IN THE MATTER OF

SOUTH VILLAGE MILLS, INC., ET AL.

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

Docket 7217. Complaint, Aug. 4, 1958—Decision, Dec. 20, 1958

Consent order requiring a corporate manufacturer and its president in Webster, Mass., to cease violating the Wool Products Labeling Act by tagging and invoicing as "100% Vicuna," woolen fabrics which did not contain vicuna or contained substantially less than said quantity, and by failing to label wool products as required by the Act.

As to the general manager of respondent corporation, the matter was disposed of by order of Oct. 21, 1959, 56 F.T.C. —.

Mr. Daniel T. Coughlin and *Mr. Thomas F. Howder* for the Commission.

Ely, Bartlett and Brown, of Boston, Mass., by *Mr. Norman T. Byrnes,* for South Village Mills, Inc., and Edward Kunkel.

INITIAL DECISION AS TO RESPONDENTS SOUTH VILLAGE MILLS, INC., AND EDWARD KUNKEL BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of the Wool Products Labeling Act, and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act, in connection with the sale and distribution of certain wool products.

An agreement for disposition of the proceeding by means of a consent order has now been entered into by counsel supporting the complaint and respondents South Village Mills, Inc., and Edward Kunkel. Respondent Joseph Crowley is not a party to the agreement, and the term "respondents" as used hereinafter will not include this individual.

The agreement provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing,

respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding as to the present respondents, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent South Village Mills, Inc., is a corporation existing and doing business under the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at South Main Street, Webster, Mass. Individual respondent Edward Kunkel is located at the same address as that of the corporate respondent.

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

ORDER

It is ordered, That the respondents, South Village Mills, Inc., a corporation, and its officers and Edward Kunkel, 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 introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

2. Falsely or deceptively identifying such products as to the character or amount of the constituent fibers contained or included therein on sales invoices or shipping memoranda applicable thereto;

3. Failing to securely affix to or place on each such product

a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product exclusive of ornamentation not exceeding five per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five per centum or more and (5) the aggregate of all other fibers;

(b) The maximum percentages of the total weight of such wool product of any nonfibrous loading, filling or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

It is further ordered, That South Village Mills, Inc., a corporation, and Edward Kunkel, 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 offering for sale, sale or distribution of Vicuna products or materials or any other products or materials in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

Misrepresenting the constituent fibers of which their products are composed or the percentages or amounts thereof in sales invoices, shipping memoranda or in any other manner.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision as to respondents South Village Mills, Inc., and Edward Kunkel of the hearing examiner shall, on the 20th day of December 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

COMBINED INSURANCE COMPANY OF AMERICA

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

Docket 6280. Complaint, Dec. 28, 1954—Order, Dec. 22, 1958

Order vacating and setting aside initial decision on jurisdictional grounds, following the ruling of the Supreme Court of the United States in the combined cases of *Federal Trade Commission* v. *National Casualty Co.* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Co.*, 357 U.S. 560, and dismissing complaint charging a Chicago insurance company with falsely advertising its accident and health insurance policies.

Before *Mr. Loren H. Laughlin,* hearing examiner.

Mr. Roslyn D. Young, Jr. and *Mr. Paul R. Dixon* for the Commission.

Arrington & Healy, of Chicago, Ill., for respondent.

FINAL ORDER

This matter having come on to be heard upon the appeals of counsel supporting the complaint and of counsel for respondent from the hearing examiner's initial decision filed prior to the ruling of the Supreme Court of the United States in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company,* 357 U.S. 560 (1958) ; and

The Commission having considered said appeals and the record and having concluded that this proceeding should be dismissed on jurisdictional grounds upon the authority of said ruling of the Supreme Court:

It is ordered, That the initial decision herein, filed July 15, 1957, be, and it hereby is, vacated and set aside.

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

IN THE MATTER OF

HUNT-MARQUARDT, INC., ET AL.

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

Docket 6765. Complaint, Apr. 5, 1957—Decision, Dec. 23, 1958

Consent order requiring 14 New York and New England jobbers of automotive replacement parts and their buying organization, which served merely as a bookkeeping device to exert their combined bargaining power, to cease violating Sec. 2(f) of the Clayton Act by soliciting and accepting illegal price advantages from suppliers which were not available to their competitors.

COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936 have violated and are now violating the provisions of Subsection (f), Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13) hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. (1) Respondent Hunt-Marquardt, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 244 Brighton Avenue, Boston, Mass.

The following respondent individuals are the officers of said respondent corporation:

Alfred S. Hunt, president.

Arthur C. Marquardt, treasurer.

H. Nelson Hartstone, secretary.

(2) Respondents George G. Mellor and Raymond W. Mellor are individuals and copartners trading as Mellor's Auto Parts with their principal office and place of business located at 134 Broad Street, Providence, R.I.

(3) Respondent Standard Auto Gear Co. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 531 Columbia Road, Dorchester, Mass.

The following respondent individuals are the officers of said respondent corporation:

Morris Roazen, president and treasurer.

David Roazen, vice president.

Louis J. Roazen, secretary and assistant treasurer.

(4) Respondent, The Tarbell-Watters Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 144 Chestnut Street, Springfield, Mass.

The following respondent individuals are the officers of said respondent corporation:

Lucius H. Tarbell, president.

John S. Leven, vice president.

Clarence E. Trevor, treasurer and secretary.

(5) Respondent Auto Electric Service Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire with its principal office and place of business located at 21 Dow Street, Manchester, N.H.

The following respondent individuals are the officers of said respondent corporation:

James Pettigrew, president.

Everett P. McAffee, treasurer and general manager.

Omar H. Amyot, secretary.

(6) Respondent Farrar-Brown Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine with its principal office and place of business located at 49 Darthmouth Street, Portland, Maine.

The following respondent individuals are the officers of said respondent corporation:

Frank G. Congdon, president.

Christian Olesen, Jr., treasurer.

Franz U. Burkett, secretary.

(7) Respondent Christie & Thomson, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its principal office and place of business located at 3 Quinsigamond Avenue, Worcester, Mass.

The following respondent individuals are the officers of the said respondent corporation:

Robert Thompson, president.

William Christie, treasurer.

Abraham Hodes, secretary.

(8) Respondent Grinold Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its principal office and place of business located at 354 Hudson Street, Hartford, Conn.

The following respondent individuals are the officers of the said respondent corporation:

Raymond W. Grinold, president and treasurer.

Cleo T. (Mrs. R. W.) Grinold, vice president.

Richard E. Ryder, secretary.

(9) Respondent Horton-Gallo-Creamer Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 96–104 State Street, New Haven, Conn.

The following respondent individuals are the officers of the said respondent corporation:

Raymond W. Grinold, president and treasurer.

Cleo T. (Mrs. R. W.) Grinold, vice president.

James T. Fleming, secretary.

(10) Respondent Hagar Hardware & Paint Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Vermont, with its principal office and place of business located at 164 St. Paul Street, Burlington, Vt.

The following respondent individuals are the officers of said respondent corporation:

Frank J. Whalen, president and treasurer.

George I. Hagar, vice president.

(11) Respondent Plattsburgh Motor Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 95 Bridge Street, Plattsburgh, New York.

The following respondent individuals are the officers of said respondent corporation:

Walter H. Church, Sr., president and treasurer.

Walter H. Church, Jr., vice president.

Joseph S. Church, secretary.

(12) Respondent Detroit Supply Company, Inc., is a corpora-

tion organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 78–82 Central Avenue, Albany, N.Y.

The following respondent individuals are the officers of said respondent corporation:

Samuel Weiss, president and treasurer.

Sidney R. Nathan, vice president.

Jacob Weiss, second vice president.

Eugene J. Nathan, assistant treasurer.

Sylvan Raab, secretary.

(13) Respondent William T. Manning Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 133 Pocasset Street, Fall River, Mass.

The following respondent individuals are the officers of said respondent corporation:

William T. Manning, Sr., president.

William T. Manning, Jr., treasurer.

Margaret C. (Mrs. Daniel) Egan, secretary.

(14) Respondent Thorpe Automotive Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 61 Montgomery Street, Pawtucket, R.I.

The following respondent individuals are the officers of said respondent corporation:

Luke E. Thorpe, president.

William H. Thorpe, vice president and treasurer.

John J. Thorpe, assistant treasurer.

Vincent Thorpe, secretary.

(15) Respondent Six-State Associates with principal office and place of business located at 285 Newtonville Avenue, Newton, Mass., is an association organized, existing and doing business under the laws of the Commonwealth of Massachusetts, by virtue of a Declaration of Trust effective December 31, 1948. Said respondent association upon its organization purchased all of the assets of Six-State Sales, Inc., a corporation organized under the laws of the Commonwealth of Massachusetts in October 1947.

The following respondent individuals are the trustees and officers of said respondent association:

Alfred S. Hunt, president and trustee.
Louis J. Roazen, vice president and trustee.
Christian Olesen, Jr., vice president.
Arthur C. Marquardt, treasurer and trustee.

PAR. 2. The respondent corporations and the co-partnership set forth in paragraph I, supra, are independent business entities principally engaged in the jobbing of automotive replacement parts and supplies. Since June 19, 1936, said jobbers have purchased and now purchase in commerce from sellers, and from sellers engaged in commerce, numerous such parts and supplies for use, consumption or resale within the United States and in the District of Columbia, and in connection with such transactions said jobbers have been and are now in active and substantial competition with other corporations, partnerships, firms and individuals also engaged in the purchase for use, consumption or resale of automotive replacement parts and supplies of like grade and quality from the same or competitive sellers. The aforesaid sellers are located in the several States of the United States, and the aforesaid buyers and said sellers cause the parts and supplies so purchased, in manner and method and for purposes as aforesaid, to be shipped and transported among and between the several States of the United States from the respective State or States of location of said sellers to the respective State or States of location of the said buyers.

PAR. 3. Respondent Six-State Associates, at all times mentioned herein has been and is now maintained, managed, controlled and operated by and for the particular jobbers associated together at any given time for the effectuation of the purchasing policies and practices hereinafter described. Certain of the respondent jobbers have been so associated together since the inception of this course of action by the organization of Six-State Sales, Inc., in 1947. All of the respondent jobbers are currently so associated together in the continuation of said course of action by respondent Six-State Associates, and each said respondent jobber following such association, adopted, ratified, approved and began taking part in the purchasing policies and practices hereinafter described.

In practice and effect, respondent Six-State Associates has been and is now serving as the medium or instrumentality by, through or in conjunction with which said jobbers exert the influence of their combined bargaining power on the competitive commodity sellers hereinbefore described. As a part of their planned com-

mon course of action, said jobbers direct the attention of said commodity sellers to the potential purchasing power possessed by them acting in concert and, by reason of such, have demanded on their individual purchases discriminatory prices, discounts, allowances, rebates and terms and conditions of sale not otherwise offered or granted by said commodity sellers in such transactions. Sellers not acceding to such demands are usually replaced as sources of supply for the commodities concerned and such market is closed to them in favor of such sellers as can be and are induced to afford the discriminatory prices, discounts, allowances, rebates and terms and conditions of sale so demanded.

Said planned common course of action usually includes the demand by said jobbers, among other things, that acceding sellers shall consider their several purchases in the aggregate for the purpose of granting thereon quantity discounts, allowances or rebates in accordance with said sellers' established schedule. When and if this demand is acceded to by a particular seller, the subsequent purchase transactions between said seller and the individual jobbers have been and are billed to and paid for through the aforesaid organizational device of Six-State Associates. Said organization thus purports to be the commodity purchaser when in truth and in fact it has been and is now serving only as agent for the several individual purchasers aforedescribed or as a mere bookkeeping device for facilitating the inducement and receipt by the said purchasers from the said sellers of discriminatory and off-scale merchandise pricing. Said Six-State Associates has not functioned and does not now function as a purchaser for its own account for consumption, use or resale of the commodities concerned.

PAR. 4. Each and all of the respondents aforenamed since June 19, 1936, have adopted, followed, and pursued purchasing policies and practices which were knowingly designed and intended to and did induce from such of the aforesaid commodity sellers as acceded, discriminatory and illegal prices, discounts, allowances, rebates, and terms and conditions of sale favorable to said respondent jobbers as aforesaid in the commodity purchase transactions hereinbefore described.

Each and all of the aforenamed respondents in furtherance of the said policies and practices and in connection with the said commodity purchase transactions are and have been utilizing and employing the device of respondent Six-State Associates, to

induce and receive by, through or in conjunction therewith, from the aforesaid acceding sellers in said transactions, the aforesaid favorable prices, discounts, allowances, rebates, terms and conditions of sale, which were known or should have been known by said respondents to be discriminatory, illegal and prohibited to said acceding sellers under subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Each and all of the aforenamed respondent jobbers during the times aforestated made individual purchases of the said commodities upon which and upon the total aggregate of which and otherwise said jobbers knowingly induced and received through use of the aforesaid device substantial monetary amounts in discriminatory and favorable prices, discounts, allowances, rebates, terms and conditions of sale from the acceding sellers in the aforesaid purchase transactions. In 1954 said respondent jobbers made purchases through Six-State Associates in the amount of $932,426.80 and received rebates in the amount of $107,641.41 from 72 such acceding sellers. In 1955 such purchases amounted to $1,618,078.12 and rebates totalled $182,753.97 from 78 said suppliers. Except under color of such or a similar organizational device, the said favorable discriminatory prices, discounts, rebates, terms and conditions of sale were to the knowledge of said respondents not available to, offered, or granted by said sellers, or their aforesaid competitors to respondents or respondents' aforesaid competitors, nor received by respondents or respondents' said competitors in connection with the aforesaid or like or similar such purchase transactions of the same or similar such commodities of like grade and quality so purchased for consumption, use or resale.

Each and all of the aforesaid discriminatory purchase transactions, so negotiated and made, tend to and do establish the acceding sellers therein as preferred sources of supply over competitive sellers not so acceding, for the purchase for consumption, use or resale by said respondent jobbers of the commodities concerned, and to give said jobbers a price advantage over competitive nonfavored buyers as aforesaid in the purchase for consumption, use or resale of the same or similar such commodities of like grade and quality.

PAR. 5. The effect of each and all of the aforesaid discriminations in prices induced by each and all of the respondents aforenamed in each and all of the purchase transactions aforedescribed

made in the manner and method and for the purpose aforestated, and received in each and all of said transactions by each and all of the respondents as aforedesignated, has been and may be to substantially lessen competition in the lines of commerce in which the aforesaid acceding sellers, said sellers' competitors, said respondent jobbers, and said jobbers' competitors, as aforesaid, are engaged and to injure, destroy or prevent competition with the said acceding sellers, the said respondent jobbers or with customers of either of them.

