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

FIELD MUSIC SALES, INC., ET AL.

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

Docket 7831. Complaint, Mar. 18, 1960—Decision, June 28, 1960

Consent order requiring San Francisco, Calif., distributors for several record manufacturers to retail outlets and jukebox operators, to cease paying concealed "payola" to television and radio disc jockeys to have their records broadcast day after day in order to increase sales.

Mr. John T. Walker and *Mr. James H. Kelley* for the Commission.
Mr. Raymond H. Levy, of San Francisco, Calif., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the offering for sale, sale and distribution of phonograph records as independent distributors for several record manufacturers to retail outlets and jukebox operators in various states of the United States, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record manufacturers, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

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, the Associate Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondent Field Music Sales, Inc., is a corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business located at 1480 Howard Street, San Francisco, California, and that respondent Richard Field is President of said corporate respondent and formulates, directs and controls the acts and practices of the corporate respondent, his address being the same as that of the corporate respondent.

The agreement provides, among other things, that 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 may 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 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 respondent Field Music Sales, Inc., a corporation, and its officers, and respondent Richard Field, 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 phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any

person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

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 28th day of June, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Field Music Sales, Inc., a corporation, and Richard Field, individually and as an officer 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

THE ROBERTS CO. ET AL.

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

Docket 6943. Complaint, Nov. 18, 1957—Decision, June 30, 1960

Order requiring two manufacturers of tackless carpet grippers, tools, and accessories, and their marketing associate, to cease engaging in a price-fixing conspiracy with their distributors effectuated by establishing geographical zones of distribution, requiring distributors to submit copies of resale invoices, and threatening discontinuance of distributorships; and to cease coercing other manufacturers of such products to sell at their fixed prices and to refrain from selling to disapproved purchasers, threatening to bring patent infringement suits against competitors, and extending terms of license agreements beyond expiration of patents; and

Requiring said companies and two others licensed to manufacture their products to cease conspiring to lessen competition by price fixing and intimidation and coercion of unlicensed competitors.

Mr. Lewis F. Depro supporting the complaint.

Gibson, Dunn & Crutcher, Mr. Julian O. Von Kalinowski; Mr. John J. Hanson and *Mr. William G. Tucker*, all of Los Angeles, Calif., for The Roberts Co., Roberts Manufacturing Co. and Roberts Corporation.

Mr. Edward T. Connors, of New York City, for Ace Tackless Corporation and United States Tackless, Inc.

No appearance for respondent Wenlyn Associates, Inc.

Initial Decision by Joseph Callaway, Hearing Examiner

This proceeding was based upon complaint issued November 18, 1957, answers therto by all respondents except Wenlyn Associates, Inc., which respondent was adjudged a bankrupt on November 15, 1957, evidence taken at a number of hearings and proposed findings, conclusions and orders submitted by all parties except said Wenlyn Associates, Inc. All proposed findings, conclusions and orders not hereinafter adopted are hereby specifically rejected.

Upon the entire record and his observation of the witnesses while testifying, the hearing examiner makes the following findings of fact, conclusions and order:

FINDINGS AS TO THE FACTS AND CONCLUSIONS

1. Respondents The Roberts Co. and Roberts Manufacturing Co. are corporations organized, existing and doing business under and by virtue of the laws of the State of California with the principal office and place of business of each said respondent being located at 600 North Baldwin Park Boulevard, City of Industry, California.

2. Respondent Roberts Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal office and place of business located in Rio Piedras, Puerto Rico.

3. The history of these concerns is as follows:

The original Roberts Co. was incorporated in California in 1946 to carry on the business of the manufacture and sale of tackless carpet gripper, tools and accessories, formerly conducted as a partnership by Roy Roberts, Hugh S. Livie and Kenneth M. Bishop. In 1953 The Roberts Co. name was changed to Roberts Manufacturing Co., one of the respondents herein, which took over the manufacturing operations. A new company was organized under the laws of California as The Roberts Co. another respondent which confined its operations to sales, taking the out put of Roberts Manufacturing Co. and also of another respondent the Roberts Corporation. This last mentioned respondent was organized in 1953 also, under the laws of Puerto Rico, with its principal place of business located in Rio Piedras, Puerto Rico to manufacture tackless carpet gripper. Both the Roberts Manufacturing Co. and Roberts Corporation are obligated to market their entire out put through the Roberts Co. It is evident that Roberts Corporation was established in Puerto Rico so that the Roberts Companies could compete on the eastern seaboard without the handicap of paying freight from the West Coast.

4. The respondents, The Roberts Co., Roberts Manufacturing Co. and Roberts Corporation are under the control of a common ownership. The three individuals Hugh S. Livie, Charles E. Hopping and Kenneth M. Bishop each own 16,667 shares out of 50,001 shares issued and outstanding of the Roberts Corporation. These three individuals each own 250 shares out of a total of 750 shares outstanding or 100% of the stock of the Roberts Manufacturing Co. These three individuals between them own 62% of the outstanding stock of the Roberts Co. The other shares are owned by 15 individuals. Hugh S. Livie has been president of Roberts Manufacturing Co. since 1953. Charles E. Hopping has been president of The Roberts Co. and Kenneth M. Bishop has been president of Roberts Corporation since 1953.

5. Respondent Ace Tackless Corporation 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 1825 Pacific Street, Brooklyn, New York.

6. Respondent United States Tackless, 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 181 Walnut Avenue, Bronx, New York.

7. Respondent Wenlyn Associates, Inc., was a corporation organized under the laws of the State of Connecticut with its principal office and place of business having been located at 32 Grove Street, New Canaan, Connecticut. Said respondent's name was changed to Wenlyn Industries, Inc., and it was engaged in the business of

the manufacture, sale and distribution of tackless carpet gripper throughout the United States until the year 1957 when said respondent was adjudged a bankrupt. Although not stated, it is fairly inferable from the record that its assets were sold and its business wound up.

8. These companies will be referred to hereafter as follows: The three Roberts Companies as Roberts Respondents; Roberts Manufacturing Co. as Robman; Roberts Corporation as Robcorp; The Roberts Co. as Robco; Ace Tackless Corporation as Ace; United States Tackless, Inc., as UST and Wenlyn Associates, Inc., as Wenlyn.

