

FOUR SEASONS

Complaint

IN THE MATTER OF

VOEDISCH BROTHERS, INC., TRADING AS  
FOUR SEASONS SPORTING GOODS, ET AL.

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

*Docket C-1731. Complaint, Apr. 20, 1970—Decision, Apr. 20, 1970*

Consent order requiring a Chicago, Ill., distributor of fishing tackle and accessories to cease misrepresenting the country of origin of any product and the strength of its fishing lines, preticketing its merchandise at a deceptively higher price than prevalent in any trade area, making false savings claims, and furnishing others means to deceive purchasers.

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 Voedisch Brothers, Inc., a corporation, trading as Four Seasons Sporting Goods, and Phillip Teitelbaum, individually and as an officer 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, Voedisch Brothers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1823 Milwaukee Avenue, Chicago, Illinois. Corporate respondent also trades as Four Seasons Sporting Goods.

Respondent, Phillip Teitelbaum, is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past, have been engaged in the advertising, offering for sale, sale and distribution of rods, reels, hooks, lines, sinkers, and various other items of fishing tackle and accessories to retailers for resale to the purchasing public.

## Complaint

77 F.T.C.

PAR. 3. In the course and conduct of their business, as aforesaid 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 Illinois, to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been and now are in substantial competition in commerce with corporations, firms and individuals engaged in the sale of fishing tackle and fishing accessories of the same general kind and nature as that sold by respondents.

PAR. 5. In the course and conduct of their business respondents have disseminated, and caused the dissemination of certain advertisements concerning said fishing tackle and fishing accessories by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements by means of bubble packaged display cards which display the articles of merchandise for the purpose of inducing, and which were likely to induce directly or indirectly the purchase of said articles of merchandise; and have disseminated and caused the dissemination of advertisements by various means including those aforesaid, for the purpose of inducing and which were likely to induce directly or indirectly, the purchase of fishing tackle, in commerce as "commerce" is defined by the Federal Trade Commission Act.

PAR. 6. By means of advertisements disseminated as aforesaid, respondents have represented directly or by implication:

1. That certain products including spools of monofilament spinning line offered for sale are ". . . American made . . ." or are manufactured in the United States.

2. That certain spools of monofilament spinning line bearing a FOUR SEASONS label are of a quality and standard of strength described as "8 lb. test"; and

3. That preticketed prices appearing on the label of certain spools of fishing line bearing the FOUR SEASONS label which are visible to the consumer through the bubble package constituting a part of the display package is the regular or customary price at which the article of merchandise sells and that another price printed on the display card, which is substantially less than the former price, is a reduced or discount price representing a substantial savings to the consumer.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

Description (by stock No.)	Spool price (price appearing on spool label)	Card price (price appearing in upper right- hand corner of display card)
F 340.....	\$0.95	59
F 350.....	1.05	69

PAR. 7. In truth and in fact:

1. Not all the products represented as being “. . . American made . . .” were manufactured in the United States. Specifically certain products including certain spools of monofilament spinning line were manufactured in Japan.

2. Not all spools of monofilament spinning line meet the standard of strength as represented.

Specifically, certain spools of said spinning line are of a lesser standard of strength, to wit, certain spools of spinning line of a standard of strength described as “6 lb. test” are represented to be of a standard of strength described as “8 lb test.”

3. The preticketed price appearing on the FOUR SEASONS label is not respondents’ good faith estimate of the actual retail selling price of said products.

Instead, the usual and regular price at which the articles of merchandise are sold is the purported “reduced” or “discount” price which is substantially less than the preticketed price appearing on the label.

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

PAR. 8. By the use of the aforesaid statements, representations and practices, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the country or origin of respondents’ products, the quality and characteristics of such products and the usual and regular prices at which such products are sold.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said state-

ments and representations were, and are, true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the above 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 respondents of all 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 respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters its order:

1. Respondent Voedisch Brothers, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and place of business located at 1823 Milwaukee Avenue, Chicago, Illinois. Corporate respondent also trades as Four Seasons Sporting Goods.

Respondent Phillip Teitelbaum is the president of said corporation and his principal office and place of business is located at the above stated address.

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, Voedisch Brothers, Inc., a corporation and its officers, trading as Four Seasons Sporting Goods or under any other trade name or names, and Phillip Teitelbaum, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of fishing tackle, fishing accessories or any other product in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "American made" or any other words, terms or phrases of similar import or meaning to describe or refer to any product not wholly manufactured in the United States; or misrepresenting, in any manner, the country of origin of a product.

2. Representing, directly or by implication, that fishing lines are of a specified strength unless such lines are of the represented strength; or misrepresenting, in any manner, the performance characteristics of any product.

3. Preticketing merchandise with any stated price amount unless (a) it is respondents' bona fide estimate of the actual retail price of the product in the area where respondents do business; (b) it does not appreciably exceed the highest price at which substantial sales of said product are made in said trade area; and (c) unless respondents have conducted a market survey which establishes the validity of said preticketed price and maintain records of such survey for a period of three (3) years.

4. Misrepresenting, in any manner, the prices at which respondents' merchandise are sold at retail, or the savings available to purchasers thereof.

5. Furnishing to others the means and instrumentalities whereby the purchasing public may be misled or deceived as to the matters and things herein prohibited.

Order

77 F.T.C.

*It is further ordered,* That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment of sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*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 the order.

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IN THE MATTER OF

ALLIED CHEMICAL CORPORATION, ET AL.

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

*Docket 8767. Complaint, Aug. 26, 1968—Decision, Apr. 29, 1970*

Order requiring a major manufacturer and distributor (Allied) of chemical products, including synthetic fibers, and a Mount Clemens, Mich., manufacturer (Robbins) of automotive safety seat belts, to divest themselves of all their assets used in the manufacture of seat belt webbing, and that for a period of 10 years they purchase 80 percent of their United States requirements of webbing from suppliers other than Allied.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 7 of the Clayton Act (15 U.S.C. Sec. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45), issues this complaint, stating its charges as follows:

I. Definitions

1. For purposes of this complaint, the following definitions are applicable:

(a) Fiber—any tough substance composed of thread-like material whether of animal, vegetable, mineral, or man-made origin, especially substances capable of being spun or woven;

- (b) Yarn—a number of fibers twisted together and used in the manufacture of webbing;
- (c) Webbing—a narrow fabric material with bound edges, woven from yarn, which is joined with a buckle to form an automotive safety seat belt assembly; and
- (d) Automotive Safety Seat Belt—a lap-type belt, shoulder harness, or similar restraining device.

## II. The Respondents

### A. *Allied Chemical Corporation*

2. Respondent, Allied Chemical Corporation (“Allied”), is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business at 61 Broadway, New York, New York.

3. In 1967, Allied was approximately the 64th largest industrial corporation in the United States in terms of annual sales with over \$1.2 billion, approximately the 39th largest in terms of assets with over \$1.6 billion, and had retained earnings of over \$412 million.

4. Together with its consolidated subsidiaries, Allied is the Nation’s seventh largest chemical company in terms of sales. Its major products include fibers and plastics, synthetic organic chemicals, chlorine, alkalis, and chromium chemicals.

5. In 1967, Allied’s sales of fibers and plastics amounted to over \$235 million and accounted for 19 percent of Allied’s total sales volume. Allied produces nylon fibers for a wide range of textile markets: heavy and medium denier yarns for seat belts, tire cord, carpeting, upholstery, cordage, and industrial fabrics; and fine deniers for hosiery and all types of wearing apparel.

6. Allied is one of only three companies, supplying yarn to producers of automotive safety seat belt webbing. In 1967, Allied’s sales of yarn to such producers amounted to over \$3.8 million.

7. At all times relevant herein, Allied has sold and shipped products in interstate commerce throughout the United States and engaged in “commerce” within the meaning of the Clayton and Federal Trade Commission Acts.

### B. *Jim Robbins Seat Belt Co.*

8. Respondent, Jim Robbins Seat Belt Co. (“Robbins”), is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business at 130 Stephenson Highway, Troy, Michigan. Robbins was formed on June 10, 1966, as an equally-owned joint venture between Allied and Jim Robbins

Company ("J. R. Co."). It was organized for the sole purpose of taking over the automotive safety seat belt business formerly conducted by J. R. Co., which business included certain webbing manufacturing assets acquired by J. R. Co. in early 1965.

9. J. R. Co., the predecessor in interest to respondent Robbins, entered the seat belt business in 1962 through the acquisition of the assets of Auto-Crat, Inc., a company which was then engaged in the manufacture of automotive safety seat belts ("seat belts").

10. In 1965, J. R. Co. sold approximately 10.3 million seat belts, valued at \$23.5 million, to automobile manufacturers. It was one of the two largest companies in the industry, each of which accounted for approximately 33.1 percent of all such sales during 1965.

11. Allied acquired J. R. Co.'s 50 percent interest in the new corporation on July 28, 1967. Since that time, Allied has operated Robbins as a wholly-owned subsidiary.

12. In 1967, Robbins sold approximately 14.4 million seat belts valued at approximately \$34.2 million to automobile manufacturers. Its market share increased to 33.6 percent, making it the dominant company in the market with sales approximately 52 percent greater than those of its nearest competitor.

13. At all times relevant herein, Jim Robbins Seat Belt Co. and its predecessor in interest, Jim Robbins Company, have sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

### III. The Nature of Trade and Commerce

#### *A. The Seat Belt Industry*

14. Prior to January 1, 1964, the manufacture and sale of seat belts was a relatively low volume business made up of a number of small firms selling seat belts almost exclusively to the aftermarket; *i.e.*, for installation as accessories on used automobiles or on new automobiles after purchase.

15. In response to certain state legislation, domestic automobile manufacturers made two lap-type seat belts standard equipment on all automobiles produced after January 1, 1964. This safety requirement has since been broadened so that, with the exception of convertibles, all six-passenger 1968 model automobiles must be equipped with six lap-type belts and two shoulder harnesses. This has created a very substantial and rapidly expanding market—the manufacture and sale of seat belts to automobile manufacturers ("seat belt industry"). Conversely, the aftermarket is quickly being eliminated. It

is estimated that aftermarket sales accounted for less than 5 percent of total domestic seat belt sales in 1967.

16. In 1963, shipments of all seat belts, whether sold to the aftermarket or to automobile manufacturers, amounted to less than 11.5 million belts valued at under \$34 million. However, in 1965, sales to automobile manufacturers, alone, amounted to over 29.0 million seat belts valued at over \$70 million. In 1967, such sales had risen to over 40 million seat belts valued at over \$101 million, a dollar increase of more than 150 percent since 1965 and almost 250 percent since 1963.

17. The rapid rise of sales to automobile manufacturers has drastically altered the structure of the seat belt industry. In 1963, at least 22 concerns were engaged in the manufacture and sale of seat belts. However, of this number, only six have been able to establish significant relationships with the four major domestic automobile manufacturers and the one foreign manufacturer selling a significant number of automobiles in the United States. In 1967, these six companies accounted for all domestic seat belt sales to automobile manufacturers.

18. Since virtually all domestic seat belt sales are now made to only five customers—General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, and Volkswagen of America, Inc., the problem of establishing a customer-supplier relationship presents a very substantial barrier to entry into the seat belt industry.

19. The seat belt industry is highly concentrated. Of the six companies in the market, the top two accounted for 55.7 percent of total sales in 1967, while the top four accounted for 82.7 percent.

20. Robbins is the only seat belt manufacturer which is integrated backward into webbing, the primary raw material used in the production of seat belts.

### *B. The Webbing Industry*

21. Prior to March 10, 1965, the webbing industry was composed of six principal producers ("webbers") each of which bought nylon yarn from one or more of three available suppliers and sold finished webbing to seat belt manufacturers.

22. On March 10, 1965, J. R. Co. acquired the webbing manufacturing assets of one of these webbers, Everlastik, Inc., a division of Chelsea Industries, Inc. ("Everlastik"), leaving five non-integrated webbers in the industry. Four of these webbers are small companies with total annual sales ranging from \$9 million to \$15 million. The

other webber is Burlington Ribbons, a division of Burlington Industries, Inc.

23. The know-how and technology involved in converting yarn to finished webbing is highly sophisticated and presents a substantial barrier to entry into the industry. Increasingly rigid webbing specifications are imposed by both the Federal Government and the automobile manufacturers.

24. The webbing industry, as a whole, is rapidly expanding. Total sales increased from approximately \$14 million in 1965 to about \$19.5 million in 1966, and to over \$20.7 million in 1967. However, sales of the five non-integrated webbers decreased from approximately \$16.8 million in 1966 to approximately \$15.8 million in 1967.

#### *C. The Yarn Industry*

25. Nylon yarn is the basic raw material used in the production of webbing. Only three companies—Allied, E. I. duPont de Nemours & Co., Inc., and American Enka Company—supply such yarn to the webbing industry.

26. In 1965, Allied accounted for under 7 percent of all yarn sold to webbers in the merchant market and supplied under 13 percent of all yarn used in the manufacture of webbing during that year. In 1967, two years after Allied's initial acquisition of an interest in Robbins, it accounted for over 11 percent of merchant sales of yarn and over 30 percent of all yarn used in the manufacture of webbing.

### IV. The Acquisitions

#### *A. Seat Belts*

27. Pursuant to a contract ("the Agreement") dated December 29, 1965, Allied entered into an arrangement with Mr. J. M. Robbins, J. R. Co., and Robbins Land Company ("Land Co."), both Michigan corporations controlled by Mr. Robbins, whereby Allied acquired certain assets utilized in the manufacture of seat belts. In consideration for \$20,000,000 Allied acquired:

(a) All of Land Co.'s right, title, and interest in and to the land and buildings comprising certain plants used in the manufacture of seat belts, said plants being located at Mt. Clemens, Michigan, and at Rochester, Michigan; and

(b) Certain patents and patent applications relating to the manufacture of seat belts, along with all rights under licenses thereunder, and goodwill, owned by J. R. Co. and/or Mr. J. M. Robbins, individually.

28. The Agreement further provided for the organization of a new Delaware corporation, Robbins. Robbins was formed to take over the automotive safety seat belt business formerly conducted by Mr. Robbins and the companies which he controlled. The new corporation had authorized capital of \$2,000,000, consisting of 20,000 shares of common stock with a par value of \$100 per share. In addition, a loan of \$10,000,000 was arranged for the new corporation.

29. After closing the transaction whereby Allied acquired the assets described in Paragraph 27, *supra*, it transferred those assets to Robbins in return for 50 percent of the latter's authorized common stock and its note in the amount of \$10,000,000. The note was immediately satisfied with the \$10,000,000 borrowed by the new corporation. Thus, Allied acquired a 50 percent stock interest in Robbins for \$10,000,000.

30. J. R. Co. transferred certain machinery, equipment, molds, dies, tools, furniture, and fixtures used in manufacturing automotive safety seat belts together with \$3,157,000 in working capital (consisting of inventory, prepaid expenses, and cash), all contracts with suppliers and purchase orders from customers related to the seat belt business, and its interest as lessee under a certain lease covering plant space at Knoxville, Tennessee, to the new corporation in exchange for 50 percent of the latter's authorized stock. No receivables were transferred to the new corporation, nor did it assume any liabilities except those which arose subsequent to the closing under the contracts and purchase orders mentioned above and under the land contracts transferred to the new corporation by Allied.

31. The Agreement was consummated on January 10, 1966. In essence, the transactions described in Paragraphs 27, 28, 29, and 30, *supra*, carried out pursuant to the Agreement, resulted in Allied's acquisition of a 50 percent interest in the automotive safety seat belt business carried on by Mr. Robbins and the companies which he controlled.

32. Paragraph 11(A)(v) of the Agreement provided that, in the event of the death of Mr. Robbins, "Allied shall have the option . . . to purchase all the stock of the new corporation [Robbins] then held by J. R. Co., by Robbins' [Mr. J. M. Robbins'] estate, or any corporation controlled by it, at a total price of \$10,000,000 increased by one-half the accumulated earned surplus of the new corporation to the date of death or decreased by one-half of any surplus deficit of the new corporation at such date as reflected on the books of the new corporation." Mr. J. M. Robbins was killed in a plane crash on September 26, 1966. Allied exercised its option and, on July 28,

## Complaint

77 F.T.C.

1967, acquired the remaining 50 percent interest in Robbins for approximately \$10,800,000.

33. In 1965, the year prior to the formation of Robbins and prior to Allied's acquisition of any interest in the seat belt business conducted by J. R. Co., the latter company sold 10.3 million seat belts valued at \$23.5 million to the two largest automobile manufacturers in the United States, such sales accounting for 99 percent of J. R. Co.'s seat belt business. J. R. Co. was one of the two largest seat belt manufacturers in the industry, each of which accounted for 331 percent of all seat belts sold to automobile manufacturers in 1965.

34. During 1966, the year prior to Allied's acquisition of the remaining 50 percent interest in the joint venture, Robbins had sales of 13.8 million belts valued at \$29.8 million. As was the case with J. R. Co. during 1965, 99 percent of Robbins' sales were made to the nation's two largest automobile manufacturers. Its market share, however, declined 29.5 percent of all seat belts sold to automobile manufacturers.

*B. Webbing*

35. On March 10, 1965, J. R. Co. acquired the inventory, machinery, equipment of one of its webbing suppliers, Everlastik. These assets, valued at \$325,000, consisted of 16 looms and associated equipment, along with an inventory of yarn and finished webbing.

36. Prior to the acquisition, Everlastik had been one of the six principal webbers in the United States, buying its yarn from Allied and selling approximately \$2-3 million of finished webbing to the seat belt industry.

37. Shortly after its acquisition, but not as part of the acquisition agreement, J. R. Co. enticed certain personnel with webbing expertise away from Everlastik.

38. In 1966, Robbins strengthened this integrated position by acquiring 14 webbing looms from Comfort-Craft, Inc., of Hialeah, Florida. The purchase price was approximately \$420,000.

## V. Violations Charged

*A. Violations of Section 7 of the Clayton Act*

39. The effect of respondents' acquisition of the seat belt business of J. R. Co., as described in Paragraphs 27 through 32, *supra*, has been, or may be, substantially to lessen competition or to tend to

create a monopoly in the manufacture and sale, in the United States, of seat belts to automobile manufacturers, webbing to seat belt manufacturers, and yarn to webbers in the following ways, among others:

(a) Robbins has, or will have, decisive competitive advantages over non-integrated producers of seat belts and webbing to the detriment of actual and potential competition;

(b) Non-integrated producers of webbing have been, or may be, deprived of a substantial customer or potential customer to the detriment of actual and potential competition;

(c) Allied's position in the manufacture and sale of yarn to webbers has been, or may be, substantially increased, to the detriment of actual and potential competition, in that the existence of Robbins' purchasing power may induce actual and potential suppliers of Robbins to purchase yarn from Allied.

(d) Allied's position in the manufacture and sale of yarn to webbers has been, or may be, substantially increased, to the detriment of actual and potential competition, through the use of Robbins' purchasing power in such a manner as to influence or attempt to influence webbers to purchase Allied's yarn by withdrawing or threatening to withdraw Robbins' patronage or by otherwise manipulating Robbins' webbing purchases;

(e) Additional acquisitions and mergers in the seat belt and webbing industries have been, or may be, precipitated to the detriment of actual and potential competition;

(f) Actual and potential competition in the seat belt, webbing, and yarn industries has been, or may be, substantially lessened because barriers to entry have been, or may be, substantially increased; and

(g) Already high concentration levels in the seat belt, webbing, and yarn industries may be substantially increased and the possibility of deconcentration lessened.

40. The acquisition of the seat belt business of J. R. Co. by respondents, as alleged above, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18).

*B. Violation of Section 5 of  
The Federal Trade Commission Act.*

41. Respondent Allied, respondent Robbins, and Robbins' predecessor in interest, J. R. Co., have carried out a program of acquisition

and expansion, the cumulative effect of which is, and has been, to lessen, restrain, and eliminate competition in the manufacture and sale, in the United States, of seat belts to automobile manufacturers, webbing to seat belt manufacturers, and yarn to webbers. Such program consists of the following:

(a) Acquisition by J. R. Co. of one of its webbing suppliers, as described in Paragraphs 35 through 36, *supra*;

(b) Formation of a joint enterprise, Robbins, for the manufacture and sale of seat belts, as described in Paragraphs 27 through 31, *supra*;

(c) Acquisition by Robbins of additional webbing assets, as described in Paragraph 38, *supra*;

(d) Acquisition by Allied of J. R. Co.'s remaining interest in Robbins, as described in Paragraph 32, *supra*; and

(e) Expansion of the acquired webbing facilities so that those facilities, which supplied only 18.2 percent of Robbins' webbing requirements in 1965, supplied 73.2 percent of such requirements in 1967.

42. The acts and practices of respondents pursuant to the program described in Paragraph 41, *supra*, have had and do have the effect of hindering, lessening, restricting, restraining, destroying, and eliminating competition in the manufacture and sale, in the United States, of seat belts to automobile manufacturers and webbing to seat belt manufacturers; have had and do have a tendency to hinder competition unduly or to create and maintain in respondents a monopoly; have foreclosed markets and access to markets to competitors and/or potential competitors in the manufacture and sale of webbing; are to the prejudice of the public and of the competitors of respondents; and constitute an unfair method of competition and an unfair act and practice within the intent and meaning of Section 5 of the Federal Trade Commission Act.

*Mr. Joseph J. O'Malley, Mr. William P. Tedards, and Mr. Arthur L. Herold* supporting the complaint.

*Mr. John W. Barnum, Mr. Robert S. Rifkind, and Mr. Philip P. Berelson* for respondents, *Cravath, Swaine & Moore*, New York, N. Y.

## INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

MARCH 5, 1970

## CONTENTS

	Page
Preliminary Statement.....	499
Findings of Fact.....	501
I. The Respondents.....	501
A. Allied Chemical Corporation.....	501
B. Jim Robbins Seat Belt Co.....	501
II. Lines of Commerce.....	502
A. Automotive Seat Belts.....	502
B. Automobile Seat Belt Webbing.....	504
C. Seat Belt Yarn.....	506
III. Acts and Practices Engaged in by Respondents.....	506
IV. The Effects of Respondents' Acts and Practices.....	510
A. Automotive Seat Belt Market.....	510
B. Automobile Seat Belt Webbing Market.....	511
C. Further Effects in the Automotive Seat Belt and Automobile Seat Belt Webbing Markets.....	511
D. Seat Belt Yarn Market.....	513
Conclusions of Law.....	513
Order.....	514

## PRELIMINARY STATEMENT

The Federal Trade Commission, on August 26, 1968, issued its complaint in this proceeding charging respondents Allied Chemical Corporation and Jim Robbins Seat Belt Co. with violating Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act. The complaint alleges that respondents have carried out a series of acts and practices, the cumulative effect of which has been to restrain competition in the domestic manufacture and sale of automotive seat belts, automobile seat belt webbing, and seat belt yarn, thereby violating Section 5 of the Federal Trade Commission Act. The complaint further alleges that respondents' acquisition of the automotive seat belt business formerly carried on by the Jim Robbins Company (hereinafter referred to as the "subject acquisition") constitutes, in itself, a violation of Section 7 of the Clayton Act, in that it may substantially lessen competition and tend to create a monopoly in each of the above-mentioned lines of commerce.

An answer was filed on October 15, 1968. Between that date and March 27, 1969, six pre-hearing conferences were held and respondents had substantial discovery including copies of all of complaint counsels' proposed documentary evidence, list of witnesses, allocation of each of the foregoing to the allegations of the complaint, and a

list of all persons interviewed by the Commission's staff. Similar material was provided by respondents to complaint counsel.

Presentation of the case-in-chief began in Washington, D.C., on August 4, 1969, and concluded on August 27, 1969.

Respondents' case began on September 9, 1969, in New York, New York. On September 10, 1969, respondents moved to strike certain exhibits and testimony which had been admitted in support of the case-in-chief and further moved to dismiss the complaint. Respondents submitted memoranda in support of these motions, and counsel supporting the complaint submitted memoranda in response to each motion. On September 10, 1969, the hearing examiner heard oral argument on the motions and, on September 12, 1969, the examiner denied both motions.

Presentation of respondents' case continued in New York City until September 19, 1969. Respondents' case resumed in Chesterfield, Virginia, on September 24, 1969, and concluded in Washington, D.C., on September 25, 1969. Counsel supporting the complaint presented rebuttal in Washington, D.C., on October 20-21, 1969, and respondents presented surrebuttal on October 27-28, 1969. The record was closed on October 28, 1969. The Commission extended the time of the hearing examiner to render an initial decision until March 12, 1970, in view of a contemplated stipulation of findings of fact, conclusions of law and order by the parties herein (see Commission order dated December 10, 1969).

Pursuant to Section 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings, counsel supporting the complaint and counsel for respondents submitted the following stipulated findings of fact, conclusions of law, and order in the above-captioned matter. Respondents participated in this submission solely for the purpose of terminating this proceeding on the basis of the proposed order and stipulated to the within findings of fact and conclusions of law solely for the purpose of this proceeding. Counsel supporting the complaint and respondents agreed that the stipulation of findings of fact and conclusions of law and the consent to entry of the proposed order shall be deemed null and void in the event that any of the findings of fact, conclusions of law or provisions of the proposed order are modified without the consent of the parties or in the event that the proposed order shall not become final. The aforesaid stipulation was executed by counsel supporting the complaint and counsel for respondents on February 26, 1970, at a post-hearing conference on that date in the presence of the hearing examiner.

Upon a careful and considered review thereof the hearing examiner is of the opinion that the stipulation as executed is accurately

supported by the findings herein and is consistent with the evidence adduced as set forth in the transcript record. Accordingly, the hearing examiner renders the findings of fact, conclusions of law and order hereinafter set forth.

## FINDINGS OF FACT

## I

## The Respondents

A. *Allied Chemical Corporation*

1. Respondent, Allied Chemical Corporation (hereinafter referred to as "Allied"), is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business at 61 Broadway New York, New York 10006. (Complaint, par. 2 and Answer.)

2. In 1967, Allied was the 64th largest industrial corporation in the United States in terms of annual sales with over \$1.2 billion, the 39th largest in terms of assets with over \$1.6 billion, and had retained earnings of over \$412 million. (Complaint, par. 3, and Answer, par. 3; CX 1.)

3. Allied sells fibers and plastics, synthetic organic chemicals, chlorine, alkalis, and chromium chemicals. (Complaint, par. 4, and Answer, par. 4.)

4. In 1967, Allied's sales of fibers and plastics amounted to over \$235 million and accounted for 19 percent of Allied's total sales volume. Allied produces nylon fibers for a wide range of textile markets: heavy and medium denier yarns for seat belts, tire cord, carpeting, upholstery, cordage, and industrial fabrics; and fine deniers for hosiery and all types of wearing apparel. (Complaint, par. 5 and Answer.)

5. In 1967, Allied was a major supplier of yarn to producers of automobile safety seat belt webbing. Allied's sales of yarn to such producers amounted to over \$3.8 million. (Complaint, par. 6, and Answer, par. 5, CX 10A; CX 14(a); Brokaw, Tr. 1149; 1150-57.)

6. Allied, at all times relevant herein, has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts. (Complaint, par. 7, and Answer.)

B. *Jim Robbins Seat Belt Co.*

7. Respondent, Jim Robbins Seat Belt Co. (hereinafter referred to as "Robbins"), is a corporation organized and existing under the

laws of the State of Delaware with its principal office and place of business located at 322 Cass Avenue, Mount Clemens, Michigan. (Complaint, par. 8, and Answer, par. 6.)

8. Robbins was incorporated on January 7, 1966, as an equally-owned joint venture between Allied and the Jim Robbins Company (hereinafter referred to as "J.R. Co."). The joint venture was created to take over the automotive seat belt business formerly carried on by the J.R. Co. (Complaint, par. 8, and Answer, par. 6; CX 24(b); CX 25(a); CX 26(a); CX 70(b); Stip. 14; CX 70(c); Stip. 15.)

9. Allied acquired J.R. Co.'s 50 percent interest in Robbins on July 28, 1967. Since that time, Allied has operated Robbins as a whollyowned subsidiary. (Complaint, par 11, and Answer.)

10. J.R. Co., a predecessor in interest to respondent Robbins (CX 33), entered the seat belt business in 1962 through the acquisition of certain assets of a company then engaged in the manufacture of automotive safety seat belts. (Complaint, par 9, and Answer, par. 7; CX 35(b).)

11. In 1965, J.R. Co. sold approximately 10.4 million seat belts to automobile manufacturers for an aggregate purchase price of approximately \$23.7 million. (Answer, par. 8.)

12. In 1967, Robbins sold approximately 14.6 million seat belts to automobile manufacturers for an aggregate purchase price of approximately \$34.5 million. (Answer, par. 9; CX 6A.)

13. At all times relevant herein, Robbins and its predecessor in interest, J.R. Co., have sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts. (Complaint, par. 13, and Answer.)

## II

### Lines of Commerce

#### A. *Automotive Seat Belts*

14. The automotive seat belt is a type of safety restraining device, manufactured for use in an automobile and designed to protect the wearer in case of an accident. (Pulley, Tr. 652; Neff, Tr. 694.)

15. The main structural components of an automotive seat belt are webbing and hardware; the hardware includes a buckle assembly and metal end fittings. (Pulley, Tr. 634-35.)

16. The automotive seat belt is a safety system that must meet: (1) high minimum standards imposed under federal legislation; and

(2) more rigid specifications imposed by the automobile manufacturers. These standards and specifications govern: (1) the type and construction of the yarn used in the webbing; (2) the type, construction, color and pattern, elongation (stretching), breaking strength, resistance to abrasion (wear), resistance to light degradation, color fastness, color crock, and resistance to staining of the webbing; and (3) the design and construction of the hardware. (Answer, par. 28; Cook, Tr. 1759; Desmarais, Tr. 1855-57; Waterhouse, Tr. 611; Tr. 577-78; RX 11; RX 15; RX 26; RX 85; RX 90; RX 97; RX 99.)

17. Automotive seat belts differ in design and performance from other types of safety belts. Specifications applying to the manufacture of automotive seat belts and components thereof, which are imposed by the Department of Transportation and the automotive manufacturers, exceed those which apply to seat belts used in aircraft, which are imposed by the Federal Aviation Administration. (Rozum, Tr. 421; Pulley, Tr. 650-54; Neff, Tr. 712-17.)

18. Prior to January 1, 1964, automotive seat belts were sold primarily in the aftermarket; that is, for installation as accessories on used automobiles or on new automobiles after purchase. (Complaint, par. 14, and Answer, par. 10; CX 70(a); Stip. 2; Rozum, Tr. 399-400; Pulley, Tr. 628-29.)

19. In 1963, shipments of all seat belts, whether sold to the aftermarket or to automobile manufacturers, amounted to less than 11.6 million belts valued at under \$34.9 million. (CX 36.)

20. In response to certain state legislation, domestic automobile manufacturers made two lap-type seat belts standard equipment on all automobiles produced after January 1, 1964. This safety requirement has since been broadened so that, with the exception of convertibles, all six-passenger automobiles manufactured after January 1, 1968, are required by federal regulations to be equipped with six lap-type belts and two shoulder harnesses. (Complaint, par. 15, and Answer, par. 11; CX 70(a); Stip. 5.)

21. Since January 1, 1964, the domestic manufacture and sale of seat belts to automobile manufacturers has rapidly expanded while aftermarket sales have rapidly declined. By 1967, aftermarket sales had dropped to approximately \$8,000,000, accounted for by eight companies still specializing in the aftermarket. Since 1967, the aftermarket has declined to practically nothing. Answer, par. 28; CX 6A; CX 28(c); Rozum, Tr. 400.)

22. The four leading domestic automobile manufacturers are the only significant purchasers of seat belts manufactured and sold in the United States. (Waterhouse, Tr. 518; Tr. 608-09; CX 28(c).)

In calendar 1967, sales of automotive seat belts to the four leading automobile manufacturers amounted to \$100,030,000, or about 93 percent of the total seat belts sold in that year. (CX 6A.)

23. The domestic automotive seat belt market is highly concentrated, with six companies accounting for all sales by United States manufacturers to the four leading United States automobile manufacturers. A substantial cause of such concentration was the Federal and State government policies requiring installation of seat belts by the automobile manufacturers and imposing, on short notice, high standards for their design and construction. Each of the manufacturers of automobile seat belts, other than Robbins and General Safety corporation, manufactures products unrelated to automotive seat belts. (Rozum, Tr. 400; Tr. 403-05; Waterhouse, Tr. 530-32; Pulley, Tr. 654-55; CX 6A; CX 6.)

24. The manufacture and sale of seat belts to automobile manufacturers is difficult to enter because of the diversity of technology required, the capital which is necessary, and the difficulty of establishing a customer-supplier relationship. (CX 57; CX 28(d).)

25. It is highly unlikely that the automotive seat belt will be displaced by an alternative device in the foreseeable future. (CX 57; Waterhouse, Tr. 547-48; Cook, Tr. 1807-08; Desmarais, Tr. 1851-52.)

#### B. *Automobile Seat Belt Webbing*

26. A narrow fabric is a woven fabric under twelve inches wide with finished edges. (Neff, Tr. 684-85.)

27. Automobile seat belt webbing is a specific synthetic narrow fabric approximately two inches wide, which is manufactured in accordance with Federal government and automobile company specifications. (Pulley, Tr. 634; Neff, Tr. 712; Shapiro, Tr. 962; Thompson, Tr. 2356.)

28. Automobile seat belt webbing is one of the primary components of an automotive seat belt and is a substantial factor in the cost of manufacturing such belts. (Rozum, Tr. 405; Waterhouse, Tr. 532; Pulley, Tr. 634-35.) The customers for automobile seat belt webbing are those companies which manufacture automotive seat belts. (Neff, Tr. 707; Tate, Tr. 874-76; Shapiro, Tr. 959-60; CX 94(a); Rose, Tr. 1045-46; CX 59(a); CX 32.)

29. Automobile seat belt webbing is a distinct product which was developed specifically in response to the demand for automotive seat belts; it is not manufactured for any use other than automotive seat belts and is not used in significant quantities for any other

purpose. (Neff, Tr. 686-87; Tr. 690-93; Rose, Tr. 1049-50; Tr. 1115; Thompson, Tr. 2359.)

30. Automobile seat belt webbing must meet: (1) high minimum standards imposed by federal specifications; and (2) more rigid specifications imposed by the automobile manufacturers. These standards and specifications govern the type, construction, color and pattern, elongation (stretching), breaking strength, resistance to abrasion (wear), resistance to light degradation, color fastness, color crock, and resistance to staining of the webbing. Despite the stringency of the Federal requirements, no automobile seat belt webbing which does not exceed those specifications would be acceptable to an automobile manufacturer. (Complaint, par. 23, and Answer, par. 15; Neff, Tr. 691-93; Waterhouse, Tr. 611; RX 11; RX 26; RX 90; RX 97; RX 98; RX 99.)

31. Because automobile seat belt webbing must be manufactured in accordance with such rigid standards and specifications (see par. 30, *supra*) it differs in significant respects from all other narrow fabrics. (Neff, Tr. 712-14; CX 87-CX 91, in conjunction with Neff, Tr. 732-37; Shapiro, Tr. 962-63; Rose, Tr. 1113; Tr. 1116-17; Pulley, Tr. 651-52; Tr. 671-72; Murray, Tr. 2417-19.)

32. The manufacture of automobile seat belt webbing requires special textile-type skills and an investment which is not easily spread over different end uses. (CX 28(d).)

33. The most difficult element in the manufacture of automobile seat belt webbing is the dyeing process. This process is distinct from all other narrow fabric dyeing processes, and it is the element of the manufacturing process which is most responsible for imparting distinguishing characteristics to automobile seat belt webbing. (Murray, Tr. 2405-06; Tr. 2417-18; Tr. 2418-19.)

34. The sophisticated equipment needed to dye automobile seat belt webbing is expensive and must be manufactured to the specifications of the automobile seat belt webbing producer. (Thompson, Tr. 2392-95; Murray, Tr. 2442.)

35. A seat belt webbing manufacturer must have experienced dyeing people with the technical expertise to dye and supervise the dyeing of automobile seat belt webbing. Such people are hard to obtain. (Neff, Tr. 703-04; Tr. 863-64; Shapiro, Tr. 963-69; Rose, Tr. 1050; Murray, Tr. 2417-19.)

36. The automobile seat belt webbing market is highly concentrated, with only six firms engaged in the manufacture and sale of such webbing. Each of the manufacturers of automobile seat belt

webbing, other than Robbins, manufactures other types of narrow fabrics. (Neff, Tr. 706-07; Rose, Tr. 1049; CX 10A.)

37. Because of the sophisticated textile expertise involved and the need for experienced personnel and specialized equipment, it would be difficult for potential entrants to enter the automobile seat belt webbing market. (Neff, Tr. 712-15; Rose, Tr. 1050; CX 28(d).)

38. In calendar 1967, Robbins, which accounted for 34.5 percent of all seat belts sold to the four leading domestic automobile manufacturers, used approximately \$6.37 million worth of automobile seat belt webbing. (CX 6A; CX 8A.)

### C. *Seat Belt Yarn*

39. Seat belt yarn is the principal material from which automobile seat belt webbing is manufactured. (Complaint, par. 25, and Answer, par. 16; Neff, Tr. 717.)

40. Seat belt yarn, the construction of which is governed by rigid specifications imposed by the automobile companies, is recognized, both by its producers and by its customers, as a distinct product. The seat belt yarn manufactured by Allied differs in chemical composition from that manufactured by E. I. du Pont de Nemours & Co. ("du Pont"). Brokaw, Tr. 1129-30; Neff, Tr. 715-17; Shapiro, Tr. 963; Thompson, Tr. 2362-63; CX 12(c); CX 13(a); Desmarais, Tr. 1855-57; Fraim, Tr. 1996-98; CX 102(b); RX 15; RX 97(a)-(c); RX 98(a)-(d); RX 99(a)-(b).)

41. At least five companies have experimented with the manufacture of seat belt yarn. Allied, du Pont, and American Enka were the only companies producing it commercially in 1967. (Neff, Tr. 717-18; Rose, Tr. 1111-12; Brokaw, Tr. 1149-50; CX 10A.)

42. Allied and du Pont are the only companies now, engaged in the manufacture and sale of seat belt yarn in the United States. (Brokaw, Tr. 1150.)

43. In 1967 total sales of seat belt yarn by all suppliers amounted to \$12,578,000. (CX 10A.)

### III

#### Acts and Practices Engaged in by Respondents

44. In early 1964, Everlastik, Inc. (hereinafter referred to as "Everlastik"), a whollyowned subsidiary of Chelsea Industries, Inc. (hereinafter referred to as "Chelsea"), became an approved source of automobile seat belt webbing at General Motors Corporation (hereinafter referred to as "GM") and Ford Motor Company (hereinafter referred to as "Ford"). Shortly thereafter, Everlastik ob-

tained a contract to supply J. R. Co. with five million yards of automobile seat belt webbing. (Murray, Tr. 2434; Fraim, Tr. 2003.)

45. In late 1964, David Casty, president of Chelsea, contacted all of the manufacturers of automobile seat belt webbing in an endeavor to sell the automobile seat belt webbing assets of Everlastik. (Fraim, Tr. 1895; Murray, Tr. 2470.)

46. Subsequently, in either December of 1964 or January of 1965, J. R. Co. began to negotiate with Chelsea for the purchase of the automobile seat belt webbing assets of Everlastik. (Fraim, Tr. 2002-03.)

47. In March of 1965, J. R. Co. acquired the machinery, equipment, fixtures, tools, dye formulas, and inventories which were being used by Everlastik in the manufacture of automobile seat belt webbing. The purchase price was \$325,000, which was allocated as follows:

(a) machinery, equipment, fixtures, tools, and dye formulas—\$175,000;

(b) inventories—\$150,000. (CX 18(a); CX 35(b); CX 44(a); CX 70(b); Stip. 13; Murray, Tr. 2436-38.)

Joseph A. Murray, who was executive vice president of a division of Chelsea, was of the opinion that the price at which the Everlastik assets were sold to J. R. Co. was very low because the dyeing equipment was much more valuable than Casty realized. (Murray, Tr. 2469; Tr. 2473.)

48. Findings 33 and 35 are incorporated by reference as an integral part of this finding. During the course of the negotiations leading to the acquisition of Everlastik, Kenneth Wellborne, an expert automobile seat belt webbing dyer and an employer of Everlastik, had been pressured to go to work for J. R. Co. as part of the sale of Everlastik to Robbins. J. R. Co. particularly wanted Wellborne because of his dyeing expertise, which J. R. Co. did not have. After the acquisition, Wellborne and six other Everlastik employees went to work for J. R. Co. (Murray, Tr. 2439-40.)

49. J. R. Co. also engaged the services of Freeman Fraim, a textile expert with a great deal of experience in the manufacture of narrow fabrics, in general, and automobile seat belt webbing, in particular. He was given general supervisory authority over the operation. Fraim had previously been the general manager of Everlastik on a consulting basis. (Fraim, Tr. 1887; Tr. 1938-39.)

50. Prior to J. R. Co.'s acquisition of the Everlastik assets, Everlastik had been purchasing seat belt yarn from Allied, du Pont, and Chemstrand. (Fraim, Tr. 1998.)

51. After J. R. Co. acquired Everlastik's assets, Allied became their sole supplier of seat belt yarn. (Fraim, Tr. 1999.)

52. By May of 1965, J. R. Co. had moved the Everlastik assets to Mt. Clemens, Michigan. (Fraim, Tr. 1939-40.)

53. Between May of 1965 and early September of 1965, J. R. Co. attempted to reestablish the acquired operation as a going concern in the manufacture of automobile seat belt webbing. However, J. R. Co. had a "tremendous amount of problems" with the operation and was unable to get the business running. (Thompson, Tr. 2351.)

54. During the July-September 1965 period, J. R. Co. had serious trouble with Allied's seat belt yarn. The breaking strength was so close to the minimum allowable that everybody, including Fraim, was alarmed. On September 6, 1965, Fraim composed a letter advising J. R. Co. to switch to du Pont yarn. (Fraim, Tr. 2023-2024; 2025; Tr. 2028-29.)

55. In September 1965, Allied assigned Robert Thompson, an Allied textile fibers expert, to J. R. Co.'s automobile seat belt webbing manufacturing operation. Within a week thereafter, Fraim was dismissed. (Thompson, Tr. 2350; Tr. 2352; Tr. 2353.)

56. At the time Allied sent Robert Thompson to J. R. Co., the Mt. Clemens plant was in poor condition and the situation was "chaotic." The employees were untrained and didn't know what they were doing. (Thompson, Tr. 2351.)

57. Mr. Thompson was given full responsibility for the entire automobile seat belt webbing manufacturing operation of J. R. Co. He had two supervisors working under him and had the authority to take additional people from the Allied organization. At his request, approximately seven Allied employees worked in the J. R. Co. operation. Thompson remained on the Allied payroll and maintained an office in New York, to which he returned occasionally. His immediate supervisor was Warren McHugh, supervisor of industrial market development for Allied. (Thompson, Tr. 2351; Tr. 2352; Tr. 2354.)

58. It is unusual for suppliers to lend the degree of assistance to customers that Allied lent to J. R. Co. Thompson is not aware of any other instance in which a supplier took total supervision of a customer's manufacturing operations. (Thompson, Tr. 2354-55.)

59. Prior to being acquired by J. R. Co., Everlastik had an automobile seat belt webbing capacity of 220,000 yards per week. At the time Thompson, at Allied's direction, took over management of J. R. Co.'s seat belt webbing manufacturing operation, the operation was producing only 30,000 yards per week. After five or six

weeks under Thompson's management, J. R. Co.'s webbing capacity had increased to 100,000 yards per week, and after about four months it was up to approximately 55,000 yards per day (Fram, Tr. 1994; Thompson, Tr. 2353-54.)

*The Subject Acquisition.* (Pars. 60-65.)

60. Within two weeks after Thompson began to manage the automobile seat belt webbing manufacturing operation of J. R. Co., Allied began to investigate the possibility of buying all or part of J. R. Co. (CX 12; CX 13.)

61. As viewed by Allied, one of the primary purposes of such an acquisition would be to assure that J. R. Co. would continue to purchase only Allied seat belt yarn, which, as late as November of 1965, was still unsatisfactory. (CX 12(a); CX 13(a); CX 14(a) & (b); CX 21(a), (b) & (c); CX 24(b) & (c); CX 27; CX 28(e); CX 37(d); CX 45; CX 57; CX 39(a).)

62. In November of 1965, Allied was not yet satisfied with the automobile seat belt webbing business of J. R. Co., despite the rapid expansion which had been achieved since Thompson began to manage the manufacturing operation in early September. Thus, another primary purpose of the proposed acquisition emerged: to provide the acquired company with the additional management and technical guidance necessary to further integrate J. R. Co.'s operations. (CX 23(e); CX 24(b); CX 37(b); CX 39(a).)

63. On December 29, 1965, Allied and J. R. Co. agreed to form a joint venture, Jim Robbins Seat Belt Co. ("Robbins") for the purpose of taking over J. R. Co.'s entire automotive safety seat belt business, including the automobile seat belt webbing manufacturing operation which was already being managed by Thompson. The agreement contemplated that Robbins would be jointly owned and managed by Allied and J. R. Co. (CX 24(b); CX 25(a); CX 26; CX 33; generally, and CX 33(c); Complaint, par. 8, and Answer, par. 6.)

64. Robbins was incorporated on January 7, 1966, and the December 29, 1965, agreement was consummated on January 10, 1966, in accordance with the terms thereof. (CX 70(a): Stip. 3; (CX 70(c): Stip 15; Complaint, par. 31, and Answer, par. 20.)

65. Robbins operated as a joint venture until July 28, 1967, at which time Allied bought out J. R. Co.'s interest in Robbins, pursuant to an option contained in the December 29, 1965, Agreement, which gave Allied the right to buy out the J. R. Co. interest if Mr. Jim Robbins should die. Since that time, Allied has operated Robbins as a wholly-owned subsidiary. (Complaint, par. 11, and Answer.)

66. The formation of the joint venture did not alter the responsibilities of Robert Thompson. He continued to manage the automobile seat belt webbing manufacturing operation and remained on the Allied payroll until April of 1966, at which time he was transferred to the Robbins payroll. (Thompson, Tr. 2355.)

67. In calendar 1965, J. R. Co., with its automobile seat belt webbing manufacturing operation under the management of Thompson from September on, supplied 18.2 percent of its own requirements of such webbing. In calendar 1967, under the joint ownership of Allied and J. R. Co. until July 28, and under the sole ownership of Allied after that, Robbins produced 73.2 percent of its own requirements. (CX 8A; CX 32; CX 59; CX 70(b); Stip. 9 and Stip. 10.)

## IV

## The Effects of Respondents' Acts and Practices

A. *Automotive Seat Belt Market*

68. In 1965, J. R. Co. sold approximately 10.4 million seat belts to GM and Ford for an aggregate purchase price of approximately \$23.7 million. (Answer, par 21.) During 1965, J. R. Co. was supplying GM and Ford with approximately 60 percent and 67 percent of their respective requirements (CX 21(b); CX 25(a); CX 26(a); CX 57) and had a "major share" of the dynamic rapidly expanding seat belt market. (CX 21(a) & (b); CX 23(b); CX 37(b) & (d).) Mr. Jim Robbins, the owner of J. R. Co., possessed "proven ability" in dealing with the leading automobile manufacturers and had done a major selling job for his products. (CX 21(b); CX 24(b); CX 26(b).)