PAR. 6. The foregoing alleged acts and practices of said respondents, in knowingly inducing and in knowingly receiving, since June 19, 1936, the aforesaid discriminations in price prohibited by subsection (a), Section 2, of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), are in violation of subsection (f), Section 2, of said Act.

Mr. Eldon P. Schrup and *Mr. Robert E. Vaughan* for the Commission.

Gorman, Voss, Brodbine & Gorman, by *Mr. John J. Brodbine,* and *Withington, Cross, Park & McCann,* by *Mr. Claude B. Cross,* all of Boston, Mass., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), the Federal Trade Commission on April 5, 1957, issued and subsequently served its complaint in this proceeding against the above-named respondents.

On October 28, 1958, after five hearings in October 1957, there was submitted to the undersigned hearing examiner an executed agreement between respondents and counsel supporting the complaint, accompanied by a subsequently executed motion to amend said agreement, which motion is signed by all counsel of record and which motion represents that all signatories to the consent agreement (except James T. Fleming as to whom this complaint is being dismissed) have consulted with them and that counsel for respondents are specifically authorized by such respondents to join with counsel in support of the complaint in this action,

providing for the entry of a consent order. Said motion being deemed appropriate, it is herewith granted.

By the terms of said agreement, as amended, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, as amended, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement, as amended. The agreement, as amended, further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement, as amended; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement, as amended, is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

Said agreement, as amended, further provides that the following individual respondents are deceased:

Arthur C. Marquardt	Morris Roazen
Lucius H. Tarbell	John S. Leven
Omar H. Amyot	Frank G. Congdon
Frank J. Whalen	

and that the following listed respondents are no longer connected with any respondent corporation, and counsel supporting the complaint do not have available any evidence or reason to believe that they will participate in like practices in the future:

David Roazen, formerly vice president,
Standard Auto Gear Co.

Franz U. Burkett, formerly secretary,
Farrar-Brown Co.

Robert Thompson, formerly president,
Christie & Thomson, Inc.
William Christie, formerly secretary,
Christie & Thomson, Inc.
James T. Fleming, formerly secretary,
Horton-Gallo-Creamer Company.

The hearing examiner having considered the agreement, as amended, and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement, as amended, is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent Hunt-Marquardt, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 244 Brighton Avenue, Boston, Mass.

The following respondent individuals are officers of said respondent corporation:

Alfred S. Hunt
H. Nelson Hartstone

Respondents George G. Mellor and Raymond W. Mellor are individuals and copartners trading as Mellor's Auto Parts with their principal office and place of business located at 134 Broad Street, Providence, R.I.

Respondent Standard Auto Gear Co. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 531 Columbia Road, Dorchester, Mass.

Respondent Louis J. Roazen, is an officer of said respondent corporation.

Respondent The Tarbell-Watters Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 144 Chestnut Street, Springfield, Mass.

Respondent Clarence E. Trevor is an officer of said respondent corporation.

Respondent Auto Electric Service Co. is a corporation organized, existing and doing business under and by virtue of the laws of

the State of New Hampshire with its principal office and place of business located at 21 Dow Street, Manchester, N.H.

The following respondent individuals are officers of said respondent corporation:

James Pettigrew
Everett P. McAffee

Respondent Farrar-Brown Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine with its principal office and place of business located at 49 Dartmouth Street, Portland, Maine.

Respondent Christian Olesen, Jr., is an officer of said respondent corporation.

Respondent Christie & Thomson, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its principal office and place of business located at 3 Quinsigamond Avenue, Worcester, Mass.

Respondent Abraham Hodes is an officer of said respondent corporation.

Respondent Grinold Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its principal office and place of business located at 354 Hudson Street, Hartford, Conn.

The following respondent individuals are officers of the said respondent corporation:

Raymond W. Grinold
Cleo T. (Mrs. R. W.) Grinold
Richard E. Ryder

Respondent Horton-Gallo-Creamer Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 96–104 State Street, New Haven, Conn.

The following respondent individuals are officers of the said respondent corporation:

Raymond W. Grinold
Cleo T. (Mrs. R. W.) Grinold

Respondent Hagar Hardware & Paint Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Vermont, with its principal office and place of business located at 164 St. Paul Street, Burlington, Vt.

Respondent George I. Hagar is an officer of said respondent corporation.

Respondent Plattsburgh Motor Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 95 Bridge Street, Plattsburgh, N.Y.

The following respondent individuals are officers of said respondent corporation:

Walter H. Church, Sr.
Walter H. Church, Jr.
Joseph S. Church

Respondent Detroit Supply Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 78–82 Central Avenue, Albany, N.Y.

The following respondent individuals are officers of said respondent corporation.

Samuel Weiss
Sidney R. Nathan
Jacob Weiss
Eugene J. Nathan
Sylvan Raab

Respondent William T. Manning Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 133 Pocasset Street, Fall River, Mass.

The following respondent individuals are officers of said respondent corporation:

William T. Manning, Sr.
William T. Manning, Jr.
Margaret C. (Mrs. Daniel) Egan

Respondent Thorpe Automotive Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 61 Montgomery Street, Pawtucket, R.I.

The following respondent individuals are officers of said respondent corporation:

Luke E. Thorpe
William H. Thorpe
John J. Thorpe
Vincent Thorpe

Respondent Six-State Associates with its principal office and place of business located at 285 Newtonville Avenue, Newton, Mass., is an association organized, existing and doing business under the laws of the Commonwealth of Massachusetts, by virtue of a Declaration of Trust effective December 31, 1948. Said respondent association upon its organization purchased all of the assets of Six-State Sales, Inc., a corporation organized under the laws of the Commonwealth of Massachusetts in October 1947.

The following respondent individuals are the trustees and officers of said respondent association:

Raymond W. Mellor, trustee
Alfred S. Hunt, trustee
Louis J. Roazen, trustee
Christian Olesen, Jr., president

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

ORDER

It is ordered, That respondents Hunt-Marquardt, Inc., a corporation; George G. Mellor and Raymond W. Mellor, copartners doing business as Mellor's Auto Parts; Standard Auto Gear Co., a corporation; The Tarbell-Watters Co., Inc., a corporation; Auto Electric Service Co., a corporation; Farrar-Brown Co., a corporation; Christie & Thomson, Inc., a corporation; Grinold Auto Parts, Inc., a corporation; Horton-Gallo-Creamer Company, a corporation; Hagar Hardware & Paint Co., Inc., a corporation; Plattsburgh Motor Service, Inc., a corporation; Detroit Supply Company, Inc., a corporation; William T. Manning Co., Inc., a corporation; Thorpe Automotive Co., a corporation; Six-State Associates, a Massachusetts trust; and following individuals: Alfred S. Hunt, Louis J. Roazen, Christian Olesen, Jr., H. Nelson Hartstone, Clarence E. Trevor, James Pettigrew, Everett P. McAffee, Abraham Hodes, Raymond W. Grinold, Cleo T. Grinold, Richard E. Ryder, George I. Hagar, Walter H. Church, Sr., Walter H. Church, Jr., Joseph S. Church, Samuel Weiss, Sidney R. Nathan, Jacob Weiss, Eugene J. Nathan, Sylvan Raab, William T. Manning, Sr., William T. Manning, Jr., Margaret C. Egan, Luke E. Thorpe, William H. Thorpe, John J. Thorpe, and Vincent Thorpe, their officers, agents, representatives and employees in connection with the offering to purchase or purchase of any automotive products or supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Knowingly inducing or knowingly receiving or accepting any discrimination in the price of such products and supplies, by directly or indirectly inducing, receiving, or accepting from any seller a net price known by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondents' business, or where respondents are competing with other customers of the seller.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the complaint be and it hereby is dismissed as to respondents Arthur C. Marquardt, Morris Roazen, Lucius H. Tarbell, John S. Leven, Omar H. Amyot, Frank G. Congdon, Frank J. Whalen, David Roazen, Franz U. Burkett, Robert Thompson, William Christie, and James T. Fleming.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 23d day of December 1958, become the decision of the Commission; and, accordingly:

It is ordered, That all of the respondents herein, except those as to whom the complaint has been dismissed, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

B. GREEN & COMPANY, INC.

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

Docket 7266. Complaint, Oct. 1, 1958—Decision, Dec. 23, 1958

Consent order requiring a distributor in Baltimore, Md., to cease violating the Oleomargarine Amendment to the Federal Trade Commission Act by listing "Del Farm" margarine in newspaper advertisements along with cheese, milk, eggs, and butter under such headings as "Dairy Products" and "Tablerite Dairy Values" or otherwise suggesting in advertising that the oleomargarine was a dairy product.

Mr. Morton Nesmith for the Commission.
Respondent, for itself.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on October 1, 1958, charging respondent with representing or suggesting that its Del Farm Margarine is a dairy product, by placing advertisements thereof under the heading of "dairy products" in newspapers and otherwise, and by intermixing such advertisements between the advertisements of dairy foods. Respondent's advertisements, so disseminated, are alleged to be misleading in material respects and to constitute false advertisements as defined in §15(a)(2) of the Federal Trade Commission Act, and unfair and deceptive acts and practices in commerce, in violation of said Act.

Thereafter, on October 24, 1958, respondent and counsel supporting the complaint herein entered into an Agreement Containing Consent Order to Cease and Desist, which was approved by the director and an assistant director of the Commission's Bureau of Litigation, and thereafter submitted to the hearing examiner for consideration.

The agreement identifies respondent B. Green & Company, Inc. as a Maryland corporation, with its principal office and place of business located at 2200 Winchester Street, Baltimore, Md.

Respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondent waives any further procedure before the hearing

examiner and the Commission; the making of findings of fact and conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. All parties agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the order to cease and desist, as contained in the agreement, when it shall have become a part of the decision of the Commission, shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; that the complaint herein may be used in construing the terms of said order; and that the agreement is for settlement purposes only, and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

After consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the hearing examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the Agreement Containing Consent Order to Cease and Desist; finds that the Commission has jurisdiction over the respondent and over its acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That the respondent, B. Green & Company, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Del Farm Margarine, or any other margarine or oleomargarine, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mail or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any statement, word, grade designation, design, device, symbol, sound, or any combination thereof, which represents or suggests that said product is a dairy product;

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said product,

any advertisement which contains any of the representations prohibited in paragraph 1 of this order.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 23d day of December 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

RENBERG'S, INC., ET AL.

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

Docket 6997. Complaint, Dec. 18, 1957—Decision, Dec. 24, 1958

Consent order requiring furriers in Tulsa, Okla., to cease violating the Fur Products Labeling Act by newspaper advertising which falsely represented prices of fur products as reduced from regular prices which were in fact fictitious, and represented percentage reductions from usual prices without maintaining adequate records for such savings claims.

Mr. S. F. House supporting the complaint.

Mr. G. Duane Vieth and *Mr. Werner Kronstein* of *Arnold, Fortas & Porter*, of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges Renberg's Inc., a corporation, and George Renberg, individually and as an officer of said corporation, hereinafter called respondents, with false advertising of fur products in violation of the Federal Trade Commission Act and the Fur Products Labeling Act.

After issuance and service of the complaint the respondents, through their attorneys, filed a motion to dismiss the complaint, supported by the affidavit of the respondent George Renberg, on the grounds that (1) the respondents did not knowingly participate directly or indirectly in any of the violations charged in the complaint, (2) there is no likelihood that respondents will commit such violations in the future and, therefore, the public interest does not require that further proceedings under the complaint be continued.

Counsel supporting the complaint answered said motion and, among other things, denied the allegations of fact set forth in the supporting affidavit. The hearing examiner denied the motion to dismiss.

Thereafter, respondents, their counsel, and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation. The agreement recites that the allegation set forth in paragraph 4 of the complaint, to the effect that

respondents' advertising failed to disclose the name or names of the animal or animals which produced the fur, should be dismissed, for the reason that there is insufficient evidence available to establish such allegation.

The pertinent provisions of said agreement are as follows: Respondents admit all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondents waive further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondents waive any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent Renberg's, Inc., is a corporation organized and doing business under the laws of the State of Oklahoma, with its office and principal place of business located at 311–313 South Main Street, Tulsa, Okla.

2. The respondent George Renberg is president of said corporation and formulates, directs and controls the acts and policies of said corporation. His address is the same as that of the corporate respondent.

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

A. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Represents directly or by implication that the regular or usual price of any fur product is in an amount which is in excess of the price at which the respondents have usually and customarily sold such products in the recent regular course of their business.

2. Represents directly or by implication through percentage savings claims, that the regular or usual retail prices charged by respondents for fur products in the recent regular course of their business, are reduced in direct proportion to the amounts of savings stated, when contrary to the fact.

B. Making price claims and representations, of the types referred to in subparagraphs A–1 and A–2 above, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

It is further ordered, That the charge set forth in paragraph 4 of the complaint herein, viz., that respondents, in advertising, failed to disclose the name or names of the animal or animals producing the fur or furs contained in the fur products, should be dismissed, and the same hereby is dismissed without prejudice.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th

day of December 1958, become the decision of the Commission; and, accordingly:

It is 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 to cease and desist.

Decision

IN THE MATTER OF

MARY LOUISE GORDON FORMERLY DOING BUSINESS AS DELUXE FUR COMPANY, ET AL.

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

Docket 7098. Complaint, Mar. 27, 1958—Decision, Dec. 24, 1958

Consent order requiring furriers in Hazleton, Pa., to cease violating the Fur Products Labeling Act by tagging fur products with excessive prices purporting to be the regular retail selling prices; by newspaper and television advertising which failed to disclose the names of animals producing certain furs or that some furs were artificially colored, represented furs falsely as from a business in liquidation, and used comparative prices and percentage savings claims, etc., not based on adequate records; and by failing in other respects to comply with the labeling, invoicing, and advertising requirements of the Act.

Mr. John T. Walker for the Commission.
Marie Louise Gordon and *George Gordon, pro se.*

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

On March 27, 1958, the Federal Trade Commission issued its complaint against Marie Louise Gordon (erroneously referred to in the complaint as Mary Louise Gordon), an individual formerly doing business as DeLuxe Fur Company, and George Gordon, an individual formerly manager of the DeLuxe Fur Company, hereinafter referred to as respondents, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the Rules and Regulations promulgated under the Fur Products Labeling Act. In lieu of submitting answer to said complaint, both of the respondents on October 20, 1958, entered into an agreement for consent order with counsel supporting the complaint disposing of all the issues in this proceeding in accordance with Section 3.25 of the Rules of Practice and Procedure of the Commission, which agreement has been duly approved by the Bureau of Litigation.

