consisting of advertising or other publicity furnished by or through respondents, or any of them, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, in connection with the processing, handling, sale or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with said respondents in the distribution of such toy, game or hobby products.

It is further ordered, That the complaint as to respondent Marcus Mercantile Co. be, and it hereby is, dismissed.

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

It is further ordered, That the respondents subject to the order to cease and desist 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 said order.

Commissioner Reilly not participating.

IN THE MATTER OF

THE REGINA CORPORATION

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

Docket 8323. Complaint, Mar. 14, 1961—Decision, April 7, 1964

Order reopening and modifying desist order of Oct. 11, 1962, 61 F.T.C. 983, so that "its terms will be in explicit accord with" the Commission's revised Guides Against Deceptive Pricing issued Jan. 8, 1964.

STATEMENT OF COMMISSIONER MACINTYRE

APRIL 7, 1964

I am again compelled to issue a separate statement setting forth my views on the Commission's action in modifying a cease and desist order in a deceptive pricing case antedating the revised Guides issued

January 8, 1964. In the petition now before us, respondent, Regina Corporation (Regina), requests that the order be set aside in its entirety on the ground that the activities documented by the record do not constitute a violation of Section 5 of the Federal Trade Commission Act as presently interpreted by the Commission in the light of the revised Guides. In the alternative, Regina asks that the order be explicitly modified to conform to the new Guides.

In rejecting respondent's plea that the order be set aside, the Commission employs rather facile generalizations, glossing over the contention that Regina's past activities as documented by the record do not constitute a violation of the law as now construed. Sweeping aside Regina's arguments on this point, the Commission broadly asserts:

> * * * the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluation could be, or how useful would be a process of continuous reexamination of old, and frequently stale, records.

I cannot adopt this rationale, for the simple reason that it does not come to grips with Regina's contention on this point, which, in fact, raises serious questions meriting a responsive and reasoned reply. At the outset, I may state that the assertion that the Guides are intended to be prospective rather than retrospective in their application avoids the realities of the matter. The Commission has only recently dismissed complaints in a number of proceedings brought prior to the issuance of the revised Guides on the ground that the proof in these proceedings did not meet the new standards. *E.g.*, see *Filderman Corporation, Inc., et al.*, Docket No. 7878 (1964) [64 F.T.C. 427]. The Commission's assertion that the Guides are prospective, in rebuttal of respondent's request for recision, is particularly inappropriate because the application of cease and desist orders are not retrospective but prospective as far as respondent's obligations thereunder are concerned. Regina and respondents in other cases may well question the effect on their future business decisions if all Commission policy reversals of this nature will be prospectively applied without regard to what has gone before.

The Commission, in this instance, has ignored another fundamental consideration. As I understand Section 5 of the Federal Trade Commission Act, the Commission is empowered to issue cease and desist

orders only upon a finding that a violation of law has occurred.[1] Unless the Commission comes to grips with the issue of whether respondent's past actions documented in this proceeding are violative of the Act, I do not see how, in good conscience, it can keep in effect a cease and desist order bearing on respondent's future conduct. The justification that a review of the record in this proceeding would be either unduly troublesome or time consuming does not absolve the Commission from performing its statutory functions. The Commission will have to grapple with this issue, either in this proceeding or in other deceptive pricing cases wherein outstanding orders issued prior to January 8, 1964, are in effect, and the number of cases in this category are, of course, numerous. The Commission may refuse, at this time, to decide the question of whether a respondent's activities leading to an outstanding cease and desist order are in violation of the law as presently interpreted by this agency. We should not, however, be surprised if the courts are asked to fill the vacuum the Commission has left, if we abdicate our functions in this manner.

The Commission's treatment of this issue ignores the further point that a decision on the merits as to whether respondent's past conduct violates the law as now construed is required here so that at least respondent and those on the Commission's staff charged with enforcing this and similar orders will know what the Commission's position is. While the evasion of this question may stave off some admittedly difficult problems in the immediate future, in the long run it can only lead to further disarray in an area of the law already subject to considerable confusion.[2]

Ignoring the issue of whether the respondent should be under order at all, the Commission has modified *Regina's* order by elaborating on its "*pro tanto*" modification procedure employed in *Clinton Watch Company, et al.*, Docket No. 7434 (Order Denying Petition To Reopen Proceeding, issued February 17, 1964) [64 F.T.C. 1443], with which I was unable to agree at that time.[3] In this instance, in addition to stating that all outstanding orders shall be interpreted and "thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing", the Commission has

[1] Section 5(b) of the Federal Trade Commission Act states in pertinent part: "* * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served * * * an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. * * *"

[2] See my statement on the revised Guides, issued January 8, 1964.

[3] See my statement, *Clinton Watch Company, et al.*, Docket No. 7434, February 17, 1964 [64 F.T.C. 1444].

specifically amended the order to require respondents to cease and desist from the following:

Advertising or disseminating any list or pre-ticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area.

As I stated in *Clinton Watch Company, et al.*, Docket No. 7434,[4] respect for the businessmen who come before us, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. Although the modification of the *Regina* order is somewhat more elaborate than that of *Clinton*, Regina's obligations are defined with no greater clarity than those of the watch company under its modified order. The modified order in this proceeding is a classic example of the enforcement problems which may be expected from the use of terms which have not been adequately defined by either the courts or this agency.[5] In this case the Commission has done again what the Supreme Court said we should not do, namely, shifted to the courts the burden of determining the factual question of what constitutes unfair conduct. See *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948). I must reiterate my surprise that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders is, in the deceptive pricing area, issuing orders, the terms of which are so imprecise and indefinite that they can lead only to administrative and judicial confusion.[6]

Order Reopening Proceedings and Modifying Cease and Desist Order

By telegram dated February 7, 1964, the Commission advised counsel for respondent in the above-captioned proceeding that, upon appropriate petition therefor, the Commission would modify the cease and desist order against respondent to conform with the revised Guides

[4] *Id.*

[5] For example, respondent, under the modified order, is required to employ a "good faith estimate" of the actual retail price prior to advertising or disseminating list or preticketed prices. To my knowledge neither the Commission nor the courts have ever defined the criteria for determining the good faith of the seller in estimating actual retail prices in any trade area. There is the further requirement that Regina cease and desist from disseminating list prices or preticketed prices unless such prices do not "appreciably exceed" the highest price at which substantial sales are made in respondent's trade area. Again, there is no precedent which will aid either Regina or other respondents similarly situated or the Commission's staff, for that matter, in determining the meaning of that phrase. The Commission leaves unanswered the question of by what percentage a list price or preticketed price would have to exceed the highest price in a trade area at which substantial sales are made. Respondents and the Commission's staff will be faced with similar difficulties in trying to divine what "substantial sales" might be in a particular trade area. The applicable percentage could conceivably vary from 1 to 100 percent.

[6] See my statement, *Clinton Watch Company, et al., supra* n. 3 [64 F.T.C. 1444].

Against Deceptive Pricing (issued January 8, 1964). Accordingly, on February 12, 1964, respondent filed a petition, pursuant to Section 3.28(b)(2) of the Commission's Procedures and Rules of Practice, to reopen the above-captioned proceeding for the purpose of setting aside or, in the alternative, modifying the cease and desist order. On March 5, 1964, the Director of the Commission's Bureau of Deceptive Practices filed an answer to respondent's petition, and respondent filed a reply on March 13.

Respondent in its petition contends that, tested under the standards of the newly revised Guides Against Deceptive Pricing, the evidence on which the cease and desist order against respondent was based is insufficient to demonstrate a violation of law, and that therefore the order should be vacated and set aside. However, the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluations could be, or how useful would be process of continuous reexamination of old, and frequently stale, records.

Since, however, the newly revised Guides are intended to have a uniform, prospective application, it is the Commission's stated policy "that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations that are stated in the Commission's newly-revised Guides Against Deceptive Pricing * * *." *Clinton Watch Company*, F.T.C. Docket 7434 (Order Denying Petition to Reopen Proceeding, issued February 17, 1964) [64 F.T.C. 1443]. In view of this policy, the Commission has determined to grant respondent's request to reopen the above-captioned proceeding, and to modify the cease and desist order so that its terms will be in explicit accord with the Guides.

Accordingly, it is ordered, That the Commission's cease and desist order issued on October 3, 1962, as amended by its order correcting final order issued on October 11, 1962 [61 F.T.C. 983], be, and it hereby is, amended so as to require respondent to cease and desist from:

> "Advertising or disseminating any list or preticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area."

Commissioner MacIntyre not concurring.

Complaint

IN THE MATTER OF

NORTH AMERICAN PHILIPS COMPANY, INC.

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

Docket 8472. Complaint, Mar. 6, 1962—Decision, Apr. 9, 1964

Order dismissing—since respondent's advertising and promotional matter has carried no reference to price since issuance of the complaint and the Commission lacked information that its advertisements fail to satisfy the requirements of the Guides Against Deceptive Pricing—complaint charging the manufacturer of "Norelco" electric shavers with supplying its distributors and retail dealers with advertising material designating excessive amounts as "Suggested Retail Price", etc., and with advertising the same prices in newspapers and magazines.

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 North American Philips Company, Inc., a corporation, has violated the provisions of said Act, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent North American Philips Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 100 East 42nd Street, New York 17, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of electric shavers to distributors and retail dealers under the trade name "Norelco".

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said merchandise, when sold, to be shipped from its places of business in the State of New York and elsewhere to purchasers thereof located in States other than the States in which the shipments originated and in the District of Columbia and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of this business, respondent has engaged in the practice of supplying its distributors and retail dealers with advertising material and other printed matter containing amounts designated as "Suggested Retail Price" and "Manufacturer's Suggested Retail Price." Respondent has also placed advertising

containing the same prices in newspapers and magazines of general circulation. The several models of the electric shaver and the prices specified, as described above, are as follows:

Norelco Speedshaver with floating head	$29.95
Norelco Speedshaver	24.95
Norelco Sportsman	19.95
Lady Norelco	24.95
Coquette	17.50

PAR. 5. By the aforesaid practices respondent has represented, and has placed in the hands of retailers and others the means and instrumentalities of representing, directly or by implication, that such prices are the usual and customary retail prices for such merchandise.

PAR. 6. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact the stated prices were and are substantially in excess of the prices at which the advertised products were and are usually and customarily sold at retail in the trade areas where the representations were made.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition in commerce with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by the respondent.

PAR. 8. The use by 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 products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of 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.

ORDER DISMISSING THE COMPLAINT

The complaint herein, issued March 6, 1962, charged the respondent with the unfair trade practice of supplying distributors and retail dealers of its electric shavers with advertising material and other printed matter containing certain suggested retail prices which were substantially in excess of the prices at which said products were usually and customarily sold at retail in the trade areas where the representations were made. Respondent filed an answer thereto which in essence

denied the material allegations of the complaint, and which asserted as a separate and complete defense abandonment of all references to price in all of its consumer advertising material more than six months prior to issuance of the complaint.

On September 11, 1962, the Commission placed this matter on the Suspense Calendar and referred the files to the Bureau of Industry Guidance for negotiation of an agreement of voluntary cessation of the aforesaid misleading advertising practices. The Commission has now been advised that neither respondent's consumer advertising nor its consumer promotional literature presently contains any reference to a suggested retail price, and we are informed that such material has carried no reference to price since the complaint issued. Further, we have been assured that respondent intends to continue to omit any reference to price in all consumer literature which advertises or promotes the electric shaver models presently marketed by it and that it has taken specific steps to effectuate this result. Finally, the Commission is not in possession of information indicating that respondent's advertising fails to satisfy the requirements of Guide III of the recently promulgated Guides Against Deceptive Pricing, effective January 8, 1964. Accordingly,

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

IN THE MATTER OF

FARRAR, STRAUS AND COMPANY, INC., ET AL.*

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

Docket 8588. Complaint, July 29, 1963—Decision, April 9, 1964

Order requiring a publisher and its advertising agency, both in New York City, to cease making various misrepresentations in advertising in newspapers and magazines and other promotional matter as to the health and other benefits to be derived by persons following the dietary principles, formulas and instructions in Gayelord Hauser's book entitled "Mirror, Mirror On The Wall".

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 Farrar, Straus and Company, Inc.,* a corporation, and Sussman and Sugar, Inc., a cor-

*Reported, as amended by order of hearing examiner dated Oct. 14, 1963, to reflect present corporate name of respondent.

poration, herein referred to as respondents have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Farrar, Straus and Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. This respondent's office and principal place of business is located at 19 Union Square West, New York, New York.

Respondent Sussman and Sugar, Inc., is a corporation organized and existing and doing business under and by virtue of the laws of the State of New York. This respondent's office and principal place of business is located at 24 West 40th Street, New York, New York.

PAR. 2. Respondent Farrar, Straus and Company, Inc. is now, and for some time last past has been, engaged in the publication, promotion, sale and distribution of a book entitled "Mirror, Mirror On The Wall" by Gayelord Hauser. This respondent causes said book when sold to be transported from its place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. This respondent maintains, and at all times mentioned herein has maintained, a substantial trade in said book in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Sussman and Sugar, Inc., is now and at all times mentioned herein has been, the advertising agency of respondent Farrar, Straus and Company, Inc., and now prepares and places, and has prepared and placed, for publication the advertising and promotional material, referred to herein, to promote the sale of the aforesaid book.

PAR. 3. In the conduct of its business, at all times mentioned herein respondent Farrar, Straus and Company, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of books.

In the conduct of its business, at all times mentioned herein, respondent Sussman and Sugar, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase in commerce of said books, respondents have made certain statements and representations with respect hereto in advertisements inserted in newspapers and magazines, and in other promotional material having a general circulation throughout the various States of the United States and in the District of Columbia.

PAR. 5. Among and typical but not all inclusive of the statements and representations made and appearing in said advertisements, and in other promotional material disseminated as herein set forth are the following:

For the long suffering reducers who try every new diet. Gayelord Hauser offers welcome and comforting relief with his shortest short cut to reducing an easy to follow common sense way of shedding weight gradually, without tears or calory charts.

* * * * * * *

Give your husband a new heart, a new waistline.

* * * * * * *

A beautifying slimming diet with no mention of calories.

* * * * * * *

* * * this says Mr. Hauser does not mean you must suffer the rigors of a low calorie diet.

* * * * * * *

Forget calories

* * * * * * *

Once you discover the way to control chemical balance of your body you'll enjoy eating exotic foods, bread, butter, salad oil, * * * and delicious desserts.

* * * * * * *

For your husband,
How to exercise scalp and save the hair * * *
Diet and Potency * * * how to Protect the heart

* * * * * * *

Teach him how to exercise the scalp to save his hair
Reveal to him the connection between diet and potency
Show him how he can protect his heart

* * * * * * *

Wonder working new formulas for beauty.
Face tightener apply it wash it off and watch droopiness disappear
A vinegar cure for stubborn dandruff
10 second slenderizer
easy to prepare neck tightener helps bring beauty stream to loose neck tissues.
herb recipe to add brightness and clarity to eyes

* * * * * * *

The wonder-working secret is that you will learn how to control the chemical balance of your body. Remember: the most beautiful woman in the world is made of the very same chemicals as you. The difference is in the way those chemicals are distributed throughout the body.

* * * * * * *

* * * Mr. Hauser, who has already led thousands of people to better health and longer life tells how you can achieve a deep and lasting loveliness through this wonderful new beauty plan. It is a plan based on the magic of beauty giving foods and simple skin-nourishing facials.

* * * * * * *

This is the way of natural cosmetics.

You will learn what foods to eat, what easy, never-tiring exercises to take, what simple, nutritious cosmetics to apply * * *

* * * * * * *

* * * you too must nourish yourself with beauty giving foods and cosmetic treatments * * *

Now, Gayelord Hauser reveals these surprising secrets:

* * * What can Dr. Rudolf Virchow's experience teach you about the order in which to eat your food?

* * * * * * *

He shows that you can be more beautiful, almost instantly, by getting rid of tension.

Mr. Hauser's most important principle is that no cosmetic treatment can equal or measure up to the natural glow of good health, and he shows how it can be attained and maintained

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein respondents have represented and are now representing directly and by implication:

1. That by following the dietary principles set forth in the book a person will:

(a) Lose weight without reducing his caloric intake,

(b) Protect the heart or restore it to normal,

(c) Increase sexual potency,

(d) Be able to control the chemical balance of the body and distribute chemicals within the body in a prescribed manner.

2. That by following certain formulas or instructions set forth in said book a person will:

(a) Tighten the skin of the face and neck and eliminate loose face and neck tissue.

(b) Slenderize in 10 seconds.

(c) Add brightness and clarity to the eyes.

(d) Prevent baldness.

(e) Cure stubborn dandruff.

(f) Rid himself of tension.

(g) Attain health and remain healthy.

3. That the order in which one eats food is important to his health.

4. That the cosmetics described in the book are natural and nutritious.

5. That the book contains hundreds of marvelous secrets of health.

6. That the exercises described in the book will never be tiring to the one performing them.

PAR. 7. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. A person following the dietary principles in the book:

(a) Will not lose weight without reducing his caloric intake.

(b) Will not protect his heart or restore it to normal, or have any other beneficial effect upon his heart.

(c) Will not increase his sexual potency.

(d) Will not control the chemical balance of his body or distribute chemicals within the body in a prescribed manner.

2. A person following the formulas and instructions in the book:

(a) Will not tighten the skin of his face and neck and will not eliminate loose face and neck tissue.

(b) Will not slenderize in 10 seconds or in any other period of time.

(c) Will not add brightness or clarity to his eyes.

(d) Will not prevent or retard baldness or excessive hair loss.

(e) Will not cure dandruff.

(f) Will not rid himself of tension, or reduce or relieve tension.

(g) Cannot rely upon attaining health or remaining healthy.

3. The order in which one eats food is not important to his health.

4. The cosmetics described in the book are not natural nor are they nutritious.

5. The book does not contain hundreds of secrets of health.

6. The exercises described in the book may produce fatigue in the person performing them.

PAR. 8. The use by respondents of the foregoing false, misleading and deceptive statements has had and now has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were and are true and into the purchase of substantial quantities of respondents' book by reason thereof.

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

Mr. Garland S. Ferguson and *Mr. Howard S. Epstein* supporting the complaint.

Mr. Patrick H. Sullivan, *Mr. E. Kendall Gillett, Jr.*, and *Whitman, Ransom and Coulson* of New York, N.Y., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER [1]

FEBRUARY 11, 1964

In this proceeding the Federal Trade Commission seeks to prevent alleged false advertising exemplified by that relating to a copyrighted book, "Mirror, Mirror on the Wall," by Gayelord Hauser. Some of the questioned advertising quotes the dust cover of the book. Respondents question the power of the Commission to prevent such advertising and also the issuance of any order against the advertising agency respondent.

The Pleadings and Pretrial Proceedings

The complaint herein was issued by the Federal Trade Commission July 29, 1963. It alleges that respondent Farrar, Straus and Company, Inc.,[2] (herein designated Farrar) is a New York corporation engaged in publishing and that it is the publisher of "Mirror, Mirror on the Wall." Respondent Sussman and Sugar, Inc., (Sussman) is also a New York corporation and the advertising agency which prepared the advertising for the book. Both respondents are alleged to be engaged in interstate commerce and in competition with other corporations in the sale and in the advertising of books, respectively. The advertising of the book is quoted and there are allegations concerning the representations made thereby. These representations are alleged to be false, misleading, and deceptive. They are further alleged to have the tendency to lead the purchasing public to purchase the book and thus to constitute a violation of § 5 of the Federal Trade Commission Act.

Respondents filed their answer August 30, 1963, admitting the states of incorporation, the jurisdictional facts regarding interstate commerce, and that most of the quoted matter in the complaint appeared in advertisements of the book or on the dust cover. The answer claimed that some of the advertising was quoted out of context or incorrectly. Respondents denied that the advertising was misleading or that they had violated § 5 of the Federal Trade Commission Act.

A prehearing conference was held October 11, 1963, which is summarized by the order of the undersigned dated October 14, 1963, the transcript thereof was thereafter amended, on notice, by order dated November 12, 1963.

Following the prehearing order, and on the eve of trial, counsel for respondents moved to amend their answer, among other things, to

[1] Caption and body of complaint amended by order dated October 14, 1963, to reflect present corporate name of respondent.

[2] The complaint originally used the title Farrar, Straus and Cudahy, Inc., former name of one of the respondents. This was changed by order of October 14, 1963.

agree that if complaint counsel presented medical testimony such testimony would support the allegations in the complaint concerning the falsity of the representations. Respondents continued to deny that the advertising should be construed as alleged in the complaint but entered into a stipulation which counsel represented made further hearings unnecessary. Thereupon on motion of counsel supporting the complaint, the hearing examiner entered an order dated December 26, 1963, which granted respondents' motion to amend its answer and counsel supporting the complaint's motion to receive the stipulation and exhibits, close the record and set times for filing proposed findings, conclusions and memoranda and counter proposals. Thereafter proposed findings, conclusions and memoranda were filed pursuant to such order.

Basis for Decision

Based on the record of this proceeding consisting of the complaint, answer, amended answer (and motion papers filed with it), stipulation dated December 11, 1963, and the exhibits marked for identification during the prehearing conference, and received in evidence by the undersigned's order of December 26, 1963; and, having considered the proposed findings, conclusions and memoranda of counsel; the following findings of fact, conclusions and order are made.[3] All proposed findings of fact and conclusions not made in substance or in the terms proposed are rejected.

FINDINGS OF FACT

1. Respondent Farrar, Straus and Company, Inc. (hereinafter sometimes referred to as Farrar), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 19 Union Square West, New York, New York. (C 1 admitted by failure to deny AA, RF 1, see CF 1.)

2. Respondent Sussman and Sugar, Inc. (hereinafter sometimes referred to as Sussman), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York,

[3] Pursuant to rule 3.21 (b), abbreviated references are made as follows:
(A) means respondents' answer.
(C) refers to complaint.
(S) means stipulation dated December 11, 1963.
(AA) means respondents' amended answer.
(CF) refers to Commission proposed findings.
(RF) refers to respondents' proposed findings.
(TR) refers to the transcript of the prehearing conference.
(CX) refers to an exhibit made part of the record by order dated December 26, 1963.
Reference to particular proof is made as an example. It in no way indicates that the hearing examiner has failed to consider the entire record.

with its office and principal place of business located at 24 West 40th Street, New York, New York (C 1 admitted by failure to deny AA, RF 2, see CF 2.)

3. Respondent Farrar is now, and for some time last past has been, engaged in the publication, promotion, sale and distribution of a book entitled, "Mirror, Mirror On The Wall," by Gayelord Hauser. (C 1 admitted AA 1, CF 3, see RF 3.)

4. Respondent Sussman is now, and at all times herein relevant, has been, the advertising agency of respondent Farrar. It prepared and placed for publication and dissemination the advertising and promotional material designated CX 2A, 2B, 3A, 3B, 4A, 4B, and 4C (S 3, RF 5, CF 4, see AA 1), to promote the sale of said book, "Mirror, Mirror On The Wall."

5. Respondent Farrar causes said book when sold to be transported from its place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. Respondent Farrar maintains and at all times mentioned herein has maintained a substantial trade in said book in commerce, as "commerce" is defined in the Federal Trade Commission Act and has been in substantial competition, in commerce with other corporations, firms and individuals in the publishing business. (AA 1, RF 3, CF 5.)

6. In the conduct of its business, and at all times relevant herein, respondent Sussman also has been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business. (RF 8, CF 6.)

7. In the course and conduct of their business, and for the purpose of inducing the purchase in commerce of said book, respondents have made certain statements and representations with respect thereto in advertisements inserted in newspapers and magazines, and in other promotional material having a general circulation throughout the various States of the United States and in the District of Columbia. (C 4 admitted by failure to deny A, AA; CX 4A, B, C and D, CX 5A, B.)

8. Among such statements are the following, contained in the dust jacket of the book, "Mirror, Mirror on the Wall":

(a) He shows that you can be more beautiful, almost instantly, by getting rid of tension, the Number One destroyer of otherwise lovely faces and figures. (CX 1A.)

(b) For the long suffering, *reducers* who try every new diet that comes along, Gayelord Hauser offers welcome and comforting relief with his shortest short cut to reducing—an easy-to-follow common-sense way of shedding weight gradually, without tears or calorie charts. In fact, he does not use the word 'calorie' at all in this book. (Emphasis in original.)

(c) Give your husband a new heart, a new waistline, a new life * * *.

(Item (c) above is in quotation marks apparently from three sentences at page 247 of the book: "*Give him a new heart* * * *", "*Give him a new waistline*, * * *", "and * * * *Give him a new life* * * *."

9. It was not established that respondent Sussman was responsible for the publication of "Mirror, Mirror on the Wall," or the dust jacket accompanying it. That was the responsibility of Farrar. (RF 8, S, AA 1.)

10. Among the statements contained in an advertisement in both the October 1, 1961 "This Week" Magazine, pp. 11 and 12 (CX 2A and 2B) and the January 6, 1963 "Parade" Magazine, pp. 13 and 14 (CX 3A and 3B) are the following:

(a) A heading, "A Beautifying, Slimming Diet With No Mention of Calories * * *."

(b) * * * This, says Mr. Hauser, does not mean you must suffer the rigors of a low calorie diet. As a matter of fact, *there is not a mention of calories in this whole amazing book.*

(c) SPECIAL FOR YOUR HUSBAND. Teach him how to exercise the scalp to save his hair. Reveal to him the connection between diet and sexual potency. * * * Show him how he can protect his heart.

(d) WONDER WORKING NEW FORMULAS FOR BEAUTY. The fabulous face tightener. Apply it, wash it off, and watch droopiness disappear. A vinegar cure for stubborn dandruff. The 10 second slenderizer. An easy-to-prepare neck tightener that will help bring the beauty stream to those loose neck tissues. An old fashioned herb recipe to add brightness and clarity to your eyes.

(e) The wonder-working secret is that you will learn how to control the chemical balance of your body. Remember: the most beautiful woman in the world is made of the very same chemicals as you. The difference is in the way those chemicals are distributed throughout the body.

(f) * * * Mr. Hauser, who has already led thousands of people to better health and longer life, tells how you can achieve a deep and lasting loveliness through his wonderful new beauty plan. It is a plan based on the magic of beauty giving foods and simple skin-nourishing facials, and invigorating home beauty treatments.

(g) This is the way of *natural cosmetics*, and it can lead you to the kind of glowing good looks that *won't* come off at night.

(h) You will learn what foods to eat, what easy, never-tiring exercises to take, what simple, *nutritious* cosmetics to apply, and hundreds of other marvelous secrets which will result in an air of enviable loveliness.

(i) * * * you too must nourish yourself with beauty giving foods and cosmetic treatments * * *.