69. In 1967, Robbins was the leading company in the automotive seat belt market, accounting for approximately 34.5 percent of total industry sales, while its closest rival, the Hamill Manufacturing Company, accounted for 22.5 percent. (CX 6A; CX 6.) Robbins is the only seat belt company integrated into either webbing or yarn. (CX 70(b); Stip. 12, CX 10A.)

70. Respondents' acts and practices, and the vertically integrated complex resulting therefrom, could place or may have placed the other automotive seat belt companies at a competitive disadvantage because Allied has the power to forego profits at all or any of three different stages of production, thereby altering the selling price of the end product—the automotive seat belt. (Pulley, Tr. 640-41; Tr. 645-47; Tr. 664; Waterhouse, Tr. 544-45; Tr. 550-51; Rozum, Tr.

428-29; Tr. 439; Tr. 491-92; Tate, Tr. 894-97; Tr. 901-02; Rose, Tr. 1052-53.)

71. Respondents' acts and practices could place or may have placed the smaller automotive seat belt companies at a further disadvantage in that Allied's extensive resources and financial power could be brought to bear on such companies (Rozum, Tr. 450-51; CX 22(c): 3rd paragraph under "Comments"; CX 23(g): 3rd paragraph under "Comments.")

*B. Automobile Seat Belt Webbing Market*

72. Robbins is the only automobile seat belt webbing company integrated into either seat belts or yarn. (CX 10A; CX 70(b): Stip. 12.)

73. Between 1965 and 1967, Allied and J. R. Co. removed almost three-fourths of the Robbins portion of the automobile seat belt webbing market from open competition. Since J. R. Co. made over a third of the automotive seat belt sales in 1967, the portion so removed from open competition by that time amounted to about twenty-five percent of the entire automobile seat belt webbing market. (CX 6A; CX 8A; CX 32; CX 59; CX 70(b): Stip. 9 and Stip. 10.)

74. The removal of Robbins' business from open competition, as noted in the preceding finding, has had a substantial impact upon competition in the automobile seat belt webbing market; it has created the possibility that some companies may be placed in danger of going out of the automobile seat belt webbing business; and it threatens to trigger a rash of defensive mergers. (Neff, Tr. 712; Tr. 720; Tate, Tr. 876-77; Tr. 882-83; Tr. 904-05; Rose, Tr. 1045-47; CX 8; CX 8A; CX 32; CX 59; CX 60; CX 70(b): Stip. 9 and 10.)

*C. Further Effects in the Automotive Seat Belt and  
Automobile Seat Belt Webbing Markets*

75. After learning of some of respondents' acts and practices, Pontonier, Inc. (hereinafter referred to as "Pontonier"), a company that manufactures and sells automotive seat belts, considered the purchase of an automobile seat belt webbing company and carried on negotiations to that effect. (Rozum, Tr. 439-440).

76. If Allied's vertically integrated complex is allowed to stand, Pontonier will probably be forced again to consider acquiring a seat belt webbing manufacturer. (Rozum, Tr. 440.)

77. As a result of the subject acquisition, American Safety Equipment Corporation (hereinafter referred to as "American Safety"), a company that manufactures and sells automotive seat belts, has

considered acquiring an automobile seat belt webbing company. (Waterhouse, Tr. 544.)

78. If Robbins should lower the price of its seat belts by eliminating secondary profits, American Safety would have no other alternative but to "get out of the business." (Waterhouse, Tr. 615.)

79. If the other automotive seat belt manufacturers were to acquire automobile seat belt webbing companies, Irvin Industries, Inc. (hereinafter referred to as "Irvin"), a company that manufactures and sells automotive seat belts, would give "serious consideration" to integrating "in order to remain competitive." (Pulley, Tr. 647.)

80. If Irvin were to integrate, it would lean toward acquiring an existing automobile seat belt webbing manufacturer. (Pulley, Tr. 648.)

81. After losing all of its Robbins business subsequent to the subject acquisition, Phoenix Trimming Company (hereinafter referred to as "Phoenix"), an automobile seat belt webbing company, became concerned that it might also lose its largest customer, the Hamill Manufacturing Company (hereinafter referred to as "Hamill"). Hamill was acquired by Firestone Tire & Rubber Company (hereinafter referred to as "Firestone") after the subject acquisition, and Phoenix, with the purpose of protecting itself, went to Firestone to ask if Firestone were interested in acquiring Phoenix (Neff, Tr. 719-20.)

82. If Allied's vertically integrated complex is allowed to stand there is a reasonable probability that additional vertical integration between and among automotive seat belt companies and automobile seat belt webbing companies will occur as a result. (Tate, Tr. 885-86.)

83. Southern Weaving Company (hereinafter referred to as "Southern Weaving"), a company that manufactures and sells automobile seat belt webbing, foresees in respondents' acts and practices the loss of business by its customers, who would be unable to compete with the vertically integrated combine. (Rose, Tr. 1052-53.)

84. If Allied's vertically-integrated complex is allowed to stand, Southern Weaving may either have to leave the automobile seat belt webbing business or align itself with a seat belt yarn manufacturer and an automotive seat belt manufacturer. (Rose, Tr. 1053-54.)

#### Conclusion

There is a substantial probability that the acts and practices engaged in by respondents will result in a series of defensive mergers and acquisitions combining automotive seat belt companies and automobile seat belt webbing companies.

*D. Seat Belt Yarn Market*

85. Allied is the only seat belt yarn producer integrated into either automobile seat belt webbing or automotive seat belts. (CX 10A; CX 70(b); Stip. 12.)

86. It was Allied's intent in making the subject acquisition to supply all of the seat belt yarn requirements of the integrated complex (CX 12(c); CX 24(b); CX 27; CX 37(b); CX 39(a); CX 45; CX 57.)

87. By 1967, Allied was supplying all of the seat belt yarn requirements of the integrated complex. (CX 10A.)

## CONCLUSIONS OF LAW

1. Allied is a corporation engaged in commerce within the meaning of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act and is subject to the jurisdiction of the Federal Trade Commission.

2. Robbins is a corporation engaged in commerce within the meaning of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act and is subject to the jurisdiction of the Federal Trade Commission.

3. The manufacture and sale, in the United States, of seat belts to automobile manufacturers is a line of commerce within the meaning of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act and is a proper relevant market within which to consider the effects of the subject acquisition and other acts and practices.

4. The manufacture and sale, in the United States, of automobile seat belt webbing is a line of commerce within the meaning of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act and is a proper relevant market within which to consider the effects of the subject acquisition and other acts and practices.

5. The manufacture and sale, in the United States, of seat belt yarn is a line of commerce within the meaning of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act and is a proper relevant market within which to consider the effects of the subject acquisition and other acts and practices.

6. Respondent Allied and respondent Robbins have carried out a program of acquisition and expansion, as set forth in Findings 46-49, 51-55, 57, and 60-67, *supra*, the cumulative effect of which has been to lessen, restrain, and eliminate competition in the manufacture and sale, in the United States, of automobile seat belt webbing

and seat belt yarn and may be to lessen, restrain, and eliminate competition in the manufacture and sale of automotive seat belts.

7. The acts and practices of respondents, viewed as a continuing course of conduct, constitute an unfair method of competition and an unfair act and practice within the intent and meaning of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for the reasons set forth in paragraph 6, *supra*.

8. The effect of respondents' acquisition of the automotive seat belt business of J.R. Co., the subject acquisition, has been, or may be, substantially to lessen competition or to tend to create a monopoly in the manufacture and sale, in the United States, of seat belts to automobile manufacturers, automobile seat belt webbing and seat belt yarn in the following ways, among others:

(a) Robbins has, or will have, decisive competitive advantages over non-integrated producers of automotive seat belts and automobile seat belt webbing to the detriment of actual and potential competition;

(b) Non-integrated producers of automobile seat belt webbing and seat belt yarn have been, or may be, deprived of a substantial customer or potential customer to the detriment of actual and potential competition;

(c) Additional acquisitions and mergers in the automotive seat belt and automobile seat belt webbing industries have been, or may be, precipitated to the detriment of actual and potential competition;

(d) Actual and potential competition in the automotive seat belt, automobile seat belt webbing, and seat belt yarn industries has been, or may be, substantially lessened because barriers to entry have been, or may be, substantially increased; and

(e) Already high concentration levels in the automotive seat belt, automobile seat belt webbing, and seat belt yarn industries may be substantially increased and the possibility of deconcentration lessened.

9. The subject acquisition constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. 18) for the reasons set forth in paragraph 8, *supra*.

ORDER

A

*It is ordered*, That Allied Chemical Corporation, a corporation ("Allied"), and Jim Robbins Seat Belt Co., a corporation ("Robbins"), their successors and assigns, on or before April 30, 1971, shall divest absolutely and in good faith, subject to approval of the Commission, all assets owned or used by Allied or Robbins as of the date

of this order in the manufacture in the United States of webbing for use in automotive safety seat belts ("webbing"). The assets to be divested in accordance with this paragraph A ("the Assets") shall not include any general purpose assets not an integral part of the webbing manufacturing operations (including, but not limited to, fork lift trucks, overhead cranes and similar equipment, real property, building improvements and fixtures) owned by Robbins and located in Mt. Clemens, Michigan. The Assets shall include Robbins' leasehold interest in a plant leased from Comfort-Craft, Inc., located in Hialeah, Florida, subject to any necessary consents to the assignment thereof.

## B

*It is further ordered*, That, pending divestiture, Allied or Robbins shall not make any change in any of the Assets which shall impair its utility for the production of webbing or its market value: *Provided*, That all or some of the Assets may be relocated in connection with their divestiture.

## C

*It is further ordered*, That, for a period of ten (10) years from April 1, 1971, Allied and Robbins shall purchase at least eighty (80) percent of their United States requirements for webbing for use in the manufacture of automotive safety seat belts ("belts") for the 1972 automotive model year and for each automotive model year thereafter from suppliers other than Allied, its affiliates and subsidiaries and shall not purchase more than forty-five (45) percent of their United States webbing requirements for any automotive model year from any one manufacturer of webbing. During this ten-year period, the use of Allied automotive safety seat belt yarn ("yarn") shall not be a prerequisite for supplying Robbins and the relationship of the yarn manufacturer to Robbins shall not be a factor in Robbins' selection of webbing.

## D

*It is further ordered*, That, for a period of ten (10) years from the effective date of this order, neither Allied nor Robbins shall sell, transfer, or otherwise assign any assets used or owned by Allied or Robbins in connection with the manufacture in the United States of belts to any foreign subsidiary, affiliate, or division of Allied: *Provided*, That Allied or Robbins may transfer such assets so long as subsequent to such transfer at least seventy-five (75) percent of the total world-wide production of belts of Allied, its subsidiaries, affil-

Order

77 F.T.C.

iates and divisions is produced in the United States by Allied or Robbins or such transfer does not result in a decrease of the capacity of Allied or Robbins to produce belts in the United States.

The provisions of the foregoing paragraph will be in applicable to the extent that the belt customers of Allied or its subsidiaries request that an increased proportion of their belt requirements to be supplied by Allied or its subsidiaries be manufactured outside the United States or to the extent that the ability of Allied or Robbins to manufacture belts in the United States is affected by flood, fire, lockout, strike, riot, act of war, embargoes or other import or export restrictions or other similar event requiring an increase of production outside the United States.

E

*It is further ordered,* That, if the consideration received for the divestiture made pursuant to this order is not entirely cash, nothing in this order shall be deemed to prohibit Allied or Robbins from accepting and enforcing a lien, mortgage, pledge, deed of trust or other security interest for the purpose of securing full payment of the price, with interest and costs, received by Allied or Robbins in connection with the divestiture. If, after divestiture in accordance with the provisions of this order, Allied or Robbins, by enforcement of such security interest, regains direct or indirect ownership or control of any portion of the Assets, said ownership or control shall be redvested subject to the provisions of this order and within such reasonable period of time as the Commission shall approve.

F

*It is further ordered,* That:

(1) pending the divestiture ordered by Paragraph A of this order, Allied and Robbins shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, any assets used by any other concern in the manufacture in the United States of yarn, webbing or belts or the stock or share capital of any other concern engaged in such manufacture; and

(2) without regard to any other provision of this order, for a period of ten (10) years from April 30, 1971, Allied and Robbins shall cease and desist from the manufacture in the United States of webbing and from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, any assets used by any other

## Order

concern in the manufacture in the United States of yarn, webbing or belts or the stock or share capital of any other concern engaged in such manufacture;

*Provided*, That nothing in this order shall prevent Allied or Robbins, from acquiring, directly or indirectly, through subsidiaries or otherwise, by purchase, lease, license or otherwise, assets, tangible or intangible, in the normal course of business or patents, trademarks or technology for use in the manufacture, distribution and sale of yarn and belts: *Provided*, That Allied shall notify the Commission of any such acquisition other than purchases of belts, webbing or other component parts or raw materials whenever the consideration therefor exceeds \$200,000 within thirty (30) days of such event: *And provided further*, That nothing herein shall prevent the purchase of any stock or share capital of any concern engaged in the manufacture of yarn or belts for investment by or for any employee benefit plan, charitable trust, or similar entity established by Allied, Robbins, or any of their subsidiaries or affiliates.

## G

*It is further ordered*, That Allied and Robbins shall submit to the Commission (i) within thirty (30) days after having been informed in writing by a person or concern that it has an interest in purchasing the Assets, the name and address of such person or concern, (ii) within ninety (90) days from the date of service of this order and every ninety (90) days thereafter, a report in writing setting forth its efforts and progress in carrying out the divestiture requirements of this order until the Assets have been divested with the approval of the Commission, and (iii) for a period of ten (10) years from the date of divestiture pursuant to this order, on July 1 of each year, a report in writing setting forth their compliance with the provisions of Paragraph C (with respect to the last preceding automotive model year), D and F of this order.

## H

*It is further ordered*, That respondent Allied shall notify the Commission at least thirty (30) days prior to any proposed change in Allied or Robbins which may affect compliance obligations arising out of this order such as dissolution, assignment or sale, resulting in the emergence of a corporate successor, the creation or dissolution of subsidiaries, or any other such change in respondents.

Order

77 F.T.C.

I

*It is further ordered*, That Allied shall forthwith distribute a copy of this order to each of its operating divisions and to each concern known by Allied or Robbins to have been a source of webbing approved by United States automobile manufacturers at any time since January 1, 1967.

## FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1967), the initial decision should be adopted and issued as the decision of the Commission:

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

*It is further ordered*, That the time within which respondents shall begin submitting the compliance reports ordered in Paragraphs G and H of the order, as set forth in the initial decision, shall commence with the service of this order upon respondents.

## IN THE MATTER OF

STEPHEN J. SHAFFER DOING BUSINESS AS  
SHAFFER SPORTSWEAR MFG. CO.

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

*Docket C-1732. Complaint, May 4, 1970—Decision, May 4, 1970*

Consent order requiring a Chicago, Ill., manufacturer of men's athletic clothing to cease misbranding its woolens and falsely advertising its textile fiber products.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Stephen J. Shaffer, individually and doing business as Shaffer

Sportswear Mfg. Co. hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stephen J. Shaffer is an individual doing business as Shaffer Sportswear Mfg. Co. with his office and principal place of business located at 2541 North Sheffield, Chicago, Illinois.

Respondent is engaged in the manufacture of men's athletic clothing.

PAR. 2. Respondent now and for some time last past has manufactured for introduction, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondent within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and 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 wool products which were stamped, tagged, labeled or otherwise identified by respondent as "Reprocessed Wool," whereas in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by the respondent 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 wool products, namely jackets, with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of the said fiber weight of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more; and (5) the aggregate of all other fibers.

Also among such misbranded wool products, but not limited thereto, were certain wool products, namely jackets, with labels on or affixed thereto which failed to disclose the name or other identification, issued or registered by the Commission of the manufacturer of the product or one or more persons subject to Section 3 of said Act with respect to said products.

PAR. 5. The acts and practices of the respondent as set forth above were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulation promulgated thereunder and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. Respondent is now and for some time last past has been engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce and in the importation into the United States, of textile products; and has sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and has sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 7. Certain of said textile fiber products were falsely and deceptively advertised in that respondent in making disclosures or implications as to fiber content of such textile fiber products in written advertisements used to aid, promote, and assist directly or indirectly, in the offering for sale of said products, failed to set forth the required information as to fiber content as provided for by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form provided by the Rules and Regulations under said Act.

Among such advertisements, but not limited thereto, were certain price lists distributed by respondent throughout the various States of the United States.

Among such falsely and deceptively advertised textile fiber products, but not limited thereto, were articles of wearing apparel which were advertised without a disclosure as to the true generic name of the constituent fibers present in the textile fiber products and articles of wearing apparel which were advertised with fiber implying terms such as "Gaberline," "Gabertex," "Tackle Twill," "Twill," and "Satin."

PAR. 8. The acts and practices of respondent as set forth above, were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder; and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 9. Respondent, now and for some time last past, has advertised, offered for sale, sold and distributed textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act. In the course and conduct of his business as aforesaid, respondent has caused his said products, when sold, to be shipped from his place of business in the State of Illinois to purchasers located in various other States of the United States, and maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 10. Respondent in the course and conduct of his business, as aforesaid, has made statements in his price lists to his customers misrepresenting the character and fiber content of certain of his said products. Among such misrepresentation but not limited thereto were statements representing such fabrics to be "Reprocessed Wool" whereas said fabrics contained substantially different fibers and quantities of fibers than represented.

PAR. 11. The acts and practices of the respondent set out in Paragraph Ten have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content of such products.

PAR. 12. The aforesaid acts and practices of respondent as herein alleged were, and are, all to the prejudice and injury of the public, and constituted and now constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, the Wool Products Labeling Act, and the Textile Fiber Products Identification Act; and

Order

77 F.T.C.

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Stephen J. Shaffer is an individual doing business as Shaffer Sportswear Mfg. Co. with his office and principal place of business located at 2541 North Sheffield, Chicago, Illinois.

Respondent is a manufacturer of men's athletic clothing.

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

## ORDER

*It is ordered*, That respondent Stephen J. Shaffer, individually, and doing business as Shaffer Sportswear Mfg. Co., or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for introduction, the introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool products" 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 or to 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

## Order

*It is further ordered,* That respondent Stephen J. Shaffer, individually and doing business as Shaffer Sportswear Mfg. Co., or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for introduction, the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported, in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act do forthwith cease and desist from falsely and deceptively advertising textile fiber products by making any representations, by disclosure or implication, as to the fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale or offering for sale of such textile fiber product, unless the same information required to be shown on the stamp, tag or label or other means of identification under Section 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

*It is further ordered,* That Stephen J. Shaffer, individually, and doing business as Shaffer Sportswear Mfg. Co., or under any other name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of jackets or other 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 the constituent fibers contained in such products on price lists or other advertising material, or in any other manner.

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

Complaint

77 F.T.C.

IN THE MATTER OF

BILLIE LEBOW, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS  
LABELING ACTS*Docket C-1733. Complaint, May 4, 1970—Decision, May 4, 1970*

Consent order requiring a New York City manufacturing furrier to cease misbranding its fur products.

## COMPLAINT

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

PARAGRAPH 1. Respondent Billie Lebow, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Billie Lebow is an officer of the corporate respondent. She formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 333 Seventh Avenue, New York, New York.

PAR. 2. Respondents are now, and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

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

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under 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 Textiles and Furs 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 Fur Products Labeling 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 respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for

Order

77 F.T.C.

a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Billie Lebow, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 333 Seventh Avenue, New York, New York.

Respondent Billie Lebow is an officer of said corporation. She formulates, directs and controls the acts, practices and policies of said corporation and her address is 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 Billie Lebow, Inc., a corporation, and its officers, and Billie Lebow, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or in transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from misbranding any fur product by:

1. Representing, directly or by implication on a label that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

*It is further ordered,* That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*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.

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IN THE MATTER OF

LESTER ROUSE BAIRD, JR., DOING BUSINESS AS  
R. BAIRD & CO.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

*Docket C-1734. Complaint, May 4, 1970—Decision, May 4, 1970*

Consent order requiring a Honolulu, Hawaii, importer and wholesaler of novelties and gift items including scarves and T-shirts to cease marketing dangerously flammable products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Lester Rouse Baird, Jr., individually and doing business at R. Baird & Co., hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, 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 Lester Rouse Baird, Jr., is an individual doing business as R. Baird & Co., with his office and principal place of business located at 524 South Street, Honolulu, Hawaii.

Respondent is an importer and wholesaler of novelties and gift items including scarves and T-shirts.

PAR. 2. Respondent is now and for some time last past has been engaged in the sale and offering for sale, in commerce, and in the importation into the United States, and has introduced, delivered for introduction, transported and caused to be transported in commerce, and has sold or delivered after sale or shipment in commerce, products as the terms "commerce" and "product" are defined in the

Complaint

77 F.T.C.

Flammable Fabrics Act, as amended, which products failed to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were scarves.

PAR. 3. The aforesaid acts and practices of respondent were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

#### DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Lester Rouse Baird, Jr., is an individual doing business as R. Baird & Co., with his office and principal place of business located at 524 South Street, Honolulu, Hawaii.

Respondent is an importer and wholesaler of novelties and gift items including scarves and T-shirts.

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

ORDER

*It is ordered,* That respondent Lester Rouse Baird, Jr., individually and doing business as R. Baird & Co., or under any other trade name and respondent's representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any fabric, product or related material as "commerce," "fabric," "product" and "related material" are defined in the Flammable Fabrics Act as amended, which fails to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

*It is further ordered,* That the respondent herein shall, within ten (10) days after service upon him of this order, file with the Commission an interim special report in writing setting forth the respondent's intention as to compliance with this order. This interim special report shall also advise the Commission fully and specifically concerning the identity of the fabric, product or related material which gave rise to the complaint, (1) the amount of such fabric, product or related material in inventory, (2) any action taken to notify customers of the flammability of such fabric, product or related material and the results thereof and (3) any disposition of such fabric, product or related material since June 3, 1969. Such report shall further inform the Commission whether respondent has in inventory any fabric, product or related material having a plain surface and made of silk, rayon and acetate, nylon and acetate, rayon or cotton or combinations thereof in a weight of two ounces or less per square yard or made of cotton or rayon or combination thereof with a raised fiber surface. Respondent will submit samples of any fabric, product or related material with this report.

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

Complaint

77 F.T.C.

IN THE MATTER OF  
MAX EISENBERG

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

*Docket C-1735. Complaint, May 4, 1970—Decision, May 4, 1970*

Consent order requiring a New York City wholesaler of fur skins to cease falsely invoicing his fur products by misrepresenting artificially colored furs as natural.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Max Eisenberg, an individual trading as Max Eisenberg, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Max Eisenberg is an individual trading as Max Eisenberg.

Respondent is a wholesaler of fur skins, with his office and principal place of business located at 200 West 30th Street, New York, New York.

PAR. 2. Respondent is now and for some time last past has been engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce; and has introduced into commerce, and sold, advertised and offered for sale in commerce, and transported and distributed in commerce, furs, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

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

Among such falsely and deceptively invoiced furs or fur products, but not limited thereto, were furs or fur products covered by invoices which failed to disclose that the fur contained in the furs or fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 4. Certain of said furs or fur products were falsely and deceptively invoiced to show that the fur contained therein was natural when, in fact, such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 5. The aforesaid acts and practices of respondent as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

#### DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with

the procedure prescribed in § 2.34 (b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Max Eisenberg is an individual trading as Max Eisenberg.

Respondent is a wholesaler of fur skins with his office and principal place of business located at 200 West 30th Street, New York, New York.

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

#### ORDER

*It is ordered,* That respondent Max Eisenberg, an individual trading under Max Eisenberg or any other name, and respondent's representatives, agents and employees, directly or through any corporation or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale, in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; or in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing furs or fur products by:

1. Failing to furnish an invoice as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on invoices that the fur contained in furs or fur products is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

*It is further ordered,* That respondent 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 he has complied with this order.