By the terms of said agreement, the respondents admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Respondents in the agreement expressly waived any further pro-

cedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that said agreement is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint. The agreement also provided that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Marie Louise Gordon is an individual formerly doing business as DeLuxe Fur Company, with office and principal place of business located at 41 North Wyoming Street, Hazleton, Pa. Respondent George Gordon is an individual formerly manager of the DeLuxe Fur Company, with office and principal place of business at the same address as Marie Louise Gordon.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act and the Fur Products Labeling Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents Marie Louise Gordon (erroneously designated in the complaint as Mary Louise Gordon), an individual formerly doing business as DeLuxe Fur Company, and

George Gordon, an individual formerly manager of the DeLuxe Fur Company, and doing business under any other trade name or names, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the introduction into commerce or the sale, advertising, offering for sale, transportation or distribution of fur products, in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing on labels attached to fur products, or in any other manner, that certain amounts are the regular and usual prices of fur products when such amounts are in excess of the prices at which such products are usually and customarily sold by respondents in the recent regular course of their business.

2. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed by the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported it in commerce;

(f) The name of the country of origin of any imported furs used in the fur product;

(g) The item number or mark assigned to a fur product.

3. Setting forth on labels attached to fur products:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder mingled with nonrequired information;

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoice;

(f) The name of the country of origin of any imported furs contained in the fur product;

(g) The item number or mark assigned to a fur product.

2. Setting forth on invoices pertaining to fur products information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products and which:

1. Fails to disclose:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur products contain or are composed of bleached, dyed or otherwise artificially colored fur, when such is the fact.

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

3. Represents, directly or by implication, that any such stock

is from the stock of a business in a state of liquidation, contrary to the fact.

D. Making claims and representations in advertisements respecting comparative prices, percentage savings claims or claims that prices are reduced from regular or usual prices unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of December 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Marie Louise Gordon (erroneously designated in the complaint as Mary Louise Gordon), an individual formerly doing business as DeLuxe Fur Company, and George Gordon, an individual formerly manager of the DeLuxe Fur Company, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

NELBRO PACKING COMPANY

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

Docket 7209. Complaint, July 23, 1958—Decision, Dec. 24, 1958

Consent order requiring a distributor of canned salmon in Seattle, Wash., to cease violating the brokerage section of the Clayton Act as evidenced by its allowance of discounts reflecting brokerage on direct sales to a large retail chain.

COMPLAINT

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

PARAGRAPH 1. Respondent Nelbro Packing Company, hereinafter sometimes referred to as Nelbro, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 401 Colman Building, Seattle, Wash. Respondent Nelbro is a wholly owned subsidiary of Nelson Bros. Fisheries Ltd., a Canadian corporation, located at Vancouver, B.C. Respondent Nelbro is engaged in distributing canned salmon, all of which are hereinafter referred to as seafood products. Respondent Nelbro is a substantial factor in the sale and distribution of seafood products, particularly canned salmon, acting in its own behalf as well as in behalf of its parent corporation in connection with sales of seafood products within the United States.

PAR. 2. In the course and conduct of its business, respondent Nelbro for the past several years has sold and distributed and is now selling and distributing seafood products in commerce as "commerce" is defined in the aforesaid Clayton Act, to buyers located in the several States of the United States other than the State in which respondent is located. Said respondent transports or causes such seafood products when sold to be transported from

its place of business or warehouse in the State of Washington to buyers or to said buyers' places of business located in various other States of the United States. Thus, there has been at all times mentioned herein a continuous course of trade in commerce in said seafood products across state lines between respondents and the respective buyers of said seafood products.

PAR. 3. For the past several years respondent Nelbro has sold and distributed, and is now selling and distributing seafood products in commerce to customers located in the several States of the United States generally through primary brokers. When selling through said brokers, respondent pays them for their services usually at the rate of five percent of the net selling price of the merchandise. In a substantial number of instances, however, respondent has made sales direct to at least one large retail chain buyer, for its own account, without utilizing the services of a broker, and on these sales respondent has allowed said buyer a discount or an allowance in lieu of brokerage, or a lower net price which reflects the brokerage normally paid to brokers for negotiating sales for it.

PAR. 4. In paying or granting to said buyers for their own account a discount or an allowance in lieu of brokerage, or a lower net price which reflects brokerage as alleged and described hereinabove, respondent has violated and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Mr. Cecil G. Miles for the Commission.

Jones & Gray, by *Mr. Hargrave Garrison,* of Seattle, Wash., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondent with having violated the provisions of §2(c) of the Clayton Act as amended (U.S.C. Title 15, §13). The respondent was duly served with process.

On October 15, 1958, respondent and the attorneys for both parties entered into an "Agreement Containing Consent Order to Cease and Desist," which was duly approved by the Bureau of Litigation of the Commission, and, on October 23, 1958, submitted to the undersigned hearing examiner of the Commission for his consideration. Thereafter the initial hearing was cancelled.

After due consideration of the said "Agreement Containing Consent Order to Cease and Desist," the hearing examiner finds that said agreement, in both form and content, is in accordance with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that, by said agreement, the parties have specifically agreed that:

1. Respondent Nelbro Packing Company is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 401 Colman Building, in the City of Seattle, State of Washington.

2. Pursuant to the provisions of subsection (c) of §2 of the Clayton Act, as amended (U.S.C. Title 15, §13), the Federal Trade Commission, on July 23, 1958, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to re-

spondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the agreement is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject-matter of this proceeding and of the person of the respondent herein; that the complaint states a legal cause for complaint under the Clayton Act, as amended, against the respondent, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order, as proposed in said agreement, is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That Nelbro Packing Company, a corporation, and its officers, agents, representatives or employees, directly or through any corporate or other device, in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of December 1958, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF

LADD KNITTING MILLS, INC., ET AL.

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

Docket 7216. Complaint, Aug. 4, 1958—Decision, Dec. 24, 1958

Consent order requiring two affiliated manufacturers and sellers of women's sweaters, with offices in Reading, Pa., and New York City, to cease advertising falsely in magazines and trade papers and on attached tags and labels, that their orlon sweaters would "not pill or fuzz" or were "Pill Proofed."

Mr. Garland S. Ferguson supporting complaint.
Respondents, Pro se.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On August 4, 1958, the Federal Trade Commission issued a complaint charging Ladd Knitting Mills, Inc., a corporation and Talbott Knitting Mills, Inc.,[1] a corporation and Lester C. Laufbahn, Nancy Laufbahn, and Stephen H. Lewis, individually and as officers of said corporations, hereinafter referred to as respondents, with misleading and deceptive statements and representations in advertising their orlon sweaters.

After issuance and service of the complaint, the respondents, and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondents admit all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondents waive further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner

[1] Now known as Talbott, Inc.

provided by statute for other orders; respondents waive any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Corporate respondent Ladd Knitting Mills, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at North Sixth Street and Heisters Lane, Reading, Pa.

2. Corporate respondent Talbott, Inc., formerly Talbott Knitting Mills, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1407 Broadway, New York, N.Y., and with offices also at North Sixth Street and Heisters Lane, Reading, Pa.

Individual respondents Lester C. Laufbahn, Nancy Laufbahn, and Stephen H. Lewis are officers of said corporations. They formulate, direct and control the policies and practices of the corporate respondents. The address of all individual respondents is the same as that of the corporate respondent, Ladd Knitting Mills, Inc.

3. 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 Ladd Knitting Mills, Inc., a corporation, and its officers; Talbott, Inc., a corporation, and its officers and Lester C. Laufbahn, Nancy Laufbahn, and Stephen H. Lewis, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of women's orlon sweaters

or any other product made of orlon, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that said products are pill proofed, pill proof or that they will not pill.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of December 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Ladd Knitting Mills, Inc., a corporation, and its officers; Talbott, Inc., a corporation, and its officers and Lester C. Laufbahn, Nancy Laufbahn, and Stephen H. Lewis, individually and as officers of said corporation, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

JEHIEL HOCHERMAN DOING BUSINESS AS J. H. MANUFACTURING COMPANY

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

Docket 7261. Complaint, Sept. 17, 1958—Decision, Dec. 24, 1958

Consent order requiring a manufacturer in New York City to cease violating the Wool Products Labeling Act by tagging as "40–50% rep. wool," blankets which contained substantially less woolen fibers than thus represented; by improperly describing a portion of the fiber content of sleeping bags on labels as "Napper"; and by failing to comply with other labeling requirements of the Act.

Mr. S. F. House supporting complaint.
Respondent, Pro se.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On September 17, 1958, the Federal Trade Commission issued a complaint charging that Jehiel Hocherman, an individual doing business as J. H. Manufacturing Company, hereinafter referred to as respondent, has violated the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated under said Wool Products Labeling Act by misbranding the wool products which he manufactures.

After issuance and service of the complaint, the respondent and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondent waives further procedural steps before the hearing examiner and the Commission,

and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent Jehiel Hocherman is an individual doing business as J. H. Manufacturing Company with his office and principal place of business at 588 Broadway, New York, N.Y. He formulates, directs, and controls the acts, practices, and policies of said business.

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 the respondent, Jehiel Hocherman, an individual doing business as J. H. Manufacturing Company, or under any other name, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of blankets and sleeping bags or other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool products, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentages by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentages of the total weight of such wool products of any nonfibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool products or of one or more persons engaged in introducing such wool products into commerce, or in the offering for sale, sale, transportation, distribution, or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Setting out on labels attached to products information, descriptive of the fiber contents, in abbreviated words or terms.

4. Using a name on labels, when naming the fibers in the required information, that is not the common generic name of the fiber.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 24th day of December 1958, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF

KISBA FUR CORPORATION, ET AL.

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

Docket 7193. Complaint, July 17, 1958—Decision, Dec. 30, 1958

Consent order requiring furriers in New York City to cease violating the Fur Products Labeling Act by invoicing fur products with fictitious prices and making pricing and savings claims without keeping adequate records as a basis therefor; by failing to comply in other respects with the labeling and invoicing requirements of the Act; and by furnishing a false guaranty that certain of their furs were not misbranded.

Mr. Charles W. O'Connell for the Commission.

Mr. Manfred H. Benedek, of New York, N.Y., for Kisba Fur Corporation and Harry I. Kushner; *Goldstein & Goldstein,* of New York, N.Y., for Sam Bassin and Sol Kushner.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with misbranding and with falsely and deceptively invoicing and advertising certain of their fur products, with failing to maintain full and adequate records disclosing the facts upon which were based pricing and savings claims and representations as to such products, and with furnishing a false guaranty that certain of their furs or fur products were not misbranded, falsely invoiced and falsely advertised, in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the director and an assistant director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondent Kisba Fur Corporation 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 315 Seventh Avenue, New York, N.Y., and that respondents Harry I. Kushner (erroneously referred to in the complaint as Harry J. Kushner),

Sam Bassin (erroneously referred to in the complaint as Sam Bassen), and Sol Kushner are president, secretary-treasurer and vice president, respectively, of said corporation, their address being the same as that of the corporate respondent.

The agreement further states that respondent Sam Bassin resides at 2105 Wallace Avenue, Bronx, N.Y., and respondent Sol Kushner resides at 2501 Nostrand Avenue, Brooklyn, N.Y.

The agreement provides, among other things, that the respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act. Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondents Kisba Fur Corporation, a corportion, and its officers, and Harry I. Kushner, Sam Bassin and Sol Kushner, 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 into commerce, 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 fur products, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur products for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(f) The name of the country of origin of any imported furs used in the fur products;

2. Setting forth on labels attached to fur products information required under §4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder which is intermingled with nonrequired information;

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoices;

(f) The name of the country of origin of any imported furs contained in the fur product;

2. Representing directly or by implication, on invoices, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent regular course of their business;

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, or public announcement or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such product in the recent regular course of their business;

D. Making pricing claims or representations in advertisements respecting comparative prices, percentage savings claims, or claims that prices are reduced from regular or usual prices, unless respondents maintain full and adequate records disclosing the facts upon which such claims or representations are based;

E. Furnishing false guaranties that certain furs or fur products are not misbranded, falsely invoiced or falsely advertised, when there is reason to believe that said furs or fur products may be introduced, sold, transported or distributed in commerce.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 30th day of December 1958, become the decision of the Commission; and accordingly:

It is ordered, That respondents Kisba Fur Corporation, a corporation, and Harry I. Kushner (erroneously named in the com-

plaint as Harry J. Kushner), Sam Bassin (erroneously named in the complaint as Sam Bassen), and Sol Kushner, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

BANKERS LIFE & CASUALTY COMPANY

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

Docket 6240. Complaint, Oct. 14, 1954—Order, Jan. 5, 1959

Dismissal, for lack of jurisdiction following decision of the Supreme Court of the United States in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), of complaint charging a Chicago insurance company with falsely advertising its accident and health policies.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Robert R. Sills and *Mr. Raymond L. Hays* for the Commission.

Brundage & Short, of Chicago, Ill., for respondent.

FINAL ORDER

This matter having come on to be heard upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision filed prior to the ruling of the Supreme Court of the United States in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958); and

The Commission having considered the record herein and the said opinion of the Supreme Court and having concluded that it should dismiss the complaint in this proceeding:

It is ordered, That the initial decision filed December 19, 1956, be, and it hereby is, vacated and set aside.

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

Commissioner Kern not participating.

Order

IN THE MATTER OF

LA SALLE CASUALTY COMPANY

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

Docket 6246. Complaint, Oct. 14, 1954—Order, Jan. 5, 1959

Dismissal, for lack of jurisdiction following decision of the Supreme Court of the United States in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), of complaint charging a Chicago insurance company with falsely advertising the benefits provided by its health and accident policies.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Robert R. Sills and *Mr. Frederick McManus* for the Commission.

Mr. Zachary D. Ford, Jr. and *Mr. George F. Barrett*, of Chicago, Ill., for respondent.

FINAL ORDER

This matter having come before the Commission upon the appeal of respondent from the hearing examiner's initial decision and upon briefs in support of and in opposition thereto, oral argument not having been requested; and

The Commission having considered the record and the ruling of the Supreme Court of the United States in its *per curiam* opinion of June 30, 1958, in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), entered subsequent to the filing of the instant appeal, and having concluded that the complaint herein should be dismissed:

It is ordered, That the initial decision herein, filed February 5, 1957, be, and it hereby is, vacated and set aside.

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

IN THE MATTER OF

NATIONAL BANKERS LIFE INSURANCE COMPANY

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

Docket 6452. Complaint, Nov. 18, 1955—Order, Jan. 5, 1959

Dismissal, for lack of jurisdiction following decision of the Supreme Court of the United States in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), of complaint charging an insurance company in Dallas, Tex., with misrepresenting the benefits provided by its health and accident policies.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Francis C. Mayer and *Mr. Eugene Kaplan* for the Commission.

Mr. Dwight E. Hill and *Strasburger, Price, Kelton, Miller & Martin*, of Dallas, Tex., for respondent.

FINAL ORDER

This matter having been heard upon cross-appeals from the initial decision of the hearing examiner filed by respondent and by counsel supporting the complaint and upon briefs in support of and in opposition thereto, and oral argument before the Commission; and

The Commission having considered the record and the ruling of the Supreme Court of the United States in its *per curiam* opinion of June 30, 1958, in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), entered subsequent to the filing of the instant appeal, and having concluded that the complaint herein should be dismissed:

It is ordered, That the initial decision herein, filed January 23, 1957, be, and it hereby is, vacated and set aside.

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

IN THE MATTER OF

SUN OIL COMPANY

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

Docket 6641. Complaint, Sept. 26, 1956—Decision, Jan. 5, 1959

Order requiring a gasoline supplier in Jacksonville, Fla., and adjacent territory to cease discriminating in price by selling gasoline to a favored service station customer at a lower price than it charged his competitors, entering into agreements with him to fix and maintain the resale price for its gasoline, and granting discounts or other considerations for that purpose.

Rufus E. Wilson, Esq., *Ross D. Young, Jr.*, Esq., and *John B. Clayton*, Esq., for the Commission.

Leonard J. Emmerglick, Esq., of Washington, D.C.; *Moffett, Frye & Leopold*, by *Henry A. Frye*, Esq., of Philadelphia, Pa.; *Rawle & Henderson*, by *Joseph W. Henderson*, Esq., of Philadelphia, Pa.; and *Osborne, Copp, Markham & Ehrlich*, by *Cyril C. Copp*, Esq., of Jacksonville, Fla., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On September 26, 1956, the Federal Trade Commission issued its complaint against Sun Oil Company, a corporation (hereinafter called respondent), charging it with price discrimination in violation of Section 2(a) of the Clayton Act (hereinafter called the Clayton Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act, and unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent discriminated in price by the sale of its gasoline to one dealer at prices substantially lower than the prices charged other dealers in the same market area, and that respondent entered into an agreement with such dealer to fix and maintain the retail price at which he sold said gasoline. Respondent appeared by counsel and filed an answer admitting the corporate, commerce, competition and certain other factual allegations of the complaint, but

denying any price discrimination in violation of the Clayton Act or any price-fixing agreement in violation of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from February 4, 1957, to December 30, 1957.

Both parties were represented by counsel, participated in the hearings and afforded a full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof, and pursuant to leave granted presented oral argument thereon. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a New Jersey corporation with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pa.

II. Interstate Commerce and Competition

The complaint alleged, respondent admitted, and it is found that it is now and for several years last past has been engaged in the offering for sale, sale, and distribution of gasoline in commerce in various States of the United States, including the City of Jacksonville, Fla., and adjacent territories. In the course and conduct of such business, respondent ships or otherwise transports its gasoline in tank cars, tankers, and trucks from its different refineries, terminals and distribution points, located in various States of the United States, to retail dealers located in the Jacksonville, Florida, area, and in various other states of the United States. All of such purchases by said retail dealers are and have been in the course of such commerce. There is now

[1] 5 U.S.C. § 1007(b).

and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers. In the course and conduct of this business, respondent is in direct and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline.

III. The Unlawful Practices

The complaint contains two counts, one alleging price discrimination in violation of the Clayton Act, and the other alleging price fixing in violation of the Act, and they are considered *seriatim*.

A. *The Price Discrimination*

The issue here framed is one of alleged secondary-line price discrimination, in that it is contended that respondent sold its gasoline to a particular dealer in Jacksonville, Fla., at prices substantially lower than respondent charged its other dealers in the same market area. Respondent's answer admitted the sale at substantially lower prices to said dealer, but denied that such dealer was in the same market area as other dealers purchasing from respondent or was in competition with such other dealers, and denied that the effect of such discrimination in price may be to injure, destroy, or prevent competition with such other dealers, or others, or that such discrimination was in violation of Section 2(a) of the Clayton Act.

The facts with respect to the price discrimination itself are substantially undisputed. Respondent had some 38 retail dealers in Duval County, Fla., which may for the purposes of this decision be characterized as the Jacksonville area, most of whom were in the City of Jacksonville itself. These dealers are independent contractors who enter into contracts with respondent concerning the purchase of respondent's gasoline and oil, and who operate filling stations at which respondent's products are advertised and sold.

During 1955, Gilbert V. McLean as such an independent contractor operated a Sun Oil filling station located at the intersection of 19th and Pearl Streets in Jacksonville, Fla. In June of 1955, the Super Test Oil Company opened a competing station at the same intersection diagonally across from McLean's station. As established in the record, Super Test was a so-called "non-

major" or "independent" brand of gasoline as compared with so-called "major" companies or "name" brands of gasoline, of which Sun Oil is one. During most of the time from June to December of 1955, the Super Test station sold its "Regular" gasoline at 26.9 cents per gallon while McLean sold his "Regular" gasoline for 28.9 cents per gallon. However, on three or four occasions between June and December of 1955, the Super Test station dropped its price substantially below 26.9, and as low as 21.9 on at least two occasions. Each time this occurred, McLean's sales of gasoline declined substantially. McLean complained several times to respondent about this situation, but nothing was done until December 1955. During that month the Super Test station reduced its prices several times on weekends, and respondent's salesman, Harry Harper, advised McLean that if it happened again respondent would try to do something.

On December 27, 1955, when McLean was still selling his gasoline for 28.9, Super Test dropped its price from 26.9 to 24.9. The same day respondent gave McLean a price allowance or discount of 1.7 cents per gallon and McLean dropped his retail price to 25.9, thereby reducing his margin of profit by 1.3 cents per gallon, the difference between the discount and the 3-cent reduction in the retail price of his gasoline. Respondent did not give this discount or lower price to any of its other retail dealers in the Jacksonville area. Approximately seven such dealers were in the same sales territory as McLean. This sales territory was one of three in the Jacksonville area established by respondent, and consisted roughly of the north one-third of Duval County. About six of these dealers were relatively close to McLean's station. This discrimination in price between McLean and respondent's other dealers continued until on or about February 16, 1956, when a price war broke out in the entire area and respondent reduced its wholesale or tankwagon price to all of its dealers in the area.

As a result, McLean's sales of gasoline increased substantially. In October 1955, he sold approximately 6,500 gallons, about the same as his sales in August and September. In November, 1955, he sold 5,900-odd gallons, in December, 8,300-odd gallons, while in January, 1956, after he reduced his price on December 27, he sold 32,100-odd gallons, almost four times as much as in December and five times as much as he averaged during August, September, October, and November. McLean's daily sales during February,

1956, until he went out of business on or about February 18, averaged approximately the same as January.

Counsel supporting the complaint called four of the Sun dealers who were in the same sales territory in Jacksonville, and the record establishes and it is found that they were in competition with McLean and adversely affected by the discriminatory price allowance granted McLean and denied them. From December 27, 1955 to February 16, 1956, they did not receive the discount given McLean and continued to sell their gasoline for 28.9 cents per gallon while McLean was selling the same product for 25.9 cents per gallon. Respondent contends that these other Sun dealers were not in the same competitive area as McLean, were not in competition with him, and therefore the granting of a lower price to McLean could not have had the effect of lessening competition or of injuring, destroying, or preventing competition with McLean. Respondent also contends that even if such dealers were in competition with McLean, counsel supporting the complaint has failed to establish that the effect of such discrimination may be to substantially lessen competition or to injure, destroy, or prevent competition with McLean, the statutory prerequisites of Section 2(a) of the Clayton Act.

With respect to respondent's first contention, the record establishes the contrary. The four dealers called as witnesses in support of the complaint were Calvin Peery, William Crabtree, Clair Winning, and Jesse McClung. Peery's station was located at the intersection of 11th and Main Streets, three blocks east and eight blocks south, and less than a mile from, McLean's station. There were received in evidence as Commission's Exhibit 21–A and respondent's Exhibit 5, maps of Duval County and Jacksonville showing the location of the various Sun stations as well as the amount of traffic flow past them. Main Street, as the name connotes, is the main thoroughfare running north and south through Jacksonville, and is also the route of U.S. 17 through Jacksonville. Pearl Street is a main artery running north and south parallel with Main Street, three blocks west of it. According to Respondent's Exhibit 5, while Main Street carries the heaviest volume of traffic, Pearl Street also carries a heavy volume of traffic, approximately one-half as much as Main Street but substantially in excess of the majority of streets in Jacksonville. Much of the traffic from the north and the northwest can proceed to the downtown area alternatively by way of either Pearl or Main Streets, and in the process pass either or both McLean's and

Peery's stations, as well as McClung's and Winning's stations, to be considered hereinafter.

From December 27, 1955, until the general price reduction in February, Peery, as well as the others, paid a wholesale price of 1.7 cents per gallon more than McLean. During December, 1955, Peery sold 10,900-odd gallons of gasoline, which was approximately his monthly average for the last six months of 1955. In January, 1956, after the discount to, and price reduction by, McLean, Peery's gallonage dropped to 9,300-odd gallons, a decline in excess of 1,500 gallons. In fact, on only six days during January did Peery sell as much as he averaged per day during December. Peery was informed not only by Crabtree and McClung but by his own customers as well that McLean was selling Sun gasoline for three cents per gallon less. Peery complained to respondent about this and the discount to McLean but was advised that nothing could be done about it. The loss of customers, as well as the geographic proximity and pattern of traffic flow, clearly demonstrate that Peery's and McLean's stations were in competition with each other. The loss of gallonage clearly demonstrates the effect of the discriminatory allowance and reduced price.

McClung operated a Sun station at the intersection of 35th and Main Streets, east and north approximately one mile from McLean's station. There are eleven streets connecting Main Street with Pearl Street between McClung's and McLean's stations. McClung testified that most of his local trade came from west of his station, which is logical because most of the area east of his station is occupied by a large cemetery. McClung also testified that most local traffic originating west of him used Pearl Street in traveling downtown, which would take them past McLean's station. McClung's credibility was seriously impaired by what proved to be an obvious alteration of his sales records, and accordingly his testimony is not credited unless it is corroborated by the testimony of other witnesses or by established facts. As previously found, the record establishes that there is a substantial flow of traffic from the north and northwest which can easily choose between Pearl and Main Streets and readily pass either or both McClung's and McLean's stations. Independently of McClung's testimony, the record establishes that McClung was aware of the discrepancy in price occurring at McLean's station, that he and Crabtree called on McLean to ascertain what was occurring, and that McClung complained about the disparate

treatment to respondent, which latter fact was admitted by respondent. As with the others, respondent did nothing for McClung.

In spite of the apparent alterations of McClung's sales record for the days in December after the price allowance to McLean, a careful analysis of these records reveals a substantial decline in gallonage during the first two weeks in January. McClung was in credit difficulties with respondent and as a result thereof respondent would not sell him gasoline except for cash, McClung went out of business in the latter part of January, and his operation and sales were not normal after January 14, 1956. An examination of Commission's Exhibit 22–E, McClung's sales records for December, 1955, reveals that the last three gallonage sales figures for December 29, 30, and 31 were altered by reducing the amount of gallonage approximately 276 gallons for the three days. A casual examination of the figures reveals erasures and changes as well as the fact that whoever did so made the mistake of forgetting to make the appropriate changes in the monthly total and in the dollar amounts listed in the column next to the gallonage figures. The first column for December 29 shows 275 gallons with an obvious erasure of the first digit, while the second column shows corresponding receipts of $79.45, with an obvious erasure of another figure appearing underneath. This amount of money is approximately correct for the gallonage listed, but it is apparent that both figures have been altered. However, on December 30 the gallon figure is 276 with an apparent change in the first digit, whereas the amount received is $108.77, the amount which would have been received for 376 gallons, obviously indicating a change in the first digit from 3 to 2 or a total reduction of 100 gallons. The same thing occurred on December 31: The first figure has obviously been changed from 402 to 302, whereas the dollar amount remains unchanged and is the correct amount for 402 gallons. In addition, a totaling of all the gallons sold in December appearing at the foot of the column exceeds by 276 gallons the actual figures appearing in the column, but is the correct total if the changed gallonages referred to above are restored to their apparent original amounts. In spite of the foregoing discrepancies, McClung's sales records do show a substantial drop in gallonage, on an average basis, for the first two weeks in January, 1956, compared with his monthly sales prior thereto.

The record establishes and it is found that McClung's station was in the same competitive area as and in competition with McLean's station.

As found above with respect to Peery and McClung, and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination. However, it must now be considered well settled that it is not necessary for the Commission to prove injury to competition in a secondary-line price discrimination case because of the meaning of the statutory language, "where the effect may be to substantially lessen competition," as construed by the Supreme Court, the Courts of Appeal and the Commission. In the recent *Sorensen* case,[2] the Commission quoted with approval the holding of the Supreme Court in the Morton Salt case,[3] no doubt the leading case dealing with the meaning of the effect clause in a secondary-line price discrimination as follows:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing *in itself* is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence. [Emphasis added.]

The dissent in *Morton Salt,* while preferring the language "reasonable probability" to "reasonable possibility," nevertheless agreed that the facts therein fully warranted an inference of adverse effect on competition without any actual showing of injury. Recent decisions of the Courts of Appeal are to the same effect.[4]

It seems self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts or gasoline, where competition is extremely keen among retailers, and where margins of profit or markups are small, a lower price to one or some of such competing retailers not only "may" but must have the effect of substantially lessening competition.

Crabtree operated a Sun station at 58th and Main Streets, east and north approximately two and one-half miles from McLean's station. As previously found, the flow of traffic in either direction

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[2] *Sorenson Mfg. Co., Inc.*, 52 F.T.C. 1659, Docket 6052 (1956).

[3] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

[4] *Moog Industries, Inc.* v. *FTC*, 238 F. 2d 43 (C.A. 8, 1956); *Edelmann & Co.* v. *FTC*, 239 F. 2d 152 (C.A. 7, 1956), cert. den.

easily could alternate between Main and Pearl Streets and readily pass either or both such stations. Crabtree's gallonage fell off substantially in January after the price allowance to McLean on December 27. Crabtree sold approximately 17,000 to 18,000 gallons per month the last four months of 1955, but in January his gallonage dropped to 14,500. About January 1 Crabtree discovered that McLean was selling Sun gasoline for three cents per gallon less and visited McLean to find out why. While Crabtree was present at McLean's station, he helped McLean pump gas and waited upon, and talked to, several of his own former customers, who told him they were buying at McLean's station because of the lower price. It is difficult to conceive of more direct evidence of both competition and effect than this. Subsequently Crabtree and McClung together visited McLean and discussed the price situation with him and ascertained that he was receiving a price allowance from respondent. Crabtree, too, complained to respondent about the price discrimination but received no assistance until the general price reduction on February 16, 1956.

Winning operated a Sun station at 8028 Lem Turner Road, approximately three and one-half miles northwest of 19th and Pearl. Lem Turner Road is a main artery from the northwest section of Jacksonville feeding directly into Pearl Street a few blocks north of McLean's station, so that most of the traffic headed for downtown which passes Winning's station would also pass McLean's. Respondent's Exhibit 5 reveals that Lem Turner Road carries a high traffic flow, approximately one-half as large as that carried by Main Street. Winning was advised of the lower price for Sun gasoline at McLean's station by Winning's own customers. Winning stated that a number of his customers, four of whom he identified by name and address, told him they could purchase the same gas for three cents less at McLean's and thereafter stopped buying from him for about one month. Winning's gallonage did not drop substantially in January. However, he testified that he worked much harder and tried to improve his service in an attempt to prevent any substantial loss of business. The indirect effect upon Winning is demonstrated by the fact that in February, after he received the price discount for the first time when the general price war broke out, his gallonage jumped from 410 gallons one day to 903 the next and stayed at such levels for several months.

As was pointed out by the witness Peery, the loss of customers to McLean also had an effect upon the sale of other items such as oil, tires, batteries, and accessories. While respondent contends that the price differential at McLean's station could have no effect upon its other dealers because they were not in the same competitive area, which respondent would limit to a very small area adjacent to and in the immediate vicinity of 19th and Pearl Streets, in addition to the facts found, hereinbefore, one of respondent's principal witnesses, its vice president, Willard Wright, in testifying before a Senate Small Business Subcommittee in 1955 on behalf of respondent, had this to say:

> Keen competition always has existed in the marketing of gasoline in most parts of the country. Motorists are particularly price conscious when they buy gasoline. Americans of all income brackets own and operate automobiles. For those in the lower brackets gasoline is an important item in their family budgets and they seek opportunities to reduce the cost of that item.
>
> Moreover, unlike consumers of most commodities, motorists are mobile. They can without trouble drive several blocks down the street to another service station, if the first fails to please them. Indeed motorists will go out of their way a mile or two to save two or three cents on a gallon of gasoline. Out on the open highways, motorists sometimes drive past 10 to 20 stations before they stop at one whose appearance and posted prices suit them.
>
> Naturally the sellers of gasoline respond to these characteristics of their customers. Alert service station operators keep a sharp eye on the prices of their competitors and price changes, particularly on the downside, are quickly followed. Delay in doing so inevitably would mean a loss of business. Volume is important to the dealer because many of his operating costs are more or less fixed, irrespective of the number of gallons of gasoline he sells. Any substantial drop in volume means an increased unit cost of doing business.[5]

The fact that the effect of respondent's price discrimination "may be to substantially lessen competition" was fully elucidated in a recent Federal court decision, the *Enterprise* case,[6] where Judge Smith said, with respect to facts substantially similar to those herein: "The effects on gallonage of price differentials in the same brand and grade of gas within an area no larger than the Greater Hartford area must be found to be substantial."

In addition to its foregoing contentions, respondent also urges that its lower price was given to McLean in good faith to enable respondent to meet competition, as provided in Section 2(b) of the Clayton Act. For several reasons this contention is without merit.

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[5] Commission's Exhibit 14-C.

[6] *Enterprise Industries, Inc.* v. *The Texas Company*, 136 F. Supp. 420 (U.S.D.C., Conn. 1955).

First and most importantly, as found by the Court in the *Enterprise* case, *supra,* and as clearly evidenced by the decision of the Supreme Court in the *Standard Oil* case,[7] the proviso in 2(b) has reference to the good faith meeting of competition of the *seller,* and not the competition of the buyer, as in this case. Exactly the same contention was made and disposed of in the *Enterprise* case, where the Court said:

> Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company. . . . That is the competitive level at which the justification is provided for defendant in the Act, however. The Act does not go so far as to allow discriminatory price cutting to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitors.

The decision of the Supreme Court in the *Standard Oil* case, *supra,* clearly establishes that the price which a seller may in good faith meet is that offered to a customer of the seller by the seller's competitor.

It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's sales thereto. Respondent would equate its dealers' competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which reduce prices. Respondent's argument is essentially one of difficulties and problems claimed to have been brought about by the statute, which is not for the Commission to pass upon and more properly should be directed to Congress.

The second reason negating respondent's attempted reliance upon Section 2(b) is that the lower price at which respondent sold its gasoline to McLean was not made in good faith to enable McLean to *meet* his price competition. With regard to this, there is considerable evidence in the record concerning a contention by counsel supporting the complaint that the usual and customary price differential between so-called regular major gasoline and regular non-major gasoline is two cents a gallon. There is also

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[7] *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951).

considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suffice it to say that there is not sufficient reliable, probative and substantial evidence in the record to establish what, if any specific amount, is the usual and customary differential between major and nonmajor regular brands of gasoline. However, the record does establish that the usual differential between McLean's station and the Super Test station across the street was two cents a gallon. McLean unequivocably testified that such a differential did not harm him competitively, but that when the differential was greater it caused him substantial injury. The record establishes that respondent gave McLean a 1.7-cent price allowance in order to enable him to post a price of 25.9, or one cent above the price to which Super Test had cut its gasoline. In the light of McLean's undisputed testimony, it is apparent that this was more than a good faith meeting of competition, even assuming *arguendo* such defense to be applicable, but was in effect a beating of competition which, of course, is not permitted by Section 2(b) of the Clayton Act. The proviso is after all a proviso and can only justify price discriminations when made in good faith to *meet* competition, and as such obviously cannot justify price discriminations in excess of those necessary to meet competition.[8]

The third reason the 2(b) defense is not applicable here is that the lower price at which respondent sold its gasoline to McLean was not made in *good faith* to enable McLean to meet his price competition. As is found hereinafter in Section III–B, in connection with the granting by respondent of the discount to McLean, respondent and McLean entered into an agreement fixing the retail price at which McLean would resell the gasoline. Section 2(b) provides a defense to a seller if his lower price is made in "good faith" to meet an equally low price of a competitor. Numerous decisions have emphasized the fact that such a lower price must have been made in good faith and have even held in this regard that the price met must be a lawful one. It is apparent that a lower price granted as consideration for an illegal agreement to fix prices could under no circumstances be considered as one made in good faith.

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[8] *Porto Rican Tobacco Co.* v. *American Tobacco Co.*, 30 F.2d 234 (C.A. 2, 1929); *Moss, Inc.* v. *FTC*, 148 F.2d 378 (C.A., 2, 1945); *Anheuser-Busch, Inc.*, 54 F.T.C. 277, Docket No. 6331 (1957); Cf. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and it is found, that respondent by engaging in the above-found acts and practices has discriminated in price between different purchasers of commodities of like grade and quality, and that the effect thereof has been, is, and may be substantially to lessen competition and to injure, destroy, and prevent competition with other retailers of respondent's gasoline, in violation of Section 2(a) of the Clayton Act. It is further concluded and found that such price discrimination was not made in good faith to meet an equally low price of a competitor.

B. *The Price-Fixing Agreement*

As previously noted, Count II of the complaint alleged that respondent and McLean entered into a combination, understanding and agreement through which they fixed and maintained the retail price at which McLean sold his gasoline. It is undisputed in the record that McLean was an independent contractor with sole and exclusive authority to fix the retail price at which he sold his gasoline. The same incident on December 27, 1955, when respondent granted a discount to McLean, is also alleged as the price-fixing arrangement between respondent and McLean. As previously found, from August to December of 1955, McLean complained several times to respondent about the price cutting by the Super Test station across the street. Until December 27, each time McLean complained to respondents agents, he was advised that there was nothing they could do about it. Respondent employs salesmen who, among other things, call upon the filling station operators in their territory. Prior to December 27, McLean had been contacted by salesman Elbey and Harper and also by Edward Beardsley, respondent's district manager.

The testimony of respondent's witnesses reveals that respondent had the situation at 19th and Pearl Streets under careful consideration for some time. McLean had made it clear that unless something was done to meet the Super Test competiton he would be forced out of business. Beardsley advised Maximilian Dietshe, respondent's regional manager, of the situation, and Dietshe in return advised Willard Wright, respondent's vice president at its home office in Philadelphia. After consideration of the situation and examination of the facts, they were all in agreement that something would have to be done to help McLean.

McLean testified that on December 27 Harper contacted him and advised him that if Super Test dropped its price again respondent would try to do something. Later the same day after Super Test dropped its price, Harper returned and advised McLean that he would be given a price adjustment of 1.7 cents if he would absorb 1.3 cents himself and drop his retail price to 25.9. As previously found, McLean had been selling his gasoline at 28.9. His gross margin of profit or difference between wholesale and retail price had been 4.8 cents per gallon. As a result of dropping his price to 25.9 and absorbing 1.3 of this reduction, his gross margin of profit was reduced to 3.5 cents per gallon.

The key issue is, of course, just what arrangement or understanding was reached between respondent and McLean on December 27. Respondent contends, and its officials so testified, that there was no agreement with McLean concerning his retail price and that he voluntarily and unilaterally elected to post a price of 25.9 cents and take a cut in profit of 1.3 cents. McLean, too, testified that there was no "agreement" between him and respondent to fix his retail price, but his testimony concerning what was actually said and done on December 27 reveals quite clearly that there was an agreement entered into between respondent and McLean fixing the price at which he would sell his gasoline in consideration of being granted a price allowance or discount by respondent.

McLean testified that he was required to take a 1.3-cent cut in profits in order to get the adjustment. Again, after testifying that there was no "agreement" to fix his retail price at 25.9 cents per gallon, McLean testified as follows:

Q. So that was a reduction of three cents a gallon?

A. Yes, sir.

Q. Did Mr. Harper or any representative of the Sun Oil Company say to you that they would attempt to keep this differential of three cents?

A. No, sir, not that I remember.

Q. But on that particular time, did he say that to you?

A. It was *made* that I wanted and *they stated* that I drop my gas to that price according to Super Test across the street, but as far as dropping it any lower or raising it—[Italics added.]

It is clear from the testimony of McLean that he was required by respondent to take a cut in profits of 1.3 cents per gallon, i.e., to post a price of 25.9 cents per gallon, in order to secure the price discount of 1.7 cents per gallon from respondent. Harper,

respondent's agent who made this arrangement with McLean, was not called as a witness, and accordingly McLean's testimony stands undisputed.

In addition to McLean's direct testimony concerning the arrangement, the factual circumstances surrounding it also lead inevitably to the conclusion that McLean did not voluntarily and unilaterally post the price of 25.9 cents, but did so as the result of an agreement with respondent in order to obtain the price assistance. It has previously been found as McLean himself testified, that he was not hurt competitively as long as the price difference between his station and the Super Test station did not exceed two cents a gallon. In addition to his testimony to that effect, undisputed statistical facts in the record clearly reveal that McLean was not hurt competitively when the difference between his price and Super Test's was two cents per gallon. This is dramatically illustrated by what happened after December 27.

When McLean cut his price to 25.9 cents on December 27, Super Test was selling its gasoline at 24.9. On January 3, 1956, approximately one week later, Super Test dropped its price to 23.9 and thereafter for substantially the entire month of January a two-cent differential existed between McLean's and Super Test's prices. Nevertheless, although the record reveals that Super Test's gallonage at 19th and Pearl had been averaging between 10,000 and 11,000 gallons per month up to December and was approximately 19,000 gallons in December, during which month Super Test cut its price several times, in January 1956, Super Test's gallonage jumped to 61,000-plus gallons and McLean's gallonage jumped approximately four or five times in excess of the preceding months. These facts make it abundantly clear that it was not necessary for McLean to reduce his price to within one cent of Super Test in order to be competitive, inasmuch as after a price reduction his gallonage increased tremendously during a month when for all but two days the difference in price between McLean and Super Test was two cents per gallon. If McLean had not been required to reduce his price to 25.9 in order to receive the 1.7-cent allowance from respondent, he could have reduced his price to 26.9, within two cents of Super Test's price, not have been hurt competitively, and yet retained a margin of four and one-half cents per gallon, thereby reducing his gross

profit only .3 cents per gallon. If he had done this, it is clear from the record that his competitive situation would not have been injured and he would have maintained a much more adequate margin of profit.

McLean told Crabtree and McClung when they contacted him concerning his lower prices that he was very dissatisfied with the arrangement because while he was selling a lot of gasoline he was doing a lot of work and not making much profit. This is corroborated by the fact that although McLean substantially increased his gallonage in January and February, on or about February 18 he gave up and went out of business. It is apparent that if McLean had retained unilateral control of his retail price, he could have reduced his price to within two cents of Super Test, retained substantially all of his margin of profit, and substantially increased his gallonage because that is exactly what happened during January with a reduced price and a two-cent differential between the stations.

It is well settled, and requires no extended discussion, that price fixing, no matter in what manner, shape, or form, and regardless of the motivation, is illegal *per se*.[9] The following comments of the Supreme Court in the *Socony-Vacuum* case [10] seem appropriate here:

* * * But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

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Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price fixing was used. * * * Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because

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[9] *Ethel Gas Corporation* v. *U.S.*, 309 U.S. 436 (1940); *U.S.* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951); and *Virginia Excelsior Mills, Inc.*, 54 F.T.C. 455, Docket No. 6630, October 25, 1957.

[10] Footnote 9, *supra*.

they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial.

While it has been found above that there is direct evidence of the price-fixing agreement, it is settled law that such an agreement also may be proven by circumstantial evidence,[11] as also found above. It further has been held by the Supreme Court that business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.[12]

In addition to denying that it had engaged in price fixing, respondent contends that even if it had it was not in violation of the Act because of the amendment of Section 5 by the McGuire Act authorizing pursuant to State laws fair trade agreements prescribing minimum or stipulated prices for the resale of branded products. The short answer to this contention is that the Florida Fair Trade Act was held unconstitutional as to nonsigners by the Supreme Court of Florida.[13] This decision, as well as numerous others, makes it clear that the McGuire Act amendment refers only to written agreements or contracts for fair trade prices, and, of course, there was no written agreement here. In addition, the Supreme Court in the *McKesson-Robbins* case [14] held that a corporation which both manufacturers and wholesales a product cannot, under the Miller-Tydings or the McGuire Acts, enter into fair trade agreements with wholesalers because in effect such agreements would be between competitors and hence in violation of Section 5(a)(5) of the Act. Respondent itself operates certain filling stations known as company stations, and accordingly if there were any fair trade agreement, it would be in violation of Section 5(a)(5) of the Act and no defense to a price-fixing agreement.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent and McLean entered into, maintained and carried out a planned common course of action, agreement, combination, or understanding to fix and maintain

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[11] *United States Maltsters Assn.* v. *FTC*, 152 F.2d 162 (C.A. 7, 1945); *Milk & Ice Cream Can Institute* v. *FTC*, 152 F.2d 478 (C.A. 7, 1946); *Fort Howard Paper Co.* v. *FTC*, 156 F.2d 899 (C.A. 7, 1946); *Allied Paper Mills* v. *FTC*, 168 F.2d 600 (C.A. 7, 1948); *Triangle Conduit & Cable Co.* v. *FTC*, 168 F.2d 175 (C.A. 7, 1948), aff'd, 336 U.S. 956; and *National Lead Co.* v. *FTC*, 227 F.2d 825 (C.A. 7, 1955).

[12] *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); and *Theatre Enterprises, Inc.* v. *Paramount*, 346 U.S. 537 (1954).

[13] *Miles Laboratories, Inc.* v. *Eckerd*, 73 So. 2d 680 (Fla. Sup Ct. 1954).

[14] *U.S.* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1955).

the retail price at which McLean was to sell gasoline, all to the prejudice and injury of the public, respondent's competitors, and McLean's competitors, which constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and the Clayton Act.

2. The effect of the acts and practices of respondent hereinabove found in Section III–A may be and has been to substantially lessen competition, and to injure, destroy, and prevent competition with the recipient of respondent's discrimination, such acts and practices constituting a violation of Section 2(a) of the Clayton Act.

3. The acts and practices of respondent hereinabove found in Section III–B are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

4. As a result thereof, substantial injury has been done to competition in commerce.

5. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondent.

ORDER

It is ordered, That respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its products in commerce, as "commerce" is defined in the Act and the Clayton Act, do forthwith cease and desist from:

A. Discriminating in price by selling such products of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's products;

B. Entering into, continuing, cooperating in, or carrying out,

or attempting so to do, any planned common course of action, understanding, agreement, combination, or conspiracy with any person or persons not parties hereto, to attempt to, or to establish, fix, adopt, maintain, or adhere to, by any means or method, prices at which said product is to be resold;

C. Granting any discounts, rebates, price reductions or other form of consideration for the purpose, or with the effect, of fixing or maintaining the prices at which said product is to be resold.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Act as amended by the McGuire Act (Public Law 542, chapter 745, 82d Cong., 2d Sess., approved July 14, 1952).

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

In Count I, complaint charges respondent with a violation of Section 2(a) of the amended Clayton Act in the sale of gasoline to one customer at prices substantially lower than prices charged competing customers, with resulting injury. In Count II, respondent is charged with a violation of Section 5 of the Federal Trade Commission Act by conspiring with such favored customer to fix and maintain the retail price at which such customer sold gasoline at his filling station. The hearing examiner found against respondent on both counts and entered his order accordingly. Respondent has appealed.

Count I

Respondent is engaged, among other things, in the sale and delivery by tank wagon of gasoline to independent filling station operators. The alleged favored customer and co-conspirator, Gilbert B. McLean, during 1955 and part of 1956, operated a filling station under contract with respondent at the intersection of 19th and Pearl Streets, Jacksonville, Florida. In June, 1955, the Super-Test Oil Company, selling a nonmajor or private brand of gasoline (as distinguished from the gasoline sold by McLean under the brand of a major supplier), opened a new service station across the street from that operated by McLean. From its opening until December, 1955, the price usually posted by Super-Test for

its regular gasoline was 26.9¢ per gallon, although on occasion, its price was lower and even as low as 21.9¢ per gallon.

The competition of this new station in selling its gasoline at substantially reduced prices caused injury to McLean who was selling at 28.9¢ per gallon, and he appealed to respondent for help. On December 27, 1955, Super-Test dropped its price to 24.9¢ per gallon. Respondent then agreed to give McLean a discount of 1.7¢ per gallon on tank wagon price and McLean dropped his price to 25.9¢. Respondent did not give a similar allowance to any other retail dealer in the Jacksonville area. This difference in price continued until February 16, 1956, when a major price war involving various other companies broke out in Jacksonville and all dealers of respondent were given a price which was the same for all.

Respondent first challenges the sufficiency of the evidence to support the findings of the hearing examiner as to Count I in the following particulars:

1. That the respondent discriminated in price between customers who were competitors within the meaning of the statute.

2. That the difference in price was of such a character as to create a probability of substantially lessening competition.

Considerable evidence was introduced on these propositions. It is reviewed at some length in the initial decision and will not be repeated here. Generally, it consists of:

1. Figures showing increase or decrease in the gallonage of certain affected stations.

2. Evidence as to the loss of specific customers.

3. Geographic details as to location of stations and streets and highways and other facts which might influence buying habits of customers.

On the subject of gallonage, the hearing examiner found that McLean's sales of gasoline were as follows:

	Gallons per month
August, September, and October 1955	6,500
November 1955	5,900
December 1955	8,300
January 1956	32,100

Daily sales until February 1956, when McLean quit business, averaged approximately the same as January.

The sales of Calvin Peery, who sold respondent's gasoline at

28.9¢, and whose sattion was less than a mile from McLean's, were as follows:

	Gallons per month
Decmber 1955	10,900
(which was approximately his monthly average for the last six months of 1955)	
January 1956	9,300

Jesse McClung, also selling respondent's gasoline at 28.9¢ and whose station was about a mile distant from McLean's, also, according to the hearing examiner, sold a substantially lesser amount of gasoline on an average basis for the first two weeks of January 1956, than he did in the previous month.

William Crabtree's Sun Station, about 2½ miles from McLean's, sold about 17,000 to 18,000 gallons per month during the last four months of 1955 and 14,500 in January, 1956.

Clair Winning, operating a Sun station about 3½ miles from McLean's, did not lose gallonage in January. After February 16, 1956, when he received the general price reduction previously referred to, his gallonage increased from 410 gallons on one day to 903.

As against these figures, respondent introduced figures from the Florida Tax reports indicating a decrease in total gasoline sales in Duval County (roughly the same as Jacksonville) from December 1955, to January 1956, of 6.8%. Respondent's appeal also calls attention to other evidence. For example, McClung's faulty records (for which the hearing examiner made due allowance in evaluating his testimony); the fact that Peery did not keep his station open on Sundays in January 1956 (a fact also true of December, 1955); Crabtree's working at the post office (although his station was operating as usual).

These circumstances have all been considered but we believe they do not explain the changes in gallonage figures as previously pointed out.

Secondly, all the station operators above named were called as witnesses and gave instances of loss of specific customers. For example, Crabtree saw some of his former customers buying gas at McLean's station and heard from them that it was because of the cheaper price. Winning identified four customers by name and address who abandoned him because of the cheaper price at McLean's. Furthermore, some of these station operators testified that they complained to respondent that they were losing business

because of this discriminatory pricing and asked for a reduction in price similar to that given McLean.

The situation disclosed by the record is similar to that considered by the Commission and the courts on several occasions. See, for example, *Federal Trade Commission* v. *Morton Salt Company* (1948) 334 U.S. 37; *In the Matter of Sorensen Manufacturing Company* (1956), Docket No. 6052.

Here, we have a number of small independent retailers selling an identical product at the same price and under substantially the same conditions. All were operating at a small margin of profit and in an area which was a reservoir of potential customers who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered. When such a situation is shown to exist, together with proof that one competitor received a discount from a common supplier, an inference of injury to the others may reasonably be drawn from that fact. Even where other evidence showing injury is presented, this inference may be considered in addition to other proof. The question involved has to do with the inference which may properly be drawn from admitted or proven facts and not with the burden of proof. Although *Samuel H. Moss, Inc.* v. *Federal Trade Commission* (1945), 148 F. 2d 378, is often cited to the contrary, the weight of authority is to the effect that counsel supporting the complaint has the burden of proof to establish the necessary injury. See *In the Matter of General Foods Corporation* (1954), 50 Federal Trade Commission Decisions 885.

In spite of certain statements made in the initial decision, the hearing examiner stated: "As found above with respect to Peery and McClung and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination."

We agree with this finding.

The respondent next argues that the hearing examiner erred in failing to find that the respondent had established in fact and as a matter of law the defense of good faith meeting of competition within the proviso of Section 2(b) of the amended Clayton Act, which provides:

> *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was

made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition.

As pointed out by the hearing examiner, this argument goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer. This construction of the proviso was upheld in *Enterprise Industries, Inc.* v. *The Texas Company* (1955), 136 F. Supp. 420 (reversed on another ground).

Count II

Prior to December 27, 1955, when Super-Test cut its price, McLean did not make any reduction. However, on several occasions, he talked to representatives of respondent and was advised they could do nothing about it. It does appear, however, that its officials were giving consideration to the matter. On December 27, 1955, Super-Test dropped its price to 24.9¢. On that same day, Harry Harper, a salesman for respondent, called at the McLean station and advised McLean that he would get a reduction of 1.7¢ per gallon.

Direct evidence as to what was said on this occasion is found in the testimony of McLean. There is some conflict in this testimony. The hearing examiner concluded that Harper advised McLean "that he would be given a price adjustment of 1.7¢ per gallon if he would absorb 1.3¢ himself and drop his retail price to 25.9¢."

The hearing examiner had the opportunity to observe the witnesses as they testified. His conclusions as to the weight to be given their various statements should be given proper consideration by the Commission. *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U.S. 474; *Folds* v. *Federal Trade Commission* (1951) 187 F. 2d 658.

There are other facts in the record that support the hearing examiner's conclusion. For example, it appears that in order to compete with Super-Test, McLean needed only a 2¢ margin which, of course, would have given him a larger margin of profit.

Crabtree and McClung both testified that McLean indicated dissatisfaction with the arrangement with respondent and that McLean told them that he was selling a lot of gas, doing a lot of work, but not making much profit. On or about February 18, 1956, McLean went out of business.

These facts lend support to the view that in posting his price, McLean was complying with an agreement, rather than acting as a free agent.

Secondly, Harry Harper was not called as a witness nor was any reason given for failure to do so. That this is a circumstance to be considered is well settled. *Runkle* v. *Burnham* (1894) 153 U.S. 216; *Local 167 International Brotherhood of Teamsters* v. *United States* (1934) 291 U.S. 293.

Robert H. Gravette, Jr., an examiner for the Federal Trade Commission, testified as to a conversation he had with McLean in which the latter told of a telephone conversation on December 27, 1955, with someone representing respondent, who said: "If you lower the price of gasoline in your station by 3¢, we will give you a promotional allowance of 1.7¢ per gallon"; that McLean reported he agreed and reduced his price accordingly.

It is not disputed that respondent knew of McLean's competitive problem and did give him a 1.7¢ reduction and that McLean thereafter reduced his price. The question to be determined is whether that reduction (either expressly or by implication) was conditioned on the posting of a certain price by McLean.

It is well known that conspiracies are often not capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances. *Bausch Machine Tool Company* v. *Aluminum Company* (1934) 72 F. 2d 236, 15 C.J.S. 1043, et seq.

The situation here is somewhat similar to that in *Eastern States Lumber Association* v. *United States* (1914) 234 U.S. 600, involving a conspiracy to violate the Sherman Act. There it was shown that members of a retail lumber dealers association collected information about wholesalers who also sold direct to consumers—a practice in disfavor with retail dealers. The names of such wholesalers were made available to all members of the association. There was no direct proof of any agreement among retailers to refrain from dealing with these wholesalers. The court held that, nevertheless, such agreement would be inferred. Here, there is direct testimony as to the agreement. The conclu-

sion that it amounted to a price fixing agreement is substantially supported by the circumstances as shown in the record.

Respondent also contends that even if an agreement were made as to price, it was, nevertheless, legal under the McGuire Act which permits agreements between a seller and a buyer prescribing minimum or stipulated resale prices under certain conditions, when such agreements are lawful under any statute, law or policy in effect in the jurisdiction in which such resale is to be made.

In *Liquor Store* v. *Continental Distilling Corporation* (Fla. 1949), 40 So. 2d 37, the Supreme Court of Florida declined to enforce the resale agreement on the ground that it was arbitrary and unreasonable and contrary to the public policy announced by the Florida Constitution and statutes. In *Miles Laboratories, Inc.* v. *Eckerd* (1954), 73 So. 2d 680, after the adoption of the McGuire Act, the Court arrived at the same conclusion. Although both of these cases had to do with "nonsigners," the decisions were not put on that ground. (For comment on these decisions, see note in 19 ALR 2d 1139, and *Shakespeare Company* v. *Lippman's Tool Shop Sporting Goods Company* (Mich. 1952), 54 N.W. 2d 268.) In *Sunbeam Corporation* v. *Masters of Miami* (1955), 225 F. 2d 191, the Federal Circuit Court of Appeals for the Fifth Circuit, in commenting on the "strong and consistent declarations of the Florida Supreme Court to the effect that the public policy of Florida is opposed to price maintenance" had this to say:

> We think it may well be that Fair Trade contracts are unenforceable in Florida even between the parties; however, it would seem that this is unnecessary in our decision here and we do not decide that question.

That case also involved nonsigners.

The McGuire Act covers agreements "prescribing minimum or stipulated prices." In this respect, it differs from the Miller-Tydings Act which has to do only with minimum prices for resale. Each statute immunizes certain agreements from attack under the Sherman Act but only to the extent that such agreements are lawful in the jurisdiction where the resale is to take place.