(j) Now, Gayelord Hauser reveals these surprising secrets: * * * What can Dr. Rudolf Virchow's experiment teach you about the order in which you eat your food? (Emphasis in original.) (CX 2A, B, 3A, B, S 2.)

11. Respondents prepared and published or caused to be prepared and published the advertising making all of the statements or representations contained in finding number 10. The publications in which they appeared are supplements to newspapers having a general circulation. They also advertised in other newspapers circulating

throughout the various States of the United States and in the District of Columbia. (RF 6, 11, C 4 admitted by failure to deny, AA, CX 4–A and B, 5–A and B.)

12. Proof was not made concerning all of the statements alleged in paragraph five of the complaint to have appeared in advertising having a general circulation throughout the various States of the United States and in the District of Columbia and, in prehearing, respondents denied responsibility for publishing certain of the exhibits containing such statements TR 8 and 9, C 2, 5, RF 5).

13. Through the use of the advertisements respondents have represented directly and by implication:

1) That by following the dietary principles set forth in the book a woman will:

(a) Lose weight without reducing her caloric intake.

(b) Protect her husband's heart or restore it to normal.

(c) Increase her husband's sexual potency.

(d) Be able to control the chemical balance of the body and distribute chemicals within the body in a prescribed manner.

2) That by following certain formulas or instructions set forth in said book a woman will:

(a) Tighten the skin of the face and neck and eliminate loose face and neck tissue.

(b) Slenderize in 10 seconds.

(c) Add brightness and clarity to the eyes.

(d) Prevent baldness in her husband.

(e) Cure stubborn dandruff.

(f) Attain health and remain healthy.

3) That the order in which one eats food is important to health.

4) That the cosmetics described in the book are natural and nutritious.

5) That the book contains hundreds of marvelous secrets of health.

6) That the exercises described in the book will never be tiring to the one performing them. (CS 2A, B, 3A, B.)

14. Respondent has conceded "that if counsel supporting the complaint did present medical testimony, such testimony would support the following proposition * * * set forth and that respondents would not have presented medical testimony to the contrary." Accordingly, the hearing examiner finds that:

The statements and representations made in or implied by the advertising quoted in finding numbers 8 and 10 are false, misleading and deceptive. In truth and in fact:

1) A person following the dietary principles in the book:

(a) Will not lose weight without reducing his caloric intake.

(b) Will not protect his heart or restore it to normal, or have any other beneficial effect upon his heart.

(c) Will not increase his sexual potency.

(d) Will not control the chemical balance of his body or distribute chemicals within the body in a prescribed manner.

2) A person following the formulas and instructions in the book:

(a) Will not tighten the skin of his face and neck and will not eliminate loose face and neck tissue.

(b) Will not slenderize in 10 seconds or in any other period of time.

(c) Will not add brightness or clarity to his eyes.

(d) Will not prevent or retard baldness or excessive hair loss.

(e) Will not cure dandruff.

(f) Will not rid himself of tension, or reduce or relieve tension.

(g) Cannot rely upon attaining health or remaining healthy.

3) The order in which one eats food is not important to his health.

4) The cosmetics described in the book are not natural nor are they nutritious.

5) The book does not contain hundreds of secrets of health.

6) The exercises described in the book may produce fatigue in the person performing them. (C 7, AA 4.)

15. Quite apart from the concession described in finding 14, the advertising contains at least one plain misstatement of fact. It states: "*As a matter of fact there is not a mention of calories in this whole amazing book.*" On page 53 the book not only uses but italicizes the word calories in a quotation from Dr. Margaret Mead. Mr. Hauser does not count calories in this book, it is true, but prevents high caloric intake in a different fashion. He makes it clear also in the book that he is in accord with the well recognized physical fact that weight must be controlled by food intake and its utilization in bodily activity. His method of reducing intake is placing emphasis on proteins and on eating and other habits which he claims will reduce the desire for too much food. The implication obtained from the advertising is to the contrary that no such reduction in intake is necessary if the regimen in the book is followed.

16. It is unnecessary to consider the effect of the dust jacket statements because the implications from the advertising in the newspaper supplements is an adequate basis for testing the advertising. The only element not present in the newspaper advertising which is in the dust jacket is the phrase quoted in finding 8(a) above. (CX 1A, 2A, 2B, 3A, 3B.)

17. While the dust jacket purports to quote from the book (see finding number 8(c)) respondent has not pointed out a place where the precise quotation appears. The quotation appearing in finding

8(c) above is the closest to the statement on the dust jacket which was found by the hearing examiner. Considering the dust jacket as a whole the hearing examiner infers from its appearance and content that it is advertising matter and not an integral part of the book.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the persons of the respondents who are engaged in interstate commerce and over the subject matter of the advertising which took place in interstate commerce.

2. No question is properly raised concerning the First Amendment to the Constitution since there is no attempt to enjoin the publication of the book, "Mirror, Mirror on the Wall" itself, but merely to prevent the use of unfair and misleading methods of advertising to induce its sale.[4]

3. While it is improbable that a person who is reasonably well informed concerning diet and nutrition would believe the representations made or implied in the advertising, such representations are capable of, and would have a tendency to, mislead many persons who are exposed to the newspaper supplements and other media in which the advertising appeared. It has been made abundantly clear that the test with respect to false advertising is "unlike that abiding faith which the law has in the 'reasonable man'. (I)[i]t has very little faith indeed in the intellectual acuity of the 'ordinary purchaser' who is the object of the advertising campaign."[5] (Parenthetical matter supplied in place of bracketed matter.)

The impression created in these advertisements is that respondents intended that they be taken seriously. Compare for contrast the Volkswagen advertisement attached to Commissioner Elman's dissent in *Mary Carter Paint Company, Inc.*, Docket 8290 dated June 28, 1962.

[4] *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904); *Donaldson* v. *Read Magazine*, 333 U.S. 178 (1948); *E. F. Drew & Co., Inc.* v. *F.T.C.*, 235 F. 2d 735 (2 Cir. 1956), *cert. denied* 352 U.S. 969 (1957); *Murray Space Shoe Corporation* v. *F.T.C.*, 304 F. 2d 270 (2 Cir. 1962).

[5] *Federal Trade Commission* v. *Sterling Drug, Inc.*, 317 F. 2d 669 (2 Cir. 1963), opinion by Judge Kaufman, p. 674; see also *Donaldson* v. *Read Magazine*, 333 U.S. 178, 188 (1948); *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937); *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F. 2d 869, 872 (2 Cir. 1961), *cert. denied* 370 U.S. 917; *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 342 (7 Cir. 1960), *cert. denied* 364 U.S. 883 (1960); *Book of the Month Club, Inc.* v. *Federal Trade Commission*, 202 F. 2d 486 (2 Cir. 1953), *cert. dismissed* 346 U.S. 883; *Moretrench Corp.* v. *Federal Trade Commission*, 127 F. 2d 792, 795 (2 Cir. 1942); *Charles of the Ritz Distributor Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 680 (2 Cir. 1944); *Zenith Radio Corp.* v. *F.T.C.*, 143 F. 2d 29, 31 (7 Cir. 1944); Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 Law and Comp. Problems, 91, 98 (1939); *Colgate-Palmolive Co.* v. *Federal Trade Commission*, 310 F. 2d 89 (1st Cir. 1962); also second opinion 326 F. 2d 517) (1963) BNA. ATRR. No. 128, p. X–1, December 24, 1963.

From the cases we infer that the public interest requires protection of the credulous and hopeful beauty seekers to whom the advertising might be particularly attractive; even though no such protection is needed for their scholarly sisters who would not believe that any book could bring about the results implied from this advertising.

4. Respondent Farrar admits responsibility for the dust jacket of the book but claims it is a part of the book. The hearing examiner has found as a fact that the dust jacket is not an integral part of the book but rather advertising prepared for the purpose of its sale. The inference is properly drawn from an examination of the dust jacket and other matters of record in this case. *Witkower Press, Inc., et al.* 57 F.T.C. 145 (1960). In modifying the initial decision in an opinion by Commissioner Anderson, the Commission made the following observation at page 218, fn. 3 of that case: " * * * From our inspection of the jackets, we note them to be eye-arresting and attractive and clearly designed to attract the attention and interest of prospective purchasers. The covers have included laudatory expressions by reviewers and others for the obvious purpose of inviting and inducing sales in book stores and when made available at the close of the author's lectures in various cities. We think that the evidence received of record clearly supports inferences that the statements and representations appearing on the paper covers constituted advertising matter under any reasonable standards and interpretation applicable to that term." This decision was appealed to the Court of Appeals for the District of Columbia and dismissed by agreement November 30, 1960. (VI. S & D. 844 not otherwise reported.)

Respondents' citation of *Koussevitzky* v. *Allen Town & Heath*, 188 Misc. 479 (1947) *aff'd.* 272 App. Div. 759, is not apposite. That case was one arising under the civil rights law of New York. That statute [6] protects the right of privacy of an individual against the publication of pictures without consent for the purpose of advertising and trade. It was held to have no application to biographies of a public figure. *Sidis* v. *F.R. Pub. Corp.*, 113, F. 2d 806 (2 Cir. 1940) and the advertising of such a biography was held to be included in the exception. Moreover, in his opinion the late Judge Shientag clearly recognized that a dust jacket on a book was advertising. He said: "The book contains pictures of him which he says are used without his permission, and it has the usual *puffing* or *advertising* cover jacket." (Emphasis supplied.) Later he said: "Since the biography does not fall within Sections 50 and 51, neither do the advertisements or announcements thereof." (*id* 484.)

[6] § 50, 51 Civil Rights Law of the State of New York.

5. The use by the respondents of the false, misleading and deceptive advertising for which they were jointly responsible has had and now has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were and are true and into the purchase of the book, "Mirror, Mirror on the Wall" published by respondent Farrar. The dust jacket for which Farrar was responsible had and has the same tendency and capacity to deceive.

6. The aforesaid acts and practices of respondents as herein set forth in the foregoing findings of fact, were and are, all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

7. The Federal Trade Commission by joining respondent Sussman has made a determination that under the facts alleged in the complaint such advertising agency should be made a respondent along with respondent Farrar, the publisher. The difference between the facts alleged and those established is so slight that there is no reason to believe that the Commission, had it been aware of such divergence, would have failed to join respondent Sussman in the complaint in view of the concessions in the amended answer and stipulation. It is a matter of the sound discretion of the Commission to determine whether or not to join an advertising agency. The joint responsibility here conceded makes it appropriate to do so.[7] Particularly in the case of a book which is available for all to read there is "no reason why advertising agencies, * * * should be able to shirk from at least prima facie responsibility for conduct in which they participate.[8]

8. Respondents attack the form of order proposed by the Commission and served with its complaint (see Respondents' Memorandum dated January 21, 1961, pp. 8–11 and Reply Memorandum dated January 29, 1964, pp. 5–7). In their first memorandum respondents allege that the order is too broad because: (1) there was only one offense with respect to one book, (2) the language preventing advertising of other books "of the same or approximately the same content, material and principles," is so vague it cannot be applied by respondents and, (3) as to Sussman it should be limited to books written by Hauser. In their Reply Memorandum respondents claim: (1) that any order with respect to Sussman should not include statements on the dust jacket

[7] *Colgate-Palmolive Co. et al.* v. *F.T.C.*, 310 F. 2d 89 (1st Cir. 1962), see also later opinion dated December 17, 1963, BNA, ATRR No. 128 p. X–1; *C. Howard Hunt Pen Co.* v. *F.T.C.*, 197 F. 2d 273, 281; *Charles A. Brenner & Sons* v. *F.T.C.*, 158 F. 2d 74 (6th Cir. 1946); *Carter Products, Inc.* v. *F.T.C.*, 323 F. 2d 523 (5 Cir. 1963); *Bristol-Myers Co. et al.* 46 F.T.C. 162.

[8] Opinion of Judge Aldrich, p. 12 of Slip Opinion. *Colgate-Palmolive Company* v. *F.T.C.* No. 6145, dated December 17, 1963. BNA. ATRR No. 128 P. X–1.

in which it did not participate, (2) the order should prevent *misrepresenting* and (3) the order should be restricted to the very book advertised or to books by the same author.

The Supreme Court in *Ruberoid* [9] made it clear that the Commission in the exercise of the power which Congress envisioned could not be required to "confine its roadblock 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 impugnity." The First Circuit in its second *Colgate-Palmolive* opinion,[10] although it expressed dissatisfaction with the Commission's order "continue[d] to believe that we should not comment on the precise terms of an order *in vacuo*." Thus we have a clear and current direction that the Commission must be permitted to determine what orders should issue to effectively prevent continuation of unlawful conduct. So long as they are "sufficiently clear and precise to avoid raising serious questions as to their meaning and application." [11] It has proposed an order with the complaint and that order should be entered if justified by the facts established and not subject to legal infirmities discovered after the issuance of the complaint.[12] With these principles in mind we consider respondents' objections.

The objections that would limit the order to advertisements of the same book or those by the same author cannot be sustained. Last year's best seller, like yesterday's newspaper affords little temptation to the advertiser. There would probably be no need for such an order at all. The next objection relating to the books whose advertising would be covered suggests that respondents are unable to determine whether they are "of the same or approximately the same content, material and principles." By reading the books publishers and advertising men should certainly be able to determine their similarity. Moreover, their obligation at most is to supply truthful advertising copy which they would in any event be bound to supply. The objections which would place Sussman in a favored position appear wholly unjustified. The fact that it did not happen to utilize the representations concerning "tension" in the advertising for which it was responsible does not make it likely that it would not do so in light of the dust jacket statement which it must have known about. This road also should be closed. To prepare honest advertising copy it must study the book and it should be no hardship to prepare honest advertising on the basis of such a study.

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[9] *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

[10] Opinion by Judge Aldrich, December 17, 1963, No. 6145. BNA. ATRR No. 128, p. X-1.

[11] *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360, 368 (1962); *Country Tweeds, Inc.* v. *F.T.C.*, Slip Opinion p. 574 (2d Cir. January 3, 1964).

[12] Compare *Winston Sales Co., Inc.*, Docket 8531, Order dated November 22, 1963 [63 F.T.C. 1456].

The final objection that only misrepresentation should be prohibited requires no change in the proposed order. It has been conceded that the representations prohibited constitute misrepresentations. They would be misrepresentations of any book "of the same or approximately the same content, material and principles." In the unlikely event that a book of the same content should effect a cure through some change in the human animal the order would clearly be subject to immediate revision.

9. The following order should be issued.

ORDER

It is ordered, That Farrar, Straus and Company, Inc., a corporation, and its officers, and Sussman and Sugar, Inc., and its officers, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of a book entitled "Mirror, Mirror on the Wall" or any other book of the same or approximately the same content, material and principles, whether sold under the same name or any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That by following the dietary principles set forth in the book a person will:

(a) Lose weight without reducing his caloric intake.

(b) Protect his heart or restore it to normal, or have any other beneficial effect upon his heart.

(c) Increase his sexual potency.

(d) Control the chemical balance of his body or distribute chemicals within his body in a prescribed manner.

2. That by following formulas or instructions set forth in said book a person will:

(a) Tighten the skin in the face or neck, or eliminate loose face or neck tissue.

(b) Slenderize in 10 seconds, or in any other period of time.

(c) Add brightness or clarity to his eyes.

(d) Prevent or retard baldness or excessive hair loss.

(e) Cure dandruff.

(f) Rid himself of tension, or reduced or relieve tension.

(g) Become healthy or remain healthy.

3. That the order in which one eats food is important to health.

4. That the cosmetics described in the book are natural or nutritious.

5. That the book contains hundreds of secrets of health or that it contains any health secret.

6. That the exercises described in the book will never be tiring to the person who performs them.

Decision of the Commission and Order to File Report of Compliance

The Commission having considered the initial decision of the hearing examiner filed February 11, 1964, and

It appearing that the initial decision contains a number of errors, and

The Commission being of the opinion that these errors should be corrected:

It is ordered, That the initial decision be, and it hereby is, modified by striking the language in parentheses following paragraph 1 of the Findings of Fact and substituting the following: (C 1, admitted by failure to deny, AA; RF 1; see CF 1).

It is further ordered, That the language in parentheses following paragraph 2 of the Findings of Fact be stricken and the following substituted: (C 1, admitted by failure to deny, AA; RF 2; see CF 2).

It is further ordered, That the language in parentheses following paragraph 3 of the Findings of Fact be stricken and the following substituted: (C 1, admitted, AA 1; CF 3; see RF 3).

It is further ordered, That the language in parentheses following paragraph 7 of the Findings of Fact be stricken and the following substituted: (C 4, admitted by failure to deny, A, AA; CX 4A, B, C, and D; CX 5A, B).

It is further ordered, That the words "Respondent has" in the first sentence of paragraph 14 of the Findings of Fact be stricken and the words "Respondents have" be substituted therefor.

It is further ordered, That subsection 2(f) of paragraph 14 of the Findings of Fact be stricken and subsection 2(g) of paragraph 14 be redesignated 2(f).

It is further ordered, That paragraph 15 of the Findings of Fact be modified by striking the sentence beginning "Mr. Hauser does not count calories", and substituting therefor the following: "Mr. Hauser does not count calories in this book, it is true, but advocates the prevention of high caloric intake in a different fashion".

It is further ordered, That the first sentence of paragraph 17 of the Findings of Fact be modified by the insertion of the word "Farrar" following the word "respondent".

It is further ordered, That subsection 3 of paragraph 8 of the Conclusions in the initial decision be modified by striking the sentence beginning "The objections which would place Sussman" and the succeeding three sentences comprising the remainder of that subsection.

It is further ordered, That paragraph 2 of the Order in the initial decision be modified by striking subsection (f), and that subsection (g) be redesignated (f).

It is further ordered, That the initial decision as modified by this order, be and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

ADVANCED QUILTING AND BATTING CORP. ET AL.

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

Docket C-734. Complaint, April 9, 1964—Decision, April 9, 1964

Consent order requiring Brooklyn, N.Y., manufacturers of wool products to cease violating the Wool Products Labeling Act by such practices as labeling and invoicing as "90% Reprocessed Wool, 10% other Fibers" and "60% Reprocessed Wool, 40% Other Fibers", quilting materials which contained substantially different fibers and amounts than represented, and by failing to label certain materials with required fiber content.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Advanced Quilting and Batting Corp., a corporation, and Rubin Partel, Mark Zelkowitz, and Joe Rosenthal, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Advanced Quilting and Batting Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Rubin Partel, Mark Zelkowitz, and Joe Rosenthal are officers of said corporation and cooperate in formulat-

ing, directing and controlling the acts, policies and practices of corporate respondent including the acts and practices hereinafter referred to.

Respondents are manufacturers of wool products with their office and principal place of business located at 43–47 Bogart Street, Brooklyn 6, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were quilting materials stamped, tagged, or labeled as containing 90% Reprocessed Wool, 10% Other Fibers, and 60% Reprocessed Wool, 40% Other Fibers, whereas in truth and in fact, said quilting materials contained substantially different fibers and amount of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain quilting materials with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 percentum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 percentum or more; (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that information required under Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form in violation of Rule 9 of said Rules and Regulations.

PAR. 6. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondents in the course and conduct of their business, as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the fiber content of certain of their said products.

Among such misrepresentations, but not limited thereto, were statements representing the fiber content thereof as 90% Reprocessed Wool, 10% Other Fibers and 60% Reprocessed Wool, 40% Other Fibers, whereas in truth and in fact, said quilting materials contained substantially different fibers and amounts of fibers than represented.

PAR. 8. In the course and conduct of their business, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other states of the United States, and maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR 9. The acts and practices set out in Paragraphs Seven and Eight have had and now have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof and to cause them to misbrand products sold by them in which said materials were used.

PAR. 10. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Wool Products Labeling Act of 1939 and the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

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

1. Respondent Advanced Quilting and Batting Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 43–47 Bogart Street, Brooklyn 6, New York.

Individual respondents Rubin Partel, Mark Zelkowitz, and Joe Rosenthal are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Advanced Quilting and Batting Corp., a corporation, and its officers, and Rubin Partel, Mark Zelkowitz, and Joe Rosenthal, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment in commerce, of wool interlining material or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Setting forth information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder in abbreviated form on labels affixed to wool products.

It is further ordered, That respondents Advanced Quilting and Batting Corp., a corporation, and its officers, and Rubin Partel, Mark Zelkowitz, and Joe Rosenthal, individually and as officers of said corporation, and respondents' representatives, agents and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of interlining material or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in quilted interlining material or any other textile products on invoices or shipping memoranda applicable thereto or in any other manner.

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

ESTEE SLEEP SHOPS, INC., ET AL.

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

Docket 8569. Complaint, May 9, 1963—Decision, April 11, 1964

Order requiring manufacturers and distributors of bedding and furniture of Chicago, Ill., to cease making deceptive savings claims in newspaper advertisements by use of retail price comparisons, and deceptively guaranteeing their mattresses.

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, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the

*This complaint was amended by order of hearing examiner dated Oct. 7, 1963, by striking therefrom the following nine non-existent corporate respondents named herein and substituting therefor Estee Sleep Shops, Inc.: Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 21st Street Estee Sleep Shop, Inc., 63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., Hammond Estee Sleep Shop, Inc.

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 21st Street Estee Sleep Shop, Inc., 63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., and Estee Bedding Company are corporations organized existing and doing business under and by virtue of the laws of the State of Illinois, and are located in Chicago, Illinois. Their principal office is at 2400 West 21st Street in the city of Chicago, State of Illinois. All of the above-named corporate respondents except Estee Bedding Company also maintain an office in Room 845, 29 South La Salle Street, Chicago 3, Illinois. Estee Bedding Company also maintains an office at 2414 West 21st Street, Chicago, Illinois.

Respondent Hammond Estee Sleep Shop, Inc., is a corporation organized existing and doing business under and by virtue of the laws of the State of Indiana, and is located in Hammond, Indiana. Its principal office is at 2400 West 21st Street in the city of Chicago, State of Illinois. It also maintains an office at 1511 Merchants Bank Building, Indianapolis 4, Indiana.

Respondents Samuel Trossman, Marvin Trossman, Harold Trossman and Norman Trossman are individuals and officers of each corporate respondent herein named. Their address is 2400 West 21st Street, in the city of Chicago, State of Illinois. They formulate, direct and control the acts and practices of all the corporate respondents, including the acts and practices hereinafter set forth. They dominate and control each corporate respondent to such an extent that each corporation is unable to formulate policy independently and each corporation's separate corporate identity is no more than a sham.

PAR. 2. Respondent Estee Bedding Company manufactures bedding and assembles furniture. Each of the other corporate respondents sells bedding and furniture at retail. They take orders for furniture and forward such orders to the executive office at 2400 West 21st Street, Chicago, Illinois. The merchandise ordered is then sent from the sole warehouse, which occupies the same premises as the factory, 2400 West 21st Street, Chicago, Illinois, to the customer.

The corporate respondents, other than the Estee Bedding Company also sell at retail furniture not manufactured by the Estee Bedding Company, but which is ordered from other manufacturers by the executive office at 2400 West 21st Street, Chicago, Illinois. They take orders from customers for this furniture and forward such orders to the

executive office. The merchandise ordered is then sent from the warehouse to the customer. None of the corporate respondents, except the Estee Bedding Company, stock bedding or furniture, except for samples. They function as showrooms.

PAR. 3. Each of the corporate respondents has accepted orders from customers who reside outside the state where it is located and has caused the executive office to ship the merchandise ordered or cause it to be shipped from the factory and warehouse located in Illinois to the customer located outside the State of Illinois. In the case of the Hammond Estee Sleep Shop merchandise has also been shipped from the factory and warehouse in Illinois to customers located in Indiana. This continues to be the manner in which sales and shipments are made by the corporate respondents. Thus each of the corporate respondents maintains, and at all times mentioned herein has maintained, a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In reality the corporate respondents have not operated and do not operate as independent individual corporations but are components of one business entity operated as a vertically integrated operation dominated and controlled by the respondents, Samuel, Marvin, Harold and Norman Trossman, which maintains, and at all times mentioned herein has maintained, a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of said bedding and furniture, respondents have placed or caused to be placed advertisements in newspapers of general circulation. The following statements from the advertisements are typical but not all inclusive:

Kroehler Foam Cushioned Sofa and Chair Save $60 Decorator designed * * *
Get yours today at Estee, only $149.88
3-Pc Bedroom Suite * * * At Estee, yours for only $149.88. Save $60
Handsome Decorator Living Room 2-Piece Sofa and Chair Suite $139.95. Save $45
Imported Danish Style Room
Group for Easy Relaxation—

Foam Lounge	$79.95
Armchair	39.95
Rocker	49.95
60" Slat Bench	19.95
Total	$189.80
You pay only	119.88
Save	$69.92

All for only $119.88

PAR. 5. Through the use of the aforesaid statements the respondents have represented, directly or indirectly, that:

1. The respondents usually and customarily sold the Kroehler foam cushioned sofa and chair for $209.88 in the recent regular course of their business and that a saving would be made of $60.

2. The respondents usually and customarily sold the three piece bedroom suite for $209.88 in the recent regular course of their business and that a saving would be made of $60.

3. The respondents usually and customarily sold the two piece sofa and chair suite for $184.95 in the recent regular course of their business and that a saving would be made of $45.

4. The respondents usually and customarily sold the Danish style room group for $189.80 in the recent regular course of their business and that a saving would be made of $69.92.

PAR. 6. In truth and in fact the respondents have not regularly sold the items listed in Paragraph Five at the prices stated therein and the savings stated therein would not be made. Therefore the statements and representations referred to in Paragraphs Four and Five are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business the respondents have made the following guarantee statements in their newspaper advertisements of their mattresses:

*5 Year Guarantee
*5 Year Written Guarantee
*15 Year Guarantee
*10 Year Guarantee
*10 Year Written Guarantee

A footnote to these statements in each advertisement explains, "should mattress become unserviceable to original purchaser from normal use, free repairs will be made".

PAR. 8. In truth and in fact the guarantee card which accompanies a mattress bears the statement that the purchaser must:

1. Fill out and mail in the guarantee stub portion of the card to the Estee Sleep Shops within thirty days of purchase.

2. Use the mattress on an Estee foundation.

3. Pay all costs of transportation and handling.

These statements are not disclosed in the respondents' advertising. Therefore the statements and representations referred to in Paragraph Seven are false, misleading and deceptive.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of bedding and furniture of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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

Mr. William A. Somers and *Mr. Robert A. Mattina* supporting the complaint.

Ruskin and Rosenbaum of Chicago, Ill., by *Harry H. Ruskin* for respondents.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

This proceeding was commenced by the issuance of a complaint on May 9, 1963, charging ten named corporate respondents and four named individual respondents, individually and as officers of said corporations, with unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act by making deceptive pricing, savings and guarantee claims for their bedding and furniture.