## Complaint

## IN THE MATTER OF

## DERMAN-HELFAND, INC., ET AL.

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

*Docket C-1736. Complaint, May 4, 1970—Decision, May 4, 1970*

Consent order requiring a New York City manufacturing furrier to cease falsely invoicing its fur products by misrepresenting artificially colored furs as natural.

## COMPLAINT

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

PARAGRAPH 1. Respondent Derman-Helfand, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Leon Derman and Nat Helfand are officers of said corporation. They formulate, direct and control the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter referred to.

Respondents are manufacturers of fur products with their office and principal place of business located at 350 Seventh Avenue, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, and sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of

## Complaint

77 F.T.C.

furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

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

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

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

PAR. 4. Certain of said fur products were falsely and deceptively invoiced to show that the fur contained therein was natural when in fact, such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs contained in said fur products, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products containing imported fur covered by invoices which failed to show the country of origin of such imported furs. The omission of the required material fact as to the country of origin of the imported furs implied that the said furs were of domestic origin when in truth and in fact the said furs were of foreign origin, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under 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 Textiles and Furs 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 Fur Products Labeling 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 respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Derman-Helfand, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Leon Derman and Nat Helfand are officers of said corporation, and they formulate, direct, and control the acts, practices and policies of said firm.

Respondents are manufacturers of fur products with their office and place of business located at 350 Seventh Avenue, New York, New York.

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 Derman-Helfand, Inc., a corporation, and its officers, and Leon Derman and Nat Helfand, 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 the manufacture for introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in

commerce, of any fur product; or in connection with manufacture for sale, the sale advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur, which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing directly or by implication on an invoice that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Misrepresenting in any manner on an invoice, directly or by implication, the country of origin of any imported fur.

*It is further ordered,* That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of dissolution or subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*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.

Complaint

IN THE MATTER OF

RICCAR AMERICA COMPANY, ET AL.

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

*Docket C-1737. Complaint, May 4, 1970—Decision, May 4, 1970*

Consent order requiring a Carlstadt, N.J., marketer of Japanese-made sewing machines to cease using bait and switch tactics, misrepresenting that its offers to sell are limited in time or to a limited number of persons, using deceptive discount schemes, misrepresenting that any article is "free," and furnishing others with means to deceive the public.

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 Riccar America Company, a corporation, and Harutoshi Yoshida and Kensaku Ogawa, individually and as officers of said corporation, and Leonard Trachtman, individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Riccar America Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 191 Broad Street, in the city of Carlstadt, State of New Jersey.

Respondents Harutoshi Yoshida and Kensaku Ogawa are individuals and officers of the corporate respondent. They formulate direct and control the acts and practices of said respondent corporation, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondent Leonard Trachtman is an individual and prior to March 31, 1967, was sales manager of the said corporate respondent. He participated with the said corporate officers in formulating, directing and controlling the acts and practices of the said respondent corporation, including the acts and practices hereinafter set forth. His address is 800 Boulevard East in the city of Weehawken, State of New Jersey.

PAR. 2. Respondents, except for respondent Leonard Trachtman, are hereinafter referred to as certain of the respondents, are now engaged in the advertising, offering for sale, sale and distribution of sewing machines, sewing machine cabinets and related products directly to the public through company operated retail outlets and to other retailers for resale to the public.

PAR. 3. In the course and conduct of their business, certain of the respondents now cause, and for some time last past the respondents have caused, their said products, to be imported into the United States from Japan, and, when sold, to be shipped from the States in which they are warehoused or otherwise stocked, to purchasers thereof located in various other States of the United States, other than the States from which such shipments originate, and further, respondents, as aforesaid, now cause, and have caused, promotional material to be prepared or processed by their distributors or at their central offices and distributed therefrom to their company operated retail outlets and to other retailers located in States other than the States in which said distributors or central offices are located, so that respondents have thereby maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. One of the respondents' sales plans has been to locate or to secure the location of registration boxes and display material in a high density traffic area, such as a shopping center, where persons are requested or invited to register for a drawing, offering as a prize a free sewing machine and cabinet. After the prize is awarded, respondents sell or otherwise distribute to their outlets or to independent retailers of their products, registration stubs identifying the names and addresses of registrants who failed to win. Such registrants are thereafter notified by letter of the location of a retail outlet where they can obtain an allegedly free sewing machine with the purchase of a cabinet. Upon the registrants' arrival at such locations, salesmen undertake to sell and, in many instances, do sell a higher priced machine to them.

PAR. 5. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents have made, and certain of the respondents are now making, certain statements and representations in magazine advertisements, promotional material and by other means with respect to drawings, sales promotions, free goods, limitations to product offers and merchandise prices.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

## Complaint

## ENTRY BLANK

## FREE DRAWING

Riccar Sewing Machine  
(Complete with cabinet)

[Picture of a sewing machine with cabinet.]

Entry blank must be deposited in the registration box. Presence not required. Riccar employees and their families may not participate in the drawing.

Other registrants will be notified as to when and where to obtain a Riccar Sewing Machine for the price of a cabinet only. Choice of Models RW3 or RW7.

All entries must be hand-written or printed CLEARLY.

NAME \_\_\_\_\_  
ADDRESS \_\_\_\_\_  
CITY \_\_\_\_\_ STATE \_\_\_\_\_

NO SALESMAN WILL CALL

Dear . . . :

Your name was registered at the Philadelphia Home Show sewing machine drawing and you will receive a new Riccar 1966 Sewing Machine for the price of the cabinet only. You have a choice of two Models: Model RW 3 or Model RW 7.

You may select at no cost to you, either of the two Models listed above with the purchase of a cabinet at prices ranging from \$39.50 for the Model RW 3 and \$69.50 for the Model RW 7.

Thousands of dollars are spent in National advertising on radio, television and magazines. We believe, however, the best advertising is to place some of our machines into each community and let their quality advertise for themselves. All we ask of you is that you show your new machine to as many of your friends as possible.

When you come in to choose the machine and cabinet you prefer, please bring this letter for identification to \* \* \*. If you are not in within one week another name will receive the new machine as we intend to place these machines as soon as possible.

Sincerely yours,  
RICCAR AMERICA CO.

\* \* \* \* \*  
You don't have to be smart to sew with a RICCAR . . . but you are.

\* \* \* \* \*  
MODEL 306B—\$339.50\*

\* \* \* \* \*  
MODEL 206B—\$269.50\*

\*Prices shown are for head only  
CABINET ONLY \$79.50

PAR. 6. By and through the use of the aforementioned statements and representations, through oral statements by respondents' salesmen and by other written statements of similar import and meaning not specifically set out herein, respondents, as aforesaid, represent, and have represented, directly or by implication, that:

1. They are conducting bona fide contest registrations of persons eligible to purchase a sewing machine and cabinet for the price of the cabinet.

2. They are making bona fide offers to give the advertised sewing machines "free," that is, as a gift or gratuity without cost to purchasers of a sewing machine cabinet at respondents' regular retail selling prices as part of a bona fide advertising and promotional program.

3. Their said offers of a free sewing machine for the price of the cabinet are made only to a limited number of persons for a limited period of one week.

4. Their price of \$339.50 for their Model 306B sewing machine head, their price of \$269.50 for their Model 206B sewing machine head and their prices of \$69.50 and \$79.50 for certain of their cabinets are the prices at which the said articles of merchandise were sold or offered for sale in good faith by respondents at retail for a reasonably substantial period of time in the recent, regular course of their business.

PAR. 7. In truth and in fact:

1. Respondents were and are not conducting bona fide contest registrations of persons eligible to purchase a sewing machine and cabinet for the price of the cabinet. Their purpose in having persons register for drawings has been to obtain leads to prospective purchasers of their higher priced machines.

2. Respondents were and are not making bona fide offers to give the advertised sewing machines "free," that is, as a gift or gratuity without cost to purchasers of a sewing machine cabinet at respondents' regular retail selling prices as part of a bona fide advertising and promotional program. Furthermore, respondents' offers have been made to attract prospective purchasers of respondents' higher priced sewing machines, and the price of the cabinet includes all or part of the price of the machine.

3. Respondents' offers of a free sewing machine for the price of the cabinet were and are not made to only a limited number of persons but are made generally to prospective purchasers of sewing machines. Said offers have not been limited to one week but are available

beyond that period of time to recipients of respondents' promotional letters.

4. Their price of \$339.50 for their Model 306B sewing machine head, their price of \$269.50 for their Model 206B sewing machine head and their prices of \$69.50 and \$79.50 for certain of their cabinets were and are not the prices at which the said articles of merchandise were sold or offered for sale in good faith by respondents at retail for a reasonably substantial period of time in the recent, regular course of their business.

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

PAR. 8. In the course and conduct of their business, as aforesaid, and in furtherance of their deceptive sales program, respondents, as aforesaid, or respondents' salesmen or representatives have represented, and now represent, directly, or by implication, in oral and written statements to registrants, who are urged or persuaded to purchase one of respondents' higher priced machines rather than to accept the sewing machine-cabinet combination included in respondents' promotional offer, that registrants will be granted a discount or allowance, commensurate with the alleged value of said promotional offer, from the prices at which such higher priced sewing machines were sold or offered for sale in good faith by respondents at retail for a reasonably substantial period of time in the recent, regular course of their business and that a bona fide savings in the amount of such discount or allowance is thereby afforded such registrants.

PAR. 9. In few, if any, instances are registrants, who purchase one of respondents' higher priced machines, as aforesaid, granted a discount or allowance, as above described, from the prices at which such sewing machines were sold or offered for sale in good faith by the aforesaid respondents at retail for a reasonably substantial period of time in the recent, regular course of their business. Said higher amounts are fictitious, as alleged, and for this reason, savings in the amounts represented are not thereby afforded such registrants.

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

PAR. 10. The respondents, by and through the use of the aforesaid acts and practices, have placed in the hands of independent retailers of their products the means and instrumentalities by and through which said retailers may mislead and deceive the public in the manner and as to the things herein alleged.

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

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

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

#### DECISION AND ORDER

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

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

The Commission having considered the agreements and having accepted same, and the agreements containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreements, makes the following jurisdictional findings, and enters the following order:

1. Respondent Riccar America Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 191 Broad Street, in the city of Carlstadt, State of New Jersey.

Respondents Harutoshi Yoshida and Kensaku Ogawa are officers of the said corporation and their principal office and place of business are located at the above address.

Respondent Leonard Trachtman is an individual and former sales manager of the said corporation and his address is 800 Boulevard East, in the city of Weehawken, State of New Jersey.

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 Riccar America Company, a corporation, and its officers, and Harutoshi Yoshida and Kensaku Ogawa, individually and as officers of said corporation, and Leonard Trachtman, individually, and respondents' agents, representatives, employees and any other person or company under the direction or control of respondents, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines, sewing machine cabinets or any other product or service, 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 persons are requested or invited to register or to submit their names, or to purchase or to receive any merchandise or service or to perform or participate in any act as a part of an advertising or promotional plan, when the primary purpose of such plan or promotion is other than as represented.

2. Representing, directly or by implication, that any product or service is offered for sale when such offer is not a bona fide offer to sell said product or service on the terms and conditions stated.

3. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements to obtain leads or prospects for the sale of their products or services.

4. Using any deceptive sales scheme or device to induce the sale of the products or services offered by respondents or by respondents' agents, representatives, employees, or by any other person or company under the direction or control of respondents.

## Order

77 F.T.C.

5. Representing, directly or by implication, that an offer of any product or service is: (a) limited as to time; (b) made to a limited number of persons; or (c) restricted or limited in any other manner, unless such represented limitations or restrictions were actually in force and in good faith adhered to.

6. Representing, directly or by implication, that any amount is respondents' usual and customary retail price for an article of merchandise or service when such amount is in excess of the price or prices at which such article of merchandise or service has been sold or offered for sale in good faith by respondents at retail for a reasonably substantial period of time in the recent regular course of their business.

7. Representing, directly or by implication, that any article of merchandise or service is being given free or as a gift, or without cost or charge, in connection with the purchase of other merchandise or service, unless the stated price of the merchandise or service required to be purchased in order to obtain said merchandise or service is the same or less than the customary and usual price at which such merchandise or service has been sold separately for a substantial period of time in the recent and regular course of business in the trade area in which the representation is made.

8. Representing, directly or by implication, that any saving, discount or allowance is given purchasers from respondents' selling price for a specified product or service, unless said selling price is the amount at which such product or service has been sold or offered for sale in good faith by respondents at retail for a reasonably substantial period of time in the recent, regular course of their business.

9. Misrepresenting, in any manner, the prices at which respondents' products or services are sold at retail in any trading area by respondents or by their dealers or the savings afforded purchasers of their products.

10. Furnishing or otherwise placing in the hands of others any means or instrumentality by and through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

*It is further ordered*, That respondents, other than individual respondent, Leonard Trachtman, shall:

a. Transmit by registered or certified mail, return receipt requested, or otherwise deliver a copy of this order to cease and

desist to all present and future distributors and to all other persons or companies, that purchase products or services from respondents for resale, and to all salesmen and to any other person or company under the direction or control of respondents; and maintain a record of such delivery.

b. After the acceptance of initial report of compliance, submit a report to the Commission once every year, during the next three years, describing: (1) all complaints, received from the public respecting representations by respondents or by any person or company under the direction or control of respondents; (2) the facts uncovered by respondents in connection with any investigation made; and (3) the action taken by respondents with respect to each such complaint.

*It is further ordered,* That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*It is further 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 they have complied with the order.

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IN THE MATTER OF

MASTER CHINCHILLA BREEDERS  
ASSOCIATION, LTD., ET AL.

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

*Docket C-1738. Complaint, May 6, 1970—Decision, May 6, 1970*

Consent order requiring two Boulder, Colo., sellers of chinchilla breeding stock to cease making exaggerated earning claims, misrepresenting the quality of their stock, deceptively guaranteeing the fertility of their stock, and misrepresenting their services to purchasers.

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 Master Chinchilla Breeders Association, Ltd., a corporation, and Lewis H. Van Meter, individually and as an officer of said corporation, and United Mar-

keting Corporation, a corporation, and Donovan S. Bonnawitz, individually and as an officer 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 Master Chinchilla Breeders Association, Ltd., and United Marketing Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of Colorado with their principal office and place of business located at 1325 Ithaca Drive, Boulder, Colorado.

Respondent Lewis H. Van Meter is an individual and officer of Master Chinchilla Breeders Association, Ltd. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporation.

Respondent Donovan S. Bonnawitz is an individual and officer of United Marketing Corporation. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporation.

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

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of obtaining the names of prospective purchasers and inducing the purchase of said chinchillas, the respondents have made, and are now making, numerous statements and representations by means of direct mail advertising and through the oral statements and display of promotional material to prospective purchasers, with respect to the breeding of chinchillas for profit without previous experience, the rate of reproduction of said animals, their hardiness, the demand for pelts and the expected returns from their sales, and the training assistance to be made available to purchasers.

Complaint

Typical and illustrative of the said statements and representations, but not all inclusive thereof, are the following:

NEED MORE MONEY FOR EDUCATION TRAVEL RETIREMENT.
ARE YOU SATISFIED WITH YOUR PRESENT INCOME?
WE MAY HAVE FOUND THE ANSWER TO FINANCIAL SECURITY FOR CITY PEOPLE AND FARMERS ALIKE.
CHINCHILLAS COULD PULL YOU OUT OF YOUR MONTHLY PAY-CHECK RUT!!!
CHINCHILLA RANCHERS ARE INCREASING THEIR ANNUAL INCOME BY RAISING HIGH QUALITY CHINCHILLAS FOR THE FUR MARKET.
IF YOU QUALIFY! YOU MAY BECOME A PART OF THIS RAPIDLY EXPANDING AND HIGHLY PROFITABLE INDUSTRY . . . PROVIDING YOU LIKE ANIMALS AND ARE INTERESTED IN MORE INCOME IN YOUR SPARE TME. . . .
TRAINING! WE FURNISH ON THE JOB TRAINING, SCHOOLS AND BULLETINS TO TEACH YOU ALL PHASES OF CHINCHILLA RANCHING.
BECOME A PART-TIME CHINCHILLA RANCHER AND EARN ADDITIONAL MONEY FOR COLLEGE EDUCATIONS, RETIREMENT INCOME, HIGHER LIVING STANDARD.

Gentlemen:

I would like to have additional information on your method of raising chinchillas. I understand this request does not obligate me in any way.

Name \_\_\_\_\_ Age \_\_\_\_\_
Address \_\_\_\_\_
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_
Occupation \_\_\_\_\_ Phone \_\_\_\_\_

I am interested in additional yearly income of: (Check One)
\$3,000 \_\_\_\_\_ \$5,000 \_\_\_\_\_ \$7,500 \_\_\_\_\_ \$10,000 \_\_\_\_\_ \$20,000 \_\_\_\_\_

. . . The business of chinchilla breeding has now developed into a substantial, well stabilized industry offering profitable returns on the modest investment required.

Chinchilla raising holds an unusually, attractive future for ambitious beginners who will apply to it the same diligence and good business principles required for success in any other field of endeavor.

. . . The Chinchilla breeds freely in captivity. Breeding may take place at any time of the year. The gestation period is 111 days. They have an average of 1.9 babies per litter and average two litters a year.

Chinchillas are hardy and live eight to ten years. . . .

. . . With the feed costs as low as \$2.00 and an average Aurora Quality pelt price of \$25.57 he also has a very good margin of profit.

But whoever you are, raising chinchillas gives you the opportunity for a SECOND INCOME, or a full time project if you wish.

. . . Average pelt prices have steadily advanced the past several years with future marketing prospects being very favorable by all indications. . . .

Complaint

77 F.T.C.

ASSOCIATION PLAN B  
THREE PAIRS SELECT CHINCHILLA

FIRST EIGHTEEN MONTH "EPP" (PROJECTION—2 OFFSPRING PER YEAR PER FEMALE CHINCHILLA)

THIS IS THE ASSOCIATION'S EXCLUSIVE "EDUCATIONAL PRODUCTION PERIOD" DURING WHICH TIME THE HERD SHOULD DOUBLE (8, INCLUDING YOUNG BONUS ANIMALS) BY THE END OF THE FIRST EIGHTEEN MONTHS.  $2 \times 8 = 16$ .

FIRST YEAR FOLLOWING "EPP" (assuming 50% male/female ratio) : 8 Females = 16 Offspring

SECOND YEAR FOLLOWING "EPP" (assuming 50% male/female ratio) : 16 Females = 32 Offspring

THIRD YEAR FOLLOWING "EPP" (assuming 50% male/female ratio) : 32 Females = 64 Offspring

START MARKETING FOURTH YEAR—FOLLOWING "EPP" (Assuming 50% ratio) : 64 Females = 128 Offspring

THAT IS A GROSS INCOME OF

\$3,200

A YEAR!

(BASED CONSERVATIVELY ON \$25 PELT PRICE AVERAGE.)

Note: Assuming the production of just 2 offspring per year per female and a 50% male/female ratio, this represents a yearly gross income of approximately two times the original investment—which is fully depreciable over the first five years.

QUESTION: IS THIS A "GOOD BUSINESS"?

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations made by their salesmen and representatives, respondents represent and have represented, directly or by implication, that:

1. It is commercially feasible to breed and raise chinchillas from breeding stock purchased from respondents in spare rooms, basements, garages or outbuildings, and that large profits can be made in this manner.

2. The breeding of chinchillas from breeding stock purchased from respondents, as a commercially profitable enterprise, requires no previous experience in the breeding, caring for and raising of such animals.

3. Chinchillas are hardy animals and are not susceptible to disease.

4. Each female chinchilla purchased from respondents and each female offspring will produce two or three litters of two live offspring per year.

5. Purchasers of respondents' breeding stock can expect a great demand for the offspring and for the pelts of the offspring of respondents' chinchillas.

6. The offspring of breeding stock purchased from respondents will have pelts selling for an average price of \$25 per pelt.

7. A purchaser starting with three females and three males of respondents' chinchilla breeding stock will have, from the sale of pelts, a gross annual income of \$3,200 by the end of the fourth year.

8. Purchasers of respondents' chinchilla breeding stock can expect to realize therefrom a net income sufficient for financial security, retirement, college education or a higher living standard.

9. Through the assistance, advice and guidance furnished to purchasers of respondents' breeding stock by respondents, purchasers are able successfully to breed and raise chinchillas as a commercially profitable enterprise.

PAR. 6. In truth and in fact:

1. It is not commercially feasible to breed or raise chinchillas from breeding stock purchased from respondents in homes, basements, garages or spare buildings, and large profits cannot be made in this manner. Such quarters or buildings, unless they have adequate space and the requisite temperature, humidity, ventilation and other necessary environmental conditions, are not adaptable to or suitable for the breeding or raising of chinchillas on a commercial basis.

2. The breeding of chinchillas from breeding stock purchased from respondents, as a commercially profitable enterprise, requires specialized knowledge in the breeding, caring for and raising of said animals, much of which must be acquired through actual experience.

3. Chinchillas are not hardy animals and are susceptible to pneumonia and other diseases.

4. Each female chinchilla purchased from respondents and each female offspring will not produce two or three litters of two offspring per year, but generally less than that number.

5. Purchasers of respondents' breeding stock cannot expect a great demand for the offspring of respondents' chinchillas or pelts therefrom.

6. The offspring of breeding stock purchased from respondents will not produce pelts selling for an average price of \$25 per pelt but substantially less than that amount.

7. A purchaser starting with three females and three males of respondents' breeding stock will not have a gross annual income of \$3,200 from the sale of pelts by the end of the fourth year, but substantially less than that amount.

8. Purchasers of respondents' breeding stock cannot expect to realize therefrom a net income sufficient for financial security, retirement, college education or a higher living standard.

9. Purchasers of respondents' breeding stock are not able successfully to breed and raise chinchillas as a commercially profitable enterprise through the assistance, advice, and guidance furnished them by respondents.

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

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

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

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

#### DECISION AND ORDER

The 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 ad-

mission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Master Chinchilla Breeders Association, Ltd., and United Marketing Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of Colorado, with their principal office and place of business located at 1325 Ithaca Drive, Boulder, Colorado.

Respondent Lewis H. Van Meter is an individual and officer of Master Chinchilla Breeders Association, Ltd. He formulates, directs and controls the acts and practices of the corporate respondent and his address is the same as that of the corporation.

Respondent Donovan S. Bonnawitz is an individual and officer of United Marketing Corporation. He formulates, directs and controls the acts and practices of the corporate respondent and his 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 Master Chinchilla Breeders Association, Ltd., a corporation, and its officers, and Lewis H. Van Meter, individually and as an officer of said corporation, and United Marketing Corporation, a corporation, and its officers, and Donovan S. Bonnawitz, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of chinchilla breeding stock or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

Order

77 F.T.C.

1. It is commercially feasible to breed or raise chinchillas in homes, basements, garages or spare buildings, or other quarters or buildings unless in immediate conjunction therewith it is clearly and conspicuously disclosed that the represented quarters or buildings can only be adaptable to and suitable for the breeding and raising of chinchillas on a commercial basis if they have the requisite space, temperature, humidity, ventilation and other environmental conditions.

2. Breeding chinchillas as a commercially profitable enterprise can be achieved in spare time or without knowledge or experience in the breeding, caring for and raising of such animals.

3. Chinchillas are hardy animals or are not susceptible to disease.

4. Female chinchillas purchased from respondents and female offspring thereof will produce two or three litters of two offspring per year.

5. The number of litters or sizes thereof or the number of live offspring produced per female chinchilla is any number or range thereof; or representing, in any manner, the past number or range of numbers of litters or sizes produced per female chinchilla of purchasers of proposed respondents' breeding stock unless in fact the past number or range of numbers represented are those of a substantial number of purchasers and accurately reflect the number or range of numbers of litters or sizes thereof produced per female chinchilla of these purchasers under circumstances similar to those of the purchaser to whom the representation is made.

6. Chinchillas or chinchilla pelts are in great demand, or that purchasers of respondents' breeding stock can expect to be able to sell the offspring or the pelts of the offspring of respondents' chinchillas because said chinchillas or pelts are in great demand.

7. Pelts from the offspring of chinchilla breeding stock sell for an average price of \$25 per pelt.

8. Chinchilla pelts from respondents' breeding stock will sell for any price, average price, or range of prices; or representing, in any manner, the past price, average price or range of prices of purchasers of respondents' breeding stock unless, in fact, the past price, average price or range of prices represented are those of a substantial number of

purchasers and accurately reflect the price, average price or range of prices realized by these purchasers under circumstances similar to those of the purchaser to whom the representation is made.

9. Purchasers of respondents' breeding stock will realize earnings, profits, or income in any amount or range of amounts, or sufficient for financial security, retirement, college education or a higher living standard; or representing, in any manner, the past earnings, profits or income of purchasers of respondents' breeding stock unless, in fact, the past earnings, profits or income represented are those of a substantial number of purchasers and accurately reflect the average earnings, profits or income of these purchasers under circumstances similar to those of the prospective purchaser to whom the representation is made.

10. The assistance, advice, or guidance furnished to purchasers of respondents' chinchilla breeding stock by respondents will enable purchasers successfully to breed or raise chinchillas as a commercially profitable enterprise.

B. Misrepresenting in any manner the earnings or profits to purchasers or the reproduction capacity of any chinchilla breeding stock.

C. Misrepresenting in any manner the assistance, training, services or advice supplied by respondents to purchasers of their chinchilla breeding stock.

D. Failing to deliver a copy of this order to cease and desist to all present and future salesmen and other persons engaged in the sale of respondents' products or services, and failing to secure from each such individual a signed statement acknowledging receipt of said order.

*It is further ordered,* That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

*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.

## Complaint

## IN THE MATTER OF

## COLONIAL STORES INCORPORATED

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

*Docket 8768. Complaint, September 20, 1968—Decision, May 7, 1970*

Order requiring a major chain of grocery supermarkets headquartered in East Point, Ga., to cease knowingly inducing or receiving discriminatory promotional payments from suppliers in connection with its special promotions.

## 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 (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Colonial Stores Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia with its principal office located at 2251 Sylvan Road, East Point, Georgia.

PAR. 2. Respondent is now, and for many years has been, engaged in the operation of a chain of retail grocery stores, selling a great variety of food, grocery, and non-edible household products. There are presently about 438 retail grocery stores composing respondent's chain, which stores are located in the States of Virginia, Georgia, North Carolina, South Carolina, Alabama, Florida, Maryland, Ohio, Kentucky, and Tennessee, and grouped geographically into divisions by respondent and designed as its Atlanta, Columbia, Jacksonville, Raleigh, Norfolk, Columbus, and Cincinnati Divisions.

In the course of its business respondent purchases food, grocery and non-edible household products of many types from a large number of manufacturers, suppliers, and handlers of such products. To create consumer demand and acceptance for the products it sells, and to attract business to its stores, respondent engages in extensive advertising. Respondent's sale of its products are substantial, exceeding \$535,000,000 annually.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaged in commerce, as "commerce" is defined

in the Federal Trade Commission Act. Respondent purchases for resale a great variety of products from a large number of suppliers located throughout the United States. Respondent causes these products, when purchased by it, to be transported from the places of manufacture or purchase to stores or warehouses located in the States of Virginia, Georgia, North Carolina, South Carolina, Alabama, Florida, Maryland, Ohio, Kentucky, and Tennessee for resale to the consuming public. There is now, and for many years has been, a constant current of trade in commerce in these products between and among various States of the United States.

In addition, respondent disseminates advertising in commerce and receives payments in commerce from suppliers for advertising and promotional services and facilities.

PAR. 4. In the course and conduct of its business in commerce, respondent is now and has been in competition with other corporations, persons, firms and partnerships in the purchase, sale and distribution of food, grocery and non-edible household products.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1962, respondent has knowingly induced and received from some of its suppliers the payment of something of value to or for respondent's benefit as compensation or in consideration for services or facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers when respondent knew or should have known that such payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such supplier's products.

PAR. 6. For example, twice each year respondent conducts a special promotion during which the products of its suppliers are featured in brochures mailed by respondent to a large number of households located in the areas in which respondent operates its retail grocery stores. Also, in connection with these special promotions, respondent provides display and advertising services and facilities to its suppliers in other advertising media and in its retail grocery stores. Respondent's special promotions sometimes have a seasonal theme and sometimes are supported by a theme of games and prizes for customers of respondent's retail grocery stores.

In connection with these special promotions and the advertising and promotion of its suppliers' products, respondent authors or selects the special promotional theme and determines the period of time that the special promotions will run. Respondent also deter-

mines the terms and conditions of the advertising and promotional services and facilities it provides to its suppliers and decides the rate of compensation the suppliers are required to pay to respondent for such service and facilities. Typical of the rates established by respondent for advertising in its brochures in some of its divisions are the following:

Division:	Full page rate
Atlanta .....	\$2,400
Jacksonville .....	1,200
Columbia .....	1,700
Raleigh .....	2,400
Norfolk .....	2,300

Respondent directly and indirectly solicits many of its suppliers to participate in these special promotions.

Examples of such special promotions consist of, although they are not limited to, the promotion entitled "Sword in the Stone" held during the first three months of 1964 and the promotion entitled "Red Carpet Sweepstakes" held during the first three months of 1965.

A substantial number of respondent's suppliers participated in respondent's "Sword in the Stone" and "Red Carpet Sweepstakes" promotions and agreed to pay, and did pay, respondent more than \$250,000 as compensation therefor.

PAR. 7. Typical of the suppliers who participated in respondent's "Sword in the Stone" promotion during the first three months of 1964, the products which were promoted, and the amounts which they paid to respondent are the following:

Name of supplier	Products	Amount
Blue Magic Company of North Carolina, Inc., Wilson, N.C.	Starch, rinse and bleach.....	\$6,500.00
Poss Famous Foods, Inc., Athens, Ga.	Hash, stew and canned meat.....	1,700.00
Louisiana State Rice Milling Co., Inc., Abbeville, La.	Packaged rice.....	1,700.00
Gebhardt Mexican Foods, Co., San Antonio, Tex.	Chili, beans and sauces.....	2,200.00
Coca Cola Company, New York, N.Y.	Soft drinks.....	6,557.08
Royal Crown Cola Co., Columbus, Ga.	Soft drinks.....	1,200.00
Gordon Foods, Atlanta, Ga.	Potato chips, crackers and nuts...	4,700.00

PAR. 8. Typical of the suppliers who participated in respondent's "Red Carpet Sweepstakes" promotion during the first three months in 1965, the products which were promoted and the amounts which they paid to respondent are the following:

Name of supplier	Products	Amount
Blue Magic Company of North Carolina, Inc., Wilson, N.C.	Starch, rinse, and bleach.....	\$1,298.00
Louisiana State Rice Milling Co., Inc., Abbeville, La.	Packaged rice.....	1,200.00
Aluminum Company of America, Pittsburgh, Pa.	Aluminium wrapping paper.....	624.00
Coca Cola Company, New York, N.Y.	Soft drinks.....	4,152.13
Gordon Foods, Atlanta, Ga.	Potato chips.....	1,733.00

PAR. 9. Many of respondent's suppliers who participated in respondent's "Sword in the Stone" promotion in 1964 and the "Red Carpet Sweepstakes" promotion in 1965, including specifically those listed herein, did not offer and otherwise make available to all their customers competing with respondent in the sale and distribution of their respective products payments or allowances, or other things of value, for advertising, display, or other promotional services or facilities on terms proportionally equal to those granted respondent.

When respondent induced and received or received said payments or allowances from its suppliers, respondent knew or should have known that it was inducing and receiving, or receiving payments or allowances for advertising, display, or other promotional services or facilities from its suppliers which the suppliers were not offering and otherwise making available on proportionally equal terms to all their other customers who were competing with respondent in the sale and distribution of such suppliers' products.

PAR. 10. The acts and practices of respondent, as herein alleged, are all to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C. 45)

*Mr. Ivan W. Smith, Robert E. Freer, Jr., and Lee S. Dewey, supporting the complaint.*

*Kilpatrick, Cody, Rogers, McClatchey & Regenstein, Atlanta, Ga., by Mr. Ernest P. Rogers, Mr. George B. Haley, Jr., and Mr. G. Kimbrough Taylor, for respondent.*

INITIAL DECISION BY ANDREW C. GOODHOPE,  
HEARING EXAMINER

OCTOBER 24, 1969

The Federal Trade Commission issued its complaint against respondent September 20, 1968, charging it with violations of Section 5 of the Federal Trade Commission Act. Respondent filed an answer in which it admitted certain allegations in the complaint but denied that it had violated Section 5 of the Federal Trade Commission Act. The complaint alleged that the respondent had engaged in unfair methods of competition and unfair acts and practices in commerce by inducing and receiving discriminatory promotional allowances from some of its suppliers. Thereafter hearings were held in Atlanta, Georgia; Greenville, South Carolina, and Washington, D.C.

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

## FINDINGS OF FACT

1. Respondent, Colonial Stores Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia. Its principal business office is located at 2251 Sylvan Road, East Point, Georgia. (Admitted in Answer.)
2. Respondent, during all times pertaining hereto, has been engaged in the business of operating a chain of retail grocery supermarkets. There are about 430 supermarkets in respondent's chain located in the States of Georgia, Florida, South Carolina, North Carolina, Virginia, Alabama, Maryland, Kentucky and Ohio. Respondent purchases a large variety of food, grocery, and nonedible household products from many suppliers for resale in its supermarkets. Respondent's sales of these products are substantial, ranging from \$480 million in 1964 to more than \$530 million in 1967. (Admitted in Answer; CX 168, 170.)
3. Respondent has six operating divisions, each under a vice president and general manager, who is responsible for about 35 to 95 supermarkets. Division headquarters are located in East Point, Georgia (Atlanta); Jacksonville, Florida; Columbia, South Carolina; Raleigh, North Carolina; Norfolk, Virginia; and Cincinnati, Ohio. During the period 1963 through 1965 there was also a Columbus, Ohio, Division which is now merged with the Cincinnati Division. Each division has its own warehouse. Most buying, advertising and promotional decisions are made at the division level and purchasing, sales, advertising and promotional records are maintained in the division offices. (Admitted in Answer; CX 170; Tr. 122, *et seq.*)
4. Respondent purchases products for sale in its supermarkets from suppliers located throughout the United States. Respondent causes these products to be transported from the State of manufacture or purchase to its warehouses and stores located in the States

of Virginia, Georgia, North Carolina, South Carolina, Alabama, Florida, Maryland, Kentucky and Ohio for resale to the consuming public. There is now, and for many years has been, a constant current of trade in commerce in these products between and among various States of the United States. In addition, respondent disseminates advertising in commerce and receives payments from suppliers in commerce for advertising and promotional services and facilities. (Admitted in Answer; CX 1-7, 170.)

5. In the course and conduct of its business, in commerce, respondent is now, and for many years has been, engaged in competition with other corporations, firms, persons and partnerships in the purchase, sale and distribution of food, grocery and nonedible household products. (Admitted in Answer; CX 170.)

6. To create consumer demand for the products it sells, respondent engages in extensive advertising. One method of advertising employed by respondent is the special event promotion based upon a seasonal theme or upon a theme of games and prizes, during which the products of respondent's suppliers are featured and are promoted by various advertising methods. These include direct mail brochures to consumer households located in those areas where respondent operates its stores; disseminates its newspaper, radio and television advertisements; and shows its in-store displays of the promoted products.

7. Respondent solicits a number of its suppliers to participate in these special promotions. Although the suppliers pay respondent for the services and facilities of advertising their products in these special promotions, it is the respondent who authors and selects the special promotional themes and who sets the periods of time during which the special promotions will run. Respondent also decides the terms and conditions of the advertising and promotional services and decides the rates of compensation the suppliers are to pay for such advertising services and facilities. (Par. Six of Answer; Tr. 205-206.)

8. Complaint counsel introduced evidence showing that respondent had a number of promotions of the general types described above during the years 1964 through 1967 in various of its divisions. Complaint counsel, however, concentrated their proof on a 19-month period from January 1964 through July 1965 and primarily on two of respondent's promotions—the Sword in the Stone promotion and the Red Carpet Sweepstakes promotion which took place during the first quarters of 1964 and 1965, respectively. (Comp. counsel Prop. Find. 16.)

9. The Sword in the Stone promotion began January 4, 1964, and extended 8-to-10 weeks into the first quarter of 1964. It was based upon a Walt Disney movie of the same name, then showing throughout the United States, and was developed into a traffic-building game by Famous Character Promotions, Inc., a professional marketer of supermarket games. The game was sold to respondent by the Famous Character firm on an exclusive basis under the terms of the sales agreement. Respondent entered into an arrangement with Metro Molding Corporation, manufacturer of the "Melmac" plastic dinnerware sold in respondent's stores, to use said dinnerware as a continuity and traffic-building item in this promotion. Respondent regarded Metro Molding as a cosponsor of the promotion. (CX 8-11, 21, 22; Tr. 199-200, 1788-1789.)

10. The promotion began in each division by the mailing of a brochure advertising the feature game and the supplier's products. The entire promotional program also included instore displays, newspaper ads and radio and television features. The mailer differed by divisions, depending upon the brand of trading stamps used in the area and upon the participating suppliers. Each brochure had about 14 full pages—each page had approximately 8 by 5 inches of four color advertising space—which respondent sold to its suppliers. Respondent mailed 2,799,400 of the Sword in the Stone brochures to households located throughout trading areas in which its stores were located. Another 92,100 were distributed by respondent through its stores to customers presumably missed by the mailing. Some participating suppliers did not buy advertisements in the mailers, but utilized other plans involving varying amounts of instore displays, and newspaper, radio and television advertisements (CX 12-17, 19, 21-22; Tr. 176-178).

11. In selecting the areas to be covered by its Sword in the Stone mailers, respondent made an effort to cover and enlarge the trading areas in which its supermarkets were located. In cities such as Atlanta, Georgia, and Charlotte, North Carolina, where respondent had many stores, the entire trading areas were covered but no effort was made to isolate neighborhoods where its stores were located. The same was true for areas, such as Gainesville, Georgia, which were not large enough to subdivide into separate mailing districts. Regardless of how the areas for the mailing were selected, respondent's purpose was to reach as many families as possible throughout its trading areas. (CX 21-22; Tr. 176-78, 1778.)

12. For full-page advertisements in the Sword in the Stone mailers, respondent charged and received from the participating

suppliers \$2400 in the Atlanta Division, \$1200 in the Jacksonville Division, \$1700 in the Columbia Division and \$2400 in the Raleigh Division. Rates for half-page ads were approximately half of that for full pages. In addition, advertising suppliers furnished respondent with suitable product identification, color art and copy for reproduction in the mailers or paid respondent for the cost of preparation. For this reason, the amounts paid by the suppliers for mailer ads sometimes varied. (CX 18.)

13. The Red Carpet Sweepstakes promotion was substantially the same in concept, purpose and execution as the Sword in the Stone promotion. It began about February 1, 1965, and continued 12 weeks until April 24, 1965. The theme of the Red Carpet promotion, however, was not the exclusive product of a professional super-market game promoter as was Sword in the Stone. Red Carpet has been a merchandising theme that respondent has used for many years in its various divisions to promote and advertise its products to the public. The Sweepstakes portion of the promotion consisted of the drawing of prizes used in the promotion as a traffic-builder.

The direct mail brochures used in the Red Carpet Sweepstakes were substantially the same as those used in the Sword in the Stone. Each division's brochure had about 14 full pages, approximately 8 by 5 inches, of four color advertising space which were sold to suppliers. Distribution to consumer households was about the same as in Sword in the Stone. (CX 123, 123A, 303, 125-30, 143; Tr. 184, *et seq.*, 201, *et seq.*)

14. Suppliers who purchased advertisements in the Red Carpet Sweepstakes mailers also received in-store displays and broad distribution in newspaper ads. For full-page advertisements in the Red Carpet Sweepstakes mailers, respondent charged the participating suppliers and received from them about \$1750 in the Atlanta Division, about \$1200 in the Jacksonville Division, about \$1200 in the Columbia Division and about \$1455 in the Raleigh Division. As in the Sword in the Stone promotion, a half-page ad in the Red Carpet mailer cost about half of the rate for a full-page ad. (CX 132, 134, 144, 303; Tr. 201, *et seq.*)

15. Complaint counsel during the course of the hearings and in their proposed findings have urged that in presenting their evidence they were proceeding in this matter under a three-fold theory of illegality. In their 15th proposed finding complaint counsel set forth their theories as follows:

In capsule, complaint counsel urge that the charges of the complaint have been sustained upon three basic theories of proof:

## Initial Decision

77 F.T.C.

a. That, because of the large number of suppliers participating in respondent's special promotions; because of respondent's general methods of inducing the suppliers to participate; because of respondent's failure to safeguard against discrimination; because of the central features of respondent's promotions including the fact that respondent selected the times, rates, themes, places, and all other features of the promotions; and because of the vast trading areas where respondent operates and the extremely large numbers of respondent's competitors in these trading areas, for all of these reasons, it was not possible in any practical sense that *all* of said suppliers made proportionally available to *all* of their customers' competing in *all* of respondent's trading areas the promotional benefits paid to respondent. This, complaint counsel urge, is a finding supported by the evidence *without* the need to prove which suppliers of which products discriminated against which of respondent's competitors.

b. That even if *all* of respondent's suppliers participating in *all* of respondent's special promotions made proportionally available to *all* of their competing customers the promotional benefits paid to respondent, and, even if this had been done contemporaneously with respondent's promotions (all of which complaint counsel contend is impossible), then in a qualitative sense, respondent has received unlawful discriminatory promotional benefits as alleged in the complaint because when respondent seized for itself the power to determine the terms, conditions, proportional rates of payment, times, places, themes, for respondent *and* respondent's competitors, then, by definition, respondent has selected circumstances most favorable to it, and not its competitors. In effect, complaint counsel contend that, granted quantitative proportionally equal treatment of competitors by respondent's suppliers, respondent has been favored in qualitative discrimination by its methods.

c. That, because of respondent's general methods and the demonstrated examples of specific supplier payments proved to be discriminatory, the complaint has been sustained in the traditional manner of the following: (Citing previous Commission and Court cases.)

16. The hearing examiner rejects the first two of complaint counsel's theories of proof. The allegations in the complaint, particularly in Paragraph Five, are in the charging language that has customarily been used in these types of cases by the Commission. Consequently, the hearing examiner and counsel in support of the complaint have been limited by the allegations in the Commission's complaint. In the Commission's opinion in its order vacating the initial decision and remanding the matter to the hearing examiner in *J. Weingarten, Inc.*, 62 F.T.C. 1521, 1524 (1963), it specifically spelled out the basic factual elements of a Section 5 violation by a buyer as follows:

1. The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.

2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.

3. The payments received by respondent were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.

4. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms. 62 FTC at 1524-1525.

It is the examiner's opinion that these factual elements must be established by reliable, probative and substantial evidence. They cannot be concluded simply from an examination of respondent's promotional plan and the manner in which it was put into effect without more. In effect, it appears to the examiner that complaint counsel are urging that all promotions originating with a buyer-retailer and involving the payment by such buyer-retailer's suppliers of any moneys or other consideration must be considered per se illegal. If one were to adopt this theory, the appropriate remedy would be the outlawing of all buyer-retailer type promotions involving supplier participation. The law in this area has not reached this point as yet and cannot be so extended—certainly not in this matter. Counsel in support of the complaint originally relied upon two suppliers of respondent as suppliers who, they asserted, had discriminated in favor of respondent during its promotions in 1964 and 1965. When the evidence was all in, it was apparent that the record would not support a finding that respondent had received discriminatory payments from the J. D. Jewell Company or The Murray Biscuit Company. Consequently, complaint counsel requested no findings based upon the payments made to respondent by these two companies. If the examiner were to adopt either of the first two theories proposed by complaint counsel, he would have had to find a violation of Section 5 in situations where the record did not establish that respondent had received discriminatory payments. Consequently, the examiner's decision is limited to complaint counsel's third theory as is required by the complaint and the Commission's decision in *J. Weingarten, Inc.*, (*supra*).

#### Participating Suppliers

17. The complaint identified eight suppliers as having discriminated in favor of respondent by making payments to respondent in its various promotions. During the prehearing conferences, complaint counsel identified three additional suppliers. During the hearings, evidence was presented pertaining to all eleven of these suppliers. Complaint counsel in their proposed findings have abandoned two of these suppliers as being examples of suppliers who made discriminatory payments to the respondent. In addition, complaint counsel

Initial Decision

77 F.T.C.

have limited their proof principally to those suppliers who participated in respondent's Sword in the Stone promotion and Red Carpet Sweepstakes promotion. Proof in the record was also limited to approximately a 19-month period from January 1964 to July 1965.

18. A tabulation setting forth the promotions named, the division of respondent in which a particular supplier participated in such promotion, and the amount of money paid to respondent by the nine suppliers upon whom complaint counsel rely is as follows:

Supplier	Promotion	Division	Amount paid	CX
Blue Magic Co.	Sword in Stone	Atlanta	\$2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Raleigh	1,104.00	150
	Thanksgiving 1964	Norfolk	650.00	151
	Red Carpet	Columbia	1,208.00	144
	Red Carpet	Raleigh	1,455.00	126, 303
	July 4, 1965	Raleigh	1,104.00	154
	July 4, 1965	Norfolk	650.00	153
	Gordon Foods	Sword in Stone	Atlanta	2,400.00
Sword in Stone		Columbia	1,700.00	61
Sword in Stone		Jacksonville	600.00	50
Sword in Stone		Norfolk	2,300.00	15, 18
Red Carpet		Atlanta	1,733.00	132
July 4, 1965		Atlanta	1,200.00	158
July 4, 1965		Columbia	770.00	161
Sword in Stone		Atlanta	2,400.00	25
Sword in Stone		Columbia	1,700.00	61
Sword in Stone		Jacksonville	1,200.00	50
Trade Winds Co.	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Columbia	924.00	191
	Red Carpet	Columbia	624.00	144
	July 4, 1965	Atlanta	650.00	158
	July 4, 1965	Norfolk	612.48	153
	July 4, 1965	Raleigh	506.90	154
	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,757.08	61
	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Columbia	1,540.00	147
Aluminum Co. of America	Thanksgiving 1964	Raleigh	1,104.00	150
	Red Carpet	Atlanta	1,750.00	132
	Red Carpet	Columbia	1,208.00	144
	Red Carpet	Raleigh	1,455.00	126, 303
	Red Carpet	Jacksonville	1,194.13	134
	July 4, 1965	Atlanta	1,109.70	158
	July 4, 1965	Columbia	770.00	161
	July 4, 1965	Norfolk	1,000.00	153
	July 4, 1965	Raleigh	1,104.00	154
	Sword in Stone	Columbia	1,700.00	61
Coca-Cola Co., New York, N.Y.	Thanksgiving 1964	Columbia	1,540.00	147
	Thanksgiving 1964	Jacksonville	396.50	149
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Columbia	1,700.00	61
	Thanksgiving 1964	Raleigh	592.00	150
	Red Carpet	Columbia	1,200.00	144
	Sword in Stone	Jacksonville	1,200.00	50
	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Norfolk	510.48	151
	Red Carpet	Norfolk	1,000.00	627
Royal Crown Cola Co., Columbus, Ga.	July 4, 1965	Raleigh	1,104.00	154
	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Jacksonville	600.00	50
	Sword in Stone	Norfolk	2,300.00	15, 18
	Red Carpet	Atlanta	1,733.00	132
	July 4, 1965	Atlanta	1,200.00	158
	July 4, 1965	Columbia	770.00	161
	July 4, 1965	Norfolk	1,000.00	153
	July 4, 1965	Raleigh	1,104.00	154
Poss' Famous Foods Inc.	Sword in Stone	Columbia	1,700.00	61
	Thanksgiving 1964	Columbia	1,540.00	147
	Thanksgiving 1964	Jacksonville	396.50	149
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Columbia	1,700.00	61
	Thanksgiving 1964	Raleigh	592.00	150
	Red Carpet	Columbia	1,200.00	144
	Sword in Stone	Jacksonville	1,200.00	50
	Sword in Stone	Raleigh	2,400.00	16, 18
	Thanksgiving 1964	Norfolk	510.48	151
Gebhardt's Mexican Foods Co.	Red Carpet	Norfolk	1,000.00	627
	July 4, 1965	Raleigh	1,104.00	154
	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Jacksonville	600.00	50
	Sword in Stone	Norfolk	2,300.00	15, 18
	Red Carpet	Atlanta	1,733.00	132
	July 4, 1965	Atlanta	1,200.00	158
	July 4, 1965	Columbia	770.00	161
	July 4, 1965	Norfolk	1,000.00	153
La. State Rice Milling Co.	July 4, 1965	Raleigh	1,104.00	154
	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Jacksonville	600.00	50
	Sword in Stone	Norfolk	2,300.00	15, 18
	Red Carpet	Atlanta	1,733.00	132
	July 4, 1965	Atlanta	1,200.00	158
	July 4, 1965	Columbia	770.00	161
	July 4, 1965	Norfolk	1,000.00	153
	July 4, 1965	Raleigh	1,104.00	154
Royal Crown Cola Co., Columbus, Ga.	Sword in Stone	Atlanta	2,400.00	25
	Sword in Stone	Columbia	1,700.00	61
	Sword in Stone	Jacksonville	600.00	50
	Sword in Stone	Norfolk	2,300.00	15, 18
	Red Carpet	Atlanta	1,733.00	132
	July 4, 1965	Atlanta	1,200.00	158
	July 4, 1965	Columbia	770.00	161
	July 4, 1965	Norfolk	1,000.00	153
	July 4, 1965	Raleigh	1,104.00	154
	Sword in Stone	Atlanta	2,400.00	25

*Blue Magic Co.*

19. The Blue Magic Company of North Carolina, now owned by the Roman Cleanser Company of Detroit, Michigan, manufactures a line of washday products, principally bleaches, sold under the

"Easy Monday" label throughout the respondent's trading area. The general manager of Blue Magic during 1964 and 1965, John Bulla, appeared and testified that during 1964 and 1965 Blue Magic had a cooperative advertising program under which it made available to each of its customers, including respondent, for promotional purposes, either in money or free goods, an amount equal to approximately 3 percent of the customer's purchases of Blue Magic products (Tr. 1695; CX 623, 626, 626 A & B). It was the policy of Blue Magic to make these payments to customers who cooperated with it and advertised its products; but some customers, such as wholesalers, who did not advertise, received free goods and off-invoice case allowances, since this was the only way that Blue Magic could promote its products with purchasers who did not advertise (Tr. 1704-06). Blue Magic had this 3 percent policy for many years and Mr. Bulla felt that the availability of the payments was general knowledge with Blue Magic customers (Tr. 1698). Blue Magic sold its products principally through brokers and depended upon them to offer the contracts and make copies of the contracts, which the brokers had in their possession, available to customers (Tr. 1695-1703). A number of such contracts, including respondent's are in evidence, (RX 301, 303-11). Mr. Bulla testified that over a period of years, respondent's payments were within 3 percent of its total purchases, and that if payments to respondent in one year exceeded 3 percent, an adjustment would be made in later years. Mr. Bulla also testified that in determining whether payments to respondent were within the 3 percent limitation he considered total annual sales to respondent, rather than sales to a particular division (Tr. 1711-13).

20. During the year 1964, Blue Magic paid respondent \$6,500 for participation in respondent's Sword in the Stone promotion in the Atlanta, Columbia, and Raleigh Divisions, and \$1,754 for respondent's 1964 Thanksgiving promotion. Blue Magic in 1965 paid respondent \$2,663 for participation in respondent's Red Carpet Sweepstakes promotion in the Columbia and Raleigh Divisions, and \$1,754 for participation in respondent's July 4 promotion in the Raleigh and Norfolk Divisions.

21. During the period November 1, 1963, through October 31, 1964, Blue Magic sold respondent \$263,087.99 worth of its products. During this period of time the respondent received payments from Blue Magic of \$6,500 for the Sword in the Stone promotion. Respondent actually would have been entitled to \$7,892.54 under Blue Magic's 3 percent cooperative advertising arrangement. While there are no figures for respondent's purchases after this period, and since re-

respondent's largest payment was early in 1964, it would appear that the later payments made to respondent by Blue Magic would be within Blue Magic's 3 percent cooperative advertisement program. (See Comp. Counsel Prop. Find. 124, Legal Argument.)

22. The alleged nonfavored customers of respondent either received offers of payments from Blue Magic (Tr. 1455) or were given price reductions or other things of value, such as printed private labels furnished at Blue Magic's cost (Tr. 1706-09), or purchased Blue Magic's products only sporadically (Tr. 1334). The record requires a finding that Blue Magic did offer to competitors of respondent something of value on a proportionally equal basis either in the form of cooperative advertising payments, which were refused or which the customer was unable to use because he chose not to advertise, or in the form of off-invoice pricing in an attempt to promote its products (Tr. 1331, 1455; RX 301-14).

23. Since the payments made to the respondent appear to be within Blue Magic's 3 percent cooperative advertising program, and the record contains no evidence that they were not, the respondent cannot be found to have induced or received discriminatory promotional payments in violation of Section 5 of the Federal Trade Commission Act, since it was operating within a well-known Blue Magic cooperative advertising contract that it had every right to believe Blue Magic was offering to or making available to all of its customers competing with respondent. In fact Blue Magic's cooperative merchandising agreement specifically stated that it was being offered to all of its customers (CX 301-11).

#### *Gordon Foods*

24. Gordon Foods, a division of Sunshine Biscuit Company, manufactures potato chips and related snack items, such as peanut butter sandwiches and bakery items, and sells them from its plants located in Raleigh, North Carolina, and Atlanta, Georgia. These products are sold primarily by Gordon's route salesmen to individual grocery stores and other retail accounts on a store-door delivery basis. In some areas Gordon sells through distributors in the same fashion and also sells direct to vending machine accounts (Tr. 1050-56). Gordon sells its potato chips to respondent on a store-door delivery basis and bills each division headquarters weekly. During 1964-1965, Gordon Foods participated in the following promotions with the respondent in the Colonial divisions listed:

Sword in the Stone.....	Atlanta.....	\$2,400	CX 329	CX 25
	Columbia.....	1,700	CX 330	CX 61
	Jacksonville.....	600	CX 346	CX 50
	Norfolk.....	2,300	CX 331	CX 15 and 18
Red Carpet.....	Atlanta.....	1,733	CX 334	CX 132
	Atlanta.....	1,200	CX 337	CX 158
	Columbia.....	770	CX 340	CX 161

Complaint counsel, while listing the above payments in their proposed findings, apparently rely for establishing a violation of Section 2(d) of the amended Clayton Act only on the payments made by Gordon to respondent's Columbia and Atlanta Divisions during the 1964 Sword in the Stone promotion (Comp. Counsel Prop. Find. 112).

25. The only witness from Gordon Foods who appeared and testified was David Ross, the comptroller of the Atlanta, Georgia, Division of Gordon Foods during the year 1964. He was assistant general manager of this Division of Gordon Foods at the time he testified. His testimony consisted primarily of the identification of a large number of exhibits. He also testified that during 1964 Gordon Foods had in effect a cooperative advertising agreement pursuant to which Gordon's customers could earn payments of up to 2 percent of their purchases from Gordon in 1963 by performing various types of promotional activities in connection with the sale of Gordon products (CX 325; Tr. 1071, 1108). Similarly, in 1965 customers were entitled to earn 1½ percent of their 1964 purchases from Gordon in return for performing various promotional services in connection with the sale of Gordon products (Tr. 1071, 1108). In 1964 the contract was a written contract (CX 325), but the 1965 contract was an oral contract; however, the performance requirements did not change (Tr. 1071). Mr. Ross testified that Gordon Foods' zone and sales managers were instructed to offer these cooperative advertising arrangements to all of Gordon's customers (Tr. 1074-75).

26. Mr. Ross also testified that respondent's Sword in the Stone promotion was an acceptable form of advertising under Gordon's contracts. He stated that the payments made to respondent by Gordon during 1964 and 1965 were charged against the amounts to which respondent was entitled under Gordon's promotional contracts and that the total payments to respondent in 1964 and 1965 were within the percentage of its purchases of Gordon's products for the preceding year as provided by Gordon's cooperative contract with respondent (Tr. 1107-08; CX 325, 357). The only conclusion that the record permits is that the payments made to respondent by

Initial Decision

77 F.T.C.

Gordon Foods were pursuant to its regular cooperative advertising agreements in effect during the years 1964 and 1965.

27. Commission exhibits 359, 359 A and B are a tabulation prepared by Gordon Foods showing payments made by Gordon during the year 1964 to a substantial number of its customers for advertising pursuant to Gordon's cooperative advertising agreements. Only a few of the agreements were produced pursuant to the subpoena at the time of the hearing since all of the 1964 records had been destroyed except those previously requested and received by a Commission investigator (Tr. 1101-03).

28. Complaint counsel contend that a number of wholesalers, wholesaler-cooperatives, and retailers were not paid any money by Gordon Foods in amounts similar to those payments made to respondent. In fact, a number of such customers did receive payments or offers of payments (Tr. 1335, 1613, 1624; CX 359, 359 A & B). While Jack Maziar, the representative of Associated Grocers Coop., Inc., of Georgia, testified that to his knowledge the Gordon contract was not offered to his company (Tr. 506), Commission Exhibits 527 and 359 show that Associated Grocers did receive cooperative advertising payments from Gordon in 1964 (Tr. 504-05). All of the alleged nonfavored retailer-competitors of respondent in the Atlanta area were members of and purchased from Associated Grocers so they should have received some benefits from these advertising allowances. Commission exhibit 359 also shows that a number of other competitors of respondent received promotional payments from Gordon. For example, Bi-Lo, Inc., a chain-store retailer in Greenville, South Carolina, handled Gordon products in competition with respondent. While the witness from Bi-Lo did not recall whether Gordon made an offer of money to Bi-Lo in 1964 (Tr. 1613), he did state that it was entirely possible that this happened in 1964 and 1965 (Tr. 1624). Moreover, Commission exhibit 359 shows that cooperative advertising payments were made to Bi-Lo in 1964. On the basis of the present record, therefore, the examiner finds that Gordon's regular cooperative advertising agreement was, at least, available to all of respondent's competitors.

29. In any event, the respondent cannot be charged with inducing or receiving discriminatory payments in violation of Section 5 of the Federal Trade Commission Act since, as found above, the payments which it did receive were within the terms of the cooperative advertising agreement that Gordon had with respondent and others. The agreement stated, among other things, "This merchandising agreement is available on proportionally equal terms to all cus-

tomers." (CX 333, 334.) The examiner does not believe that a buyer can be found to have violated Section 5 of the Federal Trade Commission Act when he accepts moneys under a supplier's regular cooperative advertising agreement unless the agreement itself, on its face, is obviously discriminatory or the buyer has some affirmative knowledge that the agreement is not being offered to competitors.

#### *Trade Winds*

30. The Trade Winds Company is a frozen foods processing firm specializing in seafood. One of its products is breaded frozen shrimp that it sells throughout the United States under the trade names "Trade Winds" and "Pan Redi." The shrimp is supplied from packing plants located in Brownsville, Texas, and Thunderbolt, Georgia.

31. During 1964, Trade Winds had a promotional advertising program under which it granted to its customers a 1 percent advertising allowance on all purchases of Trade Winds frozen seafood products. Proof of advertising was required and payment was made on a quarterly basis (CX 517, 518, 523, 524). In addition, Trade Winds, from time to time during the first quarter of 1964, granted various allowances off the invoice prices on various of its products. Both respondent and other customers in respondent's trading areas were granted these off-case promotional allowances. (See, for example, CX 521 C & D and CX 522 A-E.)

32. Respondent during its Sword in the Stone promotion in the first quarter of 1964, solicited and received a total of \$7,700 for promotion of the Trade Winds breaded fantail shrimp: \$2,400 in the Atlanta Division, \$2,400 in the Raleigh Division, \$1,700 in the Columbia Division, and \$1,200 in the Jacksonville Division (CX 513-16). The record makes it clear that these payments for advertising in respondent's Sword in the Stone promotion are in addition to the Trade Winds regular cooperative promotional programs (CX 513-20).

33. In the Atlanta trading area during the Sword in the Stone promotion, respondent had three competitors who carried the Trade Winds shrimp: The Newman Thrifty Lady Market (Tr. 1118), Morris Red Dot Supermarket (Tr. 1136), and Matthews Supermarket, Inc. (Tr. 1158). All of these retailers purchased their Trade Winds shrimp through Associated Grocers Coop., Inc., and received no offers of promotional payments directly from Trade Winds or any of its representatives. They may have benefited from whatever pay-

ments or discounts were granted to their immediate supplier. However, the only allowances offered or received by the Associated Grocers Coop. during the first quarter of 1964 were the 1 percent advertising contract (Tr. 512-15) and the promotional off-invoice allowances that, as found above, were given to Associated Grocers Coop, and the respondent.

34. Consequently, the examiner finds that the payment of \$2,400 made to respondent for participation in respondent's Sword in the Stone promotion in the Atlanta Division was discriminatory since like or similar payments were not offered to competitors of respondent either directly or through their source of supply in the Atlanta area.

35. Respondent urges that the payments for participation in the Sword in the Stone promotion should be considered as payments under the Trade Winds 1 percent promotional allowance, since there is no direct evidence that they were not. In the examiner's opinion the record is amply clear on this point. Respondent not only received the benefit of the Trade Winds regular cooperative advertising allowances, as well as all Trade Winds off-invoice discounts—as did a number of its competitors—but respondent also received substantial additional payment (\$2,400 in the Atlanta Division alone) over and above the regular allowances and discounts. There can be no other sensible explanation for these additional payments other than that they were discriminatory payments made to respondent by Trade Winds (CX 513-20).

36. Complaint counsel urge that there are additional retailers in Florence, South Carolina, who purchased through wholesalers and who were also discriminated against. This may be the case, but the evidence in the record is so vague and general that the examiner is unable to base any finding on it. These customers in Florence purchased their frozen shrimp products from wholesalers, representatives of which were not called to testify. Nor did any representative of the Trade Winds Company who had any knowledge of the Trade Winds promotional program during 1964 appear and testify. In addition, there is no documentary evidence upon which to base such a finding as there was in the Trade Winds dealings with respondent and its competitors in the Atlanta area.

37. As found above, the payment made to respondent by Trade Winds was discriminatory and in violation of Section 2(d) of the amended Clayton Act. It is further clear that respondent should have known, or at least had good reason to believe that the payment was discriminatory. Respondent was receiving payments from Trade

Winds under its regular cooperative advertising agreement and also receiving the benefit of the Trade Winds promotional discounts off the invoice price on Trade Winds products. These payments and discounts by Trade Winds were not large and for respondent to request and to take the comparatively large payments that it did, in the examiner's opinion, placed upon the respondent the duty of making certain that Trade Winds was offering similar payments to respondent's competitors. This the respondent failed to do; consequently, it must be charged with having knowledge that the payments it received from Trade Winds were in violation of Section 2(d) of the amended Clayton Act.

*Alcoa*

38. The Aluminum Company of America sold its product, household aluminum foil (Alcoa Wrap), to the respondent and a number of respondent's competitors during the years 1964 and 1965. Alcoa participated in respondent's promotions during Thanksgiving of 1964, the Red Carpet Sweepstakes in the first quarter of 1965, respondent's July 4, 1965, promotion, and the President's Sale during Thanksgiving of 1965. The only division in which Alcoa participated in these promotions was in the respondent's Columbia Division (Tr. 886-87).

39. Prior to January 1962 Alcoa had a cooperative advertising program under which it paid 3 percent of sales of Alcoa Wrap quarterly for the promotion of this product. Shortly after the entry of the Commission's order to cease and desist violations of Section 2(d) of the amended Clayton Act, *Aluminum Co. of America*, 59 F.T.C. 1058 (1961), Alcoa changed its practice and granted a 3 percent quarterly payment to its Alcoa Wrap customers, as an automatic price refund, with no advertising performance required. Since Alcoa did not advise its customers of this change, some continued to perform advertising services, and Alcoa hoped that the 3 percent payment would be used for that purpose. This practice continued during the years 1964 and 1965 with respondent regularly receiving payments from Alcoa under this 3 percent arrangement. Also Alcoa from time to time made price cuts to stimulate sales. These price cuts were programmed into Alcoa's computer and all customers in a trading area received such reductions. Alcoa's employees were not authorized to offer or to pay promotional allowances. (CX 171-88; Tr. 900-04, 911, 964.)

40. Alcoa was represented in respondent's Columbia Division by a broker, Emory L. Williamson. In the Fall of 1964, this broker

agreed to participate in respondent's Thanksgiving promotion (Tr. 292). The broker was not authorized by Alcoa to commit it to participate in this promotion or any others to which he committed his principal. Alcoa refused to pay the amount to respondent and Mr. Williamson advised respondent's Columbia Division that he was going to have to pay the Columbia Division in sample merchandise which he received (Tr. 293). Alcoa's own representative in the area, Robert V. Gill, also agreed to Alcoa's participation in Colonial Stores promotions without contacting the Alcoa management. However, he stated that the participation by Alcoa was not intended to commit Alcoa to making special payments but that the Alcoa price reductions were to cover the participation in Colonial's promotions. For example, during the 1964 Thanksgiving promotions, Alcoa had a national program offering one case of Alcoa Wrap free, with the purchase of five cases; and during Colonial's Red Carpet promotion early in 1965, Alcoa was offering 50 cents per case allowance off-invoice; and during respondent's July 4, 1965, promotion, Alcoa had a national offer of free merchandise in relation to the purchase of two items. These discounts and allowances were to cover Alcoa's participation. (Affidavit of Robert V. Gill, CX 239, 239 A & B.)

41. These transactions between Alcoa and respondent are the subject of a large number of exhibits and testimony in the record (CX 189-236; testimony of Alcoa representative James A. Anderson, Tr. 885, *et seq.*; testimony of Charles A. Porter, former senior buyer of Colonial's Columbia (Central) Division, in particular Tr. 292 *et seq.*). The problems created by Alcoa's participation in respondent's various promotions, commencing in 1964, continued until August of 1967, at which time Alcoa wrote off \$927.15, an amount due it from Colonial Stores, as an uncollectible item. Complaint counsel urge that this amount must be considered to have been an advertising allowance paid by Alcoa to Colonial Stores that was not offered or paid to Colonial's competitors during this period of time. Complaint counsel also assert that Alcoa paid respondent \$624 in sample merchandise for participation in respondent's Red Carpet Sweepstakes in 1964.

42. There can be no doubt but that there was an indebtedness of at least \$616 that respondent never repaid Alcoa. This debt, whatever its amount, arose as a result of respondent's several deductions of the amount of its invoices to Alcoa for various promotional services from its remittances to Alcoa when such invoices became past due (CX 191, 194, 197, 202; Tr. 907-20). It is clear that Alcoa did not intend

for any payments to be made by it to respondent in addition to its regular promotional programs offered to all of its competing customers. The affidavit of the Alcoa sales representative, Mr. Gill (CX 239), and the testimony of Charles A. Porter, respondent's Columbia Division buyer, and a study of the various invoices, letters, checks, etc., passing between the accounting departments of Alcoa and Colonial, leave the examiner with no explanation of the situation other than that it was a complete mutual misunderstanding. Mr. Gill intended Alcoa's participation to come out of Alcoa's regular promotional moneys or free goods and Mr. Porter expected either money or free goods and was not advised until after the promotions were completed that Alcoa's broker, Mr. Williamson, did not have authority to commit Alcoa to participate in the promotions (Tr. 296). When the records reached the respondent's accounting department, and the amounts which respondent expected were not paid, the accounting department simply deducted these amounts from its next payment due Alcoa and Alcoa's accounting department thereafter attempted to recover the amount of these deductions. Alcoa was successful, at least once, in collecting \$1,580.15 on March 30, 1966 (CX 215), less \$311.15 deducted because of a merchandise shortage (CX 222). Consequently, Alcoa did recover some of the money that respondent had deducted to cover participation by Alcoa in respondent's various promotions. After several years of correspondence and attempts by the Alcoa representative to straighten the matter out, Alcoa simply wrote off the amount of \$927.15 as an uncollectible debt since it would cost more to collect this amount than it was worth (CX 234-36; Tr. 957).

43. It is the examiner's conclusion after examining all of the documents involved and the testimony of the persons involved in these transactions that Alcoa did not violate Section 2(d) of the amended Clayton Act. Alcoa clearly refused to honor the commitments that its broker and representative had made and attempted to recover all of the unauthorized deductions taken by respondent; and it was partially successful in this attempt. Since the record does not contain evidence that Alcoa violated Section 2(d), respondent cannot be charged with having induced or received payments in violation of Section 2(d).

#### *Coca-Cola*

44. The respondent received payments during its 1964 Sword in the Stone promotion for the advertising of Coca-Cola in three of its divisions, and during its 1965 Red Carpet Sweepstakes in four of its

divisions. The complaint charges and complaint counsel argue that these discriminatory payments were made by Coca-Cola Company of New York, New York, and that the Coca-Cola Company of New York did not make available similar promotional allowances to all of its customers competing with respondent. The subject of the relationship between Coca-Cola of New York and its various bottlers in the Southeast, and the transactions between the bottlers and respondent, and respondent's competitors was the subject of extensive testimony and numerous exhibits and lengthy proposed findings (Tr. 643-814).

45. The Coca-Cola Company of New York manufactures Coca-Cola syrup in its plants in Baltimore, Maryland, and Atlanta, Georgia, and sells the syrup to licensed bottlers located throughout the United States. The Coca-Cola Company of New York has extensive advertising programs promoting Coca-Cola products. These promotions are sponsored by the Coca-Cola Company of New York itself and do not involve the bottlers in any way. The operations of the bottlers are controlled by a Bottler's Bottle Contract between Coca-Cola of New York and each bottler (CX 266). The bottler purchases the syrup, adds water and CO<sub>2</sub>, and sells the resulting mixture in bottles and cans in the trading area set forth in the particular Bottler's Bottle Contract. There is no question with regard to the existence of competition between respondent and other purchasers of Coca-Cola in respondent's trading areas since Coca-Cola is sold in practically every imaginable retail outlet (Tr. 659-60, 764).

46. The Coca-Cola Company of New York has a Bottler Sales Development Department, which employs field representatives, whose function is to promote the sales of Coca-Cola. Among other things, the field representatives make surveys and audits; call on large manufacturing companies and military accounts; and generally promote the sale of Coca-Cola to customers, including the respondent (Tr. 735-36). One of the purposes for calling on the respondent was that respondent's stores in its various divisions were supplied by a number of Coca-Cola bottlers and, in fact, the stores in some divisions were supplied by two or more bottlers. The Coca-Cola national sales representatives acted more or less as coordinators for the various bottlers with accounts such as Colonial, which are called inter-bottler accounts.

47. The promotion of Coca-Cola in the Sword in the Stone and Red Carpet Sweepstakes and other promotions was arranged between respondent and representatives of Coca-Cola's Bottler Sales Development Department. After respondent had contacted the field representatives, they, in turn, contacted the bottlers involved in respond-

ent's divisions to see if they wished to participate in respondent's promotions. The decision regarding participation was made by each bottler and the payment for the participation in the promotion came from funds that belonged to and could only be spent by each bottler. These Coca-Cola representatives had no authority to commit the bottlers to such promotions (Tr. 688, 750). The field representatives of the Coca-Cola Company did, however, assist the bottlers in arranging for them to participate in respondent's promotions. In fact, in some instances they even signed respondent's contracts on behalf of the bottlers and handled the money for the bottlers after the bottlers had decided to go along with the promotions and make the payments to respondent (Tr. 722, 779). The record contains no evidence whatever that there was any threat to or coercion of the bottlers by Coca-Cola Company to participate, and it is clear that all of the funds involved in the payments to respondent came from the bottlers' funds. The actual payments made by the various bottlers were based upon the number of respondent's stores that a particular bottler had within his territory. The amount that the bottler actually paid was approximately \$30 per Colonial store.

48. The record is clear that there were no sales made to any of respondent's divisions or stores by the Coca-Cola Company itself. All sales were made by the various Coca-Cola bottlers. The record is also clear that the Coca-Cola Company made no payments to the respondent for these promotions since all payments involved came directly from bottlers' funds. The theory of complaint counsel that the Coca-Cola Company itself, rather than the individual bottlers, violated Section 2(d) of the Clayton Act, as amended, is based upon the activities of the Coca-Cola Bottler Sales Development Department field representatives in assisting the various bottlers to participate in respondent's promotions. This contention must be rejected by the hearing examiner. There is no evidence that the bottlers were under the direct control of the Coca-Cola Company so that their identity as independent businesses can be disregarded and the Coca-Cola Company charged with responsibility for their actions. The only control that the record demonstrates that the Coca-Cola Company exercises over its bottlers is by the Bottler's Bottle Contract. The mere fact that Coca-Cola representatives assisted the bottlers in participating in respondent's promotions does not warrant a finding that the Coca-Cola Company itself is responsible for the bottlers' actions.

49. As far as the independent Coca-Cola bottlers are concerned, the record will not support a finding that the payments they made to

respondent or that the sale of Coca-Cola products by any individual bottler was made to respondent "in commerce" as is required for a violation by any of them of Section 2(d) of the amended Clayton Act. Complaint counsel themselves do not claim that any of the bottlers crossed State boundaries in selling bottled Coca-Cola. The fact that a bottler, which was located in a State other than the State in which the headquarters of a particular division of respondent was located, made its payments to this division across a State line is not sufficient to bring the entire transaction into commerce since the sales of the products and the promotional payments to respondent were based solely upon respondent's stores within the particular bottler's State and no shipment of Coca-Cola across State boundaries was made by any of the Coca-Cola bottlers.

50. The record does not establish with clarity that the payments made by the independent Coca-Cola bottlers were discriminatory. The payments as found above amounted to approximately \$30 per store in return for which Coca-Cola was advertised in respondent's mailers, described above, and other in-store promotions. None of the independent Coca-Cola bottlers testified as to what their promotional offers or payments to their customers were; but the record is clear that these bottlers offered a substantial number of promotional activities, services and equipment, without charge, to their customers (Tr. 783-84, 719-20). Among other things, these bottlers furnished outside signs, racks for the Coca-Cola products and clocks to be used in retail outlets. Chain stores, including respondent, do not use outside signs or other services or equipment offered by the bottlers (Tr. 719, 783). The alleged nonfavored customers, who were competitors of respondent and who testified regarding Coca-Cola, admitted that they had either been offered or had actually received some of the promotional material offered by the bottlers, or in some cases, case allowances for display-type promotions (Tr. 1205-10, 1226-27, 1285-87, 1320-21). Some of this equipment is quite expensive (Tr. 784). The examiner is unable to find upon the present record that the payments made to the respondent can be said to be discriminatory. For example, the Greenville, South Carolina, bottler paid respondent \$113.36 in connection with the Sword in the Stone promotion or \$28.34 for each of respondent's four stores located in this bottler's territory (CX 290-291). When considered on a per store basis, these payments are indeed small compared to the promotional aids the bottlers made available to customers competing with respondent. The record does not support a finding of discrimination by the bottlers since it fails to provide evidence by which a comparison of propor-

tionality between the payments made to respondent and the services and facilities made available to respondent's competitors.

*Royal Crown*

51. The respondent promoted Royal Crown Cola during the years 1964 and 1965 in some of its divisions. The Royal Crown Cola Company, located in Columbus, Georgia, manufactures a concentrate which it sells to a large number of franchise distributors throughout the United States. This concentrate is combined with carbonated water, bottled and sold to the public as Royal Crown Cola. In addition, the Royal Crown Cola Company itself produces this soft drink, which it cans and sells to its franchise distributors throughout the United States. In a few instances and for a temporary period of time, Royal Crown Cola Company has owned and operated franchise bottlers in various cities, none of which is pertinent to this proceeding (Tr. 532, 540-46, 557, 569).

52. Royal Crown Cola is sold through virtually every type of retail outlet in the United States, and there is no question but that the respondent is in competition with thousands of such retail outlets in the resale of both the canned and bottled soft drink (Tr. 531, 557).

53. While complaint counsel cite other payments received by respondent for the promotion of Royal Crown Cola, they base their charge that respondent induced a violation of Section 2(d) of the Clayton Act, as amended, upon the payments received by respondent in 1964 for promoting Royal Crown in the Sword in the Stone promotion. (Comp. Counsel Prop. Find. 98.) The amounts paid were \$1,200 to respondent's Jacksonville, Florida, Division and \$2,400 to respondent's Raleigh, North Carolina, Division. The products promoted during the Sword in the Stone promotion are Royal Crown Cola in both the bottles and cans (CX 16, p. 22).

54. The examiner rejects complaint counsel's contention that the Royal Crown Cola Company of Columbus, Georgia, violated Section 2(d) of the Clayton Act, as amended, as a result of the payments received by respondent to promote Royal Crown Cola products. The only testimony in the record pertaining to Royal Crown Cola, other than from retailers, is by two Royal Crown representatives, William I. Adams (Tr. 526, *et seq.*) and Lawrence Purvis (Tr. 554, *et seq.*). Their testimony is that the Royal Crown Cola Company of Columbus, Georgia, sold no products to respondent that were advertised or promoted in connection with the Sword in the Stone promotion nor made any payment to respondent in connection with such promotion

(Tr 550-51, 581-84). The evidence is undisputed that the individual bottler prepares the bottled Royal Crown Cola from the concentrate and sells it to its customers, including the respondent (Tr. 532-33). Royal Crown Cola in cans is purchased by the bottler from Royal Crown Cola Company of Columbus, Georgia, and the bottler rather than the Royal Crown Cola Company sells the canned beverage to retailers such as respondent. As with Coca-Cola the bottlers are independent businesses and the only control that the Royal Crown Cola Company exercises is pursuant to the franchise with the bottlers and consists principally of quality control over the product sold by the bottlers.

55. The payments made by the various bottlers to respondent cannot be attributed to the Royal Crown Cola Company of Columbus, Georgia. The funds from which such payments were made were derived one-half from the Royal Crown Cola Company (based upon a particular bottler's purchases of concentrate) and one-half from the bottlers. The only evidence in the record is that the Royal Crown Cola Company had no control whatever over these funds. The funds were only expended at the request of or with the approval of the individual bottlers (Tr. 537-39, 580-81). The contract for the promotion in respondent's Raleigh, North Carolina, Division was signed by the Royal Crown representative, Mr. Purvis, but it is clear he signed only on behalf of the bottlers after the bottlers themselves had determined that they wanted to participate in the respondent's promotion (Tr. 567-68, 580; CX 507). The fact that the Royal Crown Cola Company may have issued a check for the amount of the participation in respondent's promotions is only a bookkeeping function since the charges are thereafter made against each bottler's own funds, based upon the number of respondent's stores each bottler supplies with Royal Crown Cola.

56. There is no evidence in the record upon which to base a finding that any of the sales made by any Royal Crown bottlers were made in the course of commerce within the meaning of Section 2(d) of the Clayton Act, as amended.

57. The evidence in the record is also too vague and insubstantial upon which to base a finding that the payments made to respondent by the bottlers were not made available on proportionally equal terms to respondent's competitors. Complaint counsel rely upon the testimony of Sol Janow, former vice president of Daylight Grocery Co., a 7-store supermarket chain in Jacksonville, Florida (Tr. 1195, *et seq.*). This witness' testimony was vague and not based upon a review of any records. The witness did not even have control of the Daylight

records at the time he testified (Tr. 1207). However, he did testify that his stores from time to time received display racks from its local bottler, but he was unable to state what promotions were available during the first quarter of 1964 from Royal Crown bottlers. He did recall that there had been off-case promotional allowances granted to him for the promotion of Royal Crown Cola in the past (Tr. 1208). The other retailer who testified was the purchasing manager of the Atlanta Division of the Great Atlantic & Pacific Tea Company (Tr. 1213, *et seq.*). This witness only testified that a record search which he made in 1966 showed no written contracts with Royal Crown during the first quarter of 1964. However, this witness was not with the A & P Jacksonville Division during 1964 so he had no knowledge as to what offers might have been made to A & P during that time (Tr. 1213). No finding can be based upon this testimony.

58. Complaint counsel cite the Commission decision in *Royal Crown Cola Co.*, 63 F.T.C. 1950 (1963), as authority for the proposition "that the Commission has already found Royal Crown to have violated the law under circumstances similar to those which exist in this case." (Comp. Counsel Prop. Find. 99, Legal Argument.) In that proceeding the Commission held that Royal Crown Cola Company of Columbus, Georgia, had violated Section 2(d) of the amended Clayton Act. The basis for the finding of illegality was the fact that sales were made in commerce by the Royal Crown Cola Company through its wholly owned and operated bottling plant located in Columbus, Georgia. On appeal to the Commission the finding that payments made by the Royal Crown Cola local franchised bottlers could be attributed to Royal Crown was rejected when the Commission struck a conclusion of the hearing examiner to the effect that the order against Royal Crown Cola Company was applicable to sales of Royal Crown Cola to retailers by respondent's local franchised bottlers. The decision in that case is authority for the proposition that the Royal Crown Cola Company cannot be held responsible for violation of Section 2(d) of the amended Clayton Act by the Royal Crown Cola local franchised bottlers.

#### *Poss' Famous Foods*

59. Poss' Famous Foods of Athens, Georgia, manufactured a line of canned meat items of the barbecue variety in 1964 in its plant in Athens, Georgia, and did business in the nine Southeastern States (Tr. 612-15). Poss' products consist primarily of Southern Hash, Brunswick Stew, Pork with Barbecue Sauce and Hot Dog Chili

Sauce sold in various sizes (CX 506 A). Poss' sells its products direct to retail store organizations having a central warehouse and to grocery wholesalers by means of brokers whom it employs (Tr. 615-17).

60. During 1964, Poss' sold its 24-ounce Brunswick Stew to respondent and paid respondent \$1,700 for a 1-page ad in respondent's *Sword in the Stone* mailer in the Columbia Division and for featuring Poss' products in its stores during the first 10 weeks of 1964. Poss' also paid respondent \$1,576 during the fourth quarter of 1964 for participation in respondent's Thanksgiving promotion. However, complaint counsel apparently did not rely upon this payment as being discriminatory (Comp. Counsel Prop. Find. 125-30).

61. The general manager of Poss', Charles S. Mangleburg, testified that during 1964 Poss' normal way of promoting its product was to grant to any of its customers a promotional allowance in the form of free goods in return for whatever advertising or promotional activity it was able to obtain. In addition, Poss' had promotional arrangements with customers in which it granted money to them on a bill-back basis, such as was done with respondent's Columbia Division and other customers (Tr. 617-21). Mr. Mangleburg also testified that Poss' salesmen were instructed to offer the trade, generally, any promotional arrangement that was entered into with any customer at any time (Tr. 630-32). Commission exhibits 504 and 505 are tabulations showing sales and promotion advertising allowances paid by Poss' to a select number of customers within respondent's Columbia Division during the year 1964. These tabulations show that Poss' gave it customers either free merchandise as promotional allowances, received billbacks from customers for promotional allowances, or paid some other consideration to a substantial number of its customers during 1964. For example, these tabulations showing that the Winn-Dixie Stores located in Greenville, South Carolina, and that are in competition with respondent's Columbia Division stores received substantial payments, even greater than those received by respondent during 1964, for promoting Poss' products in the Winn-Dixie stores. The payments made to Winn-Dixie were for the purchase of trading stamps to be given away by Winn-Dixie in connection with the sale of Poss' products (CX 504). In addition, Poss' purchased ads in wholesalers' weekly order books and paid for cooperative advertising signs. Mr. Mangleburg further testified that at the time he approved the payment to respondent for the *Sword in the Stone* promotion, he believed that the promotion would generate more sales than actually resulted (Tr. 637-39).

62. Based upon the record, the examiner finds that the payments that respondent solicited and received from Poss' are discriminatory payments since Poss' failed to offer or to make like or similar payments available to a number of respondent's competitors selling Poss 24-ounce Brunswick Stew. While, as found above, Poss' had various methods of promoting its products, the payment made to respondent for the Sword in the Stone promotion is so greatly disproportionate when compared to the amounts offered to or granted to respondent's competitors and is so great when compared to respondent's own purchases from Poss' that respondent had every reason to know or to believe that it was receiving discriminatory payments. For example, Poss' payment to respondent for the Sword in the Stone promotion, \$1,700, amounted to 45 percent of the respondent's Columbia Division purchases of 24-ounce Brunswick Stew during the first three months of 1964. Competitors who received the free goods deals only received, at best, about 9 percent of their purchases (CX 495-503).

63. A number of respondent's competitors testified that they were not offered any promotional payments similar to those received by respondent. Duckworth Foods of Greenville, South Carolina, purchased Poss' 24-ounce Brunswick Stew during the first quarter of 1964 and received no cooperative advertising offers from Poss' or its supplier (Tr. 1351-52). Duckworth's supplier, the Associated Grocers of South Carolina, received \$39 per quarter from Poss' for an ad in its weekly order book and some free goods but no offer of money such as respondent received (CX 503-05; Tr. 632-33, 1374-75). Bi-Lo, Inc., a chain grocery store with headquarters in Greenville, South Carolina, purchased Poss' Brunswick Stew from Poss' and received no offers from Poss' during 1964 (Tr. 1615). Kash & Karry, Inc., a retailer in Greenville, South Carolina, in competition with respondent, received a promotional allowance in the form of services of Poss' demonstrator. Poss' valued these services at \$381 for the first quarter of 1964 or about 5¼ percent of this retailer's purchases from Poss'. Consequently, this retailer-competitor of respondent was discriminated against when the services it received are compared to the amount paid to respondent (CX 495, 505).

64. It is found that the payments made by Poss' to respondent were solicited and were received by respondent who knew or should have known that such payments were discriminatory since Poss' could not possibly have been offering like or similar payments to competitors of respondent.

Initial Decision

77 F.T.C.

*Gebhardt's*

65. During the first quarter of 1964 Gebhardt's Mexican Foods Company of San Antonio, Texas, a Division of Beatrice Foods Company, paid respondent \$1,700 for the promotion of its Mexican food line in respondent's *Sword in the Stone* promotion. In return for the \$1,700, Gebhardt's received a full-page ad in the *Sword in the Stone* mailer used in respondent's Columbia, South Carolina, Division. In addition, ten of the Gebhardt's basic Mexican food products were given prominent display in all of respondent's Columbia Division stores with a warehouse backup on each of the products promoted. Five of the products featured in the display were selected by Gebhardt's and the remaining five by respondent (CX 542). There is some confusion as to the exact amount received by respondent since the original payment was to be \$2,000. Respondent actually received only \$1,700, plus some advertising mats supplied by Gebhardt's. The basis for the payment was that Gebhardt's would pay \$50 per store in the Columbia Division (40 stores) for the ad and the store displays. However, respondent received something less than this amount per store (Tr. 470-84).

66. The general sales manager of Gebhardt's, Robert B. Bonner, appeared and testified (Tr. 454, *et seq.*) concerning Gebhardt's payment to the respondent and identified certain exhibits pertaining to the promotion. Gebhardt's sold its products in the Columbia, South Carolina, Division through a broker who contacted all possible accounts, including respondent, in the area in attempting to sell Gebhardt's products. No representative of this broker was called to testify so the only evidence in the record pertaining to the arrangement between Gebhardt's and respondent is that of the Gebhardt's representative, Mr. Bonner.

67. The hearing examiner is unable to conclude, based upon the testimony of this witness and the exhibits in the record, that Gebhardt's violated Section 2(d) of the amended Clayton Act in making its payment to respondent's Columbia Division. Prior to January of 1964, the Columbia Division of respondent had not carried Gebhardt's line of Mexican food products and the promotional arrangement between Gebhardt's and respondent's Columbia Division presented an opportunity for Gebhardt's to place ten of its basic Mexican food line items in forty of respondent's stores (Tr. 483-84). Mr. Bonner testified that at the time it entered into its arrangement with respondent he had instructed his broker to make the same type of promotional allowance available to all other competing

customers in the Columbia, South Carolina, Division. In fact the record establishes that a similar offer of \$40 per store was made by Gebhardt's broker to a competitor of respondent, Winn-Dixie, in the amount of \$40 per store in August 1963, which was refused (Tr. 482-83; CX 308, 308 A).

68. The only substantial, credible evidence in the record with regard to Gebhardt's promotional offers and in particular its attempt to get its basic Mexican food line placed in retail outlets, is the above cited testimony of Gebhardt's representative, Mr. Bonner. The only conclusion that can be drawn from this testimony and the exhibits is that Gebhardt's had instructed its broker to make like or similar payments to those made respondent available to all of respondent's competitors. In addition, the payments made by Gebhardt's are in the nature of introductory offers to obtain substantial coverage of its entire line in the stores located in respondent's Columbia, South Carolina, Division. As a consequence, the payment made by Gebhardt's is not a payment within the purview of Section 2(d) of the amended Clayton Act since it is a payment intended to facilitate the original sale of the products involved and does not constitute the rendering of a service or facility by the purchaser, *New England Confectionery Co.*, 46 F.T.C. 1041, 1059.

69. The record, in addition, fails to establish that there were competitors of respondent who were carrying the same or substantially the same products for resale in competition with the respondent. The respondent was paid for advertising and promoting substantially all of Gebhardt's Mexican food line consisting of ten items (Tr. 480-82). An examination of the invoices and testimony of competitors establishes that they purchased only one or two Gebhardt's products (CX 314-21). Further, Mr. Bonner testified that these products, Chili Pepper and Hot Dog Sauce, are basically not a part of Gebhardt's Mexican food line. Consequently, the record does not contain substantial evidence that competitors of respondent were purchasing the same products for which respondent received payment.

*Louisiana State Rice Milling Company, Inc.*

70. The Louisiana State Rice Milling Co., Inc., of Abbeville, Louisiana, is a marketer of table rice under the trade names "Mahatma" and "Watermaid." Louisiana State Rice sold to respondent's Atlanta, Jacksonville, Raleigh and Columbia Divisions during 1964 and 1965 and regarded each division as a separate account for sales and promotional purposes. During the respondent's Sword in

the Stone and Red Carpet promotions in the first quarters of 1964 and 1965, Louisiana State Rice participated in these promotions in respondent's Columbia Division and purchased full-page ads in respondent's mailers used in connection with these promotions. Louisiana State Rice paid respondent's Columbia Division \$1,700 for the Sword in the Stone promotion and \$1,200 for the Red Carpet promotion.

71. During 1964 and 1965, Louisiana State Rice had in effect a regular cooperative advertising agreement that it offered to all of its customers, including respondent, pursuant to which Louisiana State Rice paid the customers who took advantage of the contract, promotional allowances based upon their purchases. Also, during this period Louisiana State Rice made additional payments over and above its regular cooperative advertising agreements. As found above, Louisiana State Rice made two payments to respondent's Columbia Division during 1964 and 1965 that were over and above the regular contract (Tr. 395, 407-08; CX 399-402).

72. Commission exhibits 541 and 541 A are tabulations showing Louisiana State Rice customers and showing purchases of rice and promotional payments made to such customers during 1964 and 1965. Complaint counsel urge that these exhibits, in conjunction with the testimony of the Louisiana State Rice representative, Charles R. Godchaux, establish that the payments to respondent's Columbia and Raleigh Divisions were discriminatory (Tr. 381, *et seq.*). It is clear from Mr. Godchaux's testimony that the records he produced (CX 541, 541 A) were records of actual payments only, since there was no record of offers of payments that were not accepted by Louisiana State Rice customers (Tr. 425-27, 445-47). He was interrogated by complaint counsel only as to actual payments and not as to offers that might have been made. Considerable doubt, moreover, is cast upon CX 541 and 541 A since other records show that payments were made to some customers listed on these exhibits as having received payments; namely, Associated Grocers Mutual of Carolinas, Inc., and Harris-Teeter Supermarket, Charlotte, North Carolina (CX 414, 415; RX 216-19). Respondent's exhibits 212 thru 215 also demonstrate that Winn-Dixie of Greenville, South Carolina, was receiving promotional allowances in addition to those it received under Louisiana State Rice's regular advertising contract during 1964 and 1965. Complaint counsel state in their Proposed Finding No. 52 that they are not offering Winn-Dixie of South Carolina or Harris-Teeter Supermarket, Inc., of Charlotte, North Carolina, as examples of nonfavored customers of Louisiana State Rice. Never-

theless, the fact that substantial payments were made to these customers for promotional purposes, which are not reflected upon CX 541 and 541 A, casts considerable doubt upon these exhibits. The A & P company Division of Charlotte, North Carolina, also purchased Louisiana State Rice products, and Commission exhibits 541 and 541 A show that no payments were made to A & P during 1964 and 1965. The examiner, however, is unable to find that no offers were made to this A & P Division based upon Louisiana State Rice representative's testimony, discussed above, and no representative of the A & P company of Charlotte, North Carolina, was called to testify to establish this point.

73. The wholesaler customers of Louisiana State Rice who did appear and testify likewise did not give the examiner a basis for concluding that they were discriminated against by Louisiana State Rice. The testimony of Neal P. Ponder, general manager of Associated Grocers of South Carolina, is so vague that no finding can be based upon it (Tr. 1365, *et seq.*). Mr. Ponder testified solely from memory as to what contracts his organization had with Louisiana State Rice and what payments his company received from Louisiana State Rice. He had not searched his files for the years 1964 and 1965 nor had anyone else made such a search (Tr. 1385-86). Mr. Ponder testified that his organization had no advertising agreement with Louisiana State Rice. However, CX 541 shows that Louisiana State Rice's Contract No. 489 was in effect with Associated Grocers during 1964 and 1965 (Tr. 1373-85). Herbert B. Drake, president of Smith-Drake Company, a wholesale grocer, testified that he had no regular cooperative advertising contract with Louisiana State Rice and received no payments or offers of payments from Louisiana State Rice (Tr. 1484-1485). Consequently, it appears that Louisiana State Rice may have discriminated against this wholesaler. However, Mr. Drake did testify that he may have received free goods or case allowances from Louisiana State Rice but he could not be sure unless he reviewed his invoices for the period of time involved (Tr. 1493). Only a few of his invoices were in evidence (CX 417, 417 A-D) or available at the hearing, and apparently no file search of his records had been made before he testified.

74. Louis Hite, president of Massey-Hite Company, a wholesaler located at Florence, South Carolina, testified that he did not recall receiving any offers of payments over and above Louisiana State Rice's regular cooperative advertising payments that his company received during 1964 and 1965. He also testified that it was possible for offers to be made to his company's advertising manager without

his knowledge (Tr. 1460), but he would know of any offer that was accepted. He made it clear that the Massey-Hite Company did not accept all the cooperative advertising offered to it, only those which were worthwhile to the company (Tr. 1460-61), and that his advertising manager did have authority to refuse offers of cooperative advertising from suppliers (Tr. 1468). Consequently, the record is inconclusive as to whether this customer of Louisiana State Rice was actually discriminated against since it regularly received promotional payments under Louisiana State Rice's regular contract. The record fails to show whether additional payments were offered by Louisiana State Rice. Edgar C. Amos of the R. P. Turner Company, another wholesaler, testified that his company had no cooperative advertising contract with Louisiana State Rice (Tr. 1545-61). The record, however, establishes that Louisiana State Rice had had a regular cooperative advertising arrangement with the R. P. Turner Company since 1962 (RX 341; CX 541 A). Again, this witness had not checked the records of the R. P. Turner Company in preparing to testify (Tr. 1554); although records for the years 1964 and 1965 were available. Consequently, no conclusive finding can be based upon the testimony of this witness.

75. The advertising manager of Community Cash Stores, Spartanburg, South Carolina, Herbert T. Littlejohn, who purchased direct from Louisiana State Rice, testified that he did not recall ever receiving an offer from Louisiana State Rice for promotion of its products in excess of the regular promotional contract, which payments were regularly received during 1964 and 1965. He also testified that Community Cash Stores maintained no records of unaccepted advertising and promotion offers, and he did not remember everything that was offered but was not accepted in 1964 and 1965 (Tr. 1325). He also testified that offers were made to the Community Cash buyer that he would not know about (Tr. 1332). His testimony must be evaluated in the light of respondent's exhibit no. 300 which shows that Louisiana State Rice had made a special display promotion payment available to Community Cash in 1963 that was cancelled in March 1964. Henry Veach, executive vice president of Bi-Lo, Inc., testified that he did not recall Bi-Lo receiving any payments or offers beyond the regular contract with Louisiana State Rice (Tr. 1624). However, such a payment was made in March of 1965 (Tr. 413; CX 416). Mr. Veach also testified that Bi-Lo does not retain copies of its invoices to manufacturers showing promotional and advertising payments. Consequently, it would be difficult

to establish any offers or payments made during 1964 and 1965 to this customer (Tr. 1617-25).

76. The evidence in the record is so vague and contradictory that the examiner finds that there is no reliable evidence upon which to base a finding that respondent has knowingly induced or has received a discriminatory advertising allowance from the Louisiana State Rice Milling Company, Inc.

77. In summary, therefore, it is found that the record establishes that respondent induced and received payments as advertising allowances from two of its suppliers, in commerce, that respondent knew or should have known were not being offered or otherwise made available on proportionally equal terms to all other of such suppliers' customers who were competing with respondent in the sale and distribution of such suppliers' products; namely, Poss' Famous Foods, Inc., and Trade Winds Company.

78. Respondent argues that a large number of suppliers participated in its various promotions and that only a few were named in the complaint or were made the subject of evidence during the trial; that the payments made by these suppliers were directly chargeable against their regular cooperative advertising arrangements; that the payments were made by the suppliers on their own terms and conditions and in many instances respondent was required not only to provide the advertising and in-store displays, but also to purchase a minimum quantity of products within a specified period of time, thus indicating to respondent, and justifying it in believing, that all such suppliers were making their payments within the framework of the suppliers' regular cooperative advertising programs. As found above, this argument of respondent does have a foundation in fact, as far as respondent's dealings with nine of the eleven suppliers are concerned. In the two instances in which respondent has been found to have induced and to have received discriminatory payments, this argument must be disregarded because it simply does not apply. The payments made by Poss' Famous Foods and Trade Winds Company were over and above the amounts provided for in their regular cooperative advertising agreements and these suppliers did not require the purchase of any additional products by respondent. The payments to respondent were in fact so disproportionate to each supplier's regular cooperative advertising payments, and to the quantity of such supplier's products purchased by respondent, that no explanation is possible other than that they were discriminatory payments and that the respondent should have known that it

would have been impossible for these suppliers to have offered like or similar payments to all of respondent's competitors.

79. Competitors of respondent, large and small, operating in the same trading areas as respondent's stores, had a multitude of similar types of promotions and plans that were, at least in part, paid for by such competitors' suppliers (Tr. 218-20, 319, 1817-26, 1853). Respondent argues that it well knew of this situation and consequently it was justified in inducing and receiving the payments which it did. While it is true that the record contains evidence of a large number of such programs in effect during 1964 and 1965 by respondent's retailer-competitors, this does not justify the respondent's acceptance of the discriminatory payments made to it. Since the record contains no evidence as to the amounts paid toward the other promotions conducted by respondent's competitors, the respondent cannot justify its actions by simply saying that competitors were doing the same things. The legal obligation placed upon respondent was to be certain that its promotions were run in a lawful manner. Speculation that respondent's competitors may have been acting unlawfully or that respondent's suppliers may have been making payments toward respondent's competitors' promotions does not justify the respondent in assuming that all of its suppliers' payments to it were not discriminatory.

80. Respondent had a form contract (Form 6254) that was signed by virtually all of the suppliers from whom it received payments in connection with its promotions. Poss' Famous Foods and Trade Winds Company had signed such forms. This form contract contained the following statement: "It is understood that this same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area who purchase products as herein specified." (See, for example, CX 48). This language was inserted in Form 6254 by respondent upon the advice of its attorneys (RX 1-5 A). This agreement, as far as the record shows, was signed by each supplier freely, and no supplier testified that any information was given to the respondent to the effect that such statement was not true. Representatives of the respondent who testified all stated that they knew of nothing more that they could have done in dealing with the various suppliers to assure themselves that the payments made by the suppliers were legal.

81. The Sword in the Stone promotion commenced in all of respondent's divisions involved in this proceeding on or about January 4, 1964, and ended on March 7, 1964, (CX 62). Since respondent had purchased this promotion on short notice, it felt impelled to put the

promotion into effect in its various divisions without delay; so that instead of mailing out its usual promotional letter, it contacted by telephone or by personal call all those suppliers who, it thought, might be interested in the promotion and who might do the best job (CX 60). All of the suppliers who had agreed to participate in the promotion had made this agreement prior to the promotion so that their ads would be placed in the mailers that were to go out early in January (CX 55-58). Consequently, those suppliers who had bought ads in respondent's Sword in the Stone mailers, including Poss' Famous Foods and the Trade Winds Company, had agreed to participate in this promotion as early as January 4, 1964. Poss' Form 6254 was dated February 11, (CX 61) and Trade Winds Company, January 31, 1964, (CX 25). Both of these companies have been found to have made discriminatory payments to respondent for the Sword in the Stone promotion. The fact that Poss' and Trade Winds signed the Form 6254 long after they had committed themselves to pay respondent for this promotion can only mean that the Form 6254, as used in the Sword in the Stone promotion, is a meaningless, self-serving declaration obtained by the respondent and worthy of no weight. The respondent failed to follow the advice of its attorneys by not obtaining suppliers' signatures on its Form 6254 at the proper time—when the original agreements were made. The forms should also have been signed by a person from each supplier that the respondent knew was in a position of authority to make such a commitment, rather than merely some salesman or broker's representative. For example, had this been done, the whole episode between respondent and Aluminum Company of America, discussed above, would not have occurred.

#### CONCLUSIONS

1. In the course and conduct of its business, in commerce, respondent induced and received from its suppliers' payments, allowances, or other things of value for its benefit, as compensation for or in consideration of its advertising and promotional services and facilities in connection with its offering for sale or sale of the products sold to it by such suppliers.

2. The suppliers did not offer or otherwise make available to all of their customers who competed with respondent's payments, allowances, or other things of value for advertising and promotional services or facilities in connection with the offering for sale or sale of

their products on terms proportionally equal to those granted to respondent.

3. Respondent knew or should have known that the payments, allowances, or other things of value it received, were not offered or otherwise made available by the suppliers on proportionally equal terms to all of their other customers who competed with the respondent in the offering for sale or sale of such suppliers' products.

4. The acts and practices of respondent, as hereinbefore found, are all to the prejudice of the public, and constitute unfair methods of competition, in commerce and unfair acts and practices in commerce, within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

*It is ordered,* That respondent Colonial Stores Incorporated, a corporation, and its officers, representatives, agents, and employees, directly or indirectly, 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 do forthwith cease and desist from:

Inducing and receiving payments, allowances, or anything of value from any supplier as compensation for or in consideration of advertising and promotional services or facilities furnished by or through respondent in connection with the sale or offering for sale of such supplier's products, when respondent knows or should know that such payments, allowances, or other things of value are not being offered or otherwise made available by such supplier, on proportionally equal terms to all of such supplier's other customers, including retailer-customers that do not purchase directly from such supplier, who compete with respondent in the offering for sale or sale of such supplier's products.

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

OPINION OF THE COMMISSION

MAY 7, 1970

I

The complaint in this proceeding, issued September 20, 1968, charged that respondent had violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition and

unfair acts and practices in commerce by inducing and receiving discriminatory promotional allowances from some of its suppliers. Respondent filed an answer denying the allegations.

After full evidentiary hearings, the examiner issued an initial decision on October 24, 1969, in which he found that respondent had induced and received payments as advertising allowances from two of its suppliers, in commerce—allowances that respondent knew or should have known were not being offered or otherwise made available on proportionally equal terms to all other of such suppliers' customers who were competing with respondent in the sale and distribution of such suppliers' products. The examiner found that complaint counsel had not carried their burden of proof as to seven other suppliers alleged to have discriminated in favor of respondent by making payments to respondent in its various promotions.<sup>1</sup>

The case is now before the Commission on the cross-appeals of respondent and complaint counsel.

Respondent contends: (a) that there is insufficient evidence to support the examiner's conclusion that the payments from the discriminating suppliers, The Trade Winds Company and Poss' Famous Foods, were not offered on proportionally equal terms to its competitors; (b) that even assuming the payments were discriminatory, respondent neither knew nor should have known that such payments were discriminatory; and (c) that, even if the payments were discriminatory and respondent should have realized it, respondent nevertheless made sufficient inquiry of Trade Winds and Poss to satisfy its duty of inquiry as to the possible discriminatory nature of the allowances and therefore respondent should not be held for its conduct. Complaint counsel contend that the examiner erred in holding that there was insufficient evidence to determine that respondent had induced discriminatory payments from seven additional suppliers. Complaint counsel also contend that the evidence supported a broader order than that issued by the examiner with his initial decision.<sup>2</sup>

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<sup>1</sup> Complaint counsel identified two additional suppliers as having made discriminatory payments to respondent but, in their proposed findings, did not pursue the charges as to these suppliers. The proof presented by complaint counsel was limited principally to suppliers who engaged in respondent's "Sword in the Stone" and "Red Carpet Sweepstakes" promotions and to the period from January 1964 to July 1965.

<sup>2</sup> Before the examiner and on appeal, complaint counsel have argued alternative theories of law under which it would not be necessary to establish that respondent had received discriminatory payments in order to establish that respondent had violated Section 5 by inducing discriminatory payments. The examiner rejected these theories, and we agree that decision of this case requires no extension of the established principle that a showing of receipt of discriminatory payments is a necessary element of proof in a Section 5 "inducement case" (I.D. 561-63). See *American News Co. v. Federal Trade Commission*, 300 F.2d 104, 111 (2d Cir. 1962), cert. denied, 371 U.S. 824; *J. Wcingarten, Inc.*, 62 F.T.C. 1521, 1530 (1963).

## II

The facts are adequately set forth in the initial decision; and the examiner's findings, to the extent they are consistent with this opinion, are hereby adopted as those of the Commission.

Respondent, a Virginia corporation with its principal business office in East Point, Georgia, operates a chain of retail grocery supermarkets, located mainly in the southern part of the country. Respondent engages in extensive advertising and promotion to create demand for the products it sells. It solicits a number of its suppliers to participate in its special promotions. Respondent selects the theme of such promotions, sets the periods of time during which the special promotions will run, decides the terms and conditions of the advertising and promotional services, and decides the rates of compensation the suppliers are to pay for such services and facilities.

The payments from Trade Winds Company and Poss' Famous Foods which the examiner found to be discriminatory and induced by respondent occurred in connection with respondent's "Sword in the Stone" promotional program, run during the first quarter of 1964. This promotion, which was based upon a Walt Disney motion picture of that title showing throughout the United States at that time, was developed as a supermarket game by Famous Character Promotions, Inc. The promotion was initiated in respondent's various divisions by mailing of a brochure advertising the game and the suppliers' products. The promotional program included in-store displays, newspaper advertisements, and radio and television features. Respondent sold space in the brochures, which varied from division to division, to its suppliers. Respondent mailed 2,799,400 Sword in the Stone brochures to households in the trading areas where its stores were located. An additional 94,100 brochures were distributed by respondent through its stores to customers. Some participating suppliers did not buy advertisements in the mailers but utilized other plans involving varying amounts of in-store displays and newspaper, radio, and television advertising.

The Trade Winds Company is a frozen foods processing firm specializing in sea foods. It sells breaded frozen shrimp throughout the United States under the trade names "Trade Winds" and "Pan Redi." During 1964, Trade Winds granted, under its promotional advertising program, a 1 percent advertising allowance on all purchases of Trade Winds frozen seafood products. Trade Winds required proof of advertising and made payment on a quarterly basis. In addition, Trade Winds frequently granted off-case promotional allowances from the invoice price on certain products.

In the first quarter of 1964, during the Sword in the Stone promotion, respondent received from Trade Winds, in addition to payments under Trade Winds' regular cooperative promotional program, a total of \$7,700 for promotion of Trade Winds breaded fantail shrimp; \$2,400 of this sum was received in the Atlanta division of Colonial Stores (CX 513-520).

Respondent had three competitors who carried the Trade Winds shrimp in the Atlanta trading area during the time of the Sword in the Stone promotion (Tr. 1118, 1136, 1158). None of these competitors, each of whom purchased Trade Winds shrimp through Associated Grocers Coop., Inc., received any offers of promotional payments directly from Trade Winds or any of its representatives. The only allowances offered or received by Associated Grocers Coop. during the first quarter of 1964 were the 1 percent advertising contract and the promotional off-invoice allowances described above (Tr. 512-515). The examiner found that the payment of \$2,400 to respondent for participation in the respondent's Sword in the Stone promotion in the Atlanta division therefore was discriminatory (I.D. 569-71). We agree.

Respondent argues that there is no direct evidence that the \$2,400 payment made to respondent for participation in the Sword in the Stone program in the Atlanta division was discriminatory; it contends that complaint counsel did not present direct evidence that this sum was not for payment of the 1 percent allowance and thus failed to carry their burden of proof.

We cannot accept respondent's argument. There is evidence in the record that Trade Winds was billed \$181.25 for cooperative advertising under Trade Winds' regular quarterly promotional program (CX 520). For the \$2,400 as well as the \$181.25 payment from Trade Winds to fall within the 1 percent quarterly allowance, respondent's Atlanta division would have had to make purchases of more than a quarter of a million dollars of Trade Winds' products during the first quarter of 1964. However, respondent's sales invoices reflecting first quarter purchases from Trade Winds (CX 522 a-e) total only \$33,553.80.<sup>3</sup> Moreover, Trade Winds' sales invoices to respondent reveal that none of respondent's divisions made any weekly purchase in

<sup>3</sup> Respondent contends that no evidence was adduced to prove that this sum represented all the purchases made from Trade Winds during the quarter, but these figures were from the invoices produced by respondent upon request by Commission counsel for invoices showing first quarter purchases from Trade Winds. Respondent has not asserted that its records are incomplete or that it did not comply fully with Commission counsel's request. The \$181.25 payment is less than the \$335 to which respondent was entitled under the 1 percent allowance; this is not surprising since, as noted above, Trade Winds required proof of performance as a prerequisite to payment of the allowance (Tr. 513).

excess of \$8,000 (CX 522 a-m). Although complaint counsel did not present the "airtight" case preferable in matters of this nature, we agree with the examiner that the proof they presented was sufficient to support the allegations of the complaint as to this supplier. At a minimum, complaint counsel's proof placed upon respondent the duty of coming forward with some evidence to the contrary, evidence which respondent did not present.

The other supplier which the examiner found to have been induced by respondent to make discriminatory payments was Poss' Famous Foods of Athens, Georgia. This company manufactured a line of canned barbecue meat items in its Athens plant, including Southern Hash, Brunswick Stew, Pork with Barbecue Sauce, and Hot Dog Chili Sauce. Poss sells its products in the Southeastern United States directly to retailers with central warehouses and to wholesalers through brokers.

Poss sold its 24-ounce size of Brunswick Stew to respondent throughout 1964. It paid respondent \$1,700 for a one-page advertisement in respondent's *Sword in the Stone* mailer in the Columbia, South Carolina, division and for featuring of Poss' products in respondent's stores during the first 10 weeks of that year.

The general manager of Poss testified that, during 1964, the company's normal way of promoting its products was to grant to its customers a promotional allowance in the form of free goods in return for advertising or other promotional activity carried out for it. Poss also had promotional arrangements with customers, under which it granted money to them on a bill-back basis (Tr. 617-21). Poss' general manager further testified that its salesmen were instructed to offer the trade, generally, any promotional arrangement that was entered into with any customer at any time (Tr. 630-32).

Although Poss had various methods of promoting its products, the payments which the record shows were made to respondent were so grossly disproportionate to the amounts granted to respondent's competitors and were so large in comparison with respondent's purchases from Poss that it is reasonable to infer that respondent knew or should have known it was receiving discriminatory payments. Poss' payment to respondent for the "*Sword in the Stone*" promotion in respondent's Columbia, South Carolina, division, totaled \$1,700. This amounted to 45 percent of respondent's purchases in that division of 24-ounce Brunswick Stew during the first three months of 1964. Respondent's competitors received no more than 9 percent of their purchases, under Poss' various promotional arrangements (CX 495-503).

Representatives of several of respondent's competitors who purchased Poss' 24-ounce Brunswick Stew testified that they were not offered any promotional payments similar to those received by respondent. Duckworth Foods of Greenville, South Carolina, received no cooperative advertising offers from Poss or its suppliers during the first quarter of 1964 (Tr. 1351-52). Duckworth's suppliers, Associated Grocers of South Carolina, received \$39 per quarter from Poss for an advertisement in its weekly order book and also received some free goods; however, Associated received no offer of money such as that received by respondent (CX 503-505; Tr. 632-33, 1374-75). Bi-Lo, Inc., a grocery chain headquartered in Greenville, South Carolina, received no offers from Poss during 1964 (Tr. 1615). Kash & Karry, Inc., a retailer located in Greenville, South Carolina, received promotional allowances in the form of services of Poss' demonstrator. These demonstrator services were valued by Poss at \$381 for the first quarter of 1964, which was approximately 5¼ percent of Kash & Karry's purchases from Poss, significantly lower than the percentage granted to respondent (CX 495, 505).

In view of these facts, we accept the examiner's finding that "the payments made by Poss to respondent were solicited and were received by respondent who knew or should have known that such payments were discriminatory since Poss could not possibly have been offering like or similar payments to competitors of respondent" (I.D. 581).

## III

Respondent argues that even if it had reason to believe that the special promotional payments it solicited and received were discriminatory, and we have so found, it nonetheless should not be held to have violated the law because it fulfilled any duty of inquiry imposed upon it. This argument is based entirely upon the printed statements on respondent's promotional contract Form 6254, which was signed by virtually all suppliers who granted promotional allowances to respondent. The statement asserted that the "same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area who purchase products herein satisfied" (*e.g.*, CX 48).

The examiner described the statement of availability appearing on respondent's printed forms as a "meaningless self-serving declaration obtained by the respondent and worthy of no weight" (I.D. 589.) The examiner noted that execution of these forms by the suppliers occurred subsequent to agreement by the suppliers to participate in respondent's Sword in the Stone promotion. The

Sword in the Stone promotion was initiated in all of respondent's divisions on or about January 4, 1964 (CX 62). All suppliers who agreed to participate in the promotion had been contacted by respondent by telephone or personal visits by its representatives, and had agreed to participate in the program prior to the promotion so that their advertisements would be placed in the mailers to be distributed in early January.<sup>4</sup> As a result, suppliers such as Poss and Trade Winds who purchased advertisements in the Sword in the Stone mailers had agreed to participate in the promotion about January 4, 1964, when the promotion began. However, the signed forms which respondent asserts satisfied its duty of inquiry were not obtained until some time later. The Trade Winds form was dated January 31, 1964 (CX 25), and Poss' form was dated February 11, 1964 (CX 61).<sup>5</sup>

In these circumstances, we agree with the examiner that the *ex post facto* signature of respondent's forms did not satisfy respondent's duty of inquiry, and did not negate its inducement and receipt of discriminatory allowances from Trade Winds and Poss' Famous Foods.

As the Supreme Court noted in *Automatic Canteen Company v. Federal Trade Commission*, 346 U.S. 61, n.80 (1953), the weight which may properly be given to such statements will vary according to the factual circumstances surrounding their execution. Likewise, we need not now determine the question how, under other circumstances, a buyer's inquiry may properly be carried out. See *Giant Food, Inc. v. Federal Trade Commission*, 307 F. 2d 184, 187 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

In sum, we uphold the examiner's findings that respondent violated Section 5 of the Federal Trade Commission Act by inducing and receiving discriminatory payments from The Trade Winds Company and from Poss' Famous Foods. Respondent's appeal, to the extent that it seeks to reverse these findings, is rejected.

## IV

Inasmuch as we have determined that the examiner correctly found that respondent violated the law, as alleged in the complaint, no useful purpose would be served by reviewing complaint counsel's

<sup>4</sup> Respondent did not mail out its usual promotional letter because it had purchased this promotion on short notice and thus desired to proceed with it as quickly as possible.

<sup>5</sup> The examiner noted that respondent's practice was to have its form signed by a salesman or broker's representative rather than by a person it had determined had the authority to make such a commitment (I.D. 589).

appeal of the dismissal of the charges concerning additional suppliers alleged to have been induced into making discriminatory payments to respondent. At most, review and reversal of the examiner's findings which are challenged by complaint counsel would only serve as additional grounds for an order no different from that supported by the findings of violation which we have already upheld. Accordingly, without passing on the merits of the issues raised, the appeal of complaint counsel is dismissed.

## V

The examiner's order has been modified so that it will serve as an effective injunction against resumption of the practices shown by this record which we have found to be unlawful. The order entered in the instant case is not to be regarded as a general model or precedent for orders in other cases involving different circumstances and needs.

Commissioner MacIntyre concurs in the result.

## FINAL ORDER

This matter has been submitted to the Commission on the cross-appeals of complaint counsel and respondent from the initial decision of the hearing examiner filed on October 24, 1969. The Commission has rendered its decision denying the appeals of respondent and of complaint counsel, and adopting the findings of the hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

*It is ordered,* That respondent Colonial Stores, Incorporated, a corporation, and its officers, representatives, agents, and employees, directly or indirectly, 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, do forthwith cease and desist from:

Inducing and receiving promotional allowances or payments from any supplier as compensation for or in consideration of advertising and promotional services, furnished by or through respondent in connection with special promotions originating with or sponsored by respondent, and involving the sale or

## Complaint

77 F.T.C.

offering for sale of such supplier's products, where respondent solicits such promotional allowances and payments and knows or should know that such promotional allowances or payments are not being offered or otherwise made available by such supplier on proportionally equal terms to all of such supplier's other customers, including retail customers who do not purchase directly from such supplier, who compete with respondent in the offering for sale or sale of such supplier's products.

*It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

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

Commissioner MacIntyre concurs in the result.

## IN THE MATTER OF

## UNIVERSE CHEMICALS, INC., ET AL.

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

*Docket 8752. Complaint, December 5, 1967\*—Decision, May 13, 1970*

Order requiring a Chicago, Ill., distributor of water-repellent paints and coatings under the trade names "Kleer-Kote" and "Kolor-Kote" to cease misrepresenting that it is affiliated in any way with Union Carbide Company or any other well-known company or laboratory, using deceptive guarantees, exaggerating the waterproofing and rust resistant qualities of its products, misrepresenting the return privileges and earnings of its dealers, and furnishing others with means to mislead prospective purchasers.

## 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

\*Reported as amended by hearing examiner's order of July 10, 1968, by amending subparagraph 12 of paragraph 6 and subparagraph 12 of paragraph 7.