The Florida Fair Trade statute provides that a contract relating to the sale or resale of a commodity may lawfully contain a provision "that the buyer will not resell such commodity at less than the minimum price stipulated by the seller." Thus, the authority granted in regard to resale contracts is more limited than that contained in the McGuire Act.

Prior to the adoption of the Florida Fair Trade statute, price fixing was illegal in Florida and the contract under consideration here would clearly have been contrary to law. Even though the statute be considered to be Constitutional and enforceable as to parties to the agreement, it affords exemption from the general laws against price fixing only to the extent provided in the Act, that is, as to the establishment of a minimum price for resale. It does not give a buyer and a seller a free hand to make what contract they wish as to agreed price and thus virtually repeal the general policy of Florida against price fixing.

The agreement between respondent and McLean was not for the purpose of establishing a minimum resale price. On the contrary, it was a contract under which the parties jointly agreed to share the loss of profits incident to selling gasoline at a lower price. It was obviously not made with the Florida Fair Trade Act in mind. Nor can it derive any protection from it. Consequently, the condition laid down in the McGuire Act which is necessary for immunity from Sherman Act attack has not been met and the Act is not available to respondent.

United States v. *Socony Mobile Oil Company* (1957), 157 F. Supp 202, cited by respondent, is not in conflict with the conclusion herein. In that case, the Court pointed out that under Massachusetts law, a wholesaler or distributor has an absolute right to designate the terms of resale and that a producer of a trademarked article, which is of a class in open competition, may fix the price at which the retailer may sell. Consequently, the condition necessary for the McGuire Act to become effective is found to exist. In Florida, the opposite is true.

The hearing examiner also found that respondent operates some "company" filling stations in competition with its retailers and that, under *United States* v. *McKesson and Robbins Company, Inc.* (1955) 351 U.S. 305, the agreement between respondent and McLean would not be within the protected area afforded by the McGuire Act.

We agree with the conclusion of the hearing examiner that the defenses based on the Florida Fair Trade Act or the McGuire Act have not been established.

Finally, respondent claims that "the examiner's cease and desist order is unwarrantedly broad and punitive."

Similar objections have been made many times and rejected by the courts. In *Maryland Baking Company* v. *Federal Trade Commission* (1957) 243 F. 2d 716; *Federal Trade Commission* v.

National Lead Company (1957) 352 U.S. 419; *Moog Industries, Inc.* v. *Federal Trade Commission* (1956), 238 F. 2d 43.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Respondent's appeal is denied, and it is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions and order contained in the initial decision:

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

IN THE MATTER OF

JOSEPH W. GRAHAM TRADING AS GRAYSTONE PORTRAIT AGENCY

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

Docket 7075. Complaint, Feb. 28, 1958—Decision, Jan. 5, 1959

Order requiring a seller of enlarged colored photographs and particularly frames therefor, with headquarters in Chattanooga, Tenn., to cease representing falsely, through his door-to-door salesmen or otherwise, that the finished enlargement was a hand-painted oil portrait done by an artist and as good as the samples exhibited; that frames ordered would be 24 carat gold or walnut, would be airtight, dust proof, and waterproof, with unbreakable glass; and requiring him to disclose that the finished enlargements would be convex and oddly shaped so that they required specially designed frames obtainable only from him.

Mr. Edward F. Downs and *Mr. Garland S. Ferguson,* for the Commission.

Mr. Bruce C. Bishop, of *Folts, Bishop & Thomas,* of Chattanooga, Tenn., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves charges that respondent has violated the Federal Trade Commission Act by soliciting, selling, and distributing commercially in interstate commerce tinted or colored enlargements of photographs and photographic frames. It is alleged in the complaint that respondent, by means of false, misleading, and deceptive statements and representations of his sales agents or representatives to members of the consuming public, has sold substantial quantities of such photographs and frames in the course and conduct of his business. Respondent in his answer and testimony admits the location and nature of his business, that such business is in interstate commerce and in direct and substantial competition with others in like business, but denies, in substance, that he has violated the Federal Trade Commission Act in any way. This initial decision finds generally that the allegations of the complaint are sustained upon the whole record by a preponderance of the reliable, probative and substantial evidence as required by §7(c) of the Administrative Procedure Act and the Commission's Rules of Practice for Ad-

judicative Proceedings adopted pursuant thereto and that respondent has violated the Federal Trade Commission Act in each of the several particulars alleged in the complaint. A cease and desist order is issued herein appropriate to the findings and conclusions hereinafter set forth.

This case was instituted by the filing of a complaint on February 28, 1958, and after regular service thereof had been had upon the respondent, he filed his answer on April 21, 1958. Thereafter hearings, wherein evidence was presented by Commission's counsel, were held in Chattanooga, Tenn., on June 3, 1958, and in New Orleans, La., on June 5 and 6, 1958, after which Commission's counsel rested. Respondent presented his evidence in Chattanooga on June 30, 1958, and both parties rested. On September 15, 1958, both parties submitted their respective proposed findings of fact, conclusions of law and orders, all of which have been carefully considered in the light of the whole record presented herein. Since the evidence supports the proposed findings of facts, conclusions and order submitted by counsel supporting the complaint, the hearing examiner has adopted them either in *haec verbae* or in substance and effect. Respondent's proposals, insofar as they are in agreement with those tendered by counsel supporting the complaint, have been adopted and all others have been rejected.

The record is fairly brief, consisting of 249 pages of transcript and some ten documentary exhibits, five being offered by each party. The testimony adduced consisted of the respondent and several of his agents and business associates and a number of so-called "consumer witnesses." The latter were residents of the vicinity of New Orleans who had dealt with respondent's agents with respect to the purchase of enlarged and colored photographs and frames therefor.

There is nothing novel in the present case. Respondent's methods of operating his business in commerce in the main follow a type of procedures which have been repeatedly held by the Commission during the past twenty years to be violative of the Federal Trade Commission Act. See *International Art Co., et al.* (1938), 27 F.T.C. 1387; affirmed *International Art Co.* v. *F.T.C.* (C.C.A. 7, 1940), 109 F. 2d 393, cert. den. (1940), 310 U.S. 632; *George H. Lewis, etc.* (1939), 28 F.T.C. 987; *Midwest Studios, Inc., et al.* (1939), 28 F.T.C. 1583; *Success Portrait Co., et al.* (1942), 35 F.T.C. 227; *Leroy Miller, etc.* (1951), 48 F.T.C. 80; *H. Harold Becko, etc.* (1951), 48 F.T.C. 412; *Clinton Studios,*

Inc., et al. (1952), 48 F.T.C. 1137; and *Chester Burr Renner* (1952), 49 F.T.C. 456. These photographic cases and others are collated in §5081.612 in Volume 2, *Trade Regulation Reporter* (C.C.H.). Special significance to these decisions is given not only by the refusal of the Supreme Court to review the *International Art* case but also by the fact that in *Success Portrait* it appears that that concern which is still doing business and is the supplier of respondent herein for his photographic materials and frames, together with its representatives, salesmen, and employees, was ordered by this Commission to cease and desist from some of the fundamental practices involved herein, either directly or through any corporate or other device.

The hearing examiner, after hearing and observing all of the witnesses and their conduct and demeanor while testifying, has given full, careful, and impartial consideration to such testimony and to all other evidence presented on the record and to the fair and reasonable inferences arising therefrom, as well as to any and all facts pleaded in the complaint and admitted by the answer. All statements, arguments, and proposals of counsel have been likewise fully considered. Upon the whole record thus evaluated and weighed, it is found that the material allegations of the complaint are each and all fully and fairly established. The hearing examiner therefore specifically finds as follows:

Joseph W. Graham is an individual trading and doing business under the name of Graystone Portrait Agency. His business mail and all related correspondence is handled at P.O. Box 8278, Chattanooga, Tenn. Respondent is now, and for some ten years last past, has been engaged in the sale and distribution of tinted or colored enlargements of photographs and of frames therefor. In the course and conduct of his business, respondent has caused, and now causes, said products, when sold, to be transported from the State of Tennessee to purchasers thereof located in various other States of the United States, namely, Louisiana, Michigan, Mississippi, Arkansas, West Virginia, Kentucky, Ohio, and Indiana.

Respondent has been in direct and substantial competition with other individuals and with firms and corporations engaged in the sale and distribution of photographs, tinted or colored enlargements of photographs, and photograph frames in commerce. Respondent not only admitted this in his answer but named three competing concerns.

In connection with the sale of respondent's said products, in

the first instance of contact, sales agents or representatives employed by respondent, who are called "subdealers" by respondent, visit the homes of prospective customers in cities, towns and rural communities of the aforesaid several states. Said sales agents and representatives, in soliciting orders, carry and exhibit attractive samples of work that are represented as typical of what is done by respondent. Said samples are attractively displayed and have been skillfully done, and many of them closely resemble paintings done by hand. These sales agents and representatives attempt to interest, and often do interest, prospective customers in placing orders for enlargement to be made from photographs or snapshots furnished by the prospective customers.

In cases where sales are made, other sales agents or representatives appear some weeks later with uncolored proofs of the enlargements which are, in fact, merely enlarged unfinished prints or proofs made by photography of the photographs or snapshots previously furnished by the customers to respondent's first sales agents or representatives. These second type of sales agents or representatives, who are called "proof-passer subdealers" by respondent, thereupon obtain instructions for the colors to be used in completing the enlargements and then endeavor to sell, and often succeed in selling, the customers expensive frames for the enlargements.

One of the chief defenses urged by respondent is that these several types of "subdealers" are independent contractors. This doctrine was elaborately presented and argued in *International Art Co., et al.* v. *F.T.C., supra,* at pages 395–6, but was held unavailing to respondents there. For like rulings as to other types of business where similar claims have been made, for example, see *G. Howard Hunt Pen Co.* v. *F.T.C.* (C.A. 3, 1952), 197 F. 2d 273, 281, and *Irwin* v. *F.T.C.* (C.C.A. 8, 1944), 143 F.2d 316, 325. In the case at bar, the order blanks which customers executed in duplicate refer only to respondent here and to no other person, firm, or corporation. The public in dealing with the picture and frame salesmen are dealing with respondent and no one else. In addition to that, a number of the "consumer witnesses" testified that those who sold them the enlarged pictures and frames claimed to be salesmen or representatives of respondent. Respondent bears all the expense of the materials the salesmen carry with them, including the rather expensive cases for pictures and frames carried by the respective salesmen.

In their initial contacts with the customers, respondent's said sales agents or representatives pursue the policy of making no mention of frames for the finished enlargements they are attempting to sell, nor do they disclose to the customers that the enlargements will be made in other than ordinary shape. Nothing is said by said sales agents or representatives to indicate that the profits obtained by respondent in connection with his business, herein described, are derived from the sale of frames, nor that the real and ultimate purpose of respondent's said sales agents and representatives was and is to sell frames to the said customers.

By failing to disclose to customers that the enlargements ordered by them will be finished in odd and unusual shapes and with a curved or convex surface, thus requiring odd-style frames, the respondent's sales agents and representatives imply that enlargements will be finished in the usual or customary shape and surfaced in the usual manner. Customers are therefore induced to place orders and make deposits who would not have done so had they been apprised of the fact that the enlargements would be finished in odd shapes with a curved surface and that said enlargements would therefore require odd shaped frames which are not generally available and which, in all probability would, of necessity, have to be purchased from respondent at a price fixed by respondent.

By and through oral statements and representations made by the sales agents and representatives, and by the exhibition of samples respondent represented, directly or by implication: (1) that the finished enlargement will be a hand-painted portrait; (2) that the finished enlargements will be hand painted in oils by a well qualified artist; (3) that the finished enlargement will be as good as the samples displayed; (4) that certain frames ordered will be 24 carat gold and that others will be made of walnut; (5) that the frames are airtight and dustproof; (6) that the frames are waterproof; and (7) that the glass in the frames is unbreakable.

The aforesaid representations were and are false, deceptive and misleading. In truth and in fact: (1) Respondent's enlargements are not portraits painted by hand but are photographic enlargements with the color applied by air brush using water colors; (2) the enlargements are not hand painted in oils or by an artist; (3) respondent's finished enlargements are often inferior to the samples exhibited by respondent's agents; (4)

the frames represented as being 24 carat gold were only covered, in whole or in part, by gold lacquer and the frames represented as being made from walnut are made from other, less expensive wood; (5) respondent's frames are not airtight nor are they dustproof; (6) respondent's frames are not waterproof; and (7) the glass in respondent's frames is breakable.

It would serve no useful purpose to detail the testimony of the several witnesses with respect to the statements made and the false character of them. The respondent and his witnesses somewhat freely admitted many of them and none of the original sales representatives' statements, as testified to by the consumer witnesses, were denied by any witness. It is true that respondent called Arthur Penn, who was a "proof-passer," that is, he made the second call carrying the frames. He did not pretend to remember the conversations but relied on the fact that he always made the same sales pitch to all customers and never made any of the representations they claimed were made to them at the time they purchased the frames or were approached with regard thereto. He admitted that his business was substantially all among the poorer and lowly class of people in the New Orleans neighborhood where he lived. The distinctions drawn by respondent's counsel as to the fact that persons would not be deceived into believing many of the statements that were made, which respondent does not admit, are not persuasive. The Federal Trade Commission Act with respect to deceptive practices is intended to protect the public generally, which includes the humble and poorly informed members of the community as well as those who have greater education and opportunities. Citation of authority along this line would be so extensive as to be burdensome, and the principle is now well grained into the law in this type of case. The hearing examiner observed the "consumer witnesses" called in this case. They were not people of much education nor of high intelligence but all bore the imprint of honesty, and in their simple, unaffected ways narrated their respective transactions with respondent's agents and representatives with fairness and candor, and there is no doubt but what the sales methods employed with them were false, misleading, and deceitful in the particulars charged in the complaint. Since these people were held forth as representative of the general type of "consumer witnesses" to whom respondent's appeals were made, it must be found that these practices were general and must be prohibited.

Respondent further urges that this proceeding is not one in the public interest but, in substance, is in the nature of a number of private litigations between dissatisfied customers and the respondent. The answer to this is obvious and requires no demonstration. The Commission is not interested and makes no attempt in this proceeding to collect damages or otherwise to rectify the state of affairs existing between respondent and any of its customers. Its proceedings and orders look only to the future, and the protection of the public, particularly the gullible and ignorant, from similar deceptive practices on the part of respondent's agents and representatives.

The use by respondent of the foregoing false, deceptive and misleading statements, representations and implications has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements, representations and implications are true and to induce the purchasing public to purchase substantial quantities of respondent's products, as a result of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondent from his competitors and substantial injury has been and is being done to competition in commerce.

There being jurisdiction of the person of the respondent, upon the findings of fact hereinbefore made, the hearing examiner makes the following conclusions of law:

1. The acts and practices of the respondent hereinabove found to be false, misleading, and deceptive are all to the prejudice and injury of the public and constitute unfair and deceptive acts or practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

2. The Federal Trade Commission has jurisdiction over all of the respondent's acts and practices which have been hereinabove found to be false, misleading, and deceptive.

3. The public interest in the proceeding is clear, specific, and substantial.

Upon the foregoing findings of fact and conclusions of law, the following order is hereby entered:

ORDER

It is ordered, That respondent Joseph W. Graham, individually and trading and doing business as Graystone Portrait Agency,

or trading under any other name, his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of tinted or colored enlargements of photographs, photograph frames, or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication:

1. That the finished enlargement is a handpainted portrait or is anything other than an enlarged photograph;

2. That the finished enlargement is handpainted in oils or is painted by an artist;

3. That the finished enlargement will be as good as the samples displayed in soliciting the sale, unless such is the fact;

4. That the frames sold by respondent are 24-carat gold, or that they are made of any material other than that which is actually used;

5. That the frames sold by respondent are airtight, dustproof or waterproof;

6. That the glass in the frames sold by respondent is unbreakable.

B. Failing to disclose to customers at the time the enlargements are ordered that the finished enlargements, when delivered, will be so shaped that they can be used only in specially designed odd-styled frames that cannot ordinarily be obtained in stores accessible to the purchasing public, and that it will be difficult, if not impossible, to obtain frames to properly fit the enlargements from any source other than respondent.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The respondent, Joseph W. Graham, an individual trading and doing business under the name of Graystone Portrait Agency, has been charged with violation of the Federal Trade Commission Act. Specifically, the complaint charged and the hearing examiner found that:

> By and through oral statements and representations made by the sales agents and representatives, and by the exhibition of samples respondent represented, directly or by implication: (1) that the finished enlargement will be a hand-painted portrait; (2) that the finished enlargements will be hand painted in oils by a well qualified artist; (3) that the finished enlargement will be as good as the samples displayed; (4) that certain frames ordered

will be 24 carat gold and that others will be made of walnut; (5) that the frames are air-tight and dust-proof; (6) that the frames are waterproof; and (7) that the glass in the frame is unbreakable.

The hearing examiner held that these representations were false, deceptive and misleading.

In addition the complaint charged and the hearing examiner found that the respondent, in selling enlargements of photographs made no mention of frames, even though his ultimate purpose was to sell frames. He also failed to disclose that the enlarged photographs were of unusual dimensions. In fact the record shows that the shape of the enlarged photograph was convex, of unusual dimensions, and that appropriate frames could not be purchased in the open market. Thus customers would of necessity have to purchase odd-style frames from the respondent at respondent's price, a fact of which the customers were unaware when they ordered the enlargements.

On appeal, by briefs only, the respondent contends that the order entered is not supported by reliable, probative and substantial evidence. He questioned the credibility of the witnesses supporting the complaint, and he argued that oral testimony was admitted to alter, vary and contradict the terms of a written contract.

It appears that the respondent questions the credibility of certain witnesses because their testimony was based on conversations between them and respondent's salesmen about three or four years ago. The weight to be given such testimony is a matter to be considered. However, no sound reason has been given why such testimony should be wholly disregarded. The hearing examiner has passed on the credibility of these witnesses. Indeed in some respects the testimony of the respondent himself supports the order entered.

Likewise it is apparent that this case is not concerned with the contracts entered into between these witnesses and the respondent. The complaint is concerned with the nature and veracity of the representations made by respondent's salesmen which induced members of the public to enter into the contracts for enlargements and, later, the separate contracts for frames.

Respondent further claims that he was denied "the right to bring in thousands of satisfied consumer witnesses who would deny the allegations of the complaint."

In *Independent Directory Corporation* v. *Federal Trade Commission,* 188 F. 2d 468, 471 (1951), the Court held:

> The fact that petitioners had satisfied customers was entirely irrelevant. They [petitioners] cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.

Also it has long been settled by a multitude of cases that the Commission need not prove actual deception of the injured public but need prove only that the statements in question have the tendency or capacity to deceive.

On appeal the respondent further claimed that he

> * * * was not notified prior to the hearing, nor did the proof show which one, or more than one, of his agents or representatives made the alleged statements and representations, and therefore respondent was denied any opportunity to defend himself by having such agent testify and deny the charge or to have his agent or representative face the consumer witness as such testimony was given.

The record does not indicate that the respondent ever requested additional time from the hearing examiner to prepare his defense or in any way indicate to the hearing examiner that he was being prejudiced.

Nor does it appear that this case is a series of private controversies and is not in the public interest as contended by the respondent. The nature of the representations made, the scope of the respondent's activities and the amounts involved all indicate that this proceeding is in the public interest and that action by the Commission is warranted.

It is apparent that the order issued by the hearing examiner is proper and is fully supported by reliable, probative and substantial evidence, and that it was issued in the public interest.

The respondent's appeal is denied, and an appropriate order will be entered.

FINAL ORDER

This matter having been heard on the respondent's appeal from the hearing examiner's initial decision, and the Commission having rendered its decision denying the appeal:

It is ordered, That the hearing examiner's initial decision filed September 17, 1958, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Joseph W. Graham, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in the aforesaid initial decision.

Complaint

IN THE MATTER OF

WILLIAM FREIHOFER BAKING CO., ET AL.

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

Docket 7072. Complaint, Feb. 27, 1958—Decision, Jan. 7, 1959

Consent order requiring a large corporate baker and its subsidiary in Philadelphia to cease granting certain customers preferential discounts of up to 10% from the regular wholesale prices charged their nonfavored competitors; and paying them advertising and promotional allowances of up to 5% of purchases without making like payments available to their competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 2(a) and 2(d) of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondent William Freihofer Baking Company is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20th Street and Indiana Avenue, Philadelphia, Pa.

Respondent Freihofer Baking Company is a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 20th Street and Indiana Avenue, Philadelphia, Pa.

Respondent Imperial Foods, Inc. is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20th Street and Indiana Avenue, Philadelphia, Pa.

Respondents Freihofer Baking Company and Imperial Foods, Inc. are both wholly owned subsidiaries of respondent William Freihofer Baking Company.

PAR. 2. Respondents are now, and for several years have

been engaged in the business of baking and selling bakery products, including bread, cakes and rolls. Respondents' combined total sales on a consolidated basis covering all subsidiaries were in excess of $18,800,000 in 1956.

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

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

Respondents maintain and operate baking plants in Philadelphia, Pa.; Allentown, Pa.; and Wilmington, Del. From these plants, respondents ship and sell bakery products in the States of Pennsylvania, Delaware, New Jersey, Maryland and Virginia.

PAR. 4. Respondents, in the course and conduct of their business in commerce, are now and for many years have been competitively engaged with other corporations and with individuals, partnerships and firms in the sale of bakery products.

PAR. 5. Respondents, in the course and conduct of their business, have been and are now discriminating in price between different purchasers of their bakery products of like grade and quality by selling to some purchasers at higher and less favorable prices than they sell to other purchasers competitively engaged with the nonfavored purchasers in the resale of the products.

For example, respondents have given some of their favored purchasers as high as ten percent discount from their regularly established wholesale prices paid by other competing purchasers not receiving the preferential discounts.

PAR. 6. The effect of respondents' discriminations in price, as alleged, may be substantially to lessen, injure, destroy or prevent competition or tend to create a monopoly in the lines of commerce in which respondents and their purchasers are engaged.

PAR. 7. The foregoing acts and practices of the respondents, as alleged, violate Section 2(a) of the Clayton Act, as amended, (U.S.C., Title 15, Sec. 13).

Count II

PAR. 8. Each of the allegations contained in paragraphs 1

through 4 of this complaint are now realleged and incorporated in this count as if they were set forth in full.

PAR. 9. Respondents in the course and conduct of their business, have been and are now paying advertising and promotional allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of their products.

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

PAR. 10. The acts and practices of respondents, as alleged, violate Section 2(d) of the Clayton Act, as amended, (U.S.C., Title 15, Sec. 13).

Mr. Francis C. Mayer, and *Mr. Franklin A. Snyder* for the Commission.

Mr. Fairfax Leary, Jr., and *Mr. Robert W. Sayre,* of *Saul, Ewing, Remick & Saul,* of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On February 27, 1958, the Federal Trade Commission issued its complaint in this proceeding alleging that William Freihofer Baking Co., a corporation, erroneously referred to in the caption of the complaint as William Freihofer Baking Company, a corporation, Freihofer Baking Company, a corporation, and Imperial Foods, Inc., a corporation, hereinafter called respondents, violated the provisions of Section 2(a) and 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), by discriminating in price between different purchasers of their bakery products of like grade and quality and granting promotional allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of their products.

On November 6, 1958, there was submitted to the undersigned hearing examiner an agreement executed by respondents William Freihofer Baking Co. and Imperial Foods, Inc., their counsel, and counsel supporting the complaint, providing for the entry of a consent order.

The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation.

The agreement recites that the respondent Freihofer Baking Company was a corporation organized under the laws of the State of Pennsylvania, and that, on May 18, 1958, said corporation was merged into and now continues in William Freihofer Baking Co.; that the president of William Freihofer Baking Co., in signing the agreement, is acting for the present corporation and the Freihofer Baking Company which has been merged therein; a certificate of merger having been duly issued by the Pennsylvania Department of State and by the express provisions of Section 907 of Article 9 of the Pennsylvania Business Corporation Law (Public Law 364, May 5, 1933), the separate existence of the Freihofer Baking Company having ceased. The term "respondents," as used in said agreement, includes the respondent Freihofer Baking Company as an integral part of the William Freihofer Baking Co.

The pertinent provisions of said agreement are as follows: The respondents admit all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondents waive further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondents waive any right to challenge or contest the validity of the order entered in accordance with the agreement, and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent William Freihofer Baking Co. is a corporation organized and doing business under the laws of the State of Delaware, with its office and principal place of business located at 20th Street and Indiana Avenue, Philadelphia, Pa.

2. Respondent Imperial Foods, Inc. is a corporation organized and doing business under the laws of the State of Delaware, with its office and principal place of business also located at 20th Street and Indiana Avenue, Philadelphia, Pa.

3. Respondent Freihofer Baking Company was a corporation organized and doing business under the laws of the State of Pennsylvania, and, on May 18, 1958, was merged into and now continues in respondent William Freihofer Baking Co. The separate existence of Freihofer Baking Company has ceased.

4. 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 William Freihofer Baking Co., a corporation, and Imperial Foods, Inc., a corporation, and their officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale of bread and bread products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of the respondents' products; and

2. Making or contracting to make, to or for the benefit of any customer, any payment or allowance of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondents, unless such payment or allowance is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing with the favored purchaser in the distribution or resale of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of January 1959, become the decision of the Commission; and, accordingly:

It is ordered, That respondents William Freihofer Baking Co.,[1] a corporation, and Imperial Foods, Inc., a corporation, their officers, representatives, agents, and employees, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

[1] Erroneously referred to in the caption of the complaint and other documents as William Freihofer Baking Company.

Decision

IN THE MATTER OF

THE DENVER DRY GOODS CO.

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

Docket 7271. Complaint, Oct. 1, 1958—Decision, Jan. 7, 1959

Consent order requiring a seller in Denver, Colo., to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements, and by advertising which represented falsely that it was liquidating a half million dollars' worth of fur inventory and that purchasers would "Save one-third and more."

Mr. John T. Walker for the Commission.
Dickerson, Morrissey & Dwyer, of Denver, Colo., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with certain violations of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act. An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondent specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the

agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent The Denver Dry Goods Co. is a corporation organized, existing and doing business under the laws of the State of Colorado, with its office and principal place of business located at Sixteenth and California Streets, Denver, Colo.

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 The Denver Dry Goods Co., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. Failing to affix labels to fur products showing:

(1) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(2) That the fur product contains or is composed of used fur, when such is the fact;

(3) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(4) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) The name, or other identification, issued and registered by the Commisssion, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce;

(6) The name of the country of origin of any imported furs contained in a fur product;

(7) The item number or mark assigned to a fur product.

B. Setting forth on labels affixed to fur products:

(1) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder mingled with nonrequired information;

(2) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing:

(1) The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(2) That the fur product contains or is composed of used fur, when such is the fact;

(3) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(4) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) The name and address of the person issuing such invoice;

(6) The name of the country of origin of any imported furs contained in a fur product.

3. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale, or offering for sale of fur products, and which:

A. Represents, directly or by implication, through percentage savings claims that the regular or usual retail prices charged by respondent for fur products in the recent regular course of business were reduced in direct proportion to the amount of savings stated, when contrary to fact.

B. Represents, directly or by implication, that respondent's inventory of fur products advertised and offered for sale is in excess of the actual inventory of fur products advertised and offered for sale.

C. Represents, directly or by implication, that any such products are the stock of a business in a state of liquidation, when contrary to fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of January 1959, become the decision of the Commission; and, accordingly:

It is ordered, That the 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 the order to cease and desist.

Order

IN THE MATTER OF

PRUDENCE LIFE INSURANCE COMPANY

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

Docket 6249. Complaint, Oct. 14, 1954—Order, Jan. 8, 1959

Dismissal, for lack of jurisdiction following decision of the Supreme Court of the United States in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958), of complaint charging a Chicago insurance company with falsely advertising the benefits provided by its health and accident policies.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. Robert R. Sills and *Mr. Frederick McManus* for the Commission.

Mr. Zachary D. Ford, Jr. and *Mr. George F. Barrett*, of Chicago, Ill., for respondent.

FINAL ORDER

This matter having come on to be heard upon the appeals of counsel supporting the complaint and of counsel for respondent from the hearing examiner's initial decision filed prior to the *per curiam* opinion of the United States Supreme Court in the combined cases of *Federal Trade Commission* v. *National Casualty Company* and *Federal Trade Commission* v. *The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958) ; and

The Commission having considered said appeals and the record and having concluded that this proceeding should be dismissed on jurisdictional grounds upon the authority of said ruling of the Supreme Court:

It is ordered, That the initial decision herein, filed February 18, 1957, be, and it hereby is, vacated and set aside.

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