After being served with the said complaint, the four individual respondents and one of the corporate respondents, Estee Bedding Company, appeared by counsel and thereafter filed their joint answer admitting a number of the specific allegations in the complaint, but denying generally the illegality of the practices charged in the complaint. In addition, the respondents specifically denied the existence of the other nine corporations named in the complaint and affirmatively alleged "that the business heretofore carried on by said respective corporations (herein called Estee retail store corporations) is now carried on by Estee Sleep Shops, Inc., an Illinois corporation."

A prehearing conference was held in this matter on August 26, 1963, at which such matters as the stipulation of uncontested facts, exchange of lists of documents, and witnesses, authentication of documents, amendment of the complaint, etc., were discussed.

On September 10, 1963 complaint counsel filed a motion to amend the complaint to strike therefrom the first nine corporations named

in the caption and substituting therefor the Estee Sleep Shops, Inc. In support thereof and attached thereto, complaint counsel supplied documentary evidence including certificates of the State of Illinois, Office of the Secretary of State, establishing that the first five and the seventh through ninth corporations named in the caption of the complaint merged into 21st Street Estee Sleep Shop, Inc. (the sixth corporation named in the complaint) on March 1, 1963 and on March 19, 1963 the name of the surviving corporation "21st Street Estee Sleep Shop, Inc.," was changed to Estee Sleep Shops, Inc. Since the proposed amendment did not enlarge the scope of the proceedings, but merely deleted non-existent corporate respondents, the hearing examiner on October 7, 1963 granted the Motion to Amend the Complaint.

At the commencement of the hearing held at Chicago, Illinois on November 19, 1963, counsel for respondents indicated that respondents were willing to enter into a stipulation of all the material facts involved in this proceeding in order to avoid further hearings. Accordingly, the hearing was temporarily adjourned to permit the parties to prepare and execute a stipulation of facts. On November 20, 1963, the parties presented to the hearing examiner an executed Stipulation of Facts which was approved and ordered by the hearing examiner to be copied into the record. The record was then closed and the parties were afforded an opportunity to submit proposed findings, conclusions and order.

Thereafter, respondents' counsel submitted a proposed order and brief in support thereof and complaint counsel submitted proposed findings following in *haec verba* the paragraphs contained in the "Stipulation of Facts," proposed conclusions and a brief in support of the order set forth in the complaint.

Consideration has been given to the proposed findings, conclusions and briefs submitted. Findings Nos. 1 through 9 hereinafter adopted follow the exact language of the "Stipulation of Facts" and are not in dispute. Finding No. 10 is a conclusionary finding made by the hearing examiner based upon Findings Nos. 1 through 9 and reasonable inferences to be drawn therefrom.

FINDINGS OF FACT

1. At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 21st Street Estee Sleep Shop, Inc.,

63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., were corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, and were located in Chicago, Illinois. Their principal office was located at 2400 West 21st Street in the city of Chicago, State of Illinois. All of the above-named corporations also maintained an office in Room 845, 29 South LaSalle Street, Chicago 3, Illinois.

At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter, Hammond Estee Sleep Shop, Inc., was a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, and was located in Hammond, Indiana. Its principal office was at 2400 West 21st Street in the city of Chicago, State of Illinois. It also maintained an office at 1511 Merchants Bank Building, Indianapolis 4, Indiana.

At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter Estee Bedding Company was, and at present still is, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 2400 West 21st Street, in the city of Chicago, State of Illinois. Estee Bedding Company also maintained and still maintains an office at 2414 West 21st Street, Chicago, Illinois.

Samuel Trossman, Marvin Trossman, Harold Trossman, and Norman Trossman are individuals and at the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint in this matter, were officers of each corporation named above. Their address was and still is 2400 West 21st Street, in the city of Chicago, State of Illinois. They formulated, directed and controlled the acts and practices of all of the corporations named above, including the acts and practices set forth in the complaint in this matter and in the case of Estee Bedding Company still do. They dominated and controlled each of the above corporations to such an extent that each corporation was unable to formulate policy independently and all of the above corporations were in fact operated as one entity.

On March 1, 1963, Ashland Estee Sleep Shop, Inc., Western Estee Sleep Shop, Inc., Milwaukee Avenue Estee Sleep Shop, Inc., Central Estee Sleep Shop, Inc., Harlem Estee Sleep Shop, Inc., 63rd Street Estee Sleep Shop, Inc., 95th Street Estee Sleep Shop, Inc., and Hammond Estee Sleep Shop, Inc., merged into 21st Street Estee Sleep Shop, Inc., and on March 19, 1963, the name of the surviving corporation, 21st Street Estee Sleep Shop, Inc., was changed to Estee Sleep Shops, Inc. The surviving corporation succeeded to all of the rights and

obligations of the corporations merged into it. The Articles of Incorporation and By-Laws of the surviving corporation and the officers, namely Samuel Trossman, Marvin Trossman, Harold Trossman, and Norman Trossman remain the officers of the surviving corporation and formulate, direct, and control the acts and practices of the surviving corporation, including acts and practices of the type set forth in the complaint.

2. At the time of the publication of the advertisements quoted in Paragraph Four and Paragraph Seven of the complaint Estee Bedding Company manufactured bedding and assembled furniture and does so at present. Each of the other corporations that existed prior to the above described merger sold bedding and furniture at retail. They took orders for furniture and forwarded such orders to the executive office at 2400 West 21st Street, Chicago, Illinois. The merchandise ordered was then sent from the sole warehouse, which occupies the same premises as the factory, 2400 West 21st Street, Chicago, Illinois, to the customer.

The corporations that existed prior to the merger, other than the Estee Bedding Company, also sold at retail furniture not manufactured by the Estee Bedding Company, but which was ordered from other manufacturers by the executive office at 2400 West 21st Street, Chicago, Illinois. They took orders from customers for this furniture and forwarded such orders to the executive office. The merchandise ordered was then sent from the warehouse to the customer. None of such corporations, except the Estee Bedding Company, stocked bedding or furniture, except for samples. They functioned as showrooms.

3. Each of the corporations that existed prior to the merger accepted orders from customers residing outside the state where it was located and caused the executive office to ship the merchandise ordered or cause it to be shipped from the factory and warehouse located in Illinois to the customer located outside the State of Illinois. In the case of the Hammond Estee Sleep Shop merchandise was also shipped from the factory and warehouse in Illinois to customers located in Indiana. This is the manner in which sales and shipments were made by the corporations that existed prior to the merger and is the manner in which sales and shipments are made at present by the surviving corporation, Estee Sleep Shops, Inc., and Estee Bedding Company through the same retail locations that were employed prior to the merger. Thus each of the corporations that existed prior to the merger maintained a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act and since the merger Estee Sleep Shops, Inc., and Estee Bedding

Company have maintained and still maintain, a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In reality the corporations that existed prior to the merger did not operate as independent individual corporations, but were components of one business entity that was operated as a vertically integrated operation dominated and controlled by the respondents, Samuel, Marvin, Harold, and Norman Trossman, which maintained a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Since the merger the surviving corporation, Estee Sleep Shops, Inc., and Estee Bedding Company have been and at present are operated as a vertically integrated operation dominated and controlled by the respondents, Samuel, Marvin, Harold, and Norman Trossman, which maintains a substantial course of trade in bedding and furniture in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, and for the purpose of inducing the sale of said bedding and furniture, respondents have placed or caused to be placed advertisements in newspapers of general circulation. The following statements from the advertisements are typical, but not all inclusive:

Kroehler Foam Cushioned Sofa and Chair Save $60 Decorator designed * * * Get yours today at Estee, only $149.88

3-Pc Bedroom Suite * * * At Estee, yours for only $149.88. Save $60

Handsome Decorator Living Room 2-Piece Sofa and Chair Suite $139.95. Save $45

Imported Danish Style Room

Group for Easy Relaxation—

Foam Lounge	$79.95
Armchair	39.95
Rocker	49.95
60" Slat Bench	19.95
Total	$189.80
You pay only	119.88
Save	$69.92

All for only $119.88

5. Through the use of the aforesaid statements, the respondents have represented, directly or indirectly, that:

1. The respondents usually and customarily sold the Kroehler foam cushioned sofa and chair for $209.88 in the recent regular course of their business and that a saving would be made of $60.

2. The respondents usually and customarily sold the three piece bedroom suite for $209.88 in the recent regular course of their business and that a saving would be made of $60.

3. The respondents usually and customarily sold the two piece sofa and chair suite for $184.95 in the recent regular course of their business and that a saving would be made of $45.

4. The respondents usually and customarily sold the Danish style room group for $189.80 in the recent regular course of their business and that a saving would be made of $69.92.

6. In truth and in fact, the respondents have not regularly sold the items listed in Paragraph 5 at the prices stated therein and the savings stated therein would not be made. Therefore, the statements and representations referred to in Paragraphs 4 and 5 are false, misleading, and deceptive.

7. In the course and conduct of their business the respondents have made the following guarantee statements in their newspaper advertisements of their mattresses:

*5 Year Guarantee
*5 Year Written Guarantee
*15 Year Guarantee
*10 Year Guarantee
*10 Year Written Guarantee

A footnote to these statements in each advertisement explains, "should mattress become unserviceable to original purchaser from normal use, free repairs will be made."

8. In truth and in fact the guarantee card which accompanies a mattress bears the statement that the purchaser must:

1. Fill out and mail in the guarantee stub portion of the card to the Estee Sleep Shops within thirty days of purchase.

2. Use the mattress on an Estee foundation.

3. Pay all costs of transportation and handling.

These statements are not disclosed in the respondents' advertising. Therefore the statements and representations referred to in Paragraph 7 are false, misleading and deceptive.

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

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

quantities of respondents' products by reason of said erroneous and mistaken belief.

CONCLUSIONS

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

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

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

DISCUSSION OF APPROPRIATE ORDER

As heretofore found, respondents' deceptive pricing practices consist in part of the use in newspaper advertisements of a dual pricing system, that is, a higher undesignated price in juxtaposition with respondents' lower selling price followed by the term "save" together with a figure representing the difference between the higher and lower prices. Similarly, in newspaper advertisements, respondents set forth their selling price followed by the term "save" together with a dollar amount. Although the higher undesignated price is not spelled out in the latter type of situation, it is patently clear that the higher inferred price is the amount of the saving added to respondents' selling price. In short, although respondents employ several variations of their deceptive pricing practice, it boils down to the age old dual pricing technique, which, if accurate and truthful, is not deceptive. However, as employed by respondents, it was deceptive, since a substantial segment of the purchasing public was led to believe that the higher undesignated price was respondents' usual and customary price, when in fact respondents had not regularly sold such items at the higher price.

Paragraph 5 of the complaint as drafted as well as the form of order contained in the complaint, hereinafter set forth, which complaint counsel now requests the hearing examiner to adopt, are predicated on the theory that a higher undesignated price in juxtaposition with a lower selling price or the term "Save ——" in conjunction with respondents' selling price, universally means in the minds of the purchasing public that the higher undesignated price is respondents' usual and regular price. The hearing examiner does not agree. The use of a higher undesignated price in juxtaposition with a lower sell-

ing price or the term "Save ——" in conjunction with respondents' selling price is at least ambiguous. The ambiguity arises over the fact that the use of a higher price without designating what it stands for or the use of the term "Save ——" without indicating from what the saving is derived, is susceptible of several interpretations by the purchasing public.

Admittedly, a substantial segment of the purchasing public interprets the higher undesignated price to be respondents' usual and regular price, and when it is not, as in the instant case, they are deceived. It is also true that an equally substantial segment of the purchasing public will interpret the higher undesignated price to be the usual and regular price in the trade area, *i.e.*, the price charged by respondents' competitors. In the latter situation, such purchasers will be deceived and trade will be unfairly diverted from respondents' competitors, if the higher undesignated price is not the usual and regular price in the trade area. The fact that the higher price is respondents' usual and regular price will not cure the deceptive impression created in the minds of this segment of the purchasing public.

Under these circumstances, the continued use of a higher undesignated price, directly or by implication, whether it be respondents' usual and regular price or the usual and regular price in the trade area is ambiguous and consequently a substantial segment of the purchasing public will be misled at all times.

Complaint counsel's proposed form of order directs that respondents cease and desist from:

1. Representing, directly or by implication that:

(a) Any amount is the usual and customary price of the respondents' merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail by the respondents.

(b) Any saving is afforded in the purchase of merchandise from the respondents' price unless the price at which it is offered is lower than the price at which said merchandise is usually and customarily sold at retail by the respondents.

As the hearing examiner reads this order, it does not clearly and precisely prohibit respondents from using a higher undesignated price in juxtaposition with a lower selling price when the higher undesignated price is the usual and customary retail price of respondents. In fact paragraphs 1(a) and 1(b) would seem to sanction the very practice provided the higher undesignated price is respondents usual and customary price. As demonstrated above the continued use of an undesignated higher price in juxtaposition with a lower selling price is ambiguous and will lead to the deception of a substantial segment

of the purchasing public. This is the very essence of the matter. Since complaint counsel's form of order does not cure this deceptive practice, the hearing examiner finds the proposed form of order to be unacceptable. Furthermore, paragraph 1(b) of the proposed order would prohibit respondents from representing that any saving is afforded in the purchase of an item unless the advertised price is lower than respondents' usual price. This is unjust and unreasonable and not called for by the facts of the case. Respondents may desire to sell merchandise at lower prices than their competitors. This paragraph of the order would have the effect of preventing respondents from representing that a saving is afforded in the purchase of an item whose selling price is below the trade area price solely because the selling price is not also below respondents' usual price.

In view of the foregoing the hearing examiner has drafted his own order which would eliminate the use of undesignated dual prices with their resultant ambiguity, while preserving to respondents the right to compare their lower selling prices to their usual and regular prices, or the usual and regular prices in the trade area. The order as framed is restricted to dual pricing practices, since this is the only area of deceptive pricing in which the respondents have engaged. The hearing examiner finds no basis in respondents' past conduct from which it may fairly be anticipated that they will engage in other deceptive pricing practices in the future. *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 435 (1941). Consequently, paragraph 2 of the proposed order directing respondents to refrain from misrepresenting "in any manner" the savings available to purchasers of their merchandise is "couched in more sweeping language" than the circumstances of the matter require. *Country Tweeds, Inc., et al.* v. *Federal Trade Commission*, Trade Reg. Rep. (1964 Trade Cas.) ¶ 70,985 (C.A. 2, Jan. 3, 1964).

The order as drafted follows an affirmative approach to retail price comparisons contained in advertising, *i.e.*, a clear and truthful description to the public of the higher and lower prices. In a recent address before the 53rd Annual Convention of the National Retail Merchants Association, Chairman Dixon of the Federal Trade Commission said:

> Whether the ad is truthful or deceptive therefore depends upon how honestly and accurately the "higher" price has been described—whether the alleged "reduction" is real or whether it's a figment of the advertiser's imagination.

The Federal Trade Commission in the introduction to its *Guides Against Deceptive Pricing*, effective January 8, 1964, states:

> The basic objective of these Guides is to enable the businessman to advertise his goods honestly, and to avoid offering the consumer non-existent bargains or bargains that will be misunderstood. Price advertising is particularly effective

because of the universal hope of consumers to find bargains. Truthful price advertising, offering real bargains, is a benefit to all. But the advertiser must shun sales "gimmicks" which lure consumers into a mistaken belief that they are getting more for their money than is the fact.

In the opinion of the hearing examiner the order is tailored to cure the ill effects of the illegal conduct and to assure the public freedom from its continuance. *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88; *All-Luminum Products, Inc., et al.*, Docket No. 8485, November 7, 1963.

With respect to paragraphs 3 of the proposed form of order dealing with the guarantee violation, there is no disagreement by the parties and the hearing examiner adopts it.

ORDER

It is ordered, That respondents Estee Sleep Shops, Inc. and Estee Bedding Company, corporations and their officers and Samuel Trossman, Marvin Trossman, Harold Trossman, and Norman Trossman, 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 or distribution of bedding and furniture or other similar products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any saving is afforded in the purchase of such products by use of a direct or indirect dual price representation without using words or other descriptive means that clearly and truthfully describe both the higher and lower prices.

2. Representing, directly or by implication, that any of such products are guaranteed unless the nature and extent of the guarantee are clearly and conspicuously disclosed.

Decision of the Commission and Order to File Report of Compliance

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 11th day of April 1964, become the decision of the Commission and accordingly:

It is ordered, That 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 it has complied with the order to cease and desist.

IN THE MATTER OF

GIANT FOOD, INC.

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

Docket 6459. Complaint, May 8, 1957—Decision, Apr. 13, 1964

Order modifying, in accordance with the direction of the District of Columbia Circuit of June 14, 1962, 307 F. 2d 184 (7 S.&D. 483), desist order dated June 1, 1961 (58 F.T.C. 977), requiring a large supermarket chain with retail outlets in Maryland, Virginia and the District of Columbia, cease "knowing inducement *and* receipt of, receipt of, or contracting for the receipt of discriminatory display and promotional allowances."

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the District of Columbia Circuit a petition to review and set aside the order to cease and desist issued on June 1, 1961; and the court on June 14, 1962, having filed its decision, and on September 18, 1962, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the United States Supreme Court having denied a petition for certiorari filed by respondent;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the Court of Appeals, to read as follows:

It is ordered, That Giant Food, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> Inducing and receiving, receiving, or contracting for the receipt of, anything of value from any supplier as compensation or in consideration for display or promotional services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondent knows or could reasonably have learned that such compensation or consideration is not af-

firmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent in the sale and distribution of such supplier's products.

IN THE MATTER OF

THE GRAND UNION COMPANY

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

Docket 6973. Complaint, Dec. 5, 1957—Decision, Apr. 13, 1964.

Order modifying, pursuant to a decision of the Court of Appeals, Second Circuit, of Feb. 7, 1962, 300 F. 2d 92, 7 S.&D. 329, a cease and desist order of Aug. 12, 1960, 57 F.T.C. 382, requiring a large supermarket chain to cease inducing and receiving advertising and promotional services from some of its suppliers which discriminated against its nonfavored competitors, by limiting the language of the order to the particular practice found to violate the statute.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Second Circuit its petition to review and set aside the order to cease and desist issued herein on August 12, 1960; and the court on February 7, 1962, having filed its opinion and on April 27, 1962, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the Court of Appeals, to read as follows:

It is ordered, That respondent The Grand Union Company, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in connection with the purchase in commerce (as "commerce" is defined in the Federal Trade Commission Act) of grocery products or related merchandise, do forthwith cease and desist from:

Receiving, or inducing and receiving, the benefit of anything of value from any of its suppliers through any third person (but not directly from said supplier), as compensation or in consideration for any advertising or promotional display services or facilities furnished by or through respondent in connection with

the sale or offering for sale of products sold to respondent by any of its suppliers, when respondent knows, or should know, that such benefit is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of the suppliers' products.

IN THE MATTER OF

BANKERS SECURITIES CORPORATION

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

Docket 7039. Complaint, Jan. 15, 1958—Decision, Apr. 13, 1964

Order modifying, in accordance with the direction of the Third Circuit of Dec. 18, 1961, 297 F. 2d 403 (7 S. & D. 300), desist order of Dec. 1, 1960 (57 F.T.C. 1219) prohibiting fictitious pricing, to provide that it apply only to the Snellenburgs department stores.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed with the United States Court of Appeals for the Third Circuit a petition to review and set aside the order to cease and desist issued herein on December 1, 1960; and the court on December 18, 1961, having rendered its decision and on January 18, 1962, having entered its judgment modifying and, as modified, affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the court of appeals, to read as follows:

It is ordered, That respondent, Bankers Securities Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of carpets, rugs, or other merchandise by the department stores known as Snellenburgs, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing in any manner that certain amounts are the regular and usual retail prices of merchandise sold by Snellenburgs when such amounts are in excess of the prices at which such merchandise has been usually and regularly sold by Snellenburgs at retail, in the recent regular course of its business.

Modified Order to Cease and Desist

IN THE MATTER OF

UNITED STATES ASSOCIATION OF CREDIT BUREAUS, INC., ET AL.

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

Docket 7043. Complaint, Jun. 15, 1958—Decision, Apr. 13, 1964

Order modifying an order dated June 8, 1961, 58 F.T.C. 1044, pursuant to a decision of the Court of Appeals, Seventh Circuit, dated February 14, 1962, 299 F. 2d 220, 7 S.&D. 358, which prohibited a collection agency from making various false representations, by permitting a representation that no charges would be made for uncollected accounts where such statement is true and deleting the requirement of affirmative disclosure that its forms are for debt collection.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Seventh Circuit a petition to review and set aside the order to cease and desist issued herein on June 8, 1961; and the court on February 14, 1962, having rendered its decision and on March 7, 1962, having entered its final decree modifying and, as modified affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no petition for certiorari having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the court of appeals, to read as follows:

It is ordered, That respondent, United States Association of Credit Bureaus, Inc., a corporation, and its officers and respondents, John W. Burns and Harold E. Holder, individually and as officers of said corporate respondent, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the solicitation of accounts for collection, or the collection of, or attempts to collect accounts, or to obtain information concerning delinquent debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "association" or "credit bureaus," or any other term of similar import or meaning in the corporate name or in any other manner to designate, describe or refer to respondents' business, or otherwise representing, directly or by implication, that respondents' business is an association or a credit bureau.

2. Using the name "United States" in the corporate name or in any other manner, or an insignia so designed as to suggest government connection, to designate, describe, or refer to respondents' business; or otherwise representing, directly or by implication, that they are an agency or branch of the United States government, or that their business is in any way connected with the United States government.

3. Representing, through the use of a corporate or other trade name, or in any other manner, that their business is other than that of a collection agency engaged in collecting past due accounts.

4. Representing, directly or by implication:

(a) That their business is organized into separate functional divisions for the collection of accounts;

(b) That they employ local representatives, regional investigators, correspondents or lawyers on their personnel staff in various states or throughout the world, or that they employ any one on their personnel staff except solicitors anywhere outside of the Chicago or Oak Forest, Illinois area;

(c) That they make personal calls on debtors to collect accounts;

(d) That no charges will be made for accounts unless they are collected, unless such statement is true;

(e) That the collection fee or commission is less than any amount actually to be charged by respondents;

(f) That they furnish credit reports to parties who have assigned accounts to them.

5. Using, or causing to be used, any forms, cards or other material, printed or written, for use in obtaining information concerning delinquent debtors, which represent, directly or by implication, that money or property is being held for, or is due, persons concerning whom the information is sought, or is collectible by such persons, unless money or property is in fact due and collectible by such persons and the amount of money or property is actually stated.

Modified Order to Cease and Desist

IN THE MATTER OF

RAYEX CORPORATION ET AL.

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

Docket 7346. Complaint, Jan. 6, 1959—Decision, Apr. 13, 1964

Order modifying, in accordance with the directive of the Second Circuit dated May 7, 1963, 317 F. 2d 290 (7 S.&D. 696), by vacating as to one respondent and as to the portions of the order directed at preticketing—desist order of April 2, 1962, 60 F.T.C. 664, to require assemblers of sunglasses in Flushing, Queens, N.Y., to cease misrepresenting the diopter curve of their sunglasses and falsely claiming conformance with the standards and specifications of the U.S. Air Force or Department of Defense.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Second Circuit a petition to review and set aside the order to cease and desist issued herein on April 2, 1962; and the court on May 7, 1963, having filed its decision and on May 22, 1963, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the court of appeals, to read as follows:

It is ordered, That the respondents, Rayex Corporation, a corporation, and Ray Tunkel and Harry Kramer, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sunglasses, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(a) That their sunglass lenses have a given dioptic curve unless such is the fact; provided, however, that in the case of ground and polished sunglass lenses a tolerance not to exceed minus or plus $\frac{1}{16}$th diopters in any meridian and a difference in power between any two meridians not to exceed $\frac{1}{16}$th diopter and a prismatic effect not to exceed $\frac{1}{8}$ diopter shall be allowed.

(b) That their sunglasses, or the lenses thereof, meet or comply with the specifications and standards of the United States Air Force or Department of Defense.

IN THE MATTER OF

AMERICAN NEWS COMPANY AND THE UNION NEWS COMPANY

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

Docket 7396. Complaint, Feb. 5, 1959—Decision, Apr. 13, 1964

Order modifying, pursuant to a decision of the Court of Appeals, Second Circuit on February 7, 1962, 300 F. 2d 104, 7 S.&D. 346, a cease and desist order dated January 10, 1961, 58 F.T.C. 10, requiring large newsstand operators to cease inducing and receiving discriminatory promotional allowances from magazine publishers, by eliminating paragraph 1 of the original order dealing with attempts to induce discriminatory allowances.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Second Circuit a petition to review and set aside the order to cease and desist issued herein on January 10, 1961; and the court on February 7, 1962, having filed its decision, and on April 27, 1962, having entered its final decree modifying and as modified, affirming and enforcing said order to cease and desist; and the United States Supreme Court having denied a petition for certiorari filed by respondents;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is modified, in accordance with the said final decree of the Court of Appeals, to read as follows:

It is ordered, That the respondents, The American News Company and The Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:

> Receiving, or inducing and receiving, or contracting for the receipt of, anything of value from any of their suppliers as compensation or in consideration for display or promotional services or facilities furnished by or through respondents in connection with the processing, handling, sale, or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers

competing with respondents in the sale and distribution of such suppliers' products.

IN THE MATTER OF

VANITY FAIR PAPER MILLS, INC.

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

Docket 7720. Complaint, Jan. 5, 1960—Decision, Apr. 13, 1964

Order modifying, pursuant to a decision of the Court of Appeals, Second Circuit, dated November 17, 1962, 311 F. 2d 480 (7 S.&D. 583), an order of March 21, 1962, 60 F.T.C. 568, which charged a paper products manufacturer with violating Section 2(d) of the Clayton Act, by substituting in lieu of the words, "advertising or other services or facilities", the new words, "advertising or promotional display services or facilities and like or related practices".

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Second Circuit a petition to review and set aside the order to cease and desist issued herein on March 21, 1962; and the court on November 27, 1962, having filed its decision and on December 18, 1962, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is modified, in accordance with the said final decree of the Court of Appeals, to read as follows:

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

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or promotional display services or facilities and like or related practices furnished by or through such customer, in connection with the handling, offering for resale, or resale of the respondent's products, unless such payment is offered or otherwise affirmatively made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

IN THE MATTER OF

THE BORDEN COMPANY

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

Docket 6652. Complaint, Oct. 16, 1956—Decision, Apr. 15, 1964

Consent order requiring the second largest company in the dairy products industry—which, beginning with 1928, had by 1950, prior to the time Section 7 of the Clayton Act was amended, acquired over 500 concerns manufacturing and distributing fluid milk and milk products, and which continued to acquire similar properties to the time complaint was issued—to divest itself absolutely within 18 months, subject to approval of the Commission, of all the assets, properties, rights and privileges, tangible and intangible, acquired as the result of its acquisition of eight regional dairy businesses operating in various towns and counties in Colorado, Nebraska, New Mexico, Kansas, Michigan, Ohio, Florida, District of Columbia, Virginia, Maryland, and Oregon; and prohibiting respondent from selling milk or milk products within the marketing areas of the divested concerns for a 5-year period; and to desist, for 10 years, from acquiring dairy concerns without prior approval of the Commission.

COMPLAINT*

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent, The Borden Company, hereinafter referred to as "Borden" is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York 17, New York.

PAR. 2. Borden is primarily an operating company engaged principally in the purchase, manufacture, processing and distribution of dairy products throughout the United States and Canada. Borden is the second largest dairy company engaged in the dairy products industry in the United States. The company is engaged in commerce as

*Paragraphs 6 and 7 reported as amended by orders of hearing examiner dated Oct. 23, 1962 and May 7, 1963 to reflect additional companies to those alleged to have been acquired by respondent.

"commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 3. A substantial portion of the growth of Borden has been through mergers or acquisitions. Beginning with 1928, Borden initiated a policy of expansion by acquiring a large number of concerns engaged in practically all branches of the dairy products industry. By 1950, prior to the time Section 7 of the Clayton Act was amended, Borden had acquired over 500 concerns engaged in the purchase, manufacture, processing and distribution of fluid milk, ice cream, cheese, butter, milk by-products and condensed and evaporated milk. Primarily as a result of said acquisitions, Borden's net sales increased from $180,849,994 in 1928 to $613,763,267 in 1950. Borden followed a pattern of acquiring dairy concerns in selected localities, strengthening its position in these localities by additional acquisitions, branching out by acquiring companies in nearby localities, consolidating its local acquisitions into broad regional or district organizations, bringing into the fold leading companies in the major regions, and, by this steady pattern of encroachment, becoming a nationwide organization with a substantial share of the purchasing, manufacturing, processing and distribution of dairy products.

PAR. 4. A portion of Borden's business is conducted by eleven domestic and two Canadian subsidiaries. The company's operations are conducted through its six product divisions; viz, Fluid Milk Division, Ice Cream Division, Manufactured Products Division, Cheese Division, Special Products Division and Chemical Division.

Fluid Milk Division: The principal products of this division; viz, milk, cream, cottage cheese, butter, chocolate drink and orange drink, are manufactured or processed in 95 plants and sold in 22 States and two Canadian Provinces.

Ice Cream Division: The principal products of this division; viz, bulk ice cream, packaged ice cream, ice cream novelties and fruit sherbets are manufactured or processed in 62 plants and sold in 32 States and two Canadian Provinces.

Manufactured Products Division: The principal products of this division; viz, condensed and evaporated milk, instant coffee, instant hot chocolate, mince meat, powdered milk and malted milk are manufactured in 38 plants and sold in 48 States, all of Canada, and many foreign markets. This division also operates many milk receiving stations.

Cheese Division: The principal products of this division; viz, natural cheese, dessert cheese, process cheese foods, grated cheese, cocktail spreads and biscuits are manufactured or processed in 22 plants and sold in 48 States, all of Canada, and many foreign markets.

Special Products Division: The principal products of this division; viz, animal feed supplements, poultry feed supplements, soy bean oil, soy bean meal, prescription foods, bakers ingredients, beverage bases, milk sugar, vitamin-mineral fortifiers, and cleaning and sanitizing compounds are manufactured or processed in eight plants and sold in 48 States and all of Canada.

PAR. 5. Borden's net sales for all products increased from approximately $613 million in 1950 to approximately $810 million in 1955, an increase of $197 million, or 30%.

Borden's fluid milk sales increased from approximately $220 million in 1950 to approximately $307 million in 1955, an increase of approximately $87 million, or 39%.

Borden's sales of frozen desserts increased from approximately $107 million in 1950 to approximately $122 million in 1955, an increase of approximately $15 million or 14%. Frozen desserts, as used herein, includes ice cream, ice milk, sherbets, water ices, "mellorine", and other similar frozen dairy products. A substantial portion of the aforesaid increases in sales resulted directly from the acquisitions hereinafter described.

PAR. 6. In a series of transactions beginning in January, 1951, Borden has acquired all or part of the stocks or assets of the following named corporations engaged in the purchase, manufacture, processing or distribution of dairy products. When used herein the term "dairy products" shall include one or any number of the following products: milk, cottage cheese, cream, ice cream, cheese, butter, powdered milk, ice cream mix, canned fresh milk, frozen desserts and evaporated milk. All of the acquired corporations at the time of the said acquisitions, in the regular course of business, either manufactured, purchased, processed or distributed dairy products in and throughout the various States of the United States or purchased and received shipments of dairy products or equipment related to the manufacture, processsing or distribution of dairy products from producers, suppliers, manufacturers or processors located throughout the United States. All of the acquired corporations, prior to and at the time of the acquisitions, were engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. Such acquisitions include the following:

1951

(1) Datson Dairies, Inc., 148 West Street, Orlando, Florida.

(2) Algona Ice Cream & Candy Factory, Inc., 519 Diagonal Street, Algona, Iowa.

(3) Lindale Dairy Corporation, 124 W. Lexington Avenue, High Point, N.C.

1952

(4) Abdella Ice Cream Co., Inc., 6–8 Elm Street, Gloversville, N.Y.

(5) Hawthorne Mellody Farms Dairy of Indiana, Inc., 1224 No. Capitol Avenue, Indianapolis, Indiana.

(6) Oakside Dairy Products, Inc., Route 14, Woodstock, Illinois.

(7) Longhorn Creamery, Inc., 947 South 4th Street, Abilene, Texas.

(8) Bassett Dairies, Inc., 1945 No. Monroe Street, Tallahassee, Florida.

(9) Arden Farms Company, 1900 West Slauson Avenue, Los Angeles, California.

(10) Cooperative Dairies, Inc., Monroe, Louisiana.

1953

(11) Progress Ice Cream Co., Inc., 900 Huntington Street, Watertown, New York.

(12) Winnebago Cheese Company, 217–229 W. Division Street, Fond du Lac, Wisconsin.

(13) Washington Better Foods, Inc., 1400 Alaskan Way, Seattle, Washington.

(14) Schaefer Dairy Co., Inc., 2324 East 30th Street, Indianapolis, Indiana.

(15) Ridge Dairies, Inc., Polk County, Florida.

1954

(16) Sani-Seal Dairies, Inc., 1743 E. Genesee Avenue, Saginaw, Michigan.

(17) Sturtevant Dairy Products Co., 400 16th Street, Rock Island, Illinois.

(18) Pep Creameries, 433 Main Street, Watsonville, California.

(19) McLeran Ice Cream Co., 317 South Spring Street, Tupelo, Mississippi.

1955

(20) Cream-O-Kern, 121 E. 21st Street, Bakersfield, California.

(21) Hi-Lan Dairy, Inc., 2341 Second Avenue, Des Moines, Iowa.

(22) F. H. Soldwedel Co., 301 E. Elizabeth Street, Pekin, Illinois.

(23) Chenango Ice Cream Co., Inc., 16–18 Waite Street, Norwich, New York.

(24) Clover Farms, Inc., 77 Sedgewick Street, Bridgeport, Connecticut.

(25) Everpure, Inc., 1024 E. Fairchild, Danville, Illinois.

(26) Farmer's Dairy Management, Inc., 2707 Dixie Highway, Hamilton, Ohio.

(27) Skipton Dairy Co., Inc., 755 Worthington Street, Springfield, Massachusetts.

(28) Santa Maria Dairy Products Co., Route 3, Baton Rouge, Louisiana.

(29) Brandt Dairies, Inc., Barrington, Illinois.

(30) Terry Dairy Products Co., Inc., Little Rock, Arkansas.

(31) Clover Brand Dairies, Inc., High Point, North Carolina.

1956

(32) Sylvan Seal Milk, Inc., Philadelphia, Pennsylvania.

(33) The Continental Frozen Desserts Company, Oxon Hill, Maryland.

(34) Colonial Ice Cream Company, Inc., Scotia, New York.

1957

(35) Hygienic Dairy Company, Inc., Watertown, New York.

(36) Northern Milk Corporation, Watertown, New York.

1958

(37) Lake Shore Ice Cream, Inc., Marysville, Michigan.
(38) Central Dairy Company, Rockford, Illinois.
(39) Empire Cheese Company, Inc., Spokane, Washington.

1959

(40) Dinsmore Dairy Company, Duval, Florida.
(41) Carlson-Frink Company, Denver, Colorado.
(42) Ball & Company, Lexington, Kentucky.

1960

(43) Idol Dairy Products, Inc., Durham, North Carolina.
(44) Golden Cream Dairy, Inc., Galesburg, Illinois.

1961

(45) Clark Dairy, Inc., West Haven, Connecticut.
(46) Hyde Park Dairies, Inc., Wichita, Kansas.

1954

(47) Mayflower Dairy Company, Little Rock, Arkansas.
(48) Parker Mayflower Dairy Company, Little Rock, Arkansas.
(49) Johnson Ice Cream and Cold Storage Company, Little Rock, Arkansas.

1956

(50) Winters Dairy Company, Marshalltown, Iowa.
(51) East End Dairies, Inc., Indianapolis, Indiana.

PAR. 7. In a series of transactions beginning in January, 1951, Borden acquired all or part of the assets of dairy product concerns, located in twenty-two States, which were individually owned and were not corporations. Such acquisitions include the following:

(1) Arthur B. Hall, Haddam, Connecticut.
(2) R. J. Webb, Kermit, West Virginia.
(3) Wilson Ice Cream Company, Bloomington, Illinois.
(4) Meadowbrook Dairy, Santa Cruz, California.
(5) Blanco Dairy, Watsonville, California.
(6) Eastland Creamery, Eastland, Texas.
(7) James Clark, Tucson, Arizona.
(8) Flint Ideal Dairy, Tuscon, Arizona.
(9) South Texas Producer's Association, Waco, Texas.
(10) Quality Dairies, Pensacola, Florida.
(11) Pipkin Farms Dairy, Lakeland, Florida.
(12) Vinson's Dairy, Fort Valley, Georgia.
(13) Modern Creamery, Gilroy, California.
(14) Sam L. Mills, No. Little Rock, Arkansas.
(15) Scoggins Ice Cream Company, Oklahoma City, Oklahoma.
(16) Triangle Distributing Company, Carlsbad, New Mexico.
(17) Harms Dairy, Savannah, Georgia.
(18) Various Milk Routes, Tuscon, Arizona.
(19) Savannah Ice Cream Co., Savannah, Georgia.
(20) St. Andrews Bay Dairy, Panama City, Florida.

(21) Elco Dairy, Waxahachie, Texas.
(22) Longs Dairy, Stowe, Ohio.
(23) Frymuth's Ice Cream Co., El Paso, Texas.
(24) Gold Medal Dairy Products, Ocala, Florida.
(25) Pine Ridge Dairy, Leesburg, Florida.
(26) Ramer's Dairy, Sebring, Florida.
(27) Mandis Stock Farms & Dairy, Avon Park, Florida.
(28) Carmel Dairy, Carmel, California.
(29) Purity Milk Company, Meridian, Mississippi.
(30) Lanes Creamery, Jackson, Mississippi.
(31) Purity Ice Cream Co., Hot Springs, Arkansas.
(32) Maud Maid Ice Cream Company, Maud, Texas.
(33) Lake Wales Dairy Co., Lake Wales, Florida.
(34) Melba Creamery, Mobile, Alabama.
(35) Mansfield Dairy, Gainesville, Florida.
(36) Nacogdoches Ice Cream Co., Nacogdoches, Texas.
(37) Clearwater Jersey Dairy, Clearwater, Florida.
(38) Forman's Sanitary Dairy, Ft. Lauderdale, Florida.
(39) Schmid Milk Company, Sarasota, Florida.
(40) Ponder's Ice Cream Co., Greer, S.C.
(41) Georgia Better Milk Farms Dairy, Culverton, Georgia.
(42) Sanders Ice Cream Co., Esterville, Iowa.
(43) Mills Dairy, Hudson, Ohio.
(44) Garmon Ice Cream Co., Greenville, Mississippi.
(45) Shamrock Dairy Products Co., Lafayette, Louisiana.
(46) Lucerne Jersey Farm, Augusta, Georgia.
(47) Wren Farms, Waukesha, Wisconsin.
(48) John E. Wampler, Bedford, Indiana.
(49) Charlie O. and Mary V. Pettit, Punta Gorda, Florida.
(50) Harry L. Crisp, Marion, Illinois.
(51) Jack B. Healan (Healan Ice Cream Company), Rock Hill, South Carolina.
(52) Wayne M. Johnson, Joliet, Illinois.
(53) Walter J. Runyan, Warshaw, Indiana.
(54) John W. and Esther F. Shultz (Bon Acre Farms), Galena, Ohio.
(55) Arthur C. and Dora Plautz, Beloit, Wisconsin.
(56) Orrin Merritt (Genoa Dairy), Genoa, Illinois.
(57) Edward Campbell (Campbell Dairy), Knox, Indiana.
(58) Theophil J. Doering and Leo F. Engleton (City Dairy), Rensselaer, Indiana.
(59) William Ziesenhence (Grade "A" Dairy), Rochester, Indiana.
(60) Harold Mitchel (M & M Dairy Service), Goshen, Indiana.
(61) Hayden Patz and Ralph Chrisman (Plymouth Dairy), Plymouth, Indiana.
(62) Louis F. Venezia, Jr., Long Branch, New Jersey.
(63) Joseph Segaert, LaSalle, Illinois.
(64) Russell H. Oeschel, Dixon, Illinois.
(65) Gene E. Kelly and Gladys W. Nelson, Audubon, Iowa.
(66) Thomas and William Walsh, Ottawa, Illinois.
(67) William H. Voorhees (Knickerbocker Farms Dairy), Amsterdam, New York.
(68) Jack Wissen, Streator, Illinois.

(69) Joseph Hines and Harry Taylor, Watseka, Illinois.

(70) Robert Jones, Sr., Robert Jones, Jr., and Gertrude Jones (Jones Dairy), Gilman, Illinois.

(71) Fred Knee (Everpure Dairy), Champaign, Illinois.

(72) Harold A. Peterson and Leroy P. Merritt (Borden Belvidere Distributor), Belvidere, Illinois.

(73) Wayne Hart, Rochelle, Illinois.

(74) John Gramo, Lodi, New Jersey.

(75) Donald Quasebarth, Monon, Indiana.

(76) David F. McCarter and Robert J. McCarter, Jr. (McCarter's Quality Dairy Products), St. Augustine, Florida.

(77) George B. Smith, Trustee of the Estate of Charles W. Williams (Amsterdam Dairy), Schenectady, New York.

(78) Marvin McNitt (Lakeland Ice Cream Company), Cheboygan, Michigan.

(79) Carl F. and Richard C. Lemnitzer (Cadillac Ice Cream Company), Cadillac, Michigan.

(80) Edward Arden, d/b/a Arden Farms Dairy, Valparaiso, Indiana.

(81) John D. Eberhard and Nelda I. Eberhard, Redmond, Oregon.

PAR. 8. Borden's great size and financial resources, in relation to that of its competitors, together with its product and geographical diversification, may give and have given Borden the power, in the course and conduct of its business, to do among other things, the following:

(a) Expend substantial sums to make interest or non-interest bearing loans to customers and potential customers.

(b) Make loans of equipment and facilities in substantial amounts to its customers and potential customers.

(c) Sell equipment and facilities to customers and potential customers at prices that are substantially less than the market value of said equipment and facilities.

(d) Pay substantial sums in the form of rebates to customers and potential customers in advance of being earned.

(e) Make substantial payments to customers and potential customers in the form of gifts and gratuities.

(f) Expend substantial sums for performing service of value for its customers; e.g., repainting the customer's establishment.

(g) Charge favored customers and potential customers discriminatory prices.

(h) Expend substantial sums to promote its various brands through advertising and other promotions.

(i) Hire key employees of competitors eliminated through Borden's acquisitions.

(j) Enter into express or implied agreements or understandings with customers and potential customers which may have and do have the effect of excluding competitors.

PAR. 9. The acquisitions listed in Paragraphs Six and Seven herein, either individually or collectively, may have the effect of substantially

lessening competition or tending to create a monopoly in the following ways, among others:

(a) Industrywide concentration of the purchase, manufacture, processing or distribution of dairy products has been increased;

(b) Actual and potential competition between Borden and the acquired corporations in the purchase, manufacture, processing or distribution of dairy products may be or have been eliminated;

(c) The acquisitions by Borden may enhance Borden's competitive advantage in the purchase, manufacture, processing or distribution of dairy products to the detriment of actual or potential competition;

(d) The acquisitions provide Borden with additional facilities which Borden may utilize to extend practices identical or similar to those hereinbefore described in Paragraph Eight to the detriment of actual or potential competition;

(e) Competitive manufacturers, purchasers, processors or distributors of dairy products may be foreclosed from a substantial segment of the market in that Borden has eliminated the acquired corporations as potential suppliers or customers;

(f) Independent business concerns have been eliminated from the Dairy Products Industry;

(g) Actual and potential competition in the purchase, manufacture, processing or distribution of dairy products may be substantially lessened.

PAR. 10. The foregoing acquisitions alleged and set forth in Paragraph Six constitute a violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18).

PAR. 11. The constant and systematic elimination of actual and potential competitors and otherwise lessening of competition by the means of the acquisitions described in Paragraphs Six and Seven herein are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 12. The foregoing acquisitions, acts and practices, as hereinbefore alleged and set forth, constitute a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45).

ORDER ACCEPTING AGREEMENT CONTAINING ORDER TO CEASE AND DESIST

This matter having come before the Commission upon the hearing examiner's certification of the agreement between the parties containing a consent order to cease and desist, and it appearing that the

agreement that has been entered into affords an adequate basis for an appropriate disposition of this proceeding and should be accepted, and that the Commission itself should initially decide this matter, and forthwith issue its decision and order:

The agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Avenue, in the city and State of New York.

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

I.

It is ordered, That The Borden Company within a period not exceeding eighteen (18) months after the service upon it of this order, unless extended, shall divest itself absolutely and in good faith, subject to the prior approval of the Commission of:

A. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks, and goodwill acquired by The Borden Company as a result of the acquisition of the capital stock of Carlson-Frink Company, which are now used in the business so acquired, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Carlson-Frink Company and are now used in the business so acquired, in such manner as to restore it as a going concern in the processing, distribution and sale of fluid milk, buttermilk, cream and cottage cheese, and in the manufacture, distribution and sale of ice cream, ice milk, sherbets and water ices in the following counties:

Colorado

Adams	Elbert	Phillips
Arapahoe	Fremont	Prowers
Baca	Gilpin	Pueblo
Boulder	Grand	Sedgwick
Clear Creek	Jefferson	Teller
Custer	Kit Carson	Washington
Denver	Larimer	Weld
Douglas	Logan	Yuma
El Paso	Morgan	

Nebraska

Cheyenne	Deuel

New Mexico

Colfax	Union

B. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and goodwill acquired by The Borden Company as a result of the acquisition of the capital stock of Hyde Park Dairies, Inc., which are now used in the business so acquired, together with all plants, machinery, buildings, improvements, equipment and all other property of whatever description which have been added to the property of Hyde Park Dairies, Inc., and are now used in the business so acquired, in such manner as to restore it as a going concern in the processing, distribution and sale of fluid milk, buttermilk, half & half, cream and cottage cheese, and in the distribution and sale of ice cream, ice milk and sherbets in the following counties in Kansas:

Barber	Harvey	Stafford
Barton	Kingman	Sumner
Butler	Pawnee	Rush
Cowley	Reno	Russell
Ellsworth	Rice	
Harper	Sedgwick	

C. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and goodwill acquired by The Borden Company as a result of the acquisition of the assets of Sani-Seal Dairies, Inc., which are now used in the business so acquired, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Sani-Seal Dairies, Inc., and are now used in the business so acquired, in such manner as to restore it as a going concern in the processing, distribution and sale of fluid milk, buttermilk, half & half and cream in the following towns and counties in Michigan:

Towns

Atlanta	Easu Lake	North Bradley
Bell	Edenville	North Branch
Bentley	Frankenmuth	North Point
Birch Run	Freeland	Pinconning
Bridgeport	Hemlock	Port Sanilac
Carsonville	Hillman	Presque Isle
Carrollton	Lapeer	Saginaw
Clifford	Lewiston	Sandusky
Coleman	Marlette	Sanford
Columbiaville	McGregor	Snover
Crump	Merrill	St. Louis
Davison	Midland	Watertown
Deckerville	Mount Pleasant	Zilwaukee

Counties

Alcona	Clare	Ogemaw
Alpena	Gladwin	Oscoda
Arenac	Huron	Roscommon
Bay	Iosco	Tuscola

D. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks, and goodwill acquired by The Borden Company as a result of the acquisition of the assets of Farmers Dairy Management, Inc., which are now used in the business so acquired, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Farmers Dairy Management, Inc., and are now used in the business so acquired, in such manner as to restore it as a going concern in the processing, distribution and sale of fluid milk, buttermilk, half & half, cream and cottage cheese in Hamilton County, Ohio and the following towns in Ohio:

Bethany	Mandville	Pisgah
College Corner	Millville	Seven Mile
Fairfield	New Miami	Somerville
Hamilton	Overpeck	West Chester
Huntsville	Oxford	Williamsdale

E. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and goodwill acquired by The Borden Company as a result of the acquisition of the assets of Dinsmore Dairy Company, which are now used in the business so acquired, together with all machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Dinsmore Dairy Company and are now used in the business so acquired, in such manner as to restore it as a going concern in the distribution and sale of fluid milk, buttermilk, half & half and butter in the following towns in Florida:

Atlantic Beach	Jacksonville Beach	O'Neil
Fernandina Beach	Mayport	Ponte Vedra Beach
Jacksonville	Neptune Beach	Yulee

F. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all equipment, trade names, trademarks and goodwill acquired by The Borden Company as a result of the acquisition of the assets of the Continental Frozen Desserts Company, which are now used in the business so acquired, together with all machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Con-

tinental Frozen Desserts Company and are now used in the business so acquired, in such manner as to restore it as a going concern in the distribution and sale of ice cream, ice milk, sherbets and water ices in the District of Columbia, Arlington County, Virginia and the following towns in Maryland:

Andrews Air Force Base	College Park	Mt. Rainier
Bethesda	East Pines	Oxon Hill
Brentwood	Forest Heights	Rockville
Camp Springs	Glassmanor	Silver Spring
Cheltenham	Hyattsville	Suitland
Chevy Chase	Langley Park	Takoma Park
Clinton	Morningside	Wheaton

G. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all equipment, trade names, trademarks, and goodwill acquired by The Borden Company as a result of the acquisition of the assets of the unincorporated dairy business of David F. McCarter doing business as McCarter's Quality Dairy Products and Robert J. McCarter, Jr. (hereinafter referred to as "McCarter's"), which are now used in the business so acquired, together with all machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of McCarter's and are now used in the business so acquired, in such manner as to restore it as a going concern in the distribution and sale of fluid milk in the following towns in Florida:

College Park	Moultrie	St. Augustine Beach
Crescent Beach	St. Augustine	Vilano Beach

H. All assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, trade names, trademarks and goodwill acquired by The Borden Company as a result of the acquisition of the assets of the unincorporated dairy business owned by John D. Eberhard and his wife, Nelda I. Eberhard, at Redmond, Oregon (hereinafter referred to as "Eberhard"), which are now used in the business so acquired, together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which have been added to the property of Eberhard and are now used in the business so acquired, in such manner as to restore it as a going concern in the purchasing and processing of raw milk secured from producers located in the following counties in Oregon:

Crook	Deschutes	Jefferson

I.

By such divestitures, under the terms set forth in paragraphs A through H above, none of the stock, assets, rights or privileges,

tangible or intangible, acquired or added by respondent, shall be sold or transferred, directly or indirectly, to anyone who, immediately following the respective divestitures, shall be a stockholder holding more than one-half of 1% of the outstanding stock of the respondent, an officer, director, representative, employee or agent or otherwise directly or indirectly connected with or under the control of the respondent.

II.

Pending divestiture, respondent shall not make any changes in the plants, machinery, buildings, equipment or other property of whatever description which shall materially impair their present rate of capacity for the processing, distribution or sale of fluid milk or related products (such as, where applicable, buttermilk, half & half, cream, cottage cheese and butter), ice cream, ice milk, mellorine, sherbets or water ices, or their market value, unless said capacity or value is restored prior to divestiture.

III.

Respondent shall divest itself of the above-identified assets of Carlson-Frink Company, Hyde Park Dairies, Inc., Sani-Seal Dairies, Inc., Farmers Dairy Management, Inc., Dinsmore Dairy Company, Continental Frozen Deserts Company, McCarter's and Eberhard in the following manner and subject to the following conditions:

A. Beginning promptly after the date of service of this order upon respondent by the Commission, respondent shall make diligent efforts in good faith to sell the above-identified assets of the above named eight concerns in the manner set forth in Section I above and shall continue such efforts to the end that the sale thereof shall be effected within the aforesaid period of 18 months. Respondent shall submit to the Commission summary reports of the efforts made by respondent to obtain or discover purchasers or potential purchasers, and respondent shall submit to the Commission summaries of conversations of authorized representatives of respondent with potential purchasers or their representatives relating to the sale of such assets, and, subject to any legally recognized privilege, copies of all written communications pertaining to negotiations, offers to buy or indications of interest in the acquisitions of the whole or a part of the assets in question, within 15 days after the termination of the calendar month in which the conversations occurred or the communications were sent or received by respondent.

B. If complete divestiture shall not have been accomplished within the aforesaid period of 18 months or any extension of said period which the Commission may grant, the Commission will give respondent notice and afford it an opportunity to be heard before the Commission

issues any further order or orders which the Commission may deem appropriate.

C. For the protection of the purchaser or purchasers of the Carlson-Frink Company assets, respondent shall not sell fluid milk, buttermilk, cream, cottage cheese, ice cream, ice milk, sherbets or water ices for a period of five years from the effective date of the sale of such assets in or for the purpose of resale in the counties listed in paragraph A in Section I above.

D. For the protection of the purchaser or purchasers of the Hyde Park Dairies, Inc., assets, respondent shall not sell fluid milk, buttermilk, half & half, cream, cottage cheese, ice cream, ice milk or sherbets for a period of five years from the effective date of the sale of such assets in or for the purpose of resale in the counties listed in paragraph B in Section I above.

E. For the protection of the purchaser or purchasers of the Sani-Seal Dairies, Inc., assets, respondent shall not sell fluid milk, buttermilk, half & half or cream for a period of five years from the effective date of the sale of such assets in or for the purpose of resale in any of the towns and counties listed in paragraph C in Section I above.

F. For the protection of the purchaser or purchasers of the Farmers Dairy Management, Inc., assets, respondent shall not sell fluid milk, buttermilk, half & half, cream or cottage cheese for a period of five years from the effective date of the sale of such assets in or for the purpose of resale in the towns and county listed in paragraph D in section I above.

G. For the protection of the purchaser or purchasers of the Dinsmore Dairy Company assets, respondent shall not sell fluid milk, buttermilk, half & half or butter for a period of five years from the effective date of the sale of such assets in or for the purpose of resale in the towns listed in paragraph E in Section I above.

H. For the protection of the purchaser or purchasers of the Continental Frozen Desserts Company assets, respondent shall not sell ice cream, ice milk, sherbets or water ices for a period of five years from the effective date of the sale of such assets in or for the purpose of resale in the District of Columbia and the county and towns listed in paragraph F in Section I above.

I. For the protection of the purchaser or purchasers of the assets of McCarter's, respondent shall not sell fluid milk for a period of five years from the effective date of the sale of such assets in or for the purpose of resale in the towns listed in paragraph G in Section I above.

J. For the protection of the purchaser or purchasers of the assets of Eberhard, respondent shall not sell cream or butter for a period of

five years from the effective date of the sale of such assets in or for the purpose of resale in the counties listed in paragraph H in Section I above, and shall not purchase raw milk for the same period from producers located in said counties.

K. Within sixty days after divestiture of the assets of each of the eight concerns listed above in paragraphs C through J, respondent shall file with the Commission a report in writing setting forth in detail the manner and form in which it shall have complied with the terms of this Order with respect thereto.

L. Respondent is not required by this Order to sell, license or in any way convey and rights to any of its trademarks or trade names including "Borden's", not acquired from the eight concerns listed above.

IV.

It is further ordered, That for a period of ten years respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries, or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any domestic concern, corporate or noncorporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any state of the United States or the District of Columbia in the business or manufacturing, processing or selling at wholesale or on retail milk routes (a) fluid milk, (b) ice cream, ice milk, mellorine, sherbets or water ices, (c) natural or processed cheese, or (d) butter, without the prior approval of the Federal Trade Commission.

IN THE MATTER OF

2361 STATE CORP. ET AL.

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

Docket C-735. Complaint, Apr. 21, 1964—Decision, Apr. 21, 1964

Consent order requiring Chicago manufacturers of mattresses, box springs and other bedding products, to cease representing falsely by attaching to their mattresses labels upon which fictitious and excessive amounts were printed that such amounts did not exceed the highest price at which substantial sales were made in their trade area; and by use of such words on labels as "ORTHOPEDIC" along with a picture of a man in white jacket that the mattresses were specially designed to prevent or correct body deformities and were prescribed by doctors.

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 2361 State Corp., a corporation (formerly known as A. Brandwein & Co.), and Harry J. Brandwein and Sidney L. Brandwein, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent 2361 State Corp. (formerly known as A. Brandwein & Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the state of Illinois, with its principal office and place of business located at 2361 South State Street, Chicago 16, Illinois.

Respondents Harry J. Brandwein and Sidney L. Brandwein are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in the advertising, manufacturing, sale and distribution of mattresses, box springs and other bedding products to retailers for resale to the public.

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

PAR. 4. Respondents, for the purpose of inducing the purchase of their mattresses, have engaged in the practice of attaching, or causing to be attached, to their mattresses labels upon which certain amounts are printed thereby representing, directly or by implication, that said amounts do not appreciably exceed the highest price at which substantial sales of the preticketed article are made in respondents' trade area. In truth and in fact said amounts are fictitious and are appreciably in excess of the highest price at which substantial sales of said preticketed article are made in respondents' trade area.

PAR. 5. Respondents, in the course and conduct of their business, and for the purpose of inducing the sale of their mattresses, have

engaged in the practice of attaching or causing to be attached to their mattresses labels which contain statements, representations and depictions of which the following are typical but not all inclusive.

ORTHO-PEDIC
DE LUXE

CITATION
SCIENTIFICALLY CONSTRUCTED

FOR PROPER SUPPORT

[Depiction of a woman reclining on a mattress. Standing to one side is a man in white jacket, obstensibly a Doctor, writing a prescription.]

Created exclusively by
A. BRANDWEIN and CO., CHICAGO, ILL.

Beauty Bracer
ortho-pedic type construction

PAR. 6. By and through the use of the aforesaid statements and representations appearing on labels respondents have represented directly or indirectly:

1. Through the use of the name "Ortho-Pedic" and the statement "orthopedic type construction" alone or in conjunction with the various statements and representations above set forth relating to said mattresses, that said mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief with respect to a specific body deformity or deformities and accord with recommendations of orthopedic authorities respecting design and construction of mattresses for the prevention, correction or relief of such deformity or deformities.

2. That doctors or the medical profession prescribe the use of mattresses manufactured and sold by respondents.

PAR. 7. In truth and in fact:

1. Said mattresses have not been specially designed and constructed so as to prevent, correct or afford substantial relief with respect to a specific body deformity or deformities and do not accord with recommendations of orthopedic authorities respecting design and construction of mattresses for the prevention, correction or relief of such deformity or deformities. Said mattresses are stock mattresses which are generally available and indiscriminately offered for sale and sold to the consuming public.

2. Doctors or the medical profession do not prescribe the use of mattresses manufactured and sold by respondents.

Therefore the statements and representations as set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

PAR. 8. Respondents, by labeling their mattresses in the manner aforesaid have placed in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail price of said mattresses, the savings afforded to customers thereof and the therapeutic properties of said mattresses.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of mattresses of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby

issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent, 2361 State Corp., which corporation was formerly known as A. Brandwein & Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2361 South State Street, Chicago 16, Illinois.

Respondents Harry J. Brandwein and Sidney L. Brandwein are officers of the corporation and their address is the same as that of the corporation.

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

ORDER

It is ordered, That respondents 2361 State Corp., a corporation (formerly known as A. Brandwein & Co.), and its officers, and Harry J. Brandwein and Sidney L. Brandwein, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of mattresses, box springs, bedding products or any other article of merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing merchandise at an indicated retail price or otherwise disseminating or advertising a list, suggested or other indicated retail price for respondents' merchandise: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted for violation hereof, for respondents to affirmatively establish that such indicated retail price was disseminated or advertised in good faith and has not appreciably exceeded the highest price at which substantial sales of such article were being made in respondents' trade area.

2. Misrepresenting, directly or indirectly, the retail price at which respondents' merchandise is sold in respondents' trade area or the retail price at which respondents' merchandise is sold in the trade area of any distributor or dealer in respondents' merchandise.

3. Using on labels or in any other manner depictions of doctors or members of the medical profession or representing, directly or indirectly, that members of the medical profession prescribe the use of respondents' mattresses or other bedding products.

4. Using the word orthopedic or any variation thereof or the statement "Ortho-pedic type construction" or any other word,

term or statement of similar import or meaning in reference to or as descriptive of any said products: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted for violation hereof for respondents to establish affirmatively that:

(a) The product involved has been specially designed and constructed so as to prevent, correct or afford substantial relief with respect to a specific body deformity or deformities;

(b) The design and construction of such product accords with recommendations of orthopedic authorities for the prevention, correction or relief of such body deformity or deformities; and

(c) In using said word, term or statement, as aforesaid, it was accompanied by a designation of the kind or kinds of body deformities for which the product involved had been so designed and constructed.

5. Furnishing or otherwise placing in the hands of retailers or dealers of said products the means and instrumentalities by and through which they may mislead or deceive the purchasing public in respect to the things hereinbefore prohibited.

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

FRANK G. SHATTUCK COMPANY ET AL.

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

Docket 7743. Complaint, Jan. 12, 1960—Decision, Apr. 22, 1964

Order dismissing complaint which charged four affiliated firms in the candy and confectionery business with price discrimination in violation of Sec. 2(a) of the Clayton Act. As to three of the respondents there was insufficient evidence to support the allegations of the complaint; as to the fourth respondent the record supported the defense of good faith meeting of competitors' prices.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section

2(a) of the amended Clayton Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint as follows:

PARAGRAPH 1. Respondent Frank G. Shattuck Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 50 West 23rd Street, New York, New York. This respondent also maintains an office at 18 West Street, in Boston, Massachusetts.

Respondent W. F. Schrafft & Sons Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 529 Main Street, Charlestown, Boston, Massachusetts. This respondent is a wholly owned subsidiary of the Frank G. Shattuck Company.

Respondent Schrafft's Sales Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 133-34 36th Road, Flushing, New York. This respondent is also a wholly owned subsidiary of the Frank G. Shattuck Company.

Respondent Wallace & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 460 Smith Street, Brooklyn, New York. This respondent is also a wholly owned subsidiary of the Frank G. Shattuck Company.

PAR. 2. Respondents are engaged in the business of manufacturing, distributing and selling candy and confectionery products. Respondents' total sales for the year 1958 were approximately $56,000,000.

PAR. 3. These products were sold by respondents for use, consumption, or resale within the United States and respondents caused them to be shipped and transported from the state of location of their principal places of business to purchasers located in States other than the State in which the shipment or transportation originated.

PAR. 4. Respondents maintain a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products described, among and between the States of the United States.

Respondent W. F. Schrafft & Sons Corporation maintains and operates a manufacturing plant located in Charlestown near Boston, Massachusetts. From this plant it ships and sells throughout the United States to various purchasers located in the several States of the United States, including New York.

Respondent Wallace & Co. maintains and operates a manufacturing plant located in Brooklyn, New York. Through its jobbers, including respondent Schrafft's Sales Corporation, respondent Wallace & Co. ships and sells its candy products throughout the United States to various purchasers located in the several States of the United States.

PAR. 5. In the course and conduct of their business in commerce, respondents are discriminating in price between different purchasers of their products of like grade and quality by selling to some purchasers at higher and less favorably prices than they sell to other purchasers competitively engaged in the resale of their products with the non-favored purchasers.

For example, in the distribution and sale of their candy products, respondents have consistently charged independent retailers list price, and have granted the variety and drug chains list price less 10%. To illustrate, in Niagara Falls, New York, the following customers receive a 10% discount plus a 2% cash terms discount: Walgreen Drug and F. W. Woolworth Co. The following customers receive a 10% allowance but did not receive a 2% cash terms discount: Saraceni Drug, Mario De Gregari, People's Drug, Pine Drug, and Thriftway Five and Ten. The following customers receive a 2% cash terms discount but did not receive the special 10% allowance: Brittman, St. Francis Gift Shop, Tony and Lil's, Lo Tempio, Catatano Bros., La Salle Pharmacy Sarkus, Blue's Drug, Girard Pharmacy and Albert D'Amico.

PAR. 6. In the course and conduct of their business in commerce, respondents are competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution and sale of their products.

PAR. 7. The effect of respondents' discriminations in price, as alleged, may be substantially to lessen, injure, destroy or prevent such competition as alleged or tend to create a monopoly in the lines of commerce in which respondents and their purchasers are engaged.

PAR. 8. The foregoing acts and practices of the respondents as alleged violate Section 2(a) of the amended Clayton Act (U.S.C. Title 15, Sec. 13).

Mr. Thomas A. Sterner for the Commission.

White & Case by *Mr. Edgar E. Barton* and *Mr. Scott E. Bohon* of New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

SEPTEMBER 20, 1962

INDEX

PRELIMINARY STATEMENT

The complaint in this proceeding charges respondents Frank G. Shattuck Company, a Massachusetts corporation (hereinafter "Shattuck") and its wholly owned subsidiaries W. F. Schrafft & Sons Corporation, a Massachusetts corporation (hereinafter "Schrafft"),

Schrafft's Sales Corporation, a Delaware corporation (hereinafter "Schrafft Sales") and Wallace & Co., a New Jersey corporation (hereinafter "Wallace") with violating § 2(a) of the amended Clayton Act (15 U.S.C. § 13)[1] by "discriminating in price between different purchasers of their products of like grade and quality by selling to some purchasers at higher and less favorable prices than they sell to other purchasers competitively engaged in the resale of their products with the non-favored purchasers".

In this record counsel supporting the complaint (hereinafter "complaint counsel") has limited his proof of competitive injury, if any is proved, to competition at the retail level, to "secondary line" or "third line" competition.

Original complaint counsel, at the time complaint issued and until he was replaced by the present counsel on September 29, 1961, sought to prove that the parent company, Shattuck, although not a seller of the product line involved in the alleged price discrimination, exercised such degree of direction and control over the sales of its subsidiaries, the other corporate respondents, as to be liable for such § 2(a) violations as might be proven against any or all of such corporate subsidiary respondents in their sales of the product line. The original complaint counsel also stated his intention to prove that Schrafft Sales was and is engaged in interstate commerce, and can be held under § 2(a) of the Clayton Act for any price discriminations proven against it. In his proposed findings filed on August 17, 1962, present complaint counsel has admitted that the record will not support findings of fact and conclusions of law which would justify a cease-and-desist order against Shattuck and Schrafft Sales and in his oral argument on August 23, 1962, complaint counsel stated that this proceeding should be dismissed as to Shattuck and Schrafft Sales for failure of proof. The hearing examiner had arrived at the same conclusion by his independent examination of the record and such dismissal order as to Shattuck and Schrafft Sales will be entered. However, a proper evaluation of the record for initial decision does involve some minimal findings as to both these companies. These will be made later.

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[1] "* * * That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

In view of complaint counsel's admission that a case has not been made out in this record as to Shattuck and Schrafft Sales, the present posture of the case requires a determination only of:

(1) whether W. F. Schrafft & Sons Corporation ("Schrafft") has been proven to have violated § 2(a) of the Clayton Act under an "indirect purchaser" theory; and

(2) (a) whether Wallace's additional discounts to certain retail outlets and others constitute price discrimination under § 2(a);

(b) if so, whether competitive injury resulting from such price discrimination stands proven in this record; and

(c) if so, whether such discrimination may be justified under the "meeting competition" defense permitted under § 2(b)[2] of the Clayton Act, as amended.

Both Schrafft and Wallace sell the product line here involved.

Hearings have been conducted in Washington, D.C., and in Rochester, Buffalo, Syracuse and New York, New York. During the course of the hearings when the transcript consisted of 815 pages and there were over 700 Commission exhibits, the original complaint counsel resigned from the Commission to accept employment elsewhere. The new complaint counsel was given a generous extension of time within which to acquaint himself with the record, and particularly to decide whether he would use stipulations which had previously been negotiated by his predecessor. The present complaint counsel renegotiated the stipulations, which are now 57 pages in length, contain the testimony of 44 witnesses, and were admitted on March 15, 1962, as CX-737. The renegotiation by counsel and acceptance of the stipulations by the examiner obviated additional hearings in Buffalo, Rochester, Syracuse, and Niagara Falls, New York.

Proposed findings, conclusions, and briefs have been submitted and argued by the parties. Based upon the entire record, including the exhibits and stipulations, the examiner makes the findings and conclusions hereinafter set forth. Any finding proposed by the parties which is not hereinafter made in the form proposed, or in substantially that form, hereby is rejected. The fact that no finding summarizes the evidence in the exact manner which the parties have requested does not mean that such evidence has not been considered. It means merely that the examiner deems the evidence as summarized in his findings to be sufficiently relevant, probative, substantial and

[2] "* * * on proof being made * * * that there has been discrimination in price * * *, the burden of rebutting the prima facie case * * * shall be upon the person charged with a violation of this section * * * *Provided, however,* that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser * * * was made in good faith to meet an equally low price of a competitor."

material to dispose of the issues presented. All motions which have not previously been ruled upon, and which are not herein specifically ruled upon, are hereby overruled and denied.

Based upon the entire record, the hearing examiner makes the following:

FINDINGS OF FACT AND CONCLUSIONS

I. The Product Involved

1. The product line involved in this proceeding is the type of candy or confectionery known as "packaged gift chocolates" or "boxed candy" or "fancy packages", *i.e.*, factory-packaged boxes of candy, such as miniature chocolates which are usually sold at retail in one-pound or two-pound boxes at prices ranging from about $1.35 to $2.25 a pound, with an average price of about $1.60 a pound (or sold at somewhat higher prices per pound in the case of certain special packaging such as Valentine hearts with corsages, etc.). With respect to the respondent Wallace, the product line involved in this proceeding is the type of packaged candy or confectionery described on the Wallace price lists as: "Fancy Packages", intended to retail at prices ranging from about $1.59 to $1.89 a pound, "Specialty Packages" intended to retail at prices ranging from about $0.29 to $1.50 per package, and "Jelly Treat Paks" intended to retail at about $0.39 per package.

II. The Case Against Shattuck and Schrafft Sales. Description of the Respondents and their Business and Relationships

A. Frank G. Shattuck Company

2. Respondent Frank G. Shattuck Company, a Massachusetts corporation, has its principal office at 50 West 23rd Street, New York City. It also has an office at 18 West Street, Boston, Massachusetts. Its shares of corporate stock are listed for trading on the New York Stock Exchange. Its net sales, including those of all wholly owned subsidiaries, were $61,650,076 in 1959; $66,869,769 in 1960; and $70,276,887 in 1961. Shattuck operates approximately 50 restaurants which are located in more than one State of the Union, a catering service, business food services, coffee services, and retail shops in New York City, which sell at retail the product line here involved and other food and food line products. Shattuck sells some of its products through supermarket "Quality Isles". It has franchised restaurants in States other than New York which are operated under the Schrafft name. Shattuck sells ice cream and ice cream toppings, fudges and fruit syrups at wholesale. At its bakery and plant in New York City, Shattuck prepares or manufactures bakery goods, some

types of hard candy, and kitchen-type confections. Shattuck does not manufacture the type of boxed candy constituting the product line here involved. It purchases such boxed candy for resale at retail from its wholly owned subsidiary, respndent Schrafft. Shattuck resells this boxed candy at retail through its restaurants and retail stores. Shattuck is engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

3. During the time relevant to this proceeding Shattuck owned all of the issued and outstanding capital stock of the corporate respondents Schrafft, Schrafft Sales and Wallace. As such sole stockholder Shattuck normally would elect the directors of its wholly owned subsidiaries. The officers and directors of the four corporate respondents for the years 1957, 1958, and 1959 were:

Officers and directors of Frank G. Shattuck Co. and wholly owned subsidiaries 1957–1959, incl.

	Frank G. Shattuck Co.	W. F. Schrafft & Sons	Wallace & Co.	Schrafft Sales
Gerald Shattuck	1957 P, D	1957 D		
	1958 P, D			
	1959 P, D			
Harold D. Shattuck	1957 VP, D			
	1958 VP, D			
	1959 VP, D			
Hazen W. Jones	1957 VP, Cl, D			
	1958 VP, Cl, D			
	1959 VP, Cl, D			
Charles F. Oestereich	1957 VP, Sec.		1957 Sec.	1957 Sec., D
	1958 VP, Sec.		1958 Sec.	1958 Sec., D
	1959 VP, Sec.		1959 Sec.	1959 Sec., D
H. Morgan Shattuck	1957 VP	1957 D		
	1958 VP, D	1958 D		1958 D
	1959 VP, D	1959 D		1959 D
Henry B. Kennedy	1957 VP			
	1958 VP			
	1959 VP			
Francis C. Raethle	1957 VP			
	1958 VP			
	1959 VP			
Wesley W. Lang	1957 T			
	1958 T		1958 Asst. T	1958 Asst. T
	1959 T		1959 Asst. T	1959 Asst. T
Christopher J. Kelly	1957 Asst. VP			
	1958 Asst. VP			
	1959 Asst. VP			
LeRoy R. Sturn	1957 Asst. T			
	1958 Asst. T			
	1959 Asst. T			
Henrietta H. Gunsten	1957 Asst. Sec.			
	1958 Asst. Sec.			
	1959 Asst. Sec.			
Allen J. Schnetzer	1957 Comp.			
	1958 Comp.			
	1959 Comp.			
Alan R. Morse	1957 D			
	1958 D			
	1959 D			
John G. Shattuck	1957 D			1957 D
Isidore J. Silverman	1957 D			
	1958 D	1958 D, P		
	1959 D	1959 D, P		
Carroll D. Fearon	1958 VP			
	1959 VP			
Roland M. Howell	1958 VP			
	1959 VP			
Frank M. Folsom	1958 D			
	1959 D			

Officers and directors of Frank G. Shattuck Co. and wholly owned subsidiaries 1957–1959, incl.—Continued

	Frank G. Shattuck Co.	W. F. Schrafft & Sons	Wallace & Co.	Schrafft Sales
Walter A. McNeill	1957 D 1958 D	1957 P, D 1958 P, D	1957 D 1958 D	1957 D 1958 D
William O. Wallburg		1957 VP, Cl., D 1958 VP, Cl., D 1959 VP, Cl., D		
William V. Wallburg		1957 D 1958 D 1959 D		
William A. Silverman		1957 VP, D 1958 VP, D 1959 Exec. VP, D		
Earle Erickson		1957 VP 1958 VP		
Ernest H. Schurian		1957 T 1958 T 1959 T		
Edgar H. Savage		1957 D 1958, VP, D		
Samuel Sidd		1957 D 1958 D, VP 1959 D, VP		
Thomas E. Kneeland		1958 VP, D 1959 VP, D		
George F. Schrafft		1958 D 1959 D		
Edward J. Murrman		1959 VP		
Gerard E. Mulrahan		1959 VP		
Herbert L. Bebar			1957 P, GM, D 1958 P, GM, D 1959 P, GM, D	
Edward A. Terry			1957 VP, D 1958 VP, D 1959 VP, D	
John P. Joyce			1957 VP, D 1958 VP, D 1959 VP, D	
George B. Newman			1957 T, D 1958 T, D 1959 T, D	
Lawrence West				1957 P, GM, D 1958 P, GM, D 1959 P, GM, D
Louis G. Best				1957 T, D 1958 T, D 1959 T, D
Thomas L. Shattuck			1959 D	1959 D

NOTE: Abbreviations used:
President=P
Vice President=VP
Treasurer=T
Secretary=Sec.
Comptroller=Comp.
Director=D
Clerk=Cl

B. Schrafft's Sales Corporation

4. Schrafft's Sales Corporation, a Delaware corporation, (hereinafter Schrafft's Sales), with its principal office at 133–34 36th Road, Flushing, New York, is not a manufacturer of the product line here involved, but sells the product line at wholesale, exclusively within the State of New York. In addition it sells toys, fountain specialties and novelties. Schrafft Sales sells to approximately 7,000 retail accounts located within the seven New York counties of Westchester, Nassau, Suffolk, New York, Bronx, Kings and Queens. Schrafft Sales'

total volume of business is about $1,600,000 per year. It purchases and resells candy manufactured by Schrafft and Wallace, as well as other types of candy including Gardini chocolates, Phoenix candies, Minter bars, Callard & Bowser toffy and Greylock marshmallows. Approximately 80% of its sales volume is represented by candy manufactured by Schrafft.

5. Schrafft Sales, organized in 1939 (under the name Kantiko Inc.), is a wholly owned subsidiary of Shattuck and is successor to the wholesale jobbing business of the J. C. Schriner Co., a general confectionery jobber in New York City which went out of business in 1930. Its name was later changed from Kantiko Inc. to Shattuck Sales Company, and then to Schrafft's Sales Corporation.

6. The President, General Manager and operating head of Schrafft's Sales is Lawrence West, who has held that position for five years, and who has been employed by the Corporation since its incorporation in 1930. Prior to 1930, Mr. West had been employed by the preceding jobber, the J. C. Schriner Co. (p. 25). Mr. West, as the operating head of Schrafft's Sales, in fact runs Schrafft's Sales, acts as sales manager, and determines its sales policies, and the prices and terms upon which it sells its merchandise. Mr. West is not an officer of Shattuck but he keeps the president of Shattuck informed as to the overall financial situation of Schrafft's Sales, and consults with the Shattuck president about any capital requirements for refurbishing or plant improvement. No individual in Shattuck acts as liaison between Shattuck and Schrafft's Sales (p. 757). There is no evidence that Shattuck, or any of its officers or employees, either control or attempt to control the business operations or the sales policies or prices of Schrafft's Sales Corporation.

7. Schrafft Sales sells to all of the chain retail stores in its area which purchase Schrafft candy, including approximately eight or nine Walgreen drug stores, fifty Whelan drug stores, three Rexall drug stores, fifteen Grant variety stores, 150 Woolworth variety stores and four Newberry variety stores, at prices equivalent to 40% off the suggested retail price, plus 2% cash discount for prompt payment. The company has found it necessary to grant the 40% and 2% discounts to these retail outlets in order to meet the competition which it faces in selling candy and other products. The facts regarding the necessity for Schrafft Sales, Schrafft's and Wallace meeting the competitive prices in order to obtain and keep their candy business were testified to by the chain store candy buyers, called as witnesses by complaint counsel.

8. Some retail customers purchase Schrafft candy from Schrafft's Sales at a discount of 33⅓% from the suggested retail price, and a 2% cash discount for prompt payment.

Schrafft Sales' total sales to drug chains were as follows:

	1957	1958
United Whelan Drug Corp	$23,295	$22,672
Walgreen Drug Co	13,568	15,560
Rexall Drug Co	5,515	5,579
Jaynet Drug Co	3,184	5,724
Crown Drug Co	1,608	2,356

9. Schrafft's Sales employs about 57 persons, including nineteen salesmen. Two of these salesmen cover all of the chain store accounts to which Schrafft's Sales sells. The two salesmen who cover the chain store accounts are paid on a salary basis, while the other seventeen salesmen are paid on a commission of 7% of their sales. In most instances, Schafft's Sales delivers directly to the individual retail store of a chain. However, deliveries to the Crown Drug Company are made to that company's central warehouse in Brooklyn, New York.

10. On page 28 of his proposed findings, complaint counsel admits, and the hearing examiner hereby finds and concludes, that the record does not support a finding that Schrafft Sales is engaged in commerce as "commerce" is defined in the amended Clayton Act.

C. Wallace & Co.

11. Wallace, founded in 1870, is engaged in manufacturing, at its plant in Brooklyn, New York, and selling certain types of candy and confectionery products, including boxed candy, directly to retail outlets such as candy stores and department stores through its own staff of nine salesmen. Wallace sells to about 4,000 retail accounts throughout the United States. During the period from 1957 through 1959, Wallace also sold a small volume of boxed candy to about 20 to 25 jobbers, including Schrafft Sales. In 1960 Wallace sold to about 35 jobbers, including Schrafft Sales.

12. Herbert L. Bebar, president of Wallace for approximately 5½ years, was vice president and general manager for the preceding four years. The business operations of Wallace are conducted by Mr. Bebar and the two vice presidents, Edward Terry in charge of production, and John Joyce in charge of sales. None of these men are officers of Shattuck. Mr. Bebar keeps the president of Shattuck informed as to the overall financial condition of Wallace, and consults with the president of Shattuck concerning any capital requirements for refurbishing and plant improvement. No individual in Shattuck acts as liaison between Shattuck and Wallace.

13. There is no evidence that Shattuck, or any of its officers or employees, either control or attempt to control the business operations, the sales policies, or the pricing practices of Wallace.

14. Wallace sells boxed candy to certain of its retail customers, principally department stores, at a 10% discount from its regular price to retailer (or the equivalent of a discount of 40% off the suggested retail price) because it has found it necesary to grant the additional 10% discount to meet the prices offered by its competitiors (pp. 193–198, 881–900). Wallace sells boxed candy to its other retail customers at a 33⅓% discount off the suggested retail price. Wallace does not grant the additional 10% discount with respect to purchases of bulk candy.

15. In the regular course of business Wallace distributes to its retailer purchasers price lists for its products which include suggested resale prices to retail customers for its line of packaged candies. Wallace also attaches to its packaged candy printed tickets with suggested retail prices. During certain holiday seasons such retail price tickets may be omitted.

D. W. F. Schrafft & Sons Corporation ("Schrafft")

16. Schrafft manufactures, at its plant in Charlestown, Mass., and sells certain types of candy and confectionery products, including boxed candy, the product here involved. Other than the sales to Shattuck, all of the boxed candy sold by Schrafft is sold by a staff of from 40 to 50 territorial managers or salesmen, to approximately 600 wholesalers located throughout most of the United States. Almost all of these wholesalers are engaged in the wholesaling of tobacco products, cigarettes, cigars, and fountain syrups and appliances to retail outlets such as drug stores, tobacco shops, department stores, and similar retail purveyors. Four wholesalers who purchase and resell Schrafft's boxed candy testified in this case: Milhem Attea & Bros. (hereafter "Attea") in Buffalo, New York; Zutes, Inc. (hereafter "Zutes"), in Rochester, New York; Costello Bros. (hereafter "Costello") in Syracuse, New York; and Schrafft Sales in New York City.

17. In accordance with a long-standing policy of loyalty to its wholesalers, Schrafft has traditionally refused and still refuses to allow any retailers of its candy to by-pass the local wholesalers by buying boxed candy direct from the factory. Schrafft refers all inquiries or orders from retailers to the appropriate local wholesaler.

18. Schrafft distributes to its wholesalers printed price lists showing prices to the wholesalers, a recommended wholesale price from wholesalers to retailers, and a suggested retail price for sales of its boxed candy by retailers to consumers. In many, if not most, instances the retail price is preticketed on the package. The prices suggested for

sales by wholesalers to retailers represent a 33⅓% discount off the suggested retail price. Schrafft does not "fair trade" its products at any level of distribution.

19. Schrafft does not control the prices charged by its wholesalers to their retailer customers for Schrafft candy. The prices are quoted by the wholesaler, usually, as a percentage discount from the suggested retail price which Schrafft does publish.

20. I. J. Silverman, president of Schrafft since 1958, is the principal officer of the corporation. He carries on the business operations of Schrafft with the other Schrafft officers, none of whom are officers of Shattuck. Mr. Silverman keeps the president and the board of directors of Shattuck informed as to the overall financial condition of Schrafft (p. 23) and consults with the president and/or the board of directors of Shattuck concerning any extraordinary requirements for capital funds in excess of the amounts generated by ordinary depreciation allowances. No individual in Shattuck acts as liaison between Shattuck and Schrafft. Neither Shattuck nor any of its officers or employees either control or attempt to control the business operations or the sales policies or prices of Schrafft.

21. There is no evidence in this record of such control by Shattuck over its subsidiaries, Schrafft, Schrafft Sales and Wallace, as to indicate that the subsidiaries were mere tools of Shattuck. This record does not support a finding that the corporate identities of the Shattuck subsidiaries is a mere fiction, so as to hold Shattuck for any violation of subsection 2(a) of the Clayton Act, as amended, that may be proven against its subsidiaries. See *National Lead Company* v. *Federal Trade Commission*, 227 F. 2d 825, 828–829 (7th Cir 1955) reversed in part as to other issues in 352 U.S. 419 (1957); *H. J. Heinz Co., et al.*, 52 F.T.C. 1607 (1956); *Stokely-Van Camp, et al.* v. *FTC*, 246 F. 2d 458 (7th Cir. 1957); *Druggists Supply Corporation*, 52 F.T.C. 699, at 704–705 (1956); *Warren Petroleum Corporation*, 53 F.T.C. 268, 271–272, 282 (1956), and *Gummed Industries Assn.*, 55 F.T.C. 1409, 1411–1412 (1959).

22. In his proposed findings and conclusions complaint counsel admits and the hearing examiner hereby finds and concludes that the record "does not support a finding that respondent Frank G. Shattuck Company determines, directs, or controls the prices, terms and other policies upon which respondents W. F. Schrafft & Sons and Wallace & Co. deal with their customers" (see proposed conclusion No. 50 on page 28 of complaint counsel). The examiner finds and concludes that the complaint should be dismissed as to Shattuck.

III. The Case Against Schrafft

23. Complaint counsel seeks a cease-and-desist order against Schrafft on the "indirect purchaser" theory, even though the original complaint counsel did not draft his complaint on that theory. Paragraph Five of the complaint alleges:

> In the course and conduct of their business in commerce, respondents are discriminating in price between different purchasers of their products of like grade and quality by selling to some purchasers at higher and less favorable prices than they sell to other purchasers competitively engaged in the resale of their products with the nonfavored purchasers.

24. This allegation in the complaint is not substantiated as to respondent Schrafft by reliable, probative and substantial evidence in this record. Schrafft sells its candy products only to wholesalers who in turn resell to retailers. Complaint counsel has not proven nor attempted to prove any price discrimination by Schrafft in favor of any of its wholesalers. Complaint counsel does not contend for price discrimination at the wholesale level but only at the retail level.

25. In order to prove price discrimination by Schrafft at the retail level, complaint counsel seeks to have the hearing examiner find that the retail sellers of Schrafft candy who purchase Schrafft candy from its wholesalers are indirect purchasers from Schrafft even though none buy their candy directly from Schrafft.

26. The "indirect purchaser" theory postulates:

If a manufacturer (Schrafft), even though not ostensibly, does in fact direct and control the sales and pricing practices of its wholesalers (Attea, Zutes and Costello), then the retail purchasers (Woolworth, Walgreen Drug, LoTempio Pharmacy, Stewart Drug, Saraceni Drug, LaSalle Pharmacy, Neisner Bros., McCrory's, Sarkus, Girard Pharmacy, United Whelan Drug, etc., etc.) from such wholesalers are indirect purchasers of Schrafft for the purpose of determining whether there has been a price discrimination in violation of § 2(a) of the Clayton Act. A retailer is nonetheless a purchaser because he buys indirectly, if the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.[3]

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[3] *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); *General Motors Corp.*, 50 F.T.C. 54 (1953); *Electric Auto-Lite Co.*, 50 F.T.C. 73 (1953); *Whitaker Cable Corp.*, 51 F.T.C. 958 (1955); aff'd 239 F. 2d 253 (7th Cir. 1956), *cert. den.* 353 U.S. 938 (1957); *E. Edelmann & Co.*, 51 F.T.C. 978 (1955), aff'd 239 F. 2d 152 (7th Cir. 1956), *cert. den.* 355 U.S. 941 (1958); *Thompson Products, Inc.*, 55 F.T.C. 1252 (1959); *Dentists' Supply Co. of N.Y.*, 37 F.T.C. 345 (1943); *General Foods Corp.*, 52 F.T.C. 798 (1956); *Massachusetts Brewers Ass'n* v. *P. Ballantine & Sons Co.*, 129 F. Supp. 736 (D. Mass. 1955); *Klein* v. *Lionel Corp.*, 237 F. 2d 13 (3rd Cir. 1956); *American News* v. *FTC*, 300 F. 2d 104 (C.A. 2,) (1962); *Luxor Ltd.*, 31 F.T.C. 658 (1940); *Liggett & Myers Tobacco Company, Inc.*, 56 F.T.C. 221 (1959).

27. Complaint counsel seeks to establish Schrafft retailers as indirect purchasers because of (1) Schrafft's active participation in getting its products listed with the corporate chains, (2) the active participation of Schrafft salesmen in promoting the retail sales of Schrafft's candies, (3) the "domination" of the wholesaler's sales policies by Schrafft, and (4) Schrafft's rendition of other services to the retailer as well as the wholesaler in the marketing of its products.

A. Schrafft's Participation in "listing" its Products with Chain Stores and Governmental Agencies

28. A number of chain retailers such as F. W. Woolworth & Co., W. T. Grant Co., S. S. Kresge Co. and J. C. Penney Co., and a number of governmental agencies and instrumentalities such as the Veterans Administration, the Army & Air Force Exchange Service and the Navy Exchange Service do not permit their local outlets or buyers to stock or sell any merchandise or brands which have not first been "listed" with and approved for handling by the head office or chief buyer of the retailer or governmental agency. In order to secure a "listing" of its products with the retailers and agencies having such a requirement, a manufacturer must satisfy the chief buyer that the brand or product is adequate with respect to quality and salability, and must file with the chief buyer a detailed descriptive list of the various items comprising the manufacturer's line showing specifications, sizes, packaging, cost and suggested selling price. Samples are also submitted. If the chief buyer finds the product acceptable, the retailer or governmental agency then publishes and distributes to its various outlets, managers or local buyers a "listing" of the various items in the manufacturer's line which they are authorized to purchase and stock. Such a listing does not, however, require a local store manager to stock and sell the items listed, but merely authorizes him to do so. Schrafft seeks a listing by chain retailers and governmental agencies, in order to make this business available to the Schrafft candy wholesalers. Schrafft has not sought "listings" by Liggett Drug Co., United Whelan Drug Corp., Gray Drug Stores, Walgreen Drug Stores, Cunningham Drug Stores, Marshall Drugs, Read Drug & Chemical Co., Gallagher Drugs, Thrifty Drug Stores, Owl Drug Co., Dugan Drug Stores, Standard Drug Co. or Broward Drug & Surgical Supply Co., even though some of these retailers do in fact buy Schrafft's candy from Schrafft wholesalers.

29. These Schrafft wholesalers are not required by Schrafft to sell to the retailers or agencies with whom Schrafft's candy has been "listed". Several of the wholesalers choose not to sell to these retail outlets

in their area, with the result that Schrafft's candy is not carried in such stores.

30. Typical "listings" of Schrafft's candy with variety chain retailers are Commission's Exhibits 683 and 684, issued by the F. W. Woolworth Co. (p. 622, 633). These exhibits describe the approved items in the Schrafft line, and list the names and addresses of Schrafft wholesalers throughout the United States by geographic areas in which the particular Woolworth stores are located. The prices set forth in the listing are equivalent to a 40% discount from the suggested retail price of Schrafft candy, plus a 2% cash discount for prompt payment.

31. Most of the outlets of the variety chain stores which have "listed" Schrafft candy, actually buy Schrafft candy predominantly in "bulk", rather than the type of "boxed candy" which is involved in this proceeding. For example, in 1958 the three Woolworth stores in Syracuse, N.Y., purchased Schrafft candy in the total amount of $7,385 from the wholesaler Costello, but only approximately 11% of this amount was "boxed candy". The three Grant stores in Syracuse purchased a total of $2,269 of Schrafft candy from Costello, but only about 7% of this amount was "boxed candy". The two Kresge stores in Syracuse purchased a total of $436 of Schrafft candy from Costello, but only about 4% of this amount was "boxed candy". The McCrory store in Syracuse purchased a total of $39 of Schrafft candy from Costello, but only about 8% of this amount was "boxed candy" (CX 682B). A listing of Schrafft candy with the central buying office of the drug and variety store and department store chain, Woolworth, etc., etc., constitutes nothing more than official permission from the central buying office for the local store managers to buy the items listed on the terms stated in the listing. In practically every instance of national retail chains, the local store manager cannot purchase an item unless it is listed. Although the prices stated on a listing may result in some instances from negotiations between the central buying office and a representative of the Schrafft company, the local Schrafft jobber or wholesaler may or may not adhere to the terms set forth on the listing. If the local Schrafft wholesaler repudiates the terms stated in the listing, the wholesaler may, or may not get the business. In any event, the local Schrafft wholesaler is the person who ultimately determines the price at which he sells.

32. The practice of listing is a fact of life in modern corporate multiple unit operations, and nothing sinister or derogatory can or should be imputed to the listing practice. Listing does not connote price-fixing, price-cutting, nor discriminatory pricing practices. Schraffts' listing of its boxed candy with the central buying offices of corporate multiple unit chains does not make the individual units of

such chains, nor the chains themselves, the indirect customers of Schrafft. Without such listings Schraffts' real customers, its individual wholesalers, would not be able to sell to the individual units in the chain.

33. Complaint counsel suggested in his oral argument that Schrafft avoid the rationale of the "indirect purchaser" theory, attaching to its "listing" practices, by abandoning its present marketing procedures used since before the amendment of the Clayton Act—eliminating the wholesalers—and selling directly to the retailers. Enforcement of the Robinson Patman Act should not require abandonment of long-established marketing procedures unless a clear and undisputed case of illegality has been proven. Such is not proven in this record. And what of the 600 Schrafft wholesalers who make a profit from handling its candy? Shall these small businessmen be cut off from this source of revenue because of some misapplied theory of "indirect purchaser"?

B. Activities of Schrafft Wholesalers

1. The Wholesaler Attea in Buffalo

34. Milhen Attea & Bros. (hereafter referred to as Attea) is a general-line wholesaler of tobacco products, candy, appliances and other items in the Buffalo, New York area. Attea sells approximately 2,000 different items. Approximately 70–75% of Attea's total annual volume of business of $5½ to $6 million is in cigarettes; approximately 10% is in cigars; and approximately 10%–15% is in candy, including candy manufactured by Schrafft. Attea's total purchases of Schrafft candy during the year 1958 amounted to $117,088, or approximately 2% of Attea's total business. Attea's total purchases of Schrafft candy amounted to $122,313.72 in 1957. Attea does not buy Wallace candy. Attea employs between 32 and 36 persons, including eight salesmen, and sells to approximately 1,500–2,000 retail accounts within a forty-mile radius of Buffalo. It is estimated that somewhere between 200 to 400 of these retail accounts purchase some Schrafft candy. Attea salesmen are authorized to quote prices up to 40% off the suggested retail price of Schrafft candy in order to meet competition. Approximately 60% of the retail customers who purchase Schrafft candy from Attea are allowed 40% off the suggested retail price, and the remainder are allowed a 33⅓% discount. The 40% discount is granted by Attea to its retail customers without regard to whether they are part of a national or local chain, or are independent retailers. In addition to the 40% discount, Attea acquiesces in some customers, principally the chain stores, taking an additional 2% cash discount for prompt payment (pp. 365–368). All of the Niagara Falls, New York, retailers who

are specifically referred to in Paragraph Five of the complaint make all of their purchases of Schrafft candy from Attea; none of these retailers purchase Schrafft candy directly from Schrafft. Similarly, all of the other Buffalo, New York area retailers whose testimony has been stipulated in CX 737 purchase Schrafft candy directly from Attea, and not from Schrafft. Attea himself prices Schrafft candy to his customers without any indirect or direct influence or control by Schrafft.

35. Attea testified (p. 360), *inter alia:*

A. They could charge $8.00 less 33%, less 40%, less 45%. It's up to my men how much discount he wants to give that retailer. And again (p. 370):

My man is on the road. They are privileged to meet competition and use their own judgment—unless it is a real serious problem. Then they discuss it with me. But I give the salesmen a privilege to use their own judgment when they see fit to make the prices as they see fit.

Q. Now can they give this 40% off retail price on the demand of a retailer?

A. Yes. If they have good orders from them, yes.

2. The Wholesaler Zutes In Rochester, N.Y.

36. Zutes Inc. (hereafter Zutes) is a general line wholesaler of tobacco products, candy, health and beauty aids, novelties, toys, appliances and other items, in the Rochester, New York area. The wide variety of items sold by Zutes is illustrated by this wholesaler's extensive catalog. Approximately 35% of Zutes' total annual business of $2,800,000 is in cigarettes, approximately 20%–25% is in cigars, and approximately 20% is in confectionery products, including Schrafft candy and candy manufactured by approximately 150 other candy firms. Zutes' purchased $111,920 of Schrafft candy during 1958, approximately 4% of Zutes' total volume. A substantial portion of Zutes' candy business is bulk candy which is not involved in this proceeding. During the year 1957, Zutes' total purchases of Schrafft candy amounted to $97,631. Zutes does not buy Wallace candy.

37. Zutes employs about 28 persons, including nine salesmen, and sells to approximately 1,500 retail accounts in the seven counties around Rochester, New York. It is admitted that about 800 of these retail accounts purchase some Schrafft candy, and that about 250–300 of these retail accounts buy some Schrafft boxed candy. Zutes sells Schrafft candy to the Woolworth, Penney, Grant, Kresge, Newberry and Neisner stores and the Sibley-Lindsay & Curr department store in his area at prices equivalent to 40% off the suggested retail price, and an additional 2% cash discount for prompt payment. Zutes has found it necessary to grant the 40% and 2% discounts to these retail outlets in order to meet the competition of candy manufacturers (such as Deran Confectionery Co.) who sells directly to the retail outlets. Approximately

10% of the retail outlets which purchase Schrafft candy from Zutes Inc. receive a 40% discount from the suggested retail price, and the remainder of the retail customers receive a 33⅓% discount, and an additional 2% trade discount if they purchase Schrafft candy in unbroken cartons. The expected testimony of J. T. Gruden, E. J. Cornell, W. C. Burke and S. S. Shapiro of Rochester, New York, stipulated in this record, indicates that upon occasion they purchase Schrafft candy from Zutes in less than carton lots and consequently do not take advantage of the 2% trade discount. None of these Rochester, New York retailers purchase candy directly from Schrafft. They all purchase from Zutes.

38. Zutes prices Schrafft candy to his customers without any direct or indirect influence or control by Schrafft. Charles Zutes, Schrafft's Rochester wholesaler, testified (p. 457):

Q. Now, so far as your pricing is concerned, on all of the products which you handle, is it not a fact that you yourself and your brothers determine the price which you are going to charge?

A. Oh yes.

Q. And that includes your Schrafft products that you handle?

A. It includes everything. If you will remember, I said, when Mr. Snyder asked me what my duties were, "My duties are to establish prices", and policies include prices. I have to determine the factors as to establishing our prices.

3. The Wholesaler Costello in Syracuse

39. Costello Bros. (hereinafter "Costello") is a wholesaler of cigars, confectionery products and fountain syrups in the Syracuse, New York area. It sells hundreds of different items, including from 70 to 100 differents brands of candy. Approximately 60%–75% of Costello's $500,000–$550,000 annual business is in cigars, and the remainder is in fountain syrups and confectionery products, including the candy manufactured by Schrafft. Isadore Rose, a 50% owner of Costello, testified (pp. 517–58, 581) that Costello purchased $87,524 of Schrafft candy during 1958. This represented approximately 16% of Costello's total business. During the year 1957, Costello purchased $81,559 of Schrafft candy. Costello purchases a small amount of Wallace candy, but has only two customers for this candy.

40. Costello employs six persons, including four salesmen, and sells to approximately 800 retail accounts within a radius of 25 miles around Syracuse, New York. It is estimated that about 250 or 300 of these retail accounts purchase some Schrafft boxed candy. Costello sells Schrafft candy to Daw Drug, Day Bros., W. T. Grant, S. S. Kresge, Liggett & Co., Lincoln Stores, Murphy 5 and 10, McCrory's, United Whelan, Walgreen and Woolworth stores, at a 40% discount from the

suggested retail price, and a 2% cash discount for prompt payment. The same 40% and 2% discounts are given to the Syracuse department store E. W. Edwards & Sons. The Neisner Bros. stores in Syracuse purchase Coca-Cola syrup from Costello, but do not purchase candy from Costello (p. 540). Costello grants these 40% and 2% discounts to meet the competition which it faces in selling candy and other products. Other purchasers of Schrafft candy from Costello receive a 33⅓% discount and a 2% cash discount for prompt payment. Costello's prices are approximately 10% higher to its customers who purchase candy in quantities of less than a full carton. For example, Costello charges $8.00 for a carton of six one-pound boxes of Schrafft Gold Chest candy, or the equivalent of about $1.33 per box, but charges $1.50 per box for any purchases of this candy in quantities of less than a full carton of six. The suggested retail price for each one-pound Gold Chest box of candy is $2.00.

41. The expected testimony of Joseph G. Krassenbaum, Ephraim M. Bodow, Bernard J. Carey, Pat Vitacolonna, Richard T. Byrnes, Abraham Meyerson, Alexander Edelman, Earl Rothschild, and Henry A. Panasci has been stipulated (CX 737, pp. 20–31). All of these are Syracuse, New York area retailers who sell Schrafft candy. Schrafft does not have any direct or indirect influence or control over the prices these retailers pay to Costello for Schrafft candy. All of these retailers purchase Schrafft candy directly from Costello. At least one (Krassenbaum) buys less than a carton at a time, and consequently pays Costello the less-than-carton price. Schrafft neither directs, controls nor influences the prices which these or any other retailers pay Costello for Schrafft candy.

42. Isadore Rose, one of the owners of Costello, testified (p. 575):

Q. Mr. Rose, you charge your customers what you want to for the products you sell them, do you not?

A. Oh, sure, I make exceptions every day in the week.

Q. And that is true with regard to all the products that you sell?

A. Sure. A customer tells me "I can buy Coca-Cola for such-and-such a price, or Blackman Syrups". I'll either meet it or I'll lose the business. Consequently I'll meet it.

Q. And consequently that is true with regard to Schrafft products?

A. Absolutely.

C. Activities of the Schrafft Salesman in the Buffalo and Rochester Areas

1. Theodore Zymanek

43. Theodore Zymanek has been for about five years Schrafft's sole sales representative and "Territorial Manager" in Western New York

State including Rochester, Buffalo, Niagara Falls, and a small portion of Pennsylvania, including Bradford and St. Mary's. His job is to sell Schrafft candy to the thirteen wholesalers in his territory. Mr. Zymanek does not sell Wallace candy. He makes his headquarters in Buffalo, New York, and endeavors to spend Friday of each week calling upon the Buffalo wholesaler, Attea. He endeavors to call upon the Rochester wholesaler, Zutes, for one or two days every second week. He makes it a point to see the other eleven wholesalers in his territory at least once every four weeks, and plans to call on a jobber every day of the week.

44. Mr. Zymanek travels approximately 30,000 miles per year on business. When he calls upon a wholesaler he tries to make adjustments for unsalable goods; attends meetings of the wholesalers' salesmen to discuss new items and advertising drives; takes inventory of the wholesaler's stock of Schrafft candy; confers with the wholesaler or the wholesaler's buyer concerning new orders for Schrafft candy; and writes up such orders. In such time as remains after calling upon wholesalers Mr. Zymanek observes retail market conditions for Schrafft candy by calling upon retailers. Sometimes he calls on retailers alone, and at other times he is in the company of one of the wholesalers' salesmen. Mr. Zymanek may call upon retailers who do not handle Schrafft candy (*i.e.*, Lee Drugs) to observe the retailer's stock and displays of packaged candy. Occasionally, Mr. Zymanek may spend an entire day accompanying one of the wholesaler's salesmen in calls on the wholesaler's retail customers. Whenever Mr. Zymanek accompanies a wholesaler's salesman, the latter sells and takes orders on the entire general line of items which the wholesaler carries, which may include Schrafft candy, other brands of candy, tobacco products, etc. If Mr. Zymanek makes calls upon retailers alone he later turns over to the wholesaler, or to the wholesaler's salesman who services that particular retail account, any order for Schrafft candy which he may have obtained.

2. E. P. Costello, Jr.

45. E. P. Costello, Jr. (who has no connection with the Costello Bros. who are the Schrafft wholesaler in Syracuse), has been the sole Schrafft Syracuse area salesman and "Territorial Manager" for about five years, serving the area from Malone, New York, near the Canadian border, to the southern part of New York State, including Elmira and Binghamton, New York. Mr. Costello's job is to sell Schrafft candy to the sixteen wholesalers who are located within his territory. Mr. Costello resides and makes his headquarters in Syracuse, New York. Mr. Costello travels about the same mileage on business per year (30,000) as

does Mr. Zymanek. He performs his duties for Schrafft in the Syracuse area in substantially the same manner that Mr. Zymanek performs his duties in the Buffalo area. Messrs. Zymanek and Costello Jr. were required to, and did send in to the Schrafft main office very detailed reports of all of their activities, including a listing of the wholesalers and retailers upon whom they called, and any orders which may have been given to them for retransmittal to the wholesaler. The preparation and making of such reports by salesmen is usual and customary in all well-run sales organizations. Such facts do not add any materially significant evidence to support complaint counsel's charge that Schrafft retailers were indirect purchasers from Schrafft, even though their prices to the retailer are fixed by the wholesaler. Although the evidence demonstrates and the examiner finds that Messrs. Zymanek and Costello employ all the usual and accepted techniques of promoting vigorously the sale of Schrafft candy, the examiner also finds that neither Zymanek nor Costello control or influence, either directly or indirectly, the prices at which the Schrafft wholesalers resell Schrafft boxed candy to the retailers. Evidence in this record shows, and the examiner finds, that representatives of other products which Schrafft's wholesalers sell function as salesmen for their products, in substantially the same way that Schrafft salesmen do—attending the wholesaler sales meetings—inventorying stock—writing up orders—making appointments—calling on the retail trade alone or with the wholesaler's salesmen—attempting to generate consumer interest in their products—surveying the market, etc. (see Zutes testimony p. 453), *et seq.* This is what any alert and aggressive salesman for any product sold through wholesalers would do and be expected to do. Nevertheless, as far as the pricing of Schrafft's boxed candy is concerned, each of the wholesalers—Attea, Zutes and Rose, and Schrafft's officers—testified, and the examiner finds, that the wholesaler is the final and sole authority in establishing pricing policies and carrying out pricing practices. Neither Mr. Zymanek nor Mr. Costello influences the pricing directly or indirectly.

D. Corporate Chains' Purchasing Practices

46. Complaint counsel has introduced the testimony of Samuel Garrelick, the chief candy buyer for United Whelan Drug Stores (p. 594), William C. Strom, candy buyer for F. W. Woolworth (p. 621), Tudor Bradley, merchandise controller for W. T. Grant Company (p. 651), Alva Elliott, candy buyer for W. T. Grant Company (p. 662), and Edwin Fox, candy buyer for J. C. Penney. What these buyers testified is summarized below and constitutes a finding of fact.

47. The expected testimony of Joseph E. Wisniewski, the chief candy buyer for the Walgreen Drug Chain, is stipulated in CX 737, page 47.

48. The testimony of these candy buyers fails to prove or to supply a link in the chain of proof, that the retailer of Schrafft boxed candy is an indirect purchaser from Schrafft.

1. United Whelan Company

49. The United Whelan Company operates a chain of approximately 120 retail drug stores, and provides wholesale services for approximately 500 or 600 Whelan "agency" retail drug stores. The 120 United Whelan stores sell approximately $150,000–$160,000 worth of boxed candy per year. About $25,000 or 16% is Schrafft boxed candy, and the balance of the boxed candy sold is Whitman, and Page & Shaw (p. 619). United Whelan retail drug stores do not sell bulk candy. On the purchase of all boxed candy they receive a discount of at least 33⅓% and 10% (or the equivalent of 40%) from the suggested retail price. Whelan store managers purchase Schrafft candy from the Schrafft wholesaler in their particular geographic location, except that the sixty Whelan stores in metropolitan New York purchase Schrafft candy from Schrafft's Sales. Schrafft Sales is paid directly for the candy purchased from it, and the local Schrafft jobber is likewise paid directly for candy purchased from him. The individual store handles its complaints about Schrafft's candy directly with the local wholesaler or jobber from whom it purchases.

2. F. W. Woolworth Co.

50. The F. W. Woolworth Company (hereinafter "Woolworth") operates a chain of approximately 2,000 retail variety stores in the United States which sell drygoods, hosiery, hardware, novelties, toys, stationery, notions and candy, including both boxed candy and bulk candy. About 200 of these stores are within metropolitan New York. Woolworth's total annual sales volume of candy is approximately $51 million. Woolworth purchases candy from approximately 400 different candy manufacturers, and "listings" are issued by the Executive Office of Woolworth with respect to each of these manufacturers. All Woolworth candy is purchased directly from the manufacturer except Schrafft candy, which is purchased from wholesalers. The Woolworth witness could not determine with any degree of accuracy the amount of Schrafft candy sold by the Woolworth stores, since each individual store manager purchases it from the 600 separate Schrafft wholesalers. For the same reason, there appeared to be no way to determine accurately the number of Woolworth stores which actually

do purchase Schrafft candy. It was estimated that a majority of Woolworth stores handle it. A comparison of the volume of Schrafft candy sold by Woolworth (CX 21, in camera), with Woolworth's $51 million total candy sales volume, makes it apparent, and the examiner finds, that Schrafft candy represents a very small proportion of the total Woolworth candy sales. This includes Schrafft bulk candy as well as the boxed candy—the product here involved. Approximately 85% or 90% of the Schrafft candy purchased by the Woolworth stores is "bulk" candy, rather than the boxed candy involved in this proceeding.

51. Mr. William C. Strom, the chief candy buyer for Woolworth, and the individual responsible for issuing "listings" on candy to the Woolworth stores, deals with approximately 400 manufacturers of candy who sell directly to Woolworth. Some of these 400 manufacturers have candy comparable to the Schrafft line. They include, among others, Voneiff Drayer, Dewitt P. Henry, Derand, E. J. Brach, Sisco, Hamilton, Page & Shaw, Brown & Hollis, and Candy Cupboard. Woolworth purchases directly from all of these manufacturers, except Schrafft, at roughly comparable prices, with an average discount of around 40% from the suggested retail price of the candy for the preticketed boxed candy.

3. W. T. Grant Company

52. The W. T. Grant Company operates a chain of approximately 850 retail stores in 44 States, selling general merchandise, including such items as enameled ware, hardware, appliances, notions and candy. Grant operates about six stores in New York City. The 850 Grant stores' total volume of candy sales is between $15 million and $16 million per year, of which it is estimated that roughly $150,000 to $200,000, or about 10%, is represented by candy manufactured by Schrafft.

53. Alva Elliott, chief buyer of candy, cookies and tobacco for Grant, is responsible for issuing "listings" on candy to the Grant stores.

54. Grant purchases candy from about 300 or 400 different candy manufacturers, and "listings" have been issued by the executive office of Grant with respect to each of these manufacturers. Grant purchases its boxed candy directly from the manufacturer with the sole exception of Schrafft boxed candy, which is purchased from Schrafft wholesalers.

55. Somewhere between 200 and 400 of the Grant stores carry some Schrafft candy, but some stores with the largest candy sales volume do not handle any Schrafft candy.

56. Individual Grant store managers order and purchase Schrafft candy from the Schrafft wholesaler in their particular merchandising areas.

57. Approximately 2% or 3% of total candy sales is boxed candy. The remainder consists of bulk candy, candy bars, nuts, chewing gum, etc. Most of Grant's purchases of Schrafft candy is of bulk candy. Manufacturers of boxed candy who sell directly to Grant include a number which have lines comparable to Schraffts'. Those manufacturers include Whitman, New England Confectionery Co., Bunte (before it went bankrupt), Hershey, and others. They sell boxed candy to Grant at 40% off the suggested retail price. This is the same price at which local Schrafft wholesalers sell to Grant. There are so many candy suppliers that Grant does not find it necessary to bargain or negotiate with respect to prices and terms. If a local Grant manager is unable to purchase Schrafft candy at the 40% discount price from the local wholesaler, he will not buy Schrafft merchandise (p. 688). Several different Schrafft wholesalers who refused the 40% discount lost the business. As a result of not getting the 40% discount from some Schrafft wholesalers, Grant did not place any of its 1961 Easter candy orders with Schrafft wholesalers.

4. J. C. Penney

58. The J. C. Penney Co., Inc., operates approximately 1,690 retail stores in the United States, of which approximately 80 have candy departments. None of its stores in the New York City metropolitan area have candy departments. Penney sells over $3.5 million worth of candy a year, of which less than 5% is boxed candy.

59. Edwin Fox, chief candy buyer for Penney, is responsible for issuing "listings" on candy to the Penney stores. Penney discontinued listing Schrafft candy on May 7, 1959 and insofar as Mr. Fox was aware, only one Penney store has continued to purchase Schrafft candy since that date—the Buffalo, New York store, which purchases Schrafft candy from Attea. Even when Penney did have a listing for Schrafft candy, the Penney stores did not purchase any significant amount of Schrafft boxed candy, according to Mr. Fox's best recollection. Penney purchases candy from about 75 or 80 different manufacturers, and listings have been issued to each of them (pp. 714–715). Boxed candy is purchased directly from the manufacturer (p. 717), with the sole exception of such Schrafft candy, if any, as an individual Penney store may purchase from Schrafft wholesalers, even though Schrafft candy is no longer "listed". Many manufacturers sell directly to Penney lines of boxed candy comparable to the Schrafft line. These include Martha Washington, Mrs. Stevens, Cresca, and Brown & Haley. Penney pays these manufacturers from 40% to 43% off the suggested retail price. At the time of the hearing in this case, Penney had also received, but

had not yet acted upon, an offer from Stephen F. Whitman Company to sell boxed candy at 40% off the suggested retail price.

5. Walgreen Drug Stores

60. Walgreen Drug Stores operates approximately 451 retail drug stores in the United States. Joseph E. Wisniewski is the chief candy buyer for Walgreen. Representatives of Schrafft do not seek to have Walgreen issue a "listing" on Schrafft candy. Walgreen's Chicago, Illinois, warehouse has purchased Schrafft candy from P. J. Rubey Inc., the wholesaler handling Schrafft candy in the Chicago area in the following quantities:

1957	$75,375.87
1958	100,999.71
1959	57,202.78
1960	93,417.51

Most of the Walgreen Drug Stores handle Schrafft boxed candy. Sales of Schrafft candy to the Walgreen stores located outside the Chicago area are made to the individual Walgreen stores by local jobbers. The purchases by Walgreen's Chicago warehouse represent about 40% of the total volume of Schrafft candy handled by the Walgreen stores. Mr. Wisniewski's office lists Schrafft boxed candy at "retail less 33⅓% and 10%". This discount was in effect prior to Mr. Wisnieski's becoming candy buyer. Mr. Wisniewski believes that the Walgreen stores purchase Schrafft candy from the Schrafft wholesalers at the equivalent of 40% discount from the suggested retail price, plus a 2% cash discount for prompt payment.

61. Walgreen purchases Schrafft boxed candy directly from Schrafft wholesalers. No significant legally operative fact about the Walgreen handling of Schrafft boxed candy distinguishes the situation particularly from United Whelan, Woolworth, Grant and Penney handling of the Schrafft boxed candy line.

6. S. S. Kresge Co.

62. Ralph P. Horner (p. 723), assistant regional manager of S. S. Kresge Company, was subpoened by complaint counsel even though Earl Schmoyer was its chief candy buyer at the time. The S. S. Kresge Company operates approximately 790 retail variety stores in the United States, including about 187 in the New York region. Earl Schmoyer is the chief candy buyer for Kresge, and is the individual responsible for issuing "listings" on candy to the Kresge stores (p. 725). The individual Kresge store managers are not authorized to purchase any candy or other merchandise which has not been listed (p. 725),

and are not authorized to purchase on any terms other than those stated in a specific listing (p. 727). Nothing in Mr. Horner's testimony justifies a conclusion other than that the Kresge listing procedure does not vary in any legally significant material respect from the procedures of the other chain stores whose chief candy buyers also testified. The testimony of these buyers in many respects was repetitious, cumulative, and nothing more than a rehash of the testimony of George M. Crouse (p. 137 *et seq*), Sales Control Manager for Schrafft and its assistant Sales Manager from 1948 until 1959.

63. The hearing examiner hereby finds and concludes that Schrafft has neither directly nor indirectly discriminated in price between different purchasers of its boxed candy of like grade and quality. It is undisputed that Schrafft's selling and pricing procedures under which it sells its boxed candy exclusively to jobbers or wholesalers has been in continuous use prior to the 1936 amendments to the Clayton Act. There is no discrimination in price by Schrafft in selling to these wholesalers or jobbers. Complaint counsel has not alleged, nor has he attempted to prove, that Schrafft does discriminate in the price at which it sells to wholesalers or jobbers. It further appears that Schrafft is the only manufacturer of boxed candy (the product line here involved) which still does sell its boxed candy to jobbers and wholesalers, and not directly to retailers. The Schrafft wholesalers and jobbers who testified in this record stated unequivocally that Schrafft does not, directly or indirectly, influence or control their pricing of Schrafft's candy to the retailer. The differences in the prices at which the wholesalers or jobbers sell to the retailers are dictated by many factors, which include among them (a) the necessity of meeting competition and the demands which must be met to keep the business, (b) the size of the account, (c) the promptness with which the retailer pays his bills and (d) whether the retailer buys in carton lots, or less-than-carton lots. The wholesalers probably take into account also the retailer's purchases of the other products which the wholesaler sells, such as cigars, tobacco, cigarettes, novelties, chewing gum, nuts, bulk candy, appliances, etc., etc., and other factors related to the retailer's overall business relationship with the wholesaler.

64. There does not appear to be any § 2(a) proceeding where a cease-and-desist order has issued based upon a marketing system such as the one under attack here. In *Kraft-Phenix*, 25 F.T.C. 37 (footnote 3) *supra*, the *complaint was dismissed.* In *Champion Spark Plug Co.*, 50 F.T.C. 30, a § 2(a) case, the manufacturer had two marketing channels, sold a substantial number of its spark plugs through distributors, but at the same time made substantial sales to large fleets of motor trucks or buses; made agreements with automobile manufac-

turers obligating the automakers to purchase from respondent their entire requirements of spark plugs for a specified term; used two types of agreements with its distributors; and otherwise directly controlled the details of several differing distribution systems, which resulted in competing sellers buying at different prices.

65. In *Electric Auto-Lite Company*, 50 F.T.C. 73, the manufacturer discriminated in the prices at which it sold spark plugs as between (a) direct purchasers, (b) direct purchasers and indirect purchasers, and (c) between spark plugs sold as original equipment and spark plugs of like grade and quality sold for replacement. No discrimination by the manufacturer has been alleged or proven in the instant case. In *Auto-Lite* as in *Champion*, the manufacturer was operating more than one selling system, which also had separate pricing systems. The same is applicable to *General Motors Corporation*, 50 F.T.C. 54. In *Whitaker Cable*, 51 F.T.C. 958 (1955) *aff'd.* 239 F. 2d 253, 7th Cir. (1956) *cert. den.* 353 U.S. 938 (1957), another automotive-parts case, purchasers from the manufacturer were of more than one classification: *i.e.*, Warehouse Jobbers, Group Buying Jobbers, Wholesale Distributor Jobbers, and Private Brand Customers. The opinion found, *inter alia* (p. 962), "All of said private brand purchasers sold to jobbers and direct to retail dealers and to this extent were in competition with respondent's direct and indirect purchasers hereinabove described." In the instant case there is only one class of purchaser from the manufacturer—the wholesaler or jobber.

66. *E. Edelmann & Co.*, 51 F.T.C. 978; 239 F. 2d 152, another automotive-parts case, found that respondent sold its products to some 3500 to 4000 purchasers, of which approximately 40 were classified as warehouse distributors, 15 to 20 as private brand accounts, six as cooperative buying groups, fifty as industrial accounts, and the remainder as automotive jobbers who either buy from petitioner's distributors or from petitioner direct (239 F. 2d 153). "The price discriminations which were found to be unlawful discriminations resulted from the application of a 20% discount from a distributor's net price on purchases of petitioner's brass line and 15% on the glass and brake lines."

67. None of the features of *Edelmann's* selling and pricing procedures which were found unlawful by the Commission and the court are present in Schrafft's selling and pricing procedures.

68. *Thompson Products Inc.*, 55 F.T.C. 1252, another automotive-parts case, also involved more than one selling and pricing procedure by the same manufacturer. Its distributors were automotive-part wholesalers who annually executed distributor franchise agreements, and were served through respondent's replacement

division. The jobbers were wholesalers signing jobber franchise agreements which required them, inter alia, to maintain an average minimum dollar inventory on certain lines of Thompson merchandise. The prices at which Thompson sold its automotive parts to various vehicle manufacturers were substantially lower than those received by it for parts of like grade and quality purchased by Thompson's independent distributors and jobbers. The Thompson's selling and pricing procedures, like all the other automotive-parts cases, are so unlike the Schrafft selling and pricing procedures as to furnish no factual basis for comparison.

69. In *Dentists Supply Co. of New York*, 37 F.T.C. 343, the supply company manufactured and sold artificial teeth to (a) wholesale dealers known as dental supply houses, (b) to dental laboratories, and (c) to dentists. There again the manufacturer sold through three separate distribution channels, unlike Schrafft, which sells only to wholesalers or jobbers. In *Dentists Supply* the Commission found that the respondent discriminated in price among different customers to whom it sold directly, and who were in competition with each other on the same level of distribution. A volume discount was also involved in this case. Neither the facts, nor the law enunciated by the Commission, in *Dentists Supply* are applicable to the Schrafft situation.

70. In *General Foods Corporation*, 52 F.T.C. 798, respondent was charged with violating § 2(a), § 2(d), and § 2(e) of the Clayton Act, as amended. Respondent sold its products to institution wholesalers, to "Institution Contract Wagon Distributors", to wholesalers dealing exclusively in institution products, to wholesalers who dealt in both institution and grocery-pack products, and to numerous direct buying purchasers who operate for the feeding establishments. Its grocery-pack products were sold to wholesalers who resell to retail grocers, to chain stores, to company commissaries and others. *General Foods'* marketing system in no way resembled nor can it be equated to Schrafft's marketing system. At page 813 the hearing examiner held:

> Under the doctrine recognized in Commission cases and accepted by the courts, it is possible to consider a customer's customer as a "purchaser" within the meaning of § 2(a) if in fact the original seller exercises such a degree of control over sales by its direct customer that the latter's sales are essentially sales by the original seller. However, the decided cases disclose no common requirement, the absence of which would fail to establish an indirect customer of a manufacturer to be a "purchaser" from such seller. No case goes so far as to hold that solicitation of orders by a respondent manufacturer and turning over those orders to an intermediate distributor for billing and handling is sufficient to establish a seller-purchaser relationship between the manufacturer and the persons from whom such orders were procured. The fact that respondent's

representatives may have suggested billing prices in a few instances does not indicate a policy or practice on the part of the respondent, and in the absence of further facts, there is no basis in the present record for a finding that the users who thus procure respondent's merchandise fall within the "purchaser" category envisioned by § 2(a) of the Act.

On the whole record, the conclusion is reached that there is insufficient reliable, probative and substantial evidence to support the conclusion that any of the users of respondent's products who procure those products indirectly through intermediate sources of supply are "purchasers" from respondent within the meaning of the Act.

71. *Luxor, Ltd.*, 31 F.T.C. 658 (1940), a § 2(e) proceeding, involved the sale of toilet articles and cosmetics to retail dealers. Respondent sold its products to retail druggists and jobbers. Respondent, by contracts, fixed the resale price of its products in every State of the Union where the law permitted it to do so. In that case respondent offered its popular "Junior Size" 10¢ package only to novelty, variety, syndicate and 5 and 10¢ stores and refused to furnish such "junior" size to competing purchasers [retail druggists] of the identical products. In issuing its cease-and-desist order, the Commission relied upon its finding that Luxor's salesmen called on retail druggists who did not receive direct shipments from Luxor, and, Luxor's pricing policies on its products were maintained as to retail druggists, who were not under contract, and who purchased indirectly through drug jobbers, in the same manner in which the prices were maintained, as to druggists who were under contract to maintain prices and who received direct shipments from Luxor.

72. In his book, *The Price-Discrimination Law*, Corwin Edwards comments as follows (p. 627):

The cases involving disproportionate services have included proceedings, such as that against Luxor, in which the Commission enforced the use of a channel of distribution that the seller had vainly sought to employ before the case, the use of which was found to be undesirable by the distributors themselves after the order. The cases against disproportionate advertising allowances made it difficult if not impossible to engage in selective advertising whether or not there was a harmful competitive effect. The cases concerned with price discrimination included some, like the automobile parts cases, in which the Commission perceived injury in the secondary line of commerce even though the disfavored customers were unanimous that they had not been injured; and some, like the rubber stamp cases, in which disorderly price competition among small sellers was held to be seriously damaging to competition among them. In policy toward discrimination, the comprehensive sweep that was given to the concept of injury determined the impact of the statute; for cost justification was so difficult that it could seldom be successfully invoked, and the statutory meaning of good faith in meeting competition was so far from ordinary business conceptions of such good faith that this type of defense held innumerable snares for the unwary. A considerable portion of the Commission's effort was spent in proceedings

among small concerns directed against injuries to competition that had nothing to do with the big buyer or the predatory seller. Consequently, the statute has had an unnecessarily harassing effect on business conduct. Moreover, in applying the law in this way, the Commission was diverted from the substantial problems of power, which were the principal concern of the legislation.

73. In *Liggett & Myers Tobacco Company, Inc.*, 56 FTC 221, (1959), a § 2(d) proceeding, the hearing examiner discussed at length the "indirect customer" concept, and analyzed *Dentists' Supply Company*, *Luxor Ltd.*, *Kay Windsor Frocks, Inc.*, *Kraft-Phenix*, *General Motors*, and *Electric Auto-Lite*. On appeal from that decision, Commissioner Tait, *inter alia*, stated:

The examiner additionally found, among other things, that § 2(d) was not shown to have been violated through payments made to some customers such as vending-machine operators and not made on proportionately equal terms to certain retailers [the so-called "indirect customers"] purchasing respondent's cigarettes from wholesalers or jobbers, for the reason that such retailers were not shown to be customers of the respondent within the meaning of § 2(d).

74. Complaint counsel did not appeal from the hearing examiner's finding concerning "indirect customers", and the only reference to it in the Commission's opinion is cited above.

75. In his opinion, in *Liggett & Myers*, the hearing examiner, *inter alia*, had stated (p. 233):

The cases in which it has been decided that those who procured a respondent's products through an intermediate source were actually customers of, or purchasers from, such respondent within the meaning of the Clayton Act are not numerous, and most of them have involved § 2(a) or § 2(e) violations. All have been decided upon the principle that where such purchases were so made, *the respondent must have exercised such a degree of control over the transaction that the sales were actually sales by respondent.* (Emphasis supplied.)

76. *K. S. Corp.* v. *Chemstrand Corporation*, 198 F. Supp. 310, (S.D.N.Y. 1961) cited by the court in *American News*, *infra*, was a private action under § 2 of the Clayton Act as amended. What was before the court was a motion to dismiss the complaint. In ruling on the motion the court said, *inter alia:*

The ultimate determination as to whether sufficient control exists to make the plaintiff a purchaser within the meaning of the Act will depend to a large extent on the proof adduced as to the number and quality of the contacts between Chemstrand, the plaintiff, and Fabrex. A reading of the above-cited cases indicates the vague line that separates a covered, indirect purchaser and one who is not. It would appear that *each case must be decided on its own facts.* * * * (Emphasis supplied.)

77. *American News Company* v. *FTC*, 300 F. 2d 104, (CA 2 1962), was a proceeding by the Federal Trade Commission under § 5 of the Federal Trade Commission Act to reach practices allegedly viola-

tive of § 2(d) of the Clayton Act as amended. In its opinion, the Second Circuit stated (p. 107):

The Federal Trade Commission found that in every instance the national publisher controls the prices and terms of sale throughout the distribution process, so that neither the national distributor nor the wholesaler has any power to set prices, terms, or conditions of sale to retailers of the magazine. Moreover, since each publication bears a cover price chosen by the publisher, the publisher effectively sets the retail price as well. * * *

78. Continuing (p. 109):

If the manufacturer deals with the retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailers and *controls the terms upon which he buys* (quoting cases). (Emphasis supplied.)

79. The testimony of Schrafft employees, the testimony of the wholesalers themselves and all the other incidents of Schrafft's sales procedures specifically negate a finding that "the manufacturer * * * controls the terms upon which he [the retailer of Schrafft's candy] buys".

80. At the argument on the proposed findings, the examiner requested complaint counsel to specify the things which Schrafft is presently doing which complaint counsel would have Schrafft cease doing. His response, in substance, was that he would have Schrafft sell directly to the retailer. A marketing practice which has been employed for more than fifty years, and which directly benefits the wholesalers who are part of it, must not, of course, be lightly ordered cast aside. § 2(a) does not empower the Commission to order a manufacturer to desist from any marketing procedure unless it is proven that the manufacturer, either directly or indirectly, discriminates in price between different purchasers of commodities of like grade and quality. Such proof being absent in this record as to the Schrafft sales to its customers, it must be found that a violation of § 2(a) does not stand proven in this record. Moreover, the proof in this case does not establish the fact that Schrafft has exercised control over sales by its wholesalers to their retailers to such an extent as to justify a finding that Schrafft "controls the terms upon which he [the retailer] buys" (*American News Company* v. *FTC*, *supra*).

IV. The Case Against Wallace

81. Wallace, unlike Schrafft, sells its boxed candy directly to retailers by means of its own sales staff. Wallace does sell goods of like grade and quality at differing prices to different retailers for resale.

82. In Buffalo, Wallace granted an additional 10% discount on boxed candy to Adam Meldrum & Anderson Co. Inc., Hens & Kelly,

and Wm. Hengerer department stores. During the years 1958 and 1959 such discounts were:

	1958	1959
Adam Meldrum & Anderson Co. Inc	$103.20	$162.98
Hens & Kelly	4.01	26.24
Wm. Hengerer Co	46.10	59.90

(CX 738).

83. Wallace did not grant the 10% discount on boxed candy to Gertrude Shalala Candy Shoppe, William E. Mathias Co., or Wm. A. Jepson Inc. These latter retailers' total purchases of Wallace packaged candy of the type purchased by the department stores were:

	1958	1959
Gertrude Shalala	0	$61.52
Wm. E. Mathias	$124.00	187.68
Wm. A. Jepson	754.32	840.56

A 10% discount on these purchases comparable to the discount granted to the department stores would have amounted to total additional discounts as follows:

	1958	1959
Gertrude Shalala	0.00	$6.15
Wm. E. Mathias	$12.40	18.77
Wm. A. Jepson	75.43	84.06

84. It has been stipulated (CX 737) that the proprietors or owners of Gertrude Shalala Candy Shoppe, Wm. E. Mathias, and Wm. A. Jepson would, if called, testify (over a timely objection that the opinion portion of the testimony constitutes conclusions of fact and expressions of opinion) that:

They compete in the resale of Wallace boxed candy with the downtown department stores Adam Meldrum & Anderson Co., Inc., Hens & Kelly, and Wm. Hengerer Co.;

There is "keen competition in the sale of candy products", and in their opinion, if a competitor were able to purchase Wallace boxed candy at a 10% lower price than they, this would adversely affect their business in that such competitor would have a relatively greater overall profit margin on such candy, which extra margin could be used to improve his facilities, advertise his products, or otherwise improve his competitive position;

The two Gertrude Shalala Candy Shoppes "take advantage of all trade discounts because such discounts are extremely important in the computation of net profit";

They take advantage of all cash discounts when possible, but no cash discounts have been taken on Wallace products during the past year;

The Wm. E. Mathias Co. Inc. store and cigar and candy stand have about $270,000 annual sales;

The owner's average markup is about 23%, and is 33% on Wallace boxed candy;

The owner takes advantage of all trade discounts because such discounts are extremely important in the computation of net profit;

Cash discounts particularly are very important to him, and he always takes them;

During the past year he has taken advantage of the 2% cash discount for prompt payment offered by Wallace;

Wm. A. Jepson, Inc., a fancy food store, does about $140,000 annual business;

The company's net profit is between 2% and 2½%, excluding the owner's salary of $115.00 weekly;

Its markup on Wallace boxed candy is 33⅓% and the markup on many of the grocery items carried varies from 25% to 10%;

The owner takes advantage of all trade discounts when possible because such discounts are extremely important in the computation of net profit;

He considers the 2% cash discount very important, but very often the unavailability of cash makes taking the 2% discount impossible;

On occasion during the past year he has taken the 2% cash discount for prompt payment offered by Wallace;

During 1958–1959 Gertrude Shalala Candy Shoppes never took advantage of the 2% cash discount for payment within fifteen days from the date of the invoice;

Upon a number of occasions Wm. A. Jepson Inc. did not take advantage of the 2% cash discount.

85. In the Rochester area, Wallace granted an additional 10% discount on purchases of boxed candy to E. W. Edwards & Son and Sibley Lindsay & Curr Co., department stores. Such discounts were:

	1958	*1959*
E. W. Edwards	$107.15	$13.87
Sibley Lindsay & Curr Co	120.84	167.72

86. Wallace did not grant the additional 10% discount to Josephine Pendleton (Rochester Nut Shop), nor to Jackson & Bailey, Inc. These retailers' purchases of Wallace packaged candy of the type purchased by the Rochester department stores were:

	1958	*1959*
J. Pendleton (Rochester Nut Shop)	$41.84	$69.44
Jackson & Bailey	322.32	316.16

The additional 10% discount on these purchases would have amounted to:

	1958	*1959*
Rochester Nut Shop (J. Pendleton)	$4.18	$6.94
Jackson & Bailey	32.23	31.61

[See CX 737, CX 738.]

87. It has been stipulated that the proprietors or owners of these retail stores in the Rochester trade area, if called, would testify (over a timely objection that the opinion portion of the testimony constitutes conclusions of fact and expressions of opinion), that they compete in the resale of Wallace & Co. boxed candy with the downtown Rochester department stores E. W. Edwards & Son and Sibley-Lindsay & Curr Co.; that there is "keen competition in the sale of

candy products"; and that, in their opinion, if a competitor were able to purchase Wallace boxed candy at a 10% lower price than they, this would adversely affect their business, in that such competitor would have a relatively greater overall profit margin on such candy, which extra margin could be used to improve his facilities, advertise his products or otherwise improve his competitive position.

88. Jackson-Bailey Inc., is a confectionery store located outside the downtown shopping area of Rochester. It sells ice cream, candy, nuts and greeting cards, and its total annual sales are between $50,000 and $60,000. The sale of ice cream accounts for slightly over 50% of its total business. Its "business has been getting progressively worse over the past three years", and, as a result, the president of the company "has not been able to draw any salary from the business for the past two years". Overall markup on all its products is about 35%, and on Wallace boxed candy, 33⅓%. The owner takes advantage of all trade discounts because such discounts are extremely important in the computation of net profit. During the past year he was unable to take any cash discounts because of the lack of available cash.

89. The Rochester Nut Shop (Josephine Pendleton) is a confectionery store located in the downtown shopping area. It sells only nuts and candy. Its total sales for 1960 were about $36,000, with a net profit of slightly less than 15%, including owner's salary. Overall markup on all or most of its products is 33⅓%. The owner "takes advantage of all trade discounts because such discounts are extremely important in the computation of net profit". She takes advantage of the 2% cash discount for prompt payment whenever possible, but sometimes she cannot take advantage of it because of the lack of available cash.

90. During the years 1958 and 1959 Jackson & Bailey Inc., and Josephine Pendleton (Rochester Nut Shop) usually did not take advantage of the 2% cash discount for payment within fifteen days of the date of the invoice.

1. Wallace's Defense of No Injury to Competition

91. The Supreme Court held in *FTC* v. *Anheuser Busch, Inc.*, 363 U.S. 536 (1960), that a price discrimination under § 2(a) is merely a price difference. Applying the rationale of that decision to this case, it would appear that complaint counsel has, as to Wallace, made out a *prima facie* case. However, in *Anheuser Busch* the Supreme Court remanded the case to the Seventh Circuit for that circuit to make a determination of whether the record would support the requisite finding of competitive injury. The Seventh Circuit found that

the requisite competitive injury had not been proven, and dismissed the proceeding (289 F. 2d 835).

92. No evidence of actual or probable injury has been adduced in this record except the non-probative, speculative and conjectural stipulated evidence of retailers in Commission's Exhibit 737. However, as this examiner reads the holdings of the Federal Trade Commission in *Tri Valley Packing Association*, Dockets 7225 and 7496 (Commissions' opinion dated May 10, 1962) [60 F.T.C. 1134, 1168], *American Oil Company*, Docket 8183 (opinion dated June 27, 1962) [60 F.T.C. 1786, 1804], and *United Biscuit Company of America*, Docket 7817 (opinion of the Commission dated June 28, 1962) [60 F.T.C. 1893], such proof of competitive injury is no longer required. The Commission has enunciated a "*per se*" standard for judging probable injury to competition under § 2(a) of the Robinson-Patman Act.

93. In *Tri Valley*, the Commission held (p. 1175):

* * * In view of our holding that respondent's price discriminations may result in injury to competition *regardless of whether there is actual competition in the resale and distribution of the products involved in the discriminations*, we believe that the phrase "in the resale and distribution of respondent's products" unduly limits the scope of the order and should be deleted therefrom. (Emphasis supplied.)

and on page 1171:

In any case involving the effect of a price discrimination on competition between buyers, the requisite injury *may be inferred* from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission* v. *Morton Salt Company, supra*); and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (1956); *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (1956). (Emphasis supplied.)

94. In *American Oil*, the Commission in its opinion (p. 1806) interpreted *Morton Salt Co.* (334 U.S. 37 (1948)) as holding:

in price discrimination cases involving competition between buyers, the requisite injury to such competition *may be inferred* from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. (Emphasis supplied.)

95. Although *Anheuser* was remanded by the Supreme Court for the Seventh Circuit to determine whether there was proof of competitive injury in the record, it would appear that the opinions in *Tri Valley*, *American Oil* and *United Biscuit* eliminate the requirement of proof of competitive injury. In *American Oil* (page 3) the Commission stated: "Hence, it is unnecessary to determine whether the hearing examiner's finding of actual injury is supported by the record."

96. In *United Biscuit*, Docket 7817 [60 FTC 1893, 1898] (opinion of June 28, 1962), the Commission stated, in commenting on *Tri Valley:*

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

97. As the examiner reads the Commission's opinions in *Tri Valley*, *American Oil*, and *United Biscuit*, the absence of proof in this record of competitive injury resulting from Wallace's price differentials does not compel a dismissal of this proceeding as to Wallace.

98. However, Wallace defends further on the grounds that its lower prices to some purchasers of its candy were made in good faith to meet an equally low price of a competitor. The evidence shows and the examiner further finds:

2. Wallace's "Meeting Competition" Defense

99. The additional 10% discount was granted by Wallace to the department stores in Buffalo and Rochester because the officers of Wallace honestly and reasonably believed, in good faith, that they were meeting the equally low prices offered and given to these same department stores by a large number of Wallace's competitors, including, among others, Russell Stover Candies, New England Confectionery (Candy Cupboard), Cresca (Pascal), Stevens Candy Kitchens (Mrs. Stevens), Maple Grove, DeMet's, Loft, Jaret Imports Inc., Edward Sharp Sales Inc., Maillard, Bonomo, Brown & Haley, Whitman, Este, Miller & Hollis, Delson, Goetz, Parkside, Wunderle, Peerless, Rosemary DeParke and Louis Sherry. The need of meeting this competition was confirmed by the testimony of wholesalers in Buffalo, Rochester and Syracuse: Attea, Zutes, and Rose who sell or attempt to sell candy to these same department stores; and by the testimony of the candy buyers for United Whelan, F. W. Woolworth, W. T. Grant, and J. C. Penney Co. These candy buyers testified that they purchase candy at prices equivalent to at least a 40% discount from the suggested retail price from many competing candy companies, including, among others: Whitman, Page & Shaw, Voneiff Drayer, DeWitt P. Henry, Derand, E. J. Brach, Sisco, Hamilton, Brown & Hollis, Candy Cupboard, Martha Washington, Mrs. Stevens, Cresca and Brown & Haley.

100. John P. Joyce, who had been associated with Wallace for a long time and had been vice president in charge of sales, left Wallace on June 15, 1961, and was, at the time of his testimony, sales manager for the Loft Candy Corporation. His testimony appears at pages 880 *et seq.* of the record. At page 898 Mr. Joyce testified that in pricing

Wallace packaged candy to the E. W. Edwards department store and Sibley Lindsay & Curr stores in Rochester, and to the Adams, Meldrum & Anderson Co., Inc. and William Hengerer Co. department stores in Buffalo, he actually believed in good faith that he was "merely meeting the equally low prices offered and given to these particular department stores by the competing sellers of candy * * *". Wallace had been granting the additional 10% discount to all the department stores, without exception, for as long as Joyce had been in the business. These same department stores took a higher markup on bulk candy (not involved here) than on boxed candy because of "bag shrinkage". The Rochester and Buffalo department stores were receiving the additional 10% discount on Wallace package candy at the time Mr. Joyce went with Wallace. It was Mr. Joyce's "educated guess" that the practice of the candy manufacturers allowing the department stores the additional 10% discount on packaged candy began "some forty years ago". The manufacturers who refused this additional discount simply did not get the packaged-candy business.

101. Packaged candy has been sold to the department stores for many years past at a wholesale price which reflected a 40% markup, based upon the suggested retail sales price.

102. It is complaint counsel's position that "a seller who adopts a system of pricing which results in routine and continuing discrimination in favor of all department-store customers has no standing to invoke §2(b)" [1], citing *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) and *Federal Trade Commission* v. *Cement Institute*, 333 U.S 683.

103. The Supreme Court, in *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396 (1958) (a sequel to *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951)), specifically approved a § 2(b) defense in a factual situation similar to the one proven here. In *Standard Oil* the Supreme Court took cognizance of *Staley*, *Cement Institute* and *National Lead* (355 U.S. 401), but held, nevertheless, that the § 2(b) defense was properly invoked. In *Standard Oil*, as in this case, the pricing practice apparently preceded the 1936 Robinson-Patman amendments to the Clayton Act.

104. At page 402, the Court said:

> It appears to us that the crucial inquiry is not why reduced prices were first granted * * * but rather why the reduced price was continued subsequent to passage of the Act in 1936 * * *.

Respondent Wallace's exhibits 6 through 18–L, read in conjunction with the testimony of John P. Joyce (who had been in the candy busi-

[1] See complaint counsel's reply memorandum filed August 31, 1962.

ness for many years) and the other evidence in this record, support a finding, and the examiner does find, that Wallace's additional 10% discounts to the retailers, as proven in this record, were "* * * a response to individual competitive situations, rather than pursuant to a pricing system * * * " (see *Standard Oil*, *supra*, 355 U.S. at 404). Wallace has proven that its lower prices to some purchasers were made in good faith to meet an equally low price of a competitor, or competitors.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over the respondents Frank G. Shattuck Company, W. F. Schrafft & Sons Corporation, and Wallace & Co., and these respondents are engaged in commerce as "commerce" is defined in the Clayton Act as amended.

2. This record does not support the conclusion that respondent Schrafft's Sales Corporation was engaged in commerce, as "commerce" is defined in the amended Clayton Act. The Federal Trade Commission does not have jurisdiction over Schrafft's Sales Corporation, and this complaint should be dismissed as to that respondent.

3. Respondent Frank G. Shattuck Company does not manufacture the product line involved in this proceeding. As to its wholly owned subsidiaries, W. F. Schrafft & Sons Corporation and Wallace & Co., who do manufacture and sell such product line, Shattuck does not determine, direct, or control the prices, terms, and other policies upon which such wholly owned subsidiaries do sell the product line and deal with their customers. Respondent Frank G. Shattuck Company has not been proven in this record to have violated the Clayton Act as charged in the complaint. The complaint should be dismissed as to respondent Frank G. Shattuck Company.

4. Respondents W. F. Schrafft & Sons Corporation and Wallace & Co. manufacture and sell the product line involved in this proceeding. In the course and conduct of their businesses in commerce, Schrafft and Wallace are competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution and sale of their products.

5. The evidence in this record does not establish that W. F. Schrafft & Sons Corporation, in the course of its trade in commerce and in its sale of the product line here involved, has discriminated in price, either directly or indirectly, between different purchasers of commodities of like grade and quality by selling to some purchasers at higher and less favorable prices than they sell to other purchasers competitively engaged in the resale of their products with the more

favored purchasers, as charged in the complaint. The complaint should be dismissed as to the respondent W. F. Schrafft & Sons Corporation.

6. The evidence in this record establishes that respondent Wallace & Co. sold its products of like grade and quality to some purchasers at higher and less favorable prices than it sold such products to other purchasers competitively engaged in the resale of its products with the non-favored purchasers. Wallace & Co.'s lower prices to some purchasers were made in good faith to meet the equally low prices of its competitors. The complaint should be dismissed as to Wallace & Co.

ORDER

Now, therefore,

It is ordered, That the complaint, and this proceeding, be and hereby are, dismissed as to each and all of the respondents Frank G. Shattuck Company, W. F. Schrafft & Sons Corporation, Schrafft's Sales Corporation, and Wallace & Co., jointly and severally.

OPINION OF THE COMMISSION

APRIL 22, 1964

By DIXON, *Commissioner:*

This matter is before us on the appeal of Commission counsel from the hearing examiner's dismissal of the complaint, which had charged each of the respondents with price discrimination in violaton of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526 (1936), 15 U.S.C. 13(a)).

Briefly summarized, the corporate relationships of the various respondents are as follows. Frank G. Shattuck Company is the parent corporation and owns all of the stock in the remaining respondents. Shattuck was made a party to the proceeding solely on the theory that it exercised sufficient direction and control over the sales activities of its wholly owned subsidiaries to be held legally responsible therefor. W. F. Schrafft & Sons Corporation maintains a plant in Charlestown, Massachusetts where it produces candies for a nationwide market. Wallace & Company manufactures candy for sale in commerce at its Brooklyn, New York, plant. Schrafft's Sales Corporation is a wholesaler located in the city of New York and is engaged primarily in the sale of candy products manufactured by W. F. Schrafft & Sons and Wallace to retailers in that city.

After the record had been closed, counsel supporting the complaint recommended to the examiner that the charge against Frank G. Shattuck Company, the parent corporation, be dismissed on the basis that the evidence failed to show that it was responsible for the sales

policies of its subsidiaries. He also recommended that the charge against Schrafft's Sales, whose activities were confined solely to intrastate sales, be dismissed. The examiner made independent findings of fact in accord therewith, and these findings, which are supported by the evidence, are hereby adopted as the findings of the Commission. W. F. Schrafft & Sons Corporation and Wallace & Company, both of which are manufacturers of candy products, are thus the only respondents before us at this time. The charges against each present different problems and accordingly will be discussed separately.

I.

W. F. Schrafft & Sons markets its boxed or gift candy, the product in issue, through wholesalers who resell the products to retailers. Although Schrafft makes a few sales directly to supermarkets, these particular sales constituted only a small part of Schrafft's total sales at the time of the hearing and are not in issue in this proceeding. Thus, for the purposes of this case, all of Schrafft's sales of its products were made to wholesalers. These wholesalers purchase the products from Schrafft at a uniform price, regardless of their subsequent customers, and resell them to independent retailers and to such chain organizations as F. W. Woolworth Company, W. T. Grant Company, and Walgreen Drug Stores. The charge is predicated upon the fact that the chains are able to purchase Schrafft's candies from wholesalers for less than independent retailers purchasing the same products from the same wholesalers. Independent retailers are charged a price computed on the basis of a 33⅓% discount from the suggested consumer price, while chain stores are granted an additional 10% discount from the price at which the independents purchase. The additional discount permits the chain stores to purchase at 40% off the suggested consumer price and was thus sometimes referred to in the transcript as a 40% discount. A discount of 2% is also available to both classes of customers for prompt payment.

The first question which arises is whether responsibility for these price differences attaches to Schrafft, since instead of selling directly to retailers, Schrafft utilizes a distribution system in which it sells to wholesalers who in turn resell the products at differing prices to retailers. We have held in prior cases that where the evidence demonstrates that the manufacturer exercises a specified degree of control over the relationships and terms of the sale which occurs when the retailer purchases from the wholesaler, the retailer may, for the purposes of the Clayton Act as amended, be deemed an "indirect purchaser" from the manufacturer. *E.g.*, *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937); *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Dentists' Sup-*

ply Co. of New York, 37 F.T.C. 345 (1943); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953). The courts have recognized and applied the indirect purchaser doctrine on several recent occasions. *E.g.*, *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310 (S.D.N.Y. 1961); *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962). Although the court in *Klein* v. *Lionel Corporation*, 237 F. 2d 13 (3d Cir. 1956), declined to extend the doctrine to situations where the control was exercised through state fair trade contracts, no such issue arises in this case.

In determining whether the doctrine enunciated by these cases is applicable in a particular situation, the decision must be made on a case-by-case basis with careful scrutiny of the differing circumstances presented in each instance. *K. S. Corp.* v. *Chemstrand Corp.*, *supra*. From an examination of these and other cases, it appears that the most important factor to be considered is the degree of control exercised by the manufacturer over the prices and other terms of the sale made by the wholesaler to the retailer. Another is the extent, if any, to which the manufacturer deals directly with the retailer and by such dealing recognizes the retailer as his customer. Examples of instances of direct contact which are of particular significance are negotiations of franchise agreements with the retailer, negotiations with the retailer concerning the price which the retailer will be charged by the wholesaler, attempts by the manufacturer's salesmen to solicit orders from the retailer, policing of the retailer's resale prices by the manufacturer, inspections by the manufacturer to determine whether the retailer is fulfilling his obligation to the wholesaler, and furnishing of advertising supplies to the retailer by the manufacturer.

In this case, the transcript is replete with instances of direct contact between Schrafft and all retailers of its products, both chain and independent. Schrafft registers its products with the central purchasing offices of the various chains so that the products will be listed for purchase by the buyers of the local outlets. As required by the chains, the registration states the price at which the products are available to the chains' local outlets. The chains have indicated that they will not "list" products for purchase by their local outlets unless the products may be obtained at a price not greater than 40% off the suggested consumer price. Schrafft has thus informed the central purchasing offices of the various chains that its products may be purchased from wholesalers at such a price, which is 10% less than its usual suggested wholesale price. When chains have been billed by the wholesaler at the normal rather than the preferential price established by the act of registration, occasionally the chain has complained directly to Schrafft and Schrafft has intervened for the purpose and with the

effect of obtaining for the chain the lower price. Further, Schrafft's salesmen visit the various retailers. During these calls, the salesmen may promote new products, advise the retailers on methods of display and advertising, and even solicit orders. Schrafft requires that its salesmen complete and file with it a specific form after such visits. Obviously, therefore, Schrafft deals directly in many ways with the retailers who market its products, thus providing a basis for an inference that it recognizes these retailers as its own customers.

On the other hand, the evidence is patently insufficient to establish that Schrafft exercises any significant degree of control over the terms of the sales made by the wholesalers to the independent retailers purchasing its products. Although the wholesalers usually charge the independent retailers Schrafft's suggested price of 33⅓% off the consumer price, the transcript revealed instances where independents were able to purchase from the wholesalers at the more favorable chain store price. Several wholesalers testified that they were free to set the prices at which they sold their products. One testified that he always sold to the independents at the same price at which he sold to chains, and another stated that if he received enough pressure from independents he made the lower price available to them. Further, and by way of distinguishing this case from others of a similar nature, there is no evidence that any contracts have been executed between the wholesalers and the independents governing the prices and terms of the sales by the wholesalers to the independent retailers, the provisions of which were established by Schrafft. It does not appear that Schrafft requires the retailers to maintain a minimum inventory or a complete line of its products, or that it attempts in any way to enforce the price which it suggests that the wholesalers charge the independents for its products. In short, there is little to indicate that Schrafft could eradicate the price difference in favor of the chains by requiring that the wholesalers make its products available to the independents at the same lower price even if it attempted to do so.

Complaint counsel argues that a finding that the independent retailers are indirect purchasers from Schrafft is not necessary for a holding that Schrafft has discriminated in price. In essence, the argument is as follows. Schrafft intervened in a sales distribution system which isolated it from direct sales contact with retailers by knowingly establishing a discriminatory price in favor of the chains. The act of intervention was an act of control over prices which created a discrimination which would not otherwise have existed. Thus, according to complaint counsel, the power of control over the prices at which chains purchase from wholesalers creates a corresponding duty to

protect other retailers from price discrimination. The failure to fulfill that duty is the basis for liability under Section 2(a).

We are unable to adopt this theory. The instant case presents a unique factual situation. All of the sales in issue were made by Schrafft to independent wholesalers at uniform prices. The acts of discrimination occurred in subsequent sales by the wholesalers to the various chains and independent retailers. With the facts in this posture, we are of the opinion that Schrafft may not be held responsible for the discrimination unless it can be shown that both the chains and the independents are "indirect purchasers," as that term has been defined, from Schrafft. Our finding that the independent retailers are not "indirect purchasers" is thus a finding that an essential element of the offense has not been established and compels dismissal of the charge against Schrafft. We express no opinion on whether Schrafft exercises sufficient control over the price charged the chain stores by the wholesalers to support a finding that the chains are "indirect purchasers."

II.

The packaged candy products manufactured by Wallace & Company are sold to retailers through several channels. Some are marketed through a distribution system composed of some forty brokers and thirty-five jobbers or wholesalers. However, the majority of Wallace's sales are made directly to approximately four thousand retailers, and it is with these latter sales that we are presently concerned. Wallace's normal wholesale price is 33⅓% less than the suggested consumer price. Chains and department stores purchase at 10% less than the normal wholesale price or 40% off the suggested consumer price. That price difference was the basis for the charge of price discrimination against Wallace.

The hearing examiner found the evidence insufficient to support a finding of probable competitive injury, but after commenting that the Commission had established a "per se" rule on that issue, held that such a failure of proof was not grounds for dismissal. Upon consideration of Wallace's defense that its prices were granted in a good faith attempt to meet lower prices of competitors, the examiner concluded that the prices had in fact been so granted and on that basis dismissed the charge. Although we are in agreement with the examiner that the charges against Wallace should be dismissed, we have concluded that the dismissal must be upon different grounds.

We reject outright the examiner's conclusion that a failure of proof on the issue of probable competitive injury is not grounds for dismissal of a charge of price discrimination, and turn to a consideration of the evidence offered in support of this issue. The evidence on the question is limited to the cities of Buffalo and Rochester, New York.

Instead of calling witnesses, a stipulation containing the expected testimony of three non-favored independent retailers from Buffalo and two non-favored retailers from Rochester was introduced. One of the retailers from Buffalo was engaged in the sale of candy products, another operated a cigar and candy stand, while the third was classified as a fancy food store. In Rochester, one of the retailers realized over 50% of his business from the sale of ice cream, while the other operated a store selling candy and nuts exclusively. All, if called, would have stated that they compete with several specific stores which, according to other evidence, received the preferential ten percent discount. They would have testified further that competition in the sale of candy products is keen, that they take advantage of all trade and cash discounts where possible, and that, in their opinion, if a competitor were able to purchase Wallace boxed candy at ten percent less, their business would be adversely affected because the greater over-all profit margin on candy could be used to improve their competitors' position in the market in various ways. All considered the 2% cash discount to be "extremely important," "very important," or "particularly important." However, four of the five did not habitually take advantage of it. Three assigned as their reason the unavailability of funds, but no reason was advanced by the fourth. The stipulation revealed the average net profit margins of only two of the five witnesses. The fancy food store located in Buffalo reported an average net profit margin of 2 to 2½% on annual sales of $140,000. The other, the candy and nut store located in Rochester, reported a net profit during 1960 of slightly less than 15% on sales of $36,000. No further information on the average net profit margins of the non-favored retailers of Wallace candy appears. The stipulation is silent on the average net profit margin realized from the sale of Wallace products considered separately.

In addition to the stipulation of expected testimony complaint counsel introduced invoices showing all sales made by Wallace in the Buffalo and Rochester areas during the years 1958–1959. These invoices revealed the cash value of the discount granted to the favored retailers and provided a basis for a computation of what the value would have been to the non-favored retailers during those years. According to the examiner's calculations, the value of the discount to the non-favored Buffalo retailers reporting an average net profit margin of 2 to 2½% on annual sales of $140,000 would have been $75.43 in 1958 and $84.06 in 1959. The cash value to the Rochester retailer reporting a net profit margin of slightly less than 15% on annual sales of $36,000 would have been $4.18 in 1958 and $6.94 in 1959.

In a case such as this, where there is no proof of actual competitive injury and the non-favored retailers resell the products at a preticketed

price, factors such as the net profit margins of the non-favored retailers and the extent to which they take advantage of the 2% cash discount take on an added significance in determining the probability of competitive injury. Thus, where the discrimination does not alter the price at which the product is ultimately resold, the effects of the discrimination must be measured with reference to such factors as the impact on average net profits. Where, as here, the non-favored retailers are engaged in different types of retail business, and the evidence reveals the net profit margins of only two, whose profits are somewhat divergent, there is little upon which to project the probable effects of a discrimination. In addition, although we are told that competition in the sale of packaged candy is keen, so much so that the cash discount of 2% is of extreme importance, the evidence reveals that four of the five non-favored retailers did not habitually take advantage of this discount. In these circumstances, we find that there is in this record no basis for an informed determination of the probable competitive effect of Wallace's price discriminations.

In view of the foregoing, we find it unnecessary to reach Wallace's contention that the discriminatory prices were granted in good faith to meet the lower prices of its various competitors, and as a consequence we do not adopt the examiner's findings and conclusions in regard thereto.

For the reasons stated, the charges against each of the respondents will be dismissed. An order modifying those parts of the initial decision in conflict with our views as discussed herein and adopting the decision as so modified will issue. Rules of Practice, Section 3.24(b) (August 1, 1963), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

Commissioner MacIntyre not concurring for the reason set forth in the order, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

Final Order

This matter having been heard by the Commission upon appeal by counsel supporting the complaint from the hearing examiner's initial decision, dated September 20, 1962, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the appeal should be denied, and that the initial decision of the examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision, dated September 20, 1962, be, and it hereby is, modified by striking from the findings of fact

paragraphs 32 and 33, paragraphs 63 through and including paragraph 80, paragraphs 91 through and including paragraph 104; by striking from the conclusions paragraph 6; and by substituting therefor the findings and conclusions of the accompanying opinion.

It is further ordered, That the initial decision as above modified and as modified in the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

Commissioner MacIntyre not concurring for the reason that he considers this to be a price discrimination case of a fundamental type where competitive opportunities of small business retailers are substantially adversely affected by a continuing 10% price discrimination in favor of the large chains with which they "keenly" compete and, consequently, believes that minimally this matter should be handled in the same manner as Federal Trade Commission Docket No. 8513, *In the Matter of Atlantic Products Corporation, et al* (December 13, 1963) [63 F.T.C. 2237]. Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

CONTINENTAL PRODUCTS, INC., ET AL.

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

Docket 8517. Complaint, June 29, 1962—Decision, Apr. 23, 1964

Order requiring Chicago sellers of various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances, to retailers and to the public direct, to cease representing falsely that their merchandise was offered for sale at wholesale prices by such statements in catalogs and circulars as "* * * a wholesale catalog * * * at the lowest wholesale prices * * * general wholesale merchandise * * *." The evidence is insufficient to support the allegation in the complaint challenging respondent's use of the term "retail price".

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 Continental Products, Inc., a corporation, and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the