9. Physical exhibits of the product called tackless carpet gripper and another product involved in this proceeding called "Gripperege" are in evidence as Com. Ex. 302, 303 and 304. In addition to that Com. Ex. 305 and 306 contain pictures of these two products and show how they are used in the installation of wall-to-wall carpeting. Robman had a patent on its tackless carpet gripper which expired in April 1958; also a patent on Gripperege which has not expired. In addition to that Gripperege is a name protected by trade mark. Smoothedge is the trade mark name under which the tackless carpet gripper of the Roberts Respondents is marketed.

10. Tackless carpet gripper consists of two kinds, standard and pre-nailed with the latter being the most expensive. Each kind consists of four types, A, B, C and D. With Type A being a short-pinned thinner plywood; Type B, short-pinned thicker plywood; Type C, long-pinned and thinner plywood and Type D, long-pinned and thicker plywood.

11. All of the respondents follow the above product classification in marketing their products, which classification was first set up by the original Roberts Co.

12. A "distributor" is defined as a firm or corporation identified with the carpet trade, mantaining warehouse facilities, operating its own selling organization, purchasing solely for resale to the trade and listed as a distributor (or wholesaler) in Dun & Bradstreet or other nationally accredited directory.

13. A "dealer" is defined as one who is a merchant or floor covering contractor regularly engaged in the sale and/or installation of floor covering products.

14. All of the respondents have been and all except respondent Wenlyn are now engaged in interstate commerce within the meaning of the Federal Trade Commission Act in that they ship or cause to be shipped products manufactured or handled by them, including tackless carpet gripper, tools and accessories used in the installa-

tion of wall-to-wall carpeting, from the several places of production in the States of California, New York and Connecticut and in the Commonwealth of Puerto Rico to customers and purchasers thereof located in states other than the places of production or origin of shipment and there has been a constant current and course of trade and commerce in such products between and among the several States of the United States and in the District of Columbia.

15. Respondent Robman has been and is now engaged in interstate commerce in that the products manufactured by it are and have been shipped by it on order of respondent Robco to various purchasers (distributors of respondent Robco) throughout the United States. Said respondent Robman has been further engaged in interstate commerce in that it has shipped or caused to be shipped the product "gripperege" to various distributors of respondents Ace, UST, and Wenlyn, located in various States through the United States.

16. Respondent Robcorp has been and is now engaged in interstate commerce in that the tackless carpet gripper manufactured by it is and has been shipped by it on order of respondent Robco to various purchasers (distributors of respondent Robco) throughout the States located in the eastern part of the United States.

17. Respondent Robco enjoys the largest volume of sales of any company in the tackless carpet gripper industry and accounts for a greater volume of business than all of its competitors combined. For the year 1957 the total volume of sales of Robco amounted to approximately $3,500,000. More than 80% of such sales were derived from products manufactured by respondents Robman and Robcorp.

18. Respondent Robco, since about 1948, has been and is now engaged in the sale and distribution of its products through distributors located throughout the United States, the number of which was about 146 in 1957. Said distributors in turn resell the same products to various dealers.

19. In Los Angeles the products of respondent Robman are sold through a distributor, Tri-State Distributing Co., as well as several other distributors with the Tri-State Distributing Co., being under the same ownership as respondent Robman.

20. Respondent Robco has three groups of distributors: (1) those carrying the full Roberts' line of tools, accessories and tackless carpet gripper; (2) those handling tools only and (3) those handling tackless carpet gripper only.

21. Respondent Ace is now and has been since about 1953 engaged in the production, sale and distribution of tackless carpet gripper,

used in the installation of wall-to-wall carpeting. Said respondent has only one plant which is located in Brooklyn, New York.

22. The area and method of distribution of respondent Ace has been nation wide, both direct to dealers and through distributors. In 1957 said respondent's total volume of sales amounted to about $600,000.

23. Respondent UST is now and has been since about 1953 engaged in the production, sale and distribution of tackless carpet gripper used in the installation of wall-to-wall carpeting. Said respondent has only one plant which is located in the Bronx, New York.

24. The area and method of distribution of respondent UST has been nationwide, both direct to dealers and through distributors. In 1957 said respondent's total volume of sales amounted to more than $600,000.

25. Respondent Wenlyn, since about 1954 and until about the middle of 1957, was engaged in the production, sale and distribution of tackless carpet gripper, used in the installation of wall-to-wall carpeting. It operated one plant which was located in New Canaan, Connecticut. Said respondent's total volume of sales in 1957 amounted to about $130,000.

26. This respondent discontinued the business of the manufacture, sale and distribution of tackless carpet gripper in or about July or August 1957 and was adjudged a bankrupt in or about December 1957.

27. Prices for carpet gripper are usually given in the resale price by a distributor to a dealer with a certain percentage off to the distributor, which is his profit. The unit most often referred to in a price change is 12,000 feet. Other prices are usually tied to this unit.

The First Charge of Conspiracy

28. There are two contested issues in this proceeding. The first one is based on the charge that the Roberts Respondents and their unnamed distributors of tackless carpet gripper, tools and accessories have engaged in an understanding agreement, conspiracy and planned common course of action among themselves to hinder, suppress, lessen or eliminate competition in the interstate sale and distribution of such products.

29. The original Roberts Co. and the partnership it succeeded were pioneers in the tackless carpet gripper field. For a considerable period of time, their struggle was to convince those who installed wall-to-wall carpeting to use tackless carpet gripper instead of turning the edge of the carpet at the wall and tacking it down.

They spent considerable money in educating the trade in the use of tackless carpet gripper. In 1948 it was decided that the best method of distribution would be to appoint a number of distributors over the country and sell only through them. Prior to that time they had sold directly to dealers.

30. Robco, for a period of four or five months studied various policies and merchandising methods of major floor covering companies such as Armstrong, Congoleum-Nair and Mohawk, who sold to distributors, and direct selling methods of Bigelow and Sanford. After this study, Robco arrived at a sales policy and a plan whereby it could carry on an educational program with the distributor. Robco desired an easily administered plan and it was necessary to develop policies as to what Robco would and would not do. Likewise, Robco felt that a sales policy was necessary in order to solve foreseeable problems before any issue arose. In general, the sales policy was superseded at intervals by a new sales policy which provided that it "cancels and supersedes any previous written or oral statements of policy." The Sales Policy itself was incorporated into a folder with advertising and merchandising material and presented to the distributor. Sometimes distributors were established in person; other times they were established by mail.

31. Walter Selck of Chicago was the first Roberts' distributor. Shortly thereafter, in 1948, Roberts was able to obtain some 38 of the Mohawk Carpet distributors as distributors.

32. Robco desired that each of the distributors read the Sales Policy so he would know and understand its contents. Solely, to insure that the distributor did so, a form of memorandum was used which the dealer was requested to sign. Initially, when the Mohawk distributors were established as Robco distributors, the form was not used, but when Robco began establishing distributors by mail it found it desirable to use the forms for the reasons stated.

33. In the early stages, Robco would request the distributor to return this form. Hopping estimated that perhaps 60% returned the form; the distributor, however, would be retained regardless of whether or not he signed. When Robco made a policy change which it felt was important, it likewise used the form as a device to insure that distributors read the new change. The signature slips would then be sent out with the policy but not even half were returned. Robco subsequently discontinued the use of the forms sometime in 1953 or 1954.

34. Beginning in 1948 all subsequent distributor's sales policies have included substantially the following provisions:

Smoothedge distributors may not sell Smoothedge carpet gripper or Gripperege to another jobber, wholesaler, distributor or retailer for resale to the trade;

Resale list prices and terms for products of Robco are established in authorized price lists;

Resale list prices and terms for all products manufactured or distributed by Robco must be maintained by the distributor;

Copies of invoices of all Smoothedge carpet gripper and Gripperege sales must be mailed daily to Robco at its home office.

35. An understanding and agreement, tacit or otherwise by the new distributor that the terms of the sales policy including the resale price would be complied with was a part of the appointment of a distributor. So far as the record shows all who remained Robco distributors complied with these conditions.

36. As Mr. DeStories, Vice president of Robco wrote one of their distributors, Mike Halebian in New York, on February 28, 1955 upon his appointment as a distributor:

There are just a few points that really should be clarified in written form for the record; they are:

The Roberts Co. is a "policy house"; this has been best exemplified by our recent action toward I. Beck & Sons.

A distributor selling Smoothedge products can quote our price list (referring to resale price) with full confidence that no other distributor can offer a better price.

I should like to ask you Mike to review once again our Sales Policy and Price List, understanding clearly that this constitutes the entire agreement.

37. The distributorship of I. Beck & Sons in New York had been canceled just prior to the appointment of Mike Halebian as a distributor. Although other reasons are given in the record for canceling the distributorship of I. Beck & Sons, this letter indicates cancelation for failure to follow Robco's distributor policy. This may not have been the true reason, but Mr. DeStories certainly wanted Mr. Halebian to think it was. The record contains another letter of DeStories to a distributor stating: "* * * Policy violation will result in * * * cancelation of the existing distributorship."

38. Mr. Hopping stated that Robco didn't have to police adherence to their resale price. Their distributors just sold at the prices Robco suggested. However the record shows the resale price for distributors was never referred to as the "suggested resale price" until December 17, 1957. The last distributor policy, in evidence in point of time still contained the provisions in regard to maintaining resale prices (without calling them suggested prices) and in regard to furnishing Robco with copies of invoices of Smoothedge carpet gripper and Gripperege. This selling at the dealer price fixed by

Robco was relaxed slightly in highly competitive areas in 1956 to the extent that distributors were advised that they could sell Smoothedge carpet gripper below the fixed resale price provided there was furnished to Robco together with copy of the invoice, proof that the dealer had been offered a competitive carpet gripper at the lower price. This proof had to consist of a copy of the invoice to the dealer of the competitive product or a statement signed by the dealer stating that he was offered the competitive carpet gripper at such price naming it by a distributor giving the distributor's name and giving the date.

39. There seems not to have been much competition in selling Gripperege and the tools. The prices to distributors and the resale price of these were fixed in Robco's price lists and seems to have remained the same all over the country during the whole period covered by the testimony.

40. The Roberts Respondents had the field to themselves in the sale of carpet gripper until 1953 and 1954 when "competition just started to rear its ugly head" to use the phrase of Mr. DeStories in his memorandum to the Robco Board of Directors in March 1957. Several concerns along the Atlantic seaboard and some in Western States began to manufacture and sell carpet gripper to dealers at lower prices than Robco's distributors were permitted to sell. Robco's distributors in New York City kept clamoring that Robco do something. Robco maintained that these other manufacturers were infringing on the patent under which Smoothedge carpet gripper was manufactured and asked these distributors to obtain samples of the competitive carpet grippers and the names of both the manufacturers and sellers. It was thought at first that threats of infringement suits would be sufficient to quiet the competition. The distributors cooperated but the process was too slow to stop the loss of business by Robco and its distributors. Robman filed a suit in the fall of 1954 against UST the largest manufacturing competitor of Smoothedge carpet gripper, alleging infringement of their patent, but that didn't seem to slow down the competition much either. The situation became so bad in New York City by August 1955 that Robco sales there had decreased 86% below that of the previous August.

41. In October 1955 Crockett & Buss, one of Robco's distributors in New York City sent Robco the result of a survey, voluntarily made, among their salesmen as to why Smoothedge wasn't selling. The answer was price. Also about the same time, Mr. Hopping and Mr. DeStories, president and vice president of Robco and Mr. Livie, president of Robman made a trip to New York

and personally interviewed dealers to determine for themselves why Smoothedge carpet gripper was not selling. The answer was again price. Robco and its distributors had maintained a dealer price, all over the country including New York City of 4.5 cents on standard Smoothedge in 12,000 foot quantities for direct factory shipments to dealers in June 1954 with higher prices on smaller quantities and on pre-nailed. These direct factory shipments to dealers were sold through distributors and Robco billed the distributor who in turn billed the dealer. They were still trying to maintain that price in August 1955. This allowed 12.2% profit to the distributors. According to reports received from their distributors in New York City in the fall of 1955 competitive carpet grippers were being offered dealers at from 1.9 to 2½ cents per foot.

42. The worst thing about this competition was that the Roberts Respondents and their distributors thought the low prices offered by their competitors were unfair competition; that the manufacturers were infringing on Robman's patent in manufacturing carpet gripper at all and this also held for every distributor of these competitive manufacturers. None of these competitive manufacturers seemed to be equal to the Roberts Companies in financial resources.

43. Something had to be done. All of their distributors in New York City looked to Robco to point the way. The distributors were prevented from cutting prices by Robco's Sales Policy. Even if the distributors had not been prevented by the Sales Policy, their margin of profit was too small for them to cut prices enough to make any difference. Price competition was springing up over the rest of the country, but nowhere else was it as bad as in New York.

44. On November 14, 1955 Robco put a new sales plan in operation. The country was divided into price zones with the prices being identical to all dealers in each zone. New York City and Long Island were made Zone 1. The dealer price on direct factory shipments in that Zone in 12,000 foot quantities on standard Smoothedge was made 2 cents per foot and on prenailed 2.2 cents plus freight from the shipping point, which added very little to the price. It was cheap freight because it was to be shipped from Puerto Rico by Robcorp. These new price lists were not sent to dealers as had previously been the custom but to the three New York City distributors so that their salesmen could break the news to the dealers. In zones were the price competition had not been so keen, higher prices were maintained. In order to make this low price in New York City, the distributor's profit was cut to 5%. Robco tried to inform all three of its New York distributors of this

price cut at the same time so they would have an even break. These distributors really cooperated and went out and sold Smoothedge at these new prices. Effective competition in New York City was practically eliminated for a time. Mr. Metal the sales manager for UST said their New York City business dried up over night. The tackless carpet gripper made by UST was the largest competitor of Smoothedge. Mr. Metal said that just before this price drop by Robco about 20% of UST's sales were made in the New York City area. Mr. Kraut, who was then president of Wenlyn, one of the smaller manufacturers of a competitive carpet gripper said that business at these new prices meant a loss to them and they had to look for sales in other territories where prices were higher. Wenlyn at that time did about 75% of its business in New York City and Connecticut areas. Mr. Lieberman who was then president of Ace, another manufacturer of a competitive tackless carpet gripper, with its own plant located in the Bronx, New York said that when these prices of Robco went into effect in New York, his company lost practically all of the business they ever had in that area. UST and Ace sold through distributors with a fixed resale price to dealers at that time, as Robco did, according to the record. Wenlyn had some distributors but also sold direct to some dealers. Mr. DeStories of Robco in commenting on this price reduction in New York said in a memorandum to his Board of Directors:

> The effect of this action is graphically portrayed inasmuch as we not only realized the highest volume ever in the company's history from the particular territory but we were also rapidly approaching the potential line and at a rate that would close the gap between the two lines more than they had ever been closed before.

45. By the potential line DeStories meant a graph line showing a conservative estimate of the Smoothedge carpet gripper that would be sold if all contracts for new installations of wall-to-wall carpeting in the area called for Smoothedge carpet gripper to be used. Prices were also slashed by Robco in California, which was made Zone 6, at the same time. They were not cut so drastically as in New York, competition was keenest in California. Robco's prices were changed in other zones including California as early as January 11, 1956 but stayed down in New York City until June 1, 1956 when the price of direct factory shipments in 12,000 foot quantities were raised to 2.5 cents for standard and 2.8 cents for prenailed. In March 1956, Robco reduced the prices in Zone 2, consisting of Connecticut, Delaware, Maryland, Rhode Island, parts of New Jersey, Pennsylvania and the District of Columbia, to those put into effect in New York City on November 14, 1955.

599869—62——101

46. There is testimony in the record, undisputed, that it is customary in the floor covering industry for the manufacturers to sell through distributors, to fix resale prices to dealers and insist on those prices being maintained, to require the furnishing of invoice copies of sales to dealers. The testimony shows many benefits flowing to both distributors and manufacturers from requiring copies of invoices.

47. The above are the main facts in the record bearing upon the first charge of conspiracy.

48. The following defenses are set up:

(1) The price fixing was a unilateral action on the part of Robco which concern had the right to do business with whom it pleased and set the terms and conditions upon which it would do business.

(2) Robco's price reductions and establishment of zones were actions taken in good faith to meet competition and not illegal.

(3) Even if Robco and its distributors agreed on resale prices, such an agreement would not be illegal because it is protected by the "Fair Trade" Acts.

49. The rule that a trader engaged in private business may exercise his discretion as to with whom he will deal and set the terms is subject to the condition that a particular method of doing business may not run afoul of the anti-trust laws.[1]

50. Robco's distributors in each area would normally have been competitors between themselves for the business of the dealers in that area, except for the agreement of Robco with each distributor consisting of the Distributor Sales Policy and the price list. Each distributor knew, as Mr. DeStories wrote Mike Halebian, that no other distributor would undersell him and therefore as between distributors price was eliminated as an element of competition. Without the agreement the stifling of competition in New York would not have occurred. This was no unilateral action by Robco. This was a combination or agreement in restraint of trade.[2]

51. The charge here is a combination or agreement to hinder, suppress or lessen competition in the interstate sale of carpet gripper. This agreement existed all over the country, between Robco and

---

1 *William Goldman Theatres v. Loew's, Inc.*, 150 F. 2d 738.

2 *Advertising Specialty National Association* v. *F.T.C.*, 238 F. 2d 108; *William Goldman Theatres* v. *Loew's, Inc.*, *Supra Dr. Miles Medical Co.* v. *Park & Sons*, 220 U.S. 373; *F.T.C.* v. *Beech-Nut Packing Co.*, 257 U.S. 441. Also see *George Washington University Law Review*, December 1958, p. 260. The case of *U.S.* v. *Parke Davis & Co.*, D.D.C. 1957, 1958 *CCH Trade* cases, par. 68,856 cited by respondent does not conflict with these decisions. The Court expressly found there was no agreement, only an announcement by Parke Davis & Co. Furthermore, the Court's decision may have been influenced some by the fact that it found the defendant had quit the practice with no likelihood of resumption.

each and all of its 146 distributors. What happened in New York City was only alleged to have been done in furtherance of the agreement. It is true that price cutting, without more, is not a violation of the law, but when price cutting happens as a result of the agreement between Robco and its distributors, with the effect on competition shown in New York, it demonstrates the ability of the agreement to hinder and suppress competition.[3]

52. The fact that Smoothedge carpet gripper was at that time a patented product is no defense to this charge.[4] The remedy provided for infringement of a patented product is suit in the court to collect damages and stop the infringement.

53. Under the McGuire Amendment to the Federal Trade Commission Act and the New York Fair Trade Law respondent Robco had the right unilaterally to fix the resale price of its Smoothedge carpet gripper in New York, and in any other states having similar valid laws. The New York Fair Trade Law however conflicts with the anti-trust laws. It can only be enforced by reason of the exception created by the McGuire Amendment to the Federal Trade Commission Act. The New York Fair Trade Law must therefore be construed strictly.[5] A strict construction would not make Robco's agreement with its distributors to hinder, suppress or lessen competition in the interstate sale of carpet gripper legal,[6] although the same effect, so far as resale price maintenance in New York is concerned could be reached by Robco's unilateral action.

54. The complaint does not limit its allegations under this charge to an agreement by Robco and its distributors but also charges Robman and Robcorp with being parties to the agreement. The record shows written agreements between Robman and Robco and between Robcorp and Robco to cover their dealings with each other. It is claimed that all three dealt at arms length.

55. As stated before the three individuals, Livie, Hopping and Bishop own 100% of the stock of Robman, all but 1,000 shares out of a total of 50,001 shares of the stock of Robcorp, and a majority of the stock of Robco. Each of these three men is president of one of these three concerns. Corporations can only act through their officers. In spite of the written agreements, this record shows throughout how Robco and Robman developed as two different arms

[3] *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 797; 231 F. 2d 356 is not applicable because the claimed violation of the law there consisted of cutting prices in Los Angeles and leaving them as they were in other places.

[4] *U.S. v. A. Schrader's Son, Inc.*, 252 U.S. 85; *U.S. v. Masonite Corp.*, 316 U.S. 265, 277.

[5] *General Electric Co. v. Masters Mail Order Co., Inc.*, of Washington, D.C., 244 F. 2d 681.

[6] *Milk and Ice Cream Can Institute v. F.T.C.*, 152 F. 2d 478, 481.

of the same organization and complete unity of action by these two in the matters described in the record. Furthermore, it is fairly inferable from the record that Robcorp did not come into being until "competition reared its ugly head" on the East Coast. It is further fairly inferable from the record that Robcorp in Puerto Rico manufacturing Smoothedge carpet gripper, enables Robco to meet competition along the eastern seaboard without being handicapped by paying freight from the West Coast. There may have been other reasons for its organization, but this was certainly one of them. Robcorp is only another arm of the same organization. Robcorp upon orders from Robco ships the carpet gripper manufactured in Puerto Rico in commerce to purchasers from Robco located along the Atlantic Seaboard.

56. Thus, it is found that the first charge of conspiracy has been sustained by a preponderance of the evidence.[7]

The Second Conspiracy Charge

57. The complaint also charges a conspiracy between the Roberts Respondents, Ace, UST and Wenlyn in the manufacture, sale and distribution of carpet gripper to hinder, suppress, lessen or eliminate competition and to create a monopoly in these respondents in the interstate sale and distribution of it.

58. It is further alleged that in furtherance of said conspiracy, among other things, these respondents fixed and agreed upon the prices to be charged for the sale and resale of carpet gripper.

59. Shortly after the November 14, 1955 drop in prices on December 5, 1955, Mr. Metal, Sales Manager for UST and Mr. Fuhrman, Sales Manager for Ace, had a meeting in Chicago with Mr. DeStories of Robco. As a result of that meeting, Mr. DeStories carried back to his home office information that both UST and Ace were interested in a license to manufacture and sell Smoothedge carpet gripper. UST at that time had been sued as an infringer and Ace had been threatened with suit. If the terms of a license were agreed upon, it was to dispose of the suit against UST and do away with the threat of a suit against Ace.

60. As a result of the preliminary meeting and some correspondence, between the parties, a series of meetings were held in Chicago from January 7 through January 12 in 1956. At these meetings

---

[7] "The doctrine that a corporation is a legal entity separate and apart from the persons composing it, is a legal theory introduced for the purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy and when invoked in support of an end subversive of this policy, will be disregarded by the courts." *Newark Ladder & Bracket Sales Company, Inc., et al. v. Furniture Workers Union Local, et al.*, 4 A. 2d 49, citing cases.

Mr. Hopping, Mr. Livie and Mr. DeStories from the Roberts Respondents, Mr. Metal from UST and Mr. Fuhrman from Ace were present. As a result of this meeting UST and Ace were licensed on March 1, 1956 by Robman to manufacture and sell Smoothedge carpet gripper on which Robman had a patent and all claims for damages for infringement were dismissed. The licenses called for a graduated royalty payment based on the amount of carpet gripper sold and the selling price. The royalty was to be paid through April 22, 1961, although Robman's patent expired in April 1958. Subsequently on May 1, 1956 similar license was issued to Wenlyn.

61. There were a number of different meetings held by representatives of the Roberts respondents with these licensees. In addition to the meetings in January 1956, meetings were also held in June and July 1956, in January, June, July, August and September, 1957. All of the witnesses were in agreement as to the meetings held, except DeStories and Hopping said the July 1957 meeting was not a formal one, but only casual meetings in the corridors of the Merchandise Mart Building in Chicago. DeStories and Hopping said that they refused to have a formal meeting with the licensees at that time because Mr. Stoumen of Edgemaster Corporation was to be present. Edgemaster's license had not been completed at that time.

62. There is apparent complete disagreement between the representatives of the Roberts respondents on the one hand and the representatives of the licensees as to what was said and done at these meetings.

63. Metal from UST and Fuhrman from Ace were the only ones present at all of the meetings. They state that the Roberts people stated that a licensing agreement could and should lead to an agreement to fix prices at levels where everybody could make some money. Metal and Fuhrman both stated that Hopping, DeStories and Livie when he was present constantly tried to get the licensees to agree in raising prices uniformly in different areas and eventually all over the country. They further said that the Roberts people particularly DeStories threatened that if the licensees did not agree to raise prices uniformly and maintain them Robco would put the 2 cent and 2.2 cent for standard and prenailed New York dealer price for 12,000 feet into effect all over the country.

64. The other unlicensed competitors were also keeping the market down. Metal and Fuhrman both said that the 2 cent and 2.2 cent price would be ruinous to them so they agreed to do as DeStories wanted then to do. The next meeting DeStories would show up with a list of violations of the agreement. The licensees would explain that the lower than agreed on dealer prices were due to their

distributors cutting the price to dealers without the knowledge of the licensees. Upon this being stated DeStories told the licensees that the way to stop that was to require the distributors to send in copies of their invoices to dealers as Robco did. The licensees stated they were not strong enough to make and enforce such requirement. DeStories then told them that another way to keep the distributors from cutting the price to dealers was to cut down the distributors' margin of profit. About 18 to 22% of the dealer price was the maximum profit that ought to be allowed distributors. The less margin of profit allowed to a distributor, the less likely he would be to cut the resale price to dealers to get the business. At each meeting after these talks by Livie, DeStories and Hopping, particularly DeStories, the licensees would again agree to maintain the higher dealer price. UST, Ace and Wenlyn did raise dealer prices and were joined by Robco in such raises from time to time, but they wouldn't stay up. Some distributor would cut prices again or some unlicensed competitor would cut them and things were then back like they were before the raise. Metal and Fuhrman were supported generally by Marvin S. Howard and Jerome Kraut of Wenlyn as to what was said and done at the meetings between the licensor and licensees.

65. The version of what happened as given by Livie, Hopping and DeStories of the Roberts respondents is that at the time they made the reduction in price in New York City on November 14, 1955 and the lesser reduction in the Los Angeles area, UST was the largest competitor, Ace, next, and then Wenlyn. By that time UST and Ace had established distributors in a good many sections of the country and even had distributors in Los Angeles. They were cutting prices in Robco's own back yard. Besides all of them being infringers on Robman's patent they were unethical competitors. Robco tried ignoring them for a while but they wouldn't go away. They stayed and were increasing their percentage of the available business.

66. The Roberts respondents after careful consideration decided that they could deal with these competitors better as licensees than they could as infringers on Robman's patent. Suits and threats of suit hadn't stopped them anyhow, although no infringement suit was ever brought to trial. These competitors of the Roberts respondents and the men running them were mere children when it came to knowing how to run a business. Mr. Livie said that there was still 35% of the wall-to-wall carpeting laid by the turn and tack method. Instead of trying to build new business from this untouched source, all these competitors knew how to do was to cut

the price of carpet gripper to get the business from Robco and from each other. They had done this to such an extent that prices were demoralized and nobody in the business was making any money. These various meetings with Metal, Fuhrman, Kraut and Howard were for the purpose of teaching them the elementary principles of how to run a business. In a series of meetings with Metal of UST, Fuhrman of Ace and a little later Kraut and Howard of Wenlyn, Livie, Hopping and DeStories, with DeStories doing most of the talking, tried to get these competitors to set a definite dealer price and stick to it. Wenlyn had been selling to some dealers direct. The license agreement penalized them for doing this and they were urged by Livie, Hopping and DeStories to appoint distributors and sell only to them, with a fixed resale price for the distributors to sell to dealers. Over and over again the Roberts competitive policy adopted in November 1955 (as distinguished from the Distributor Sales Policy) was repeated to Metal, Fuhrman, Kraut and Howard. It was that Robco would meet any dealer price of any competitor no matter how low but would not undersell competitors if the price was raised. DeStories did say to these licensees that if they continued their indiscriminate pricing practices it would result in the New York prices of 2 cents and 2.2 cents for standard and prenailed respectively, prevailing all over the country. Robco's method of requiring its distributors to send in copies of invoices to dealers was explained. UST, Ace and Wenlyn claimed they were not strong enough to make this as a requirement of their distributors. DeStories then explained that if distributors were allowed a large margin of profit on a certain dealer price, they would be tempted to cut the resale price to get the business. By cutting down on the distributor's margin of profit they could be discouraged from cutting the resale price. DeStories suggested that the distributor's margin of profit should be between 18 and 22%.

67. The above is the version of Livie, Hopping and DeStories as to what was said and done at the meeting with Metal, Fuhrman, Kraut and Howard.

68. Taking either version of what happened at the meetings, Robco's competitive policy as stated was an open invitation to UST, Ace and Wenlyn to get together and raise prices all over the country or in any locality, saying in effect that if they did Robco would raise its dealer price to correspond. As an illustration of how this works, during the first meeting in January 1956 with Metal and Fuhrman, after the license terms had been agreed upon, there was talk of a price raise. Metal and Fuhrman say in the 11 western states. A price raise was announced on January 11, 1956 by UST and Ace

in that area. Being unwilling to take the word of Metal and Fuhrman for the price raise DeStories called his office in Los Angeles on the same day. Upon being assured there that UST's and Ace's new prices were on the street in Los Angeles DeStories ordered a price raise of Smoothedge carpet gripper in their then Zone 6 consisting of all of California, half of Oregon and Washington and one county in Nevada. Prices of Robco, UST and Ace were then identical in Robco's Zone 6 according to DeStories. Raising one's prices when a competitor does, standing alone, does not prove an agreement to fix price. However, when Robco's competitors raised their prices after being told what Metal and Fuhrman were told and Robco raised its prices above those previously made on direct factory shipments so that prices of all three were identical in the same area this was a raise to a fixed price pursuant to a common understanding.[8]

69. This however was before the date of the conspiracy alleged in the complaint. That conspiracy is alleged to have begun about May 1, 1956. UST and Ace were licensed March 1 but Wenlyn's license was dated May 1, 1956.

70. Metal insisted that the license contain a provision penalizing the licensee by making him pay a higher royalty on all carpet gripper sold direct to dealers, and that provision was inserted. Metal and Fuhrman then insisted that Wenlyn be given the same kind of license, which was done. A suspicion creeps in that Metal was hoping to get rid of Wenlyn as a competitor by these moves, because it was known in the trade that Wenlyn at that time had very few distributors and sold largely direct to dealers. Kraut and Howard say they saw no alternative to signing the license agreement. They were threatened with suit for infringement if they didn't. They would have to line up a bunch of distributors in order to survive if they did. Robco had taken their best distributor away from them, Mike Halebian of New York City. They said they signed because they thought they would be protected from unlicensed competition, and if so they could make a go of it. But Wenlyn couldn't pay the royalty and meet the competition so it became bankrupt.

71. Metal of UST, Fuhrman of Ace and Kraut and Howard of Wenlyn all testified about an agreed price raise to dealers to 3.9 cents for standard and 4.2 cents for prenailed in 12,000 foot quantities.

72. Metal said this happened at the July 1956 meeting, and Robco was notified. Kraut and Howard said it was agreed upon at the

[8] *Fort Howard Paper Co.* v. *F.T.C.*, 156 F. 2d 899, 906.

June 1956 meeting but was not to go into effect until later. Fuhrman first said the agreement was made at the June 1956 meeting and then changed it to the July meeting. All agreed that Robco knew of the agreed price raise. Mr. DeStories, Mr. Hopping and Mr. Livie denied there was any agreement or that they had any knowledge of such agreement.

73. There is documentary evidence in the record in support of a finding that there was an agreement or common understanding to raise prices and that such agreement was not merely idle talk.

74. On July 8, 1956 UST put out a new price list raising the price to dealers to 3.9 cents for standard and 4.2 cents for prenailed in 12,000 foot quantities. This same price list raised the distributor price to 3.3 cents for standard and 3.55 cents for prenailed. This price list is in evidence. Metal said this new price was issued subsequent to the July meeting of licensor with the licensees. DeStories produced a hotel bill which he said showed that he did not even reach New York until after July 8, 1956. These distributor prices allowed a profit to UST distributors of approximately 22% on their cost price when they sold at 3.9 cents and 4.2 cents to dealers. It will be remembered that DeStories admitted telling the licensees that a distributor's profit should not exceed 22% to prevent him cutting the dealer price.

75. Howard and Kraut both said Wenlyn put out a price raise to dealers to 3.9 cents for standard and 4.2 cents for prenailed in 12,000 foot quantities at approximately the same time as the UST price list mentioned above. The accompanying Wenlyn distributor price was 3.3 cents and 3.8 cents according to Howard; 3.3 cents and 3.6 cents according to Kraut. They both said the distributor price was made to vary slightly from that of UST so as not to look like collusion.

76. On August 30, 1956 Ace raised the dealer price to 3.9 cents for standard and 4.2 cents for prenailed in 12,000 foot quantities. This price list is in evidence but does not show the accompanying distributor price.

77. On September 4, 1956 Robco raised its New York dealer prices to 3.9 cents for standard and 4.2 cents for prenailed in 12,000 foot quantities. This price list is in evidence. The accompanying price to the New York distributors was 3.2 cents for standard and 3.42 cents for prenailed.

78. There are certain invoices in the record of UST and Wenlyn to their distributors in New York. Metal of UST said in reading a UST invoice to a distributor, if a certain price was shown with a discount off from that price the price named was the dealer price.

If no discount (other than the 2% for cash) is shown the invoice shows the distributor price.

79. Prior to Robco's price raise on September 4, 1956, UST invoices in evidence to Livingston Sales Corporation of Brooklyn, its distributor, during June, July and August 1956 show a dealer price of 2.2 cents for regular and 2.4 cents for prenailed. The record shows 19 invoices to this distributor during September, October and November 1956. Of these, 10 were at the distributor price of 3.3 cents for standard and 3.55 cents for prenailed. This was the UST distributor price to accompany the increase to 3.9 cents for standard and 4.2 cent for prenailed in 12,000 foot quantities to dealers. Of the nine other invoices six were for random lengths, evidently accumulations of left-overs, and two were marked "to meet competitive offer." The other invoice showed part shipment on an order for 100,200 feet of standard. According to the other invoices this was an unusually large order.

80. These invoices show an attempt not altogether successful to maintain a dealer price in the New York area of 3.9 cents and 4.2 cents. It must be remembered that there were unlicensed competitors in the area to contend with. Among these was Edgemaster, later licensed by Robman. By agreement, counsel for the Roberts Respondents had access to all the UST invoices for the period, and did not show the facts to be different.

81. The Wenlyn invoices to their New York distributor during October and November 1956 which are in evidence uniformly show a distributor price of 3.3 cents for standard and 3.6 cents for prenailed. In December 1956 Wenlyn's prices, like those of UST, began to go down to meet competitive offers, according to the invoices.

82. The documentary evidence in the record shows something more here than the play of competitive forces. The price raise in New York City on September 4, 1956 by Robco was an increase of more than 50% on direct factory shipments. No other price raise by Robco, from November 14, 1955 until this complaint was issued was any where nearly as drastic as this one. New York City was the most highly competitive market in the country. Under the circumstances the price raise by Robco on September 4, 1956 to the exact dealer price to which UST, Ace and Wenlyn had already raised their prices certainly shows that Robco's "competitive policy" as it was called, in action, can, and did, cause a price raise by common understanding, which had a tendency to restrain competition. Mr. DeStories' explanation of why the New York prices were raised on September 4, 1956 and why they were raised the exact amount they

were, does not seem like a logical one. The preponderance of the evidence in the record is to the effect that there was a uniform price raise in New York by planned common course of action and that it was at least partially effective during September, October and November, 1956. The degree of effectiveness is not the test as to whether the law has been violated.[9] The facts show a violation of the Federal Trade Commission Act. The complaint in this case does not allege maintenance of prices fixed by agreement.

83. Counsel for the Roberts Respondents insist that this case must be dismissed because no injury to competition has been shown. Such a showing was not necessary in this case.[10]

84. Counsel for the Roberts respondents also contend that this is a private controversy between the Roberts Respondents and their licensees; that the complaint must be dismissed for lack of public interest. As a sub-point it is contended that the record shows that prices to the consuming public have not been enhanced.

85. The record does show a dispute between the Roberts respondents and the licensees over unpaid royalties. That is a private controversy and has no bearing on this case.

86. The evidence shows that in most cases where carpet gripper is used, the home owner, the builder or owner or lessee of an office building or a hotel, contracts for wall-to-wall carpeting. Carpet gripper is used by the dealer in furnishing the finished product, wall-to-wall carpeting. The purchasing public of carpet gripper consists of those called dealers in this proceeding. Mr. DeStories at one place in his testimony correctly referred to the dealer as "the end user of the product." There is public interest in the preservation of competition and any agreement to fix prices to these "end users of the product" is against public policy.[11]

87. The acts and practices of the respondents herein have had a tendency to hinder, suppress and eliminate competition in the sale and distribution of tackless carpet gripper in interstate commerce and have been to the prejudice of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That Roberts Manufacturing Co., Roberts Corporation and The Roberts Co., all corporations, respondents herein, their

---

[9] *Allied Paper Co.* v. *F.T.C.*, 168 F. 2d 600. *Fort Howard Paper Co.* v. *F.T.C.*, 156 F. 2d 899, 906. The case of *U.S.* v. *General Electric Co.*, 272 U.S. 476, cited by respondents is not applicable to the facts in this case.

[10] *U.S.* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 218.

[11] *F.T.C.* v. *Beech Nut Packing Co.*, *supra*.

respective officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale and distribution of carpet gripper or other products used in laying wall-to-wall carpeting, in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, understanding or agreement between any one or more of said respondents and any one or more of their distributors, as "distributors" is defined in the findings herein, or other customers, to:

1. Fix or establish the prices, terms or conditions of resale of such product;

2. Establish geographical zones of distribution for said products for the purpose of or with the effect of fixing the prices, terms or conditions of resale for such products;

3. Have distributor submit copies of invoices of resale of such products or information contained in such invoices for the purpose or with the effect of enforcing resale prices;

4. Restrict any of said respondents distributors or other customers in the resale of such products as to the identity of purchaser or as to price.

5. Discontinue or threaten to discontinue distributorships for the purpose of or with the effect of causing adherence to any prices, terms or conditions of resale.

It is further ordered, That the respondents Roberts Manufacturing Co., Roberts Corporation, The Roberts Co., United States Tackless, Inc., and Ace Tackless Corporation, all corporations, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale and distribution of carpet gripper or other products used in laying wall-to-wall carpeting in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action or agreement between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto to do or perform any of the following acts:

1. Fixing or establishing the prices, terms or conditions of sale or resale for such products;

2. Limiting the customers of respondents to persons known as distributors or wholesalers or to any other particular category of persons;

3. Fixing or assessing penalties by contract or otherwise for the sale of said products by respondents to users or to any other class or classes of persons;

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondents may enter into in conformity with Section 5 of the Federal Trade Commission Act as amended by the McGuire Act (Public Law 542, Chapter 745, 82nd Congress, 2d Session, Approved July 14, 1952).

It is further ordered, That this proceeding be, and the same hereby is, dismissed as to Wenlyn Associates, Inc., also known as Wenlyn Industries.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

Respondents manufacture, distribute and sell "tackless" stripping, a product used in the installation of wall-to-wall carpeting. The roots of this controversy lie deeply embedded in industry history. A brief examination of that history is necessary to illuminate the issues now ripe for decision.

That history begins around 1938, when Roy M. Roberts devised a new method for the installation of wall-to-wall carpeting, the method commonly referred to today as the "tackless" method. Prior to that time the traditional (and universally used) method of installation was the so-called "turn and tack" method, whereby the edge of the carpet was turned under and secured to the floor with tacks. This method had a number of disadvantages. Its use often resulted in an unsightly appearance around the edges of the carpeting. The tackless method devised by Roberts involves the use of small strips of plywood nailed to the floor. Protruding from the plywood are other nails placed at an angle with the points upward; the carpeting is affixed to the protruding nails. This technique eliminated bulges and wrinkles and protruding tackheads, thus materially improving the appearance of the installed carpeting.

In 1938 a partnership known as the Roberts Tackless Carpet Strip Company was formed by Roberts, K. M. Bishop and Hugh S. Livie, to manufacture, promote and sell the new product. This company was the first in the field and it held the basic patents. Merchandising the new product proved to be a complex task, necessitating heavy outlays for promotion. During the period 1946 to 1957, for instance, the Roberts group of companies spent approximately $3,000,000 on its merchandising programs.

In 1946, The Roberts Co., a California corporation, was organized to carry on the business of the partnership. Still another reorganization of the Roberts interests occurred in 1953. In that year the name of the Roberts Co. was changed to Roberts Manufacturing Co., and two new corporations were organized—The Roberts Co., a California corporation, and the Roberts Corporation, a Puerto Rican corporation. The operations of the first and last named companies were and are confined solely to the manufacture of the tackless stripping and tools and other accessories used in carpet installation; both are obligated to sell their entire output to the Roberts Co., the marketing arm of the group. The Roberts Co. distributes its products through a network of 146 authorized distributors, who in turn resell to dealers in carpeting.

The activities of the three corporations are closely integrated and they are commonly owned. Livie and Bishop, two of the original Roberts partners, together with Charles S. Hopping hold all of the outstanding stock of the Roberts Manufacturing Co. and the Roberts Corporation. This triumverate also owns 62% of the outstanding stock of the Roberts Co. Since the 1953 reorganization Livie has been president of Roberts Manufacturing Co., Bishop has been president of the Roberts Corporation and Hopping president of the Roberts Co.

The original Roberts partnership and its successor corporations have been the dominant factor in the industry throughout its history. The Roberts interests had no competition at all until 1949 or 1950, and no vigorous, well-organized competition until 1953. At the time this complaint was issued the Roberts Co. still had the largest volume of sales of any company in the tackless carpet gripper industry, with sales greater than those of all its competitors combined. Recent competitors include the following concerns: United States Tackless, Inc., Ace Tackless Corporation, Wenlyn Associates, Inc. (later Wenlyn Industries, Inc.), and the Edgemaster Corporation.[12]

The complaint alleges two basic but separate violations of Section 5 of the Federal Trade Commission Act. The first charge is

[12] These designations are used hereafter:

Edgemaster Corporation	Edgemaster
Wenlyn Associates	Wenlyn
United States Tackless, Inc.	UST
Ace Tackless Corporation	Ace
The Three Roberts Companies	Roberts Respondents
The Roberts Co.	Robco
Roberts Manufacturing Co.	Robman
Roberts Corporation	Robcorp
Tackless Carpet Gripper	Gripper

that the Roberts respondents and their distributors engaged in an understanding, agreement, combination, conspiracy and planned common course of action to lessen or eliminate competition in the sale and distribution of Roberts products, by fixing the prices at which the distributors resold gripper and by establishing that the distributors would refuse to sell Roberts products to others for resale to the trade. The second charge is that the Roberts Respondents and Respondents Ace, UST and Wenlyn, licensees of the Robman gripper patent, agreed to lessