in *American News Company, et al.* v. *F.T.C.*, 2 Cir., 300 F. 2d 104 (February 7, 1962).

110. It is concluded, therefore, that Food Center, which purchased from Flotill, and which sold Flotill products only to retailers, did not compete with Elm Farm and Stop & Shop in the distribution of such products. Flotill's sales to Food Center will, accordingly, be disregarded in the further consideration of this issue.

111. The advertising and promotional allowances which were granted by Flotill to Elm Farm and to Stop & Shop were not for use only in connection with selected items, but were for use generally in the promotion of all Flotill products, both under Flotill labels and under private labels. There was no material difference in the grade and quality of Flotill products sold to its various customers, or in the grade and quality of particular items sold under private labels and under Flotill labels.

112. The competitive retail grocery market represented by the Boston area, as used herein, may be loosely defined to include an area within a radius of approximately 25 to 50 miles of the center of Boston. The record makes it abundantly clear that in 1956 and 1957 Elm Farm and Stop & Shop were in substantial competition with each other in the retail sale of Flotill products in the Boston area; and that First National Stores, The Great Atlantic & Pacific Tea Co., Star Market Company and Supreme Markets, Inc., were in substantial competition with Elm Farm and with Stop & Shop in the retail sale of Flotill products in the Boston area in those years.

113. Flotill granted a promotional allowance of 1% to both Elm Farm and Stop & Shop on their total purchases of its products in 1956, and no question of proportional inequality between those two customers is raised with respect to that allowance.

114. Flotill also made an additional payment of $1,000 to Elm Farm to promote the products being sold to it by Flotill in 1956, and did not make or offer to make such additional payment to Stop & Shop in the same or in a proportionally equal amount, or in any amount. Accordingly, the promotional payment of $1,000 by Flotill to Elm Farm in 1956 was not made available to Stop & Shop on proportionally equal terms, or on any terms, and was in violation of Section 2(d) of the Clayton Act.

115. The 1% promotional allowance was also paid by Flotill to Elm Farm on its 1957 purchases, but was not made available to Stop & Shop for that year. Counsel for respondents point out that Stop & Shop promoted Flotill products more in each of the years 1957 and 1958 than it did in 1956, and was not greatly influenced by a promotional allowance in deciding to promote certain items. They contend that under such circumstances there was no justification for Flotill to continue

the 1% allowance to Stop & Shop in 1957. It is not clear in what respect these circumstances constitute justification for failure to make allowances to competing customers available on proportionally equal terms. Insofar as these considerations may be relevant, however, the record also indicates that Elm Farm spent more in promoting Flotill products in 1956 and 1957 than the allowance which it received from Flotill for that purpose, and that it made no accounting to Flotill as to the money spent; and there is no showing concerning the extent to which Elm Farm was required or influenced to promote certain items as a result of the allowance. In any event, Flotill did not make the allowance *available* on proportionally equal terms, or on any terms, to Stop & Shop in 1957, and its allowance to Elm Farm in that year, accordingly, violated Section 2(d) of the Clayton Act.

116. Counsel for respondents contend that the Boston stores of First National, A&P, Star Market, and Supreme Markets did not buy direct, but purchased from Flotill through agents who had offices located in California, and, accordingly, that Flotill had no reason to know that the goods would actually be shipped to Boston. They urge, in effect, that because of this lack of knowledge that its goods would ultimately be sold by these companies in the Boston area in competition with Elm Farm and Stop & Shop, there was no occasion for Flotill to grant a promotional allowance to them.

117. Although they cite no authority to support this contention, the statement of the situation seems to present equitable considerations which warrant examination. It is clear from the record that throughout 1956 and 1957 Flotill was invoicing its products to the Boston area warehouses of these companies, and that it was shipping its products or knowingly delivering its products for shipment, to those warehouses. Advance bookings or reservations are generally made at the time the fruits and vegetables are canned, and deliveries are made over the period of the next one to twelve months, ordinarily at prices prevailing at the time of shipment. At the time the San Francisco buying offices of First National, A&P and Topco placed advance bookings or reservations with Flotill, there were no detailed specifications as to where the merchandise would be shipped, but when shipping instructions were given, Flotill knew the destination of the goods.

118. The testimony of the Flotill official responsible for its sales and pricing policies and practices disclosed that he was well acquainted with the Boston market, and with the fact that the chain stores to which Flotill sold in that area included First National, A&P, Star Market and Supreme Markets (Tr. 201, 254). He made no claim that he was unaware that they were selling Flotill products in the Boston

area. On the contrary, he explained that the 1% advertising allowance was not offered to them because "from our judgment on the basis of past history and on the knowledge of the chain's operation, they couldn't use this particular type of promotion" (Tr. 202).

119. It is concluded that in 1956 and 1957 Flotill's customers in the Boston area included First National, A&P, Star Market and Supreme Markets; that each of those customers was in competition with Elm Farm and Stop & Shop in the distribution of Flotill products; and that Flotill's failure to make available to those customers on proportionally equal terms the advertising and promotional allowances which it granted to its two favored customers, Elm Farm in 1956 and 1957, and Stop & Shop in 1956, constituted violation of Section 2(d) of the Clayton Act.

CONCLUSIONS

1. In Flotill's transactions with field brokers, title to the merchandise passes from Flotill to the field brokers, and from the field brokers to the buyers on the same terms. The field brokers do not place orders with Flotill until they have orders for the particular merchandise from specific buyers, and they do not purchase any merchandise from Flotill for their own accounts. In such transactions the field brokers are not in fact the buyers, but are intermediaries acting for Flotill in selling to the buyers. The payments by Flotill to field brokers, therefore, do not violate Section 2(c) of the Clayton Act.

2. The payments by Flotill to Bushey & Wright of 1% for its services in enclosing Flotill products in pool car shipments to Nash-Finch, were for services to Flotill in connection with the shipment of its products. They were not payments to an agent of Nash-Finch in violation of Section 2(c) of the Clayton Act.

3. The allowance by Flotill to Nash-Finch of 2½% on its total purchases of Flotill products was not a promotional allowance; and it was not made in good faith to meet the advertising and promotional allowances received by Nash-Finch from competitors of Flotill. It was a discount or allowance in lieu of brokerage, in violation of Section 2(c) of the Clayton Act.

4. Flotill granted a promotional allowance of 1% to two of its competing customers, Elm Farm and Stop & Shop, on their total purchases of its products in 1956, which was not made available on any terms to other customers of Flotill competing with them in the distribution of Flotill products. It also granted a promotional allowance to Elm Farm on its total purchases from Flotill in 1957, and made an additional payment of $1,000 to Elm Farm to promote the

products being sold to it by Flotill in 1956, which allowance and additional payment were not made available on any terms to Stop & Shop or to other customers of Flotill competing with Elm Farm in the distribution of Flotill products. Such promotional allowances and payment were, accordingly, made in violation of Section 2(d) of the Clayton Act.

5. The corporate respondent named in the complaint herein is Flotill Products, Inc. Subsequent to the issuance of the complaint, however, the name of that corporation was changed to Tillie Lewis Foods, Inc. The order to cease and desist should, accordingly, identify the corporate respondent by its present name, Tillie Lewis Foods, Inc.

6. The circumstances in this proceeding do not warrant attaching liability to the individual respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser. They are responsible as officers of the corporate respondent, and should be bound by the order to cease and desist as officers of the corporation; but they should not be bound in their individual capacities.

ORDER

It is ordered, That respondent, Tillie Lewis Foods, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Paying, granting or allowing, directly or indirectly, to Nash-Finch Company, or to any other buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of any such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of respondent's products to any such buyer for his own account.

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

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser, in their individual capacities.

OPINION

JUNE 26, 1964

By Dixon, *Commissioner:*

The complaint in this matter charges the corporate respondent [1] and three of its principal officers with violating Section 2(c) [2] and Section 2(d) [3] of the Clayton Act, as amended, in the sale of canned fruits and vegetables. The hearing examiner sustained the Section 2(d) charge and that aspect of the Section 2(c) charge relating to corporate respondent's dealings with the Nash-Finch Company. He further held that respondents' dealings with field brokers did not violate Section 2(c) and that the persons named as respondents in the complaint should not be held in their individual capacities for the violations found to exist. The case is before us on cross-appeals.

The proceeding is concerned with three separate factual complexes, two alleged to involve the payment of brokerage or allowances in lieu thereof in violation of Section 2(c) and one the payment of disproportionate promotional allowances prohibited by Section 2(d). Because they are essentially unrelated, the three situations were afforded seriatim treatment by the hearing examiner and such will be our course here.

Respondents' Dealings with Field Brokers

The facts as to these transactions are not seriously disputed and the hearing examiner's findings with respect thereto are carefully and accurately drafted. The issue arises from his application of the law to these facts.

Traditionally a field broker operates in the geographic area in which as in this case, the canners, such as Flotill, are located. He maintains

[1] In June 1961, the name of the corporate respondent was changed to Tillie Lewis Foods, Inc.

[2] Section 2(c) provides: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[3] Section 2(d) provides: "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

close contact with all canners in his area, including many small firms whose product lines are limited or who may operate only for short periods of time during the year. These small canners are restricted in the distribution of their products by their inability to maintain a sales force and by their inability to fill large orders and make available the lower rates obtainable by shipping in carload lots. The function of a field broker is, in effect, to compensate for these limitations by providing a selling organization to enable the small canner to effect the economies of mass selling and distribution available to his large competitor.

In performing his function, the field broker usually operates through a local broker who is located in the same area as the purchasers and who deals directly with them. Occasionally, the field broker deals directly with the purchaser, usually a wholesale grocer or a large retail chain organization. Of importance in this relationship is the fact that the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice. Generally, the rate of this commission is either 4% or 5% depending on the type of commodity involved. The local broker usually receives half of the field broker's commission, either 2% or 2½%, and, in those instances in which a local broker is not used, the field broker retains the full commission.

Complaint counsel argue that the transactions between Flotill and its field brokers are actual sales, thus making the field broker the "other party to such transaction" to whom, under Section 2(c), the seller is barred from paying "anything of value as a commission, brokerage, or other compensation." Their contention is based on the fact that Flotill invoices the field brokers and looks to the field brokers for payment, and upon the testimony of certain witnesses, including a Flotill official, that title to the goods passes to the field brokers. This latter issue that of title passage, has been the principal subject of controversy

throughout this aspect of the proceeding, respondents' position being that the field broker acts in the capacity of a *del credere* agent.

We have given careful consideration to the facts of record which detail the relationship between Flotill and its field brokers. In summary, these facts are as follows:

The field broker operates from a small office, maintains no warehousing or handling facilities, and never takes possession of any goods. Usually at the beginning of the packing season, the local broker estimates the future needs of the customers in his area and forwards this information to the field broker. He, in turn, places a reservation with Flotill which, in effect, merely serves as a guide as to what should be canned for the season and is in no way binding on any customer. Upon receiving a specific order from a customer through the local broker, during or after the packing season, the field broker forwards the order to Flotill. In this connection, it is the testimony of respondents' principal field broker, A. M. Beebe Company, that from 90% to 95% of the business it places with Flotill is for goods under the purchaser's private label. Thus, when the order has been confirmed, the purchaser forwards his labels directly to Flotill. At the time the order is placed or shortly thereafter, the field broker issues shipping instructions to Flotill. These instructions give the name and location of the customer and the method and time of delivery.

In many instances, goods of other canners are needed to fill a freight car and thus avoid the expense of less than carload shipments. The field broker, usually working with the local broker, will perform the necessary paperwork and issue instructions to the canners and to the carrier in order to combine shipments. Flotill products are loaded on the car by Flotill employees. Upon completion of the loading, the goods are shipped directly to the ultimate purchaser, never to the field broker. Upon shipment, Flotill sends directly to each purchaser having goods loaded in the car, a copy of the shipping manifest (the original is placed in the car) listing the merchandise shipped, showing the order in which it is loaded, and bearing Flotill's name as the canner. All three of Flotill's field brokers testifying herein stated that the goods become the purchaser's inventory when shipped, and that the purchaser may borrow money thereon at that time. Moreover, they testified that at no stage of the transaction could they borrow money on this merchandise.

As to the method of billing for the goods, the three field brokers testified that Flotill bills them at the time the goods are shipped.[4] It is the testimony of one of the field brokers that the bill he receives

[4] Tr. 533, 1164, 1263.

from Flotill is usually accompanied by the shipping documents. The field broker then remits payment to Flotill [5] and at that time or shortly thereafter, bills the ultimate purchaser at the same price he paid Flotill. The Beebe representative testified that his company "just make(s) a transcript of the canner's invoice," passing on the same price to the ultimate buyer. In this regard, it is to be noted that the billing form used by the A. M. Beebe Company bears in its heading the wording "Accommodation Billing For Account Of Seller."

In billing the purchaser, the field broker passes on all discounts and allowances granted by the canner, including any cash discount for prompt payment as well as any price adjustments due to market fluctuations. In this latter regard, the evidence discloses that the prices on canned goods fluctuate rapidly. Shown in the record are two instances of price reductions in the sale of certain canned goods between the time Flotill billed Beebe and the time that Beebe billed the purchaser. Beebe billed the purchaser at the lower of the two prices and received credit from Flotill for the difference.[6]

The record discloses a few instances in which a field broker, Harcourt-Greene Company, billed the purchaser at a slightly higher price than the field broker was billed by Flotill. This field broker testified that the slight increase was to compensate for additional expenses incurred in handling paperwork on certain small orders. However, there is no evidence that Flotill's principal field broker or its other field broker who testified herein ever billed goods to the purchaser at either higher or lower prices. The hearing examiner concluded that these few instances were not typical of any substantial portion of Harcourt's business. Moreover, he found that these instances represent sharp departures from the method of operation of field brokers. From our review of the record, we fully agree with the examiner's finding, and, in view of the importance of the question of the legality of the normal operation of field brokers, we feel that in making a determination on this question in this case these isolated instances should be disregarded.[7]

It is, of course, well settled that Section 2(c), while permitting a seller to compensate a broker for services actually rendered on the seller's behalf, bars the direct or indirect payment of brokerage to a

[5] It appears from the testimony of one of the field brokers that on some occasions the field broker pays the canner in advance of shipment in order to enable small canners in need of financing to have their goods released from a warehouse.

[6] RX 12 k–n, 16 p–t.

[7] If the evidence were otherwise and it were established that a field broker customarily bills purchasers at a price higher than he pays Flotill, such fact might well support a conclusion that such field broker is acting for and on behalf of himself in his dealings with canners.

person buying on his own account for resale. As it is undisputed that Flotill pays brokerage to its field brokers, we must determine whether these field brokers are actually performing a service for Flotill in sales to others or whether they are in fact buying on their own account for resale.

Complaint counsel cite a number of so-called "buying broker" cases in which we have held that brokerage paid to brokers buying and reselling on their own accounts contravenes the statute. In those cases, however, the evidence was such as to clearly establish that ownership of the goods vested absolutely in the brokers. As an example, in the *Southgate* case,[8] the goods were shipped to the broker who stored them in his own warehouse, paid insurance and taxes thereon, resold the goods at prices and on terms which it alone determined, filed claims in its own name against the carrier for loss or damage in transit, and made a profit or sustained a loss on each transaction depending upon market conditions subsequent to its contract with the seller. In the recent *Western Fruit Growers* case,[9] the seller-buyer relationship was established by evidence that the goods were shipped directly to the brokers, the shipper lost control thereof after shipment, the brokers customarily invoiced their purchasers at prices higher or lower than the prices invoiced by the suppliers and, in the event the broker had to sell at a lower price, the broker sustained the loss.

The circumstances surrounding the course of dealing in those and other buying broker cases clearly established that the broker was in fact the "other party" to the transaction. The facts as we have detailed them with respect to Flotill's dealings with field brokers are to the contrary. While Flotill bills and receives payment from the field brokers, none of the indicia of actual ownership of the goods by the field brokers are present but, in fact, are negated. Viewed as a part of the entire transaction from the time of the placing of the order by the ultimate purchaser until delivery of the goods to him, we find that technical title passage, if such be the case, would not be conclusive but would be merely incidental to the services performed by the field broker for the canner.

The facts in this record establish that these field brokers do not purchase for their own account but function as intermediaries on behalf of Flotill in its sales to other parties. As such, they are entitled to brokerage commissions paid by the seller. Complaint counsel's appeal on this issue is therefore denied.

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[8] *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607 (4th Cir. 1945).

[9] *Western Fruit Growers Sales Co.* v. *Federal Trade Commission*, 322 F. 2d 67 (9th Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

The Alleged Brokerage Payments to Nash-Finch

In addition to Flotill, the *dramatis personnae* involved in the second alleged violation of Section 2(c) are Nash-Finch Company, a large wholesale grocer with its headquarters in Minneapolis, Minnesota, and Bushey & Wright, Inc., a food broker.

Nash-Finch Company operates approximately fifty-six wholesale branches in eight midwestern states. Its volume of sales in a recent year approximated $125,000,000. While most items sold are purchased from others, the company does produce its own vacuum-packed coffee in a plant which it wholly owns. Products are principally sold to retail grocers, but sales are also made to hotels and restaurants. A substantial portion of the food items sold by Nash-Finch is labeled with its private brands or private labels, "Our Family" and "Golden Valley."

Bushey & Wright is a large brokerage establishment, operating offices in Boston, Chicago, and San Francisco. Its selling areas are located primarily in the East, in New York State, New England, and in the Southeastern states. Bushey & Wright owns two private labels; "Blue and White" and "Red and White."

Bushey & Wright has acted as a broker for canners and processors selling to Nash-Finch for many years. One witness testified that there is a personal relationship between the two firms, going back to the time when Nash-Finch was a part of Bushey & Wright. The respondent Flotill is a substantial supplier of canned fruits and vegatables to Nash-Finch; however, only a very small percentage of its sales to this customer in recent years has been made through Bushey & Wright. By far the greater number of sales during this period was negotiated directly with Nash-Finch without the service of Bushey & Wright or any other broker. Concerning the transactions by and among Flotill, Bushey & Wright and Nash-Finch during the years 1954 to 1958, the record contains the following figures:

Year	*Total sales to Nash-Finch*	*Commissions paid to Bushey & Wright*	*Estimated sales to N-F through B & W*
1954 (last half)	$67, 006. 55	$281. 21	$11, 248. 00
1955	197, 910. 94	226. 84	9, 073. 00
1956	569, 994. 43	358. 14	14, 325. 00
1957	764, 573. 75	(1)	(1)
1958	734, 745. 23	(1)	(1)

[1] Not available.

(The figures showing the estimated sales to Nash-Finch upon which Bushey & Wright received commissions were calculated from the figures showing the commission paid, which commissions were usually at the rate of 2½ percent. The great bulk of the respondents' sales

to Nash-Finch (95 to 99 percent) bore the buyer's private levels, "Our Family" or "Golden Valley.")

The record shows that on many of the sales made directly to Nash-Finch Flotill has granted to this purchaser a price reduction or allowance equivalent in amount to the normal brokerage fee paid to brokers on sales to other purchasers in which brokers' services have been utilized.[10]

The facts concerning the allowances are not complicated. The record shows that Nash-Finch's purchases from Flotill increased sharply during the last six months of 1955. Sales in the twelve months prior to June of 1955 totaled less than $80,000. Sales for the next six months, that is, the last half of 1955, exceeded $185,000. There is no complete explanation in the record for the sudden preference for Flotill's products.

At one place in their briefs, complaint counsel contend that Bushey & Wright was paid the usual brokerage rate of 2½ percent on the Nash-Finch purchases from Flotill during the period 1954 through 1958, but this is not correct. As found by the hearing examiner, by far the majority of the purchases in question were made directly from Flotill without the intervening sales aid of Bushey & Wright and on these purchases the broker received no compensation whatsoever. This was true as early as the last six months of 1954, for, as the record shows, Bushey & Wright received only $281.21 in brokerage on Nash-Finch's purchases, totaling $67,006.55, during that period. Bushey & Wright received no brokerage at all on Nash-Finch's purchases of $12,626.25 during the first six months of 1955. The record is silent as to when Nash-Finch began dealing directly with Flotill without the aid of a broker, but from the foregoing it can be seen that this course of dealing began sometime prior to the last half of 1954.

On December 1, 1955, Flotill commenced giving a 2½ percent allowance or price reduction to Nash-Finch on all items purchased, *i.e.*, on total purchases regardless of label. The allowance was tendered in the form of credit memoranda issued at irregular periods. The first of the credit memoranda issued April 3, 1956, and credited Flotill's account $401.86 as a "special promotional allowance" of 2½ percent on $16,074.23 purchases during the month of December 1955. A second memorandum issued July 12, 1956, in the amount of $3,218.22 covered purchases during the first six months of 1956. On October 19, 1956,

[10] Although respondents take issue with the hearing examiner's finding that the 2½ percent allowance is equivalent to the customary brokerage commission paid by Flotill on sales to Nash-Finch through Bushey & Wright, this fact is clearly established in the record. Both the Flotill and the Bushey & Wright representatives testified directly to this effect. (Tr. 234, 962).

a third credit memorandum, in the amount of $6,209.29 was issued, allowing credit at 2½ percent for purchases made during July, August and September of 1956. On December 10, 1956, a fourth credit memorandum issued, granting allowances in the amount of $2,122.96 on purchases made during October and November of 1956. The total amount received by Nash-Finch from Flotill during the first twelve months of this arrangement totaled $11,952.33. As stated, it is complaint counsel's contention that this amount represents a payment or allowance in lieu of brokerage. It is respondents' contention that the true nature of the payments is, as described on the credit memoranda, a "special promotional allowance."

There is of course, nothing unlawful in a seller making direct sales to a buyer even though he utilizes brokers in selling to other buyers. And it has been held that a seller may discharge his brokers and commence selling directly to all customers, passing on to them the savings engendered by the elimination of brokerage commissions.[11] However, that is not the situation in this case and we must decide whether the allowance given to Nash-Finch was produced by a savings in brokerage expense due to Flotill's direct dealing with the account. If that were the case, the allowance is unlawful, for "[a] price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 176 (1960).

The record does not reveal the proportion of Flotill's total sales which are made through brokers. It would appear, however, that a substantial part of their business is so transacted, for they utilize the services of more than 100 food brokers. But, as noted, there was an undetermined time lapse between the institution of direct dealings between respondents and Nash-Finch and the payment of the questioned allowances. Thus, a finding that the allowances were unlawful discounts in lieu of brokerage must depend upon an inference drawn from all the facts and circumstances. Quite obviously such an inference could be more easily drawn had the first payment occurred simultaneously with the discontinuance of Bushey & Wright as a full-time broker, as erroneously contended by complaint counsel. But the time lapse is not destructive of the reasonableness of the inference, as respondents argue, for our decision must be based upon all the facts without undue emphasis to any one. A fact tending to support the inference is the mathematical identity of the allowance and the brokerage paid on sales to many other customers. Moreover, while Flotill did grant promotional allowances to other customers, a company official testified that its arrangements with Nash-Finch were unique and that

[11] *Robinson v. Stanley Home Products, Inc.*, 272 F. 2d 601 (1st Cir. 1959).

it was the only customer receiving a 2½ percent allowance on all purchases.

Only one witness testified in any detail with respect to the facts surrounding the agreement to pay the allowance to Nash-Finch. This witness had been the vice-president in charge of grocery merchandising for Nash-Finch during the relevant 1954–1958 period. The witness testified that the allowance was granted to Nash-Finch at his request. He stated that Nash-Finch was spending a good deal of money promoting its "Our Family" brand of goods. In response to his request to a Flotill official for "some help," Flotill agreed to pay 2½ percent of its gross sales to Nash-Finch as an "advertising and promotional allowance." He first testified that brokerage was never discussed in connection with the negotiation and was not a part of "our thinking" but subsequently he stated "* * * when we made the arrangement with Flotill for the advertising and promotional allowance, it was agreed that there was no element of brokerage in the deal to us, to Bushey and Wright, or to anyone else, we were to use that money for promoting Our Family and Golden Valley brands in our territory.* * *"—"Eliminating the brokerage feature deprived Bushey and Wright—the Bushey and Wright office, of the brokerage income that they had had on this Flotill business prior to the agreement.* * *" He was then asked why it was decided to eliminate Bushey & Wright as a broker and responded, "Because there are certain advantages in pooling our specifications with one canner who was a full-line canner, as Flotill is. There are economies in it for him. There are economies in it for us. I didn't make any decisions as to whether they should discontinue paying brokerage to Bushey and Wright, or not. I just asked for an advertising and promotional allowance and said, 'We will deal directly with you.'" This witness was later asked point-blank whether he felt that the fact that Nash-Finch dealt directly with Flotill rather than through an intervening broker accounted for the promotional allowance received. He responded, "Well, I think the fact we were buying directly represented economies to them, a convenience to them, and a sure outlet for their goods.* * *" He stated that he had no ability to give a "definite answer" on the question of whether the Flotill "economies" included the saving of the normal 2½ percent brokerage commission.

Respondents' position, in effect, that the discount was granted as a valid promotional allowance within the exception of the "services rendered" clause of Section 2(c) must be rejected.

The evidence in support of this contention consists of a showing that on Flotill's credit memoranda to Nash-Finch, the payments were noted as "special promotional allowances," together with testimony that

the funds were placed in Nash-Finch's advertising and promotion account and that from time to time advertising tear sheets and handbills were sent to Flotill and the merchandise program was discussed with them. Additionally, there is testimony that in requesting the allowance, Nash-Finch discussed with Flotill the fact that Flotill's competitors, principally California Packing Corporation (Cal-Pack) and Libby, McNeill & Libby (Libby), were granting promotional allowances on sales of their own brands to Nash-Finch.

On the other hand, it is undisputed that Nash-Finch was spending a substantial sum of money in advertising its "Our Family" line of goods prior to receiving the discount from Flotill. Although Flotill's sales of "Our Family" items to Nash-Finch increased considerably after the granting of the discount, there is nothing in the record indicating that Nash-Finch increased the percentage of its promotional expenditures after receiving the discount. It is significant also that Flotill was not the exclusive supplier of the Nash-Finch brands and that use of this discount to promote those brands would inure, in part, to the benefit of other canners. Moreover, both Cal-Pack and Libby had granted Nash-Finch promotional allowances "for a great many years" prior to the discussion of Nash-Finch's representative with Flotill and, as found by the examiner, there is no reasonable relationship between the allowance Nash-Finch received from Flotill and that which it received from the other two companies.

A comparison of the details of Flotill's Nash-Finch arrangement with its customary promotional deals further indicates the true nature of the Nash-Finch transaction. It was Flotill's usual practice to confine its promotional allowances to a single product or to a limited geographical area. As an example, respondents' representative testified that his company was at that time in the process of granting a promotional allowance on one product—catsup. In its dealings with Nash-Finch, however, Flotill granted discounts on the purchase of all Flotill products for the entire eight-state area in which Nash-Finch operates. Also, the manner in which this allowance was paid to Nash-Finch represented a departure from Flotill's other method of paying allowances as shown in the record. In granting a promotional allowance of one percent to certain customers in the Boston area, Flotill issued a "Credit Memorandum," crediting the account of these customers with an allowance based on their purchases for a calendar year. [12] In contrast, the Nash-Finch representative testified that "When we needed some advertising and promotional money and we had some coming from Flotill, I would write a letter and say that the advertising

[12] CX 40, 52.

and promotional allowance on purchases from this date to this date are due us, and they would remit." [13]

Finally, despite the relative magnitude of the discount to Nash-Finch, Flotill had no arrangement with that company for an accounting and, in fact, never requested such an accounting.

In summary, the evidence discloses no economy to Flotill in its method of selling to Nash-Finch other than selling directly without brokerage expense. Moreover, the evidence negates a finding that in return for the allowance, Nash-Finch actually performed any services other than those which it usually performed for itself. The evidence supports a finding that the allowance was granted as a result of pressure by Nash-Finch, a large wholesaler purchaser, who advised Flotill to the effect that "If you are going to continue to enjoy our business and if you are going to be the principal source of our supply, we have to have some help from you."

It is our conclusion that the 2½ percent allowance granted by the respondents to Nash-Finch reflected the savings in brokerage expenses which the respondents had theretofore incurred in selling to Nash-Finch and that, therefore, the allowance was "in lieu of brokerage" and unlawful.

The One Percent Payment to Bushey & Wright

Bushey & Wright for a number of years had served as a broker for canners other than Flotill in sales to Nash-Finch. With the exception of one canner, California Packing Corporation, these canners paid Bushey & Wright the usual brokerage commission of 2½ percent. The majority of the sales by these other canners to Nash-Finch were in less than carload lots. As it was prohibitively expensive to ship less than a full carload of merchandise, Bushey & Wright, as a part of its normal brokerage service to these canners, arranged for the pooling of their shipments into one car. It appears that one car destined only for Nash-Finch might contain the merchandise of as many as twelve canners.

The organizing and scheduling of pool cars requires skill and specialized service. Bushey & Wright had performed this operation as a part of its brokerage service for canners in sales to Nash-Finch for a number of years. Although some time prior to 1954 Flotill began selling directly to Nash-Finch, the majority of its sales continued to be in less than carload quantities and both parties desired the pool car services of Bushey & Wright. Bushey & Wright was willing to and

[13] Tr. 922, 923.

did provide this service for these parties for a substantial period of time without compensation.[14]

In early 1956, within a month or two after the initiation of the 2½ percent payments to Nash-Finch, both Flotill and Nash-Finch officials decided that Bushey & Wright should be compensated for the large amount of paperwork which the pool car service entailed. It was agreed that both parties would contribute to the fee to be paid this broker upon shipment on which it performed the service of including Flotill goods in a car destined for Nash-Finch. On such shipments the 2½ percent allowance to Nash-Finch would be reduced to 2 percent. Flotill would take this withheld ½ percent, together with another ½ percent contributed by it, to make up the full 1 percent to be paid to Bushey & Wright.

This procedure was placed into operation in January of 1956. The record reveals that by far the greater number of Flotill's shipments to Nash-Finch thereafter was in less than carload amounts, with Bushey & Wright performing the pool car service on such shipments. During the first six months of 1956, Nash-Finch received the so-called "special promotional allowance" upon purchases totaling $156,323.37. Of this total, only $18,349.89 was shipped without using the pool car service of Bushey & Wright.

Complaint counsel contend that the 1 percent fee paid Bushey & Wright constitutes brokerage paid by the seller to an agent of the buyer. It is our conclusion that the hearing examiner's rejection of this contention is correct. As we view it, the payment of the 1 percent to Bushey & Wright by Flotill constituted no more than payment of brokerage to the seller's broker for a service which is normally performed by such brokers. And the fact that Flotill deducted one-half of this 1 percent from the 2½ percent theretofore allowed to Nash-Finch on its purchases did not change the nature of the payment. When a seller reduces the amount of an unlawful allowance to a buyer, transferring the withdrawn money to a broker, he is lessening his violation, not enchancing it.

The 2(d) Charge

Under Section 2(d) of the amended Clayton Act, the respondents are charged with having discriminated between competing buyers by granting advertising or promotional allowances to some which were not made available on proportionally equal terms to others.

Complaint counsel confined their proof to dealings which respondents had with customers reselling their products in the greater Boston,

[14] The Bushey & Wright representative testified that it performed this service without pay on Flotill shipments to Nash-Finch because it received its regular brokerage commission on sales by other canners to Nash-Finch included in the car and because providing this service created a better relationship with Nash-Finch for future business.

Massachusetts, area during the years 1956 and 1957. Two of respondents' customers operating in that trade area received promotional allowances, while five of their competitors did not.

Elm Farm Foods Company is one of the favored customers. This retail grocery chain operates supermarkets in New England, with about twenty-five or thirty of its stores located in the Boston area. It made substantial purchases from Flotill during the years 1956 and 1957, and on such purchases received a promotional allowance equal to 1 percent of total purchases. In addition, it received a lump sum payment of $1,000 from the respondents in the fall of 1956.

The other favored customer was Stop & Shop, Inc., a retail grocery chain operating in New England. Forty or fifty of its stores are in the greater Boston area. The only promotional payment received by this customer in 1956 and 1957 was a 1 percent allowance on its total purchases from Flotill during the year 1956. The grocery sales manager of this company, responsible for buying and selling groceries, testified that he was not aware that Flotill offered to pay his company a promotional allowance at any time during the year 1957, nor was the company offered any payments equivalent to or proportionally equal to the $1,000 paid to Elm Farm in 1956. The record further shows that Stop & Shop and Elm Farm competed in the resale of Flotill products.

Thus, the evidence clearly establishes that Elm Farm and Stop & Shop were not afforded proportionally equal treatment by Flotill in the payment of advertising allowances. While these unlawful transactions alone are sufficient to justify an order to cease and desist, the record indicates that Flotill sold to several other retail companies doing business in the Boston area in competition with Elm Farm and Stop & Shop. Since these companies received no allowance of any nature, the 1 percent allowance paid to Stop & Shop in 1956 and the allowances to Elm Farm were discriminatory as to these other retailers.

Among the companies discriminated against were First National Stores, which operates about 180 stores in the Boston area; The Great Atlantic & Pacific Tea Company, operating about 100 to 125 stores in the Boston area; Star Market Company, with seven stores in the Boston area; and Supreme Markets, Inc., with about six stores in the Boston area. Respondents contend that since these companies made their purchases from Flotill through agents who had offices located in California, Flotill had no reason to know or believe that the goods would be shipped to Boston. Thus, respondents contend that these customers purchasing in California were not "customers" as that term is used in Section 2(d).

Respondents argue that The Great Atlantic & Pacific Tea Company and the First National Stores have retail outlets in many areas other

than the Boston area; that these customers take title to the goods purchased from Flotill in California and are responsible for shipment to their various outlets. Sales are made to them f.o.b. Stockton, California. Flotill, of course, places the goods in freight cars for shipment to the warehouses designated by the customers. It disclaims any knowledge as to where the products would be sold to consumers because of the possibility that the chain store customers might order the cars diverted to another destination while in transit.

But a seller is under an obligation to affirmatively offer or otherwise make available promotional allowances on proportionally equal terms to all customers who compete in the resale of its goods. This obligation entails whatever inquiry is necessary to establish whether customers in fact compete. If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious. A violation of Section 2(d) is determined by objective rather than subjective considerations. If the favored and nonfavored customers actually compete in the resale of the seller's goods, the Act may be violated without regard to the seller's knowledge of the lawfulness or unlawfulness of a disproportionate promotional allowance. To hold otherwise would recognize the right of a seller to discriminate in favor of or against any customer who conducts his resale operations in more than one trade area.

The hearing examiner found that Flotill was well acquainted with the Boston market; that Flotill was invoicing its products to the Boston area warehouses of these companies; and on all shipments, whether immediately made or after a delay waiting for instructions, Flotill was aware of the destination of the goods. The hearing examiner additionally points out that the responsible Flotill official testified that a 1 percent promotional allowance was not offered to these nonfavored customers because he felt that "they couldn't use this particular type of promotion." On the basis of these and other record facts, it is our conclusion that The Great Atlantic & Pacific Tea Company and First National Stores were in fact nonfavored customers of Flotill, competing with the favored customers, Stop & Shop and Elm Farm, in the Boston area. The conclusion follows that the promotional payments to the latter two companies were discriminatory as to the former two companies and hence violated Section 2(d).

Respondents' contentions with respect to two of the other allegedly disfavored customers, Supreme Markets and Star Market, differ somewhat from those discussed above. These companies purchase from Flotill through the medium of Topco, a buying organization. In ordering from Topco, the customers did not particularly specify Flotill goods and their orders could have been filled by Topco with goods ordered

from other canners. However, Topco's function appears to be largely that of a buying agent. As a matter of fact, the witnesses from Star and Supreme Markets so characterized it. After receiving an order from Topco for either Star or Supreme, Flotill ships the goods directly to the retailers and bills the retailers. These facts clearly demonstrate that Star and Supreme are customers of Flotill for the purposes of the Act, leading to the conclusion that the discriminatory payments to their competitors, Elm Farm and Stop & Shop, were unlawful. The hearing examiner's findings and conclusion with respect to this problem are correct and will be affirmed.

In the proceedings before the hearing examiner, complaint counsel contended that Food Center Wholesale Grocers, Inc., a grocery wholesaler selling to retail stores in the Boston area, should be considered as a nonfavored customer. Among Food Center's customers in 1956 and 1957 were three grocery supermarkets trading under the name New England Food Fair. Each of these three supermarkets was separately incorporated but each had the same officers, directors and stockholders as did Food Center Wholesale Grocers, Inc. It was complaint counsel's theory that this community of ownership, direction and control made Food Center in actual practice a retailer competing with the favored Stop & Shop and Elm Farm. The hearing examiner was not so persuaded, holding that Food Center was actually a wholesaler selling to many retail grocers, with only a relatively small proportion of its sales going to the Food Fair Stores. He concluded, "The circumstances disclosed by this record do not warrant a finding that the separate corporate organizations may be disregarded, and that Food Center was actually competing at the retail level through the Food Fair Stores." He further held that there was no showing sufficient to bring the transactions within the indirect customer doctrine discussed by the court in *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962).

In their petition for review, complaint counsel indicated that they would not appeal this holding by the hearing examiner, but in their appeal brief they state that the Commission's intervening decision in *Fred Meyer, Inc.*, 63 F.T.C. 1, Docket No. 7492, March 29, 1963, makes necessary such an appeal. In the *Fred Meyer* case, we held that wholesalers whose retailer customers compete with direct buying retailers are themselves in competition with such direct buying retailers in the distribution of the supplier's goods and that they are, therefore, entitled to proportionally equal allowances. The respondents have chosen not to brief this question, arguing that the point is not properly before the Commission since it was not raised in the petition for review. They cite our decision in *Revlon, Inc.*, 62 F.T.C. 968, Docket

No. 7175, December 18, 1962, wherein we held that an exception which went beyond the questions stated in a petition for review was not properly before the Commission for determination. That decision was rendered under the Rules of Practice, issued and effective June 1, 1962, now superseded, which specifically provided in §4.21(b) that exceptions to be briefed must be "* * * limited to the questions stated in the petition for review * * *" and, in § 4.21(c), "Material not included in the exceptions or brief may not be presented to the Commission in oral argument or otherwise."

As a practical matter we see no real need to resolve the factual and legal questions here presented. The *Fred Meyer* decision places these respondents, no less than any other interstate sellers, on notice that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers. Thus, to comply with the order to cease and desist to be entered herein, the respondents must henceforth consider Food Center and all similarly situated wholesaler customers as customers within the scope and meaning of Section 2(d). Since we have not reviewed the hearing examiner's findings and conclusions on this point (findings 105 through 110), they will not be adopted as part of the Commission's decision.

The Remedy

Respondents object to the terms of the order to cease and desist, arguing that the order is too broad and does not spell out with sufficient definition and clarity the exact conduct prohibited. Orders to cease and desist must be drawn with sufficient scope to cover the myriad forms and procedures utilized by buyers and sellers. To prohibit with exactness only the conduct actually engaged in would invite avoidance of the order by minute changes in procedure. In the words of the Supreme Court:

> Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. [*Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).]

In our opinion, the hearing examiner's order dealing with the 2(c) aspect of this proceeding "does no more than prohibit the practices found to exist in this case and closely related acts, all of which are

expressly prohibited by section 2(c)." *Western Fruit Growers Sales Co.* v. *Federal Trade Commission*, *supra*. Modification thereof would not be appropriate.

Likewise, while the 2(d) order issued by the hearing examiner is couched substantially in the terms of the statute, we believe that no extensive modification is required. Section 2(d) deals with a relatively precise type of unlawful activity, discrimination in the granting of promotional allowances to competing customers. The only manner in which an order narrower than the terms of the statute can be framed is to limit its application to goods, parties, and geographic areas directly involved in the violation proved. In this matter such an order would require Flotill to cease granting Elm Farm and Stop & Shop promotional allowances on nondietetic canned fruits and vegetables unless a proportionally equal allowance is available to all other customers who compete in the distribution of such products in the Boston area. Such an order would clearly not protect the public interest, for it would be directed against specific past acts which may or may not recur rather than against an unlawful practice which may be resumed in a different area with different customers. Moreover, the respondents need not proceed with any new planned course of business activity at their peril, for under our procedures, as recently codified in the Rules of Practice effective August 1, 1963, "Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order." (§ 3.26(b), 28 Fed. Reg. 7080, 7091.)

The Individual Respondents

The complaint names Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser in a dual capacity as individuals and as officers of the respondent corporation. The hearing examiner decided that there was no need to have the order to cease and desist run against the respondent persons excepting in their capacity as officers of the corporation and he dismissed the complaint as to them as individuals. Complaint counsel feel that this is error and have appealed. In this instance and on these facts we are inclined to agree with counsel.

The record reveals that the corporate respondent was completely controlled and was almost 100 percent owned by the three named respondents. During the relevant period of time Mrs. Lewis owned 94.5 percent of the outstanding stock and her nephews, Albert S. and Arthur H. Heiser, the other two individual respondents, each owned approximately 2¾ percent. Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt

that an order against the individuals is necessary. *Fred Meyer, Inc.*, 63 F.T.C. 1, Docket No. 7492, March 29, 1963. The reason for such decisions is obvious, for under those circumstances the corporation exists at the sufferance of its owners.

The hearing examiner held that the principal rule followed by the Commission in deciding questions of individual liability is to not attach such liability "* * * except upon a showing of special circumstances which would indicate a likelihood that failure to do so may cause an evasion of the order against the corporation." While we feel that the hearing examiner has over-simplified the rationale of our numerous holdings on this question, the standard referred to is not an inappropriate one. But even under this standard we think these individuals should be subjected to the requirements of the order. While there is no indication that they desire to do so, the individual respondents have the absolute power to terminate the existence of this corporation at any time. A decision to abandon the corporation and continue operations as a partnership could be made for reasons entirely unconnected with this proceeding and without any intention of evading an order to cease and desist. This, however, could be the practical result, leaving the public with but doubtful protection against a resumption of the practice. On balance we believe that the public interest requires an order against the individual respondents in their individual capacity and we so hold.

An order effecting the decision herein related will issue.

Commissioner Elman has filed a separate opinion. Commissioner MacIntyre dissented in part and has filed an opinion dissenting in part. Commissioner Reilly did not participate in the decision for the reason that he did not hear oral argument.

Separate Opinion

JUNE 26, 1964

By Elman, *Commissioner:*

I.

The Robinson-Patman Act was a product of concern with monopolistic tendencies in distribution. Large buyers, it was believed, were using their bargaining power to extort preferential price concessions from suppliers, thereby enhancing their power to dominate, and even destroy, small distributors compelled to pay higher prices for goods sold in competition with these large rivals. Congress considered that price discrimination should be forbidden where it reflected power, rather than efficiency, and where there was a danger of injury to com-

petition or a tendency to monopoly. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, embodies this basic legislative determination.

Congress was aware, however, that one of the reasons for the ineffectuality of the original Section 2 of the Clayton Act in preventing the growth of monopolies in distribution was the existence of a number of subterfuges or artifices by which discriminatory discounts or allowances were passed off as transactions unrelated to price discrimination. Section 2(c) through 2(e) were added to the Clayton Act by the Robinson-Patman Act in order to prevent 2(a) from being thus outflanked.

The Federal Trade Commission's investigation of chain stores had revealed that price discrimination was frequently accomplished through manipulation of brokeargе.[1] Two practices in particular were involved. The first was the practice of using "dummy" brokers.[2] A buyer would designate one of his employees as a broker and insist that the seller pay this "broker" a specified "brokerage" fee. The "broker"

[1] The Commission's *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. 62–63 (1935), stated the problem as follows:

"*Allowances for brokerage.*—A number of the manufacturers in the grocery group stated that they give allowances in lieu of brokerage to certain chain customers. Some of these give this allowance only when the customer has a buyer at the producing center or shipping point, the amount of such allowance being equal to regular brokerage. Other manufacturers stated that they limit the payment of such allowance to a few large chain customers and then only in response to a demand. Such allowances are not uniform as between chains. Where brokerage allowance is granted, some of the manufacturers allow cooperative chains 2½ percent, while they allow corporate chains a brokerage fee of 5 percent. The reason for this discrimination is that it is necessary to grant the larger discount to the corporate chains to obtain their business.

"Some manufacturers who distribute through brokers stated that they were required to pay brokerage not only to their brokers, but also to the chain purchasers. One manufacturer, however, stated that where it pays brokerage to one of the large chain-store purchasers, no brokerage is paid to its own broker. The chain involved has established a buying agency which holds itself out to be a merchandise broker. When the chain, through this buying agency, orders a car of the products of the manufacturer for delivery to one destination, the buying agency receives brokerage. If the manufacturer has a broker located in the territory to which the products are shipped, the broker receives no brokerage. However, when the buying agency of the chain orders a car of the products of the manufacturer for delivery to more than one destination, a mixed shipment, the brokerage is divided, the agency for the chain receiving one half and the broker into whose territory the shipment is destined receiving the other half of the brokerage fee."

[2] The legislative history of Section 2(c) is set out in some detail in *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 168–69:

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination."

then would remit the fee to his employer without having performed any brokerage services. The second practice with which Congress was concerned was closely related. A large buyer, rather than set up a "dummy" broker and require payment of "brokerage" to him, might simply demand a discount or allowance respecting or "in lieu of" brokerage.[3] Like the first practice, this was a method for extorting a brokerage fee or commission from the seller, not on account of brokerage services actually rendered, but as an indirect form of price discrimination. Congress sought, in Section 2(c), to deal with the first practice by forbidding brokerage payments to a party on the other side of the transaction where no services were rendered, and with the second by forbidding "any allowance or discount in lieu" of brokerage where such discount or allowance was not justified by any services rendered.[4]

In either case, the prohibition contained in Section 2(c) was intended to be absolute. Congress was concerned with practices which it believed to be without any redeeming social or economic value—practices whose only purpose was circumvention of the price-discrimination law. Section 2(c) is a *per se* provision, and the *per se* category is ordinarily confined to "agreements or practices which because of their pernicious effect on competition and *lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal. * * *" *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5. (Emphasis added.) It is because the section is directed at practices which are inherently pernicious and unjustifiable that the ordinary defenses to a *prima facie* case of price discrimination are not available and that competitive injury need not be proved.

The corollary to this is that Section 2(c) applies only to transactions in which no brokerage services are actually rendered. Spurious, false, unearned brokerage is forbidden; but if a businessman performs a valuable and substantial service or function in the distribution of goods, he is entitled to be compensated for it, and Section 2(c) does not apply.

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[3] "In the Final Report on the Chain-Store Investigation * * * Congress had before it examples not only of large buyers demanding the payment of brokerage to their agents but also instances where buyers demanded discounts, allowances, or outright price reductions based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all. * * * These transactions were described in the report as the giving of 'allowances in lieu of brokerage' * * * or 'discount[s] in lieu of brokerage.'" *Broch, supra,* note 2, at 169, n. 5.

[4] Section 2(c) provides "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom the compensation is so granted or paid."

Edward Joseph Hruby, F.T.C. Docket 8068 (decided Dec. 26, 1962) [61 F.T.C. 1437]. That is so even if he is not a conventional broker yet performs services which in other situations are performed by brokers. *Central Retailer-Owned Grocers, Inc.* v. *F.T.C.*, 317 F. 2d 410 (7th Cir. 1963). If a price discrimination does not involve phony brokerage, but takes the form of an express, undisguised price reduction or discount, Section 2(c) has no application. A discrimination that has been forced into the open is dealt with not under 2(c) but under 2(a), the price-discrimination provision of the Act.[5]

Thus, Section 2(c) has only a limited though important role to play in the enforcement of the Robinson-Patman Act. It is not a general regulation of brokers or other intermediaries, or of methods of distribution. It was not intended to freeze the brokerage function at what it may have been in 1936, or to tell brokers whether they may buy and resell on their own account, or to prevent buyers from performing brokerage functions, or otherwise to discourage changes or innovations in traditional forms of distribution. It is not concerned with legitimate, *bona fide* transactions at all, but strictly with phony, unearned brokerage. The common characteristic of all transactions prohibited by 2(c) is that brokerage or other legitimate and valuable services in distribution are *not* performed.

To be sure, excerpts will be found in the Congressional debates on Section 2(c) indicating some confusion as to what was deemed to be "legitimate" brokerage.[6] Viewed as a whole, the brokerage payments and allowances with which Congress was concerned were payments and allowances of fake or dummy brokerage. The legislative history is replete with "assertions that the act would not inhibit the realiation of savings based on genuine efficiencies",[7] and the statute as finally enacted expressly allows brokerage payments or allowances "for services rendered". As the Supreme Court has held, the provisions of the Robinson-Patman Act must be construed to harmonize with overall antitrust

[5] "If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act." *Robinson* v. *Stanley Home Products, Inc.*, 272 F. 2d 601, 604 (1st Cir. 1959). "* * * [T]he purpose of attaching per se illegality to the section 2(c), (d), and (e) prohibitions was precisely to force unearned commissions out in the open. False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' category; rather it falls into the trap deliberately set for it by the law. Discriminator-concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to show their true character, and to be measured by the sections of the law dealing with discrimination." H.R. Rep. No. 2966, 84th Cong., 2d Sess. 97–98 (1956). See *F.T.C.* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68.

[6] See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936); 80 Cong. Rec. 9418 (1936) (remarks of Congressman Utterback). But see 80 Cong. Rec. 9420 (1936) (remarks of Congressman Celler).

[7] Note, 77 Harv. L. Rev. 1308, 1313 (1964). See H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936).

policy. *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 74. Section 2(c), therefore, cannot be invoked to insulate so-called independent brokers or any other class against competition from other businessmen performing genuine, not phony or sham, services in distribution, or in any other way to rigidify the channels of distribution and thereby discourage competition and economic progress.

Despite confusion engendered by some early Commission and lower court cases,[8] the scope and limits of Section 2(c) are simple and clear. The function which 2(c) performs in the overall statutory scheme is, since the Supreme Court's landmark decision in *Broch* and the Commission and court cases following it, no longer open to doubt. In *Broch*, the Court plainly indicated that Section 2(c) has no application in any case where "the buyer rendered any services to the seller or . . . anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 173. *Hruby* and *CROG* (*Central Retailer-Owned Grocers, Inc.*) have already been mentioned. In the first, a buyer was permitted to receive "brokerage" in compensation for the valuable services performed by him for the seller; in the second, a buyer, not a broker, was permitted to be compensated for services often performed by brokers. In *Thomasville Chair Co.* v. *F.T.C.*, 306 F. 2d 541 (5th Cir. 1962), the court held that a savings in brokerage may lawfully be passed on by the seller to the buyer if the allowance reflects actual savings in distribution costs. And today, in *Flotill*, the Commission holds that an intermediary may lawfully be compensated for brokerage services even though he is the purchaser. (See pp. 1153–1155, *infra.*)

The effect of these decisions has been to restore Section 2(c) to its proper role in the scheme of the Robinson-Patman Act. Section 2(c) prohibits only three general types of transaction. The first is the payment of unearned brokerage to a dummy who renders no services and is controlled by the other party to the transaction. (See pp. 1149–1150, *supra.*) A variation of this would be where the dummy, in an attempt to mask a violation of the statute, performs only slight or nominal services which do not entitle him to brokerage. In the second type of transaction to which 2(c) applies, the dummy is dispensed with entirely. The seller grants directly to the buyer an allowance or discount for, on account of, or in lieu of, brokerage, and no services are rendered by the buyer to the seller justifying the allowance, and no savings in distribution costs are effected.

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[8] See, *e.g.*, *Modern Marketing Service, Inc.* v. *F.T.C.*, 149 F. 2d 970 (7th Cir. 1945); *Southgate Brokerage Co.* v. *F.T.C.*, 150 F. 2d 607 (4th Cir. 1945); *Webb-Crawford Co.* v. *F.T.C.*, 109 F. 2d 268 (5th Cir. 1940); *Biddle Purchasing Co.* v. *F.T.C.*, 96 F. 2d 687 (2d Cir. 1938); *Quality Bakers of America* v. *F.T.C.*, 114 F. 2d 393 (1st Cir. 1940); *Columbia River Packers Assn., Inc.*, 44 F.T.C. 118; *Custom House Packing Corp.*, 43 F.T.C. 164; *Ketchikan Packing Co.*, 44 F.T.C. 158.

The third type of transaction is that involved in the *Broch* case. There a broker was actually used in a transaction in which a discriminatory price concession was granted by seller to buyer; and the broker, by accepting a reduction in the brokerage due him on the sale from the seller, helped defray the concession. The vice in such an arrangement is that if a seller is free in this manner to shift the burden of a discriminatory concession to another person, the broker, he obviously has less incentive to resist a powerful buyer's demand for preferential price treatment. If, on the other hand, the seller is absolutely forbidden to recoup such a discount or allowance from his broker, he is likely to put up more resistance to the importunings of large buyers seeking discriminatory price concessions. Section 2(c) closes the easy and inviting route to price discrimination which would be wide open if the seller could shift the cost of discrimination to a third person, the broker.

But Section 2(c) imposes no obligation on a seller to employ brokers on any or all of his sales.[9] Suppose that a seller uses brokers on most of his transactions, and, at the same time, certain buyers in the industry employ agents to actively seek out the sellers: If such an agent, rather than a seller's broker, is instrumental in bringing together seller and buyer, he has plainly rendered a valuable service to the seller as well as to the buyer; even if he is the latter's agent he is not barred by Section 2(c) from being compensated by the seller. In *Broch*, by way of contrast, where a broker was used in the transaction, the buyer rendered no services to the seller, and the brokerage allowance granted the buyer was therefore phony and unearned. *Broch* would have been decided differently if anything in the buyer's method of dealing had justified a brokerage reduction. In that event the reduction would have been lawful and could have been passed on to the buyer without violation of 2(c).[10]

II.

Applying the principles which I believe govern the interpretation and application of Section 2(c) to the facts of the present case, I agree that respondents' dealings with field brokers are not unlawful under Section 2(c). There are some 150 field brokers in the country, and until the commencement of the present action it was not suggested that the services they perform are unlawful. Not only is their function a useful and legitimate one; it is essential to the survival of small business in the canning industry. Large canners are able to ship directly in carload lots to food brokers (called "local brokers") located in the areas

[9] "There is nothing in the bill that requires the employment of a broker; there is nothing to prevent sales direct from seller to buyer." 80 Cong. Rec. 9418 (1936) (remarks of Congressman Utterback). See *Robinson* v. *Stanley Home Products, Inc., supra.*

[10] See discussion of *Broch* and *Thomasville,* p. 1152 of this opinion, *supra.*

where their customers are, or to the customers, be they wholesalers or retailers, directly. Also, large canners are able to deal directly with local brokers because they maintain sales forces in the field. Small canners cannot distribute in this way. They lack adequate sales forces, and are unable to fill large orders or ship in carload lots. If they are to compete at all with the large canners, they must have a method of pooling orders and shipments and establishing contact with the local brokers. The traditional method of doing so has been through the use of "field brokers" located in the seller's area and familiar with the seller's needs and resources.

As the Chairman's opinion recognizes, the field broker performs an economically valuable and entirely ethical function as an intermediary. He is entitled to be compensated for it. It would be absurd to view the payment of compensation by small canners to field brokers as a sinister attempt to circumvent the price-discrimination law—the kind of thing at which Section 2(c) is aimed. Who, in this case, are the favored, and who the unfavored, buyers? Who is, or could be, injured by the field brokers' method of doing business? Where is there any threat to competition, or danger of monopoly? The field brokers perform useful services to small, independent canners; the field-brokerage system is a legitimate means by which the ability of such canners to compete with their large rivals is strengthened. To hold this system unlawful would impede, not advance, the policies of the Robinson-Patman Act.

The Chairman's opinion reaches the right result, however, by a curious route. The opinion assumes that, in their dealings with respondents, the field brokers actually take title to the goods, but concludes that such "technical title passage" is not "conclusive" but merely "incidental to the services performed by the field broker for the canner." (P. 1135.) The opinion contrasts the "buying broker" cases (*e.g.*, *Southgate Brokerage Co.* v. *F.T.C.*, 150 F. 2d 607 (4th Cir. 1945)), where "ownership of the goods vested absolutely in the brokers." (P. 1135.)

But under *Hruby* (*Edward Joseph Hruby*, F.T.C. Docket 8068 (decided Dec. 26, 1962)) [61 F.T.C. 1437], a *bona fide* independent intermediary, such as a field broker, is entitled to be compensated for his services even though he is a buyer and the parties denominate such compensation as "brokerage". It is therefore immaterial whether, in what sense, or to what extent the field broker acquires title to the goods. To make legality depend on whether his title is "incidental" or "absolute" is to introduce irrelevant and confusing standards into a law designed to deal with the realities of commercial transactions, not their superficial forms. As for the "buying broker" cases, they were

decided not on the basis of the quantum of possession or the nature of the title enjoyed by the intermediaries, but, rather, on the simple, and in my opinion erroneous and discredited,[11] notion that "brokerage" may in no circumstances be paid by a seller to a purchaser or vice versa. By upholding the lawfulness of the brokerage payments to the field brokers, while recognizing that they are purchasers taking title to the goods on the sale of which they receive brokerage, the Chairman's opinion effectively cuts the ground out from under the old "buying broker" cases.

The sum and substance of the Commission's disposition of the field-broker issue is clear: the Commission no longer accepts the dogma that Section 2(c) forbids, in any and all circumstances, the payment of compensation in the form of brokerage for services rendered by a seller to a purchaser or by a purchaser to a seller. Since this dogma is the foundation of the buying-broker cases, their precedential authority has evaporated. So far as the buying-broker issue is concerned, the actual decision of the Commission in the instant case can only be regarded as confirming and strengthening *Hruby*, and as supporting the views expressed in Part I of this opinion.

III.

The finding that the 2½% allowance, labeled a promotional allowance, given by respondent to Nash-Finch was an unlawful allowance in lieu of brokerage has an inadequate basis in the facts.

Respondent uses local brokers on some, but not all, of its sales. Since 1954, and, for all the record shows, for a much longer time, respondent has made almost all of its sales to Nash-Finch directly. Neither it nor Nash-Finch has employed brokers on such sales. The reason for the elimination of brokerage in these transactions appears to be that respondent sells in such large quantities to Nash-Finch that the services of a broker are not needed. (The Chairman's opinion does not suggest that there is anything illegitimate about eliminating brokerage on such a ground, for, as mentioned earlier, nothing in Section 2(c) requires that a broker's services be used in any or all

[11] In discussing the effect of the Commission's application of Section 2(c) in general, and of the "buying broker" cases in particular, a former Chief Economist of the Commission, who is certainly not unfriendly to Robinson-Patman Act objectives, has stated:

"Viewed as a whole, the brokerage cases appear to include many that did not express the central purposes of the Robinson-Patman Act and that had effects partly inconsistent with those purposes.

* * * * * * *

In reducing the fluidity of the activities of buying brokers, several cases have substantially impaired the competitive strength of small wholesalers who are dependent on l.c.l. purchases and of the brokers who serve them, and probably have also weakened smaller producers in their competition with large producers." Edwards, The Price Discrimination Law 150–51 (1959).

transactions.) In December 1955, Nash-Finch requested respondent to grant it a promotional allowance. Respondent agreed. The figure arrived at was 2½%, and this is approximately the brokerage rate which respondent would have had to pay if it had dealt with Nash-Finch through a broker. The record is silent on how the 2½% figure was arrived at.

These facts do not permit a finding that respondent granted an unlawful allowance in lieu of brokerage. As is conceded (Chairman's opinion, p. 1138), this is not a situation, like *Broch*, in which the cost of a price concession (even assuming that the 2½% allowance should be regarded in that light) was shifted to the broker. The broker was out of the picture long before the concession was conceived or made. Brokerage was eliminated in these transactions not because the buyer demanded that part of the seller's normal brokerage be deflected to him in the form of a discount or allowance, but because the parties found it economical to do business without a broker's services. (Cf. *Thomasville.*) There is, moreover, a far simpler explanation for the promotional allowance than that it was given on account of brokerage—namely, that it was given in consideration of promotional activities undertaken by Nash-Finch. I find insufficient indication in the record—and the Chairman's opinion stops short of suggesting—that the promotional allowance was not *bona fide.* While there may be circumstances in which a promotional allowance may be a forbidden allowance in lieu of brokerage (see, e.g., *F.T.C.* v. *Washington Fish & Oyster Co.*, 282 F. 2d 595, 598 (9th Cir. 1960); *Point Adams Packing Co.*, 55 F.T.C. 852), the circumstances of this case do not warrant the inference that the allowance to Nash-Finch was the result of the kind of brokerage manipulation at which the "in lieu" provision of Section 2(c) is directed.

In the *Broch* decision, the Supreme Court reminded the Commission: "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case. *Main Fish Co., Inc.*, 53 F.T.C. 88." 363 U.S., at 175–76. The *Main Fish* decision, which the Supreme Court cited approvingly, had held that where the only evidence of a 2(c) violation consisted of a simultaneous reduction in sales price and in brokerage costs on the same transaction, a *prima facie* case was not established. It is clear both from the Supreme Court's language and from its reference to *Main Fish* that the Court will not sustain a finding that Section 2(c) has been violated where the only evidence is that the seller at once

pays lower brokerage and charges a lower price on the same transaction. For an inference that the seller is passing on the brokerage discount to the favored seller by means of a price reduction to arise, "the Commission * * * may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price" (*Thomasville Chair Co.*, F.T.C. Docket 7273 (Memorandum Accompanying Final Order Dismissing Complaint, October 22, 1963 [63 F.T.C. 1048, 1049])), as was done in *Broch.*

In the present case, the elimination of brokerage was not even simultaneous with the granting of a concession, and both the elimination of brokerage and the granting of a promotional allowance to Nash-Finch are explicable without any reference to price discrimination—the first because it was economical for the parties to do without a broker's services, the second because the seller received a *quid pro quo* (*i.e.*, promotional efforts on behalf of its products) for granting the allowance.[12]

While the arithmetical equivalence between the brokerage reduction and the promotional allowance, and some of the other circumstances mentioned in the Chairman's opinion, are somewhat suggestive of a relationship between the reduction and the allowance, in my opinion they fall short, in the circumstances, of satisfying the Commission's burden of proof under Section 2(c).[13]

Opinion, Dissenting in Part

JUNE 26, 1964

By MacIntyre, *Commissioner:*

I have voted for the order to cease and desist which the Commission is issuing today in this matter and I am, with one exception, in complete accord with the percipient opinion of Chairman Dixon. My sole difference with the Chairman stems from his handling of the allegation that respondents have paid illegal brokerage to field brokers. I feel that the record shows this charge to have been sustained and I would interpret the order to cease and desist as forbidding the continuation of such payments.

My beliefs in this respect do not stem from a failure to recognize the important and valuable function performed by field brokers in

[12] "[A] lower price is *not* an allowance 'in lieu of' brokerage if it is causally conceived in considerations *other* than a saved commission or fee." Rowe, Price Discrimination Under the Robinson-Patman Act 341 (1962).

[13] With respect to the other issues in the present case, I concur in the result.

the distribution of canned foods but from a dogged conviction that there is a right way and a wrong way to conduct business affairs within the framework of the antitrust laws and I am unwilling to do violence to both facts and law in this or any other proceeding in order to put the stamp of approval upon a practice which I know is *per se* illegal.

I have carefully examined the evidence of record and find myself in complete agreement with the findings and conclusions of the hearing examiner expressed in finding number 35, striken by the Commission's final order. This finding reads:

> From the record as a whole, the conclusion seems clear that in the transactions here in question Flotill deals with the field brokers and not with the ultimate purchasers. It sells and invoices the merchandise to the field broker, extends credit to him, and looks only to him for responsibility in the transactions. It is believed that in these circumstances title to the merchandise passes from Flotill to the field broker, and that legally the field broker is "the other party" to the transaction. It would seem to follow, therefore, that, as contended by counsel supporting the complaint, in its transactions with field brokers Flotill pays brokerage to the other parties to such transactions in violation of Section 2(c) of the Clayton Act.

This conclusion by the hearing examiner who heard and considered all of the evidence and the additional facts that the wholesalers and retailers who buy Flotill goods from field brokers are not aware of the identity of the packer (much of the goods carries the field broker's private label)—see Initial Decision, Findings 27 and 28—all failed to have any impact on the Majority. To the contrary, the Majority holds that "* * * field brokers do not purchase for their own account but function as intermediaries on behalf of Flotill in its sales to other parties * * *".

It seems to me that the decision to hold Flotill's transactions with field brokers lawful has been generated more by semantics and the "tyranny of words" than the substantive facts. I cannot escape the feeling that the appellation "field broker" has influenced the decision and perhaps even been determinative. In other words, I feel the decision would have been different if the enterprises in question had been known as "field distributors" or perhaps "field buyers." A person does not become a "broker" within the meaning of the Robinson-Patman Act by so calling himself, but by reason of his function. The facts here show the "field brokers" to be in actuality buyers and resellers and as such not legally entitled to receive brokerage.

As I stated above, my comments should not be interpreted as condemnation of the field broker's position in the food distribution industry. I hold no doubt that field brokers perform a useful and valuable function in assisting canners, and especially smaller canners, to

bring their products to market. I suspect that the hearing examiner and Chairman Dixon recognize the legitimate and useful function of the typical field broker and are desirous of not interfering therewith. But much of Flotill's dealings with its field brokers was atypical in that sales were made to the field brokers with attendant title passage, leaving the field broker free to sell directly to wholesalers and retailers at speculative prices and without the aid of a local broker. Under such circumstances, Section 2(c) is clearly violated by the payment of brokerage.

As I see it, a canner must make a selection. He can either sell to a field broker, granting him such functional discounts as the character of such buyer's resale warrants, or the canner may pay brokerage to the field broker, issuing his invoices and looking for payment to the wholesalers and retailers who buy and resell the goods. But the two systems cannot be blended without doing violence to the law. Also, to permit a buyer to receive brokerage on purchases made for its own account opens the door to abuse and discrimination.

These apparent prospective results have not deterred the Majority. Here the Commission is departing from the clear route of judicial interpretation of the statute. It is off on an uncharted course. It seems to be saying that in a single transaction a trader may act as a broker for the seller, a buyer, and as an intermediary or agent of those to whom the buyer resells, and still receive brokerage from the seller for handling the transaction. Indeed, this is a blending and mixing of functions and personalities. This blending and mixing will breed and make confusion inevitable. This action by the Commission cannot be accounted for except for the fact that it is in keeping with what some requested the Commission to do in the issuance of Trade Practice Rules for the Fresh Fruit and Vegetable Industry. But that is not a good reason for the Commission doing what it has done in this case. Here the Commission has dumped the problems involved into a heap and mixed them as one would the ingredients of a tossed salad. By so doing, it would appear that the Majority is looking ahead to doing something similar in the Fresh Fruit and Vegetable situation. Perhaps tossed salads are worthwhile products from fresh fruits and vegetables, but the mixing and blending of these legal problems in either this case or in any future handling of the proposed Trade Practice Rules for the Fresh Fruit and Vegetable Industry will help no one.

Final Order

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision and upon briefs

and oral argument in support of and in opposition to said appeals; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted in part and denied in part, that respondents' appeal should be denied, and that certain of the hearing examiner's findings as to the facts and conclusions should be modified to conform to the views expressed in said opinion:

It is ordered, That the initial decision be modified by striking findings numbered 6 through 17 and substituting therefor that part of the accompanying opinion beginning on page 1147 with the words "The complaint names" and ending on page 1148 with the words "and we so hold."

It is further ordered, That the initial decision be modified by striking therefrom the findings numbered 35 and 52.

It is further ordered, That the initial decision be modified by striking therefrom conclusion numbered 6 on page 1130 and substituting therefor the following:

> 6. The circumstances of this case warrant the conclusion that the order to cease and desist should be directed against respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser in their individual capacities as well as in their capacities as officers of the corporation.

It is further ordered, That the initial decision be modified by striking the order on page 1130 and substituting therefor the following:

> *It is ordered*, That respondents Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), a corporation, and Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the sale of canned fruits and vegetables in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:
>
> > 1. Paying, granting or allowing, directly or indirectly, to Nash-Finch Company, or to any other buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of any such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with

any sale of respondents' products to any such buyer for his own account.

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondents as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondents' products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

It is further ordered, That, with the exception of findings numbered 105 through 110 which have not been reviewed, the initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser 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 Elman's views are set forth in a separate opinion. Commissioner MacIntyre dissented in part. Commissioner Reilly did not participate for the reason he did not hear oral argument.

IN THE MATTER OF

ALFONSO GIOIA & SONS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a), 2(d), AND 2(e) OF THE CLAYTON ACT

Docket 7790, Complaint Feb. 25, 1960—Decision, June 30, 1964

Consent order requiring a macaroni manufacturer in Rochester, N.Y., to cease discriminating in price by such practices as giving to some customers substantial discounts on certain of its products and free goods, but not to other customers competing with them, in violation of Sec. 2(a) of the Clayton Act; making payments for advertising or other services furnished in connection with the sale of its products to some customers but not to their competitors, thus violating Sec. 2(d); and furnishing demonstrators to certain customers while not furnishing proportionally equal services to all other competing purchasers, in violation of Sec. 2(e).

313-121—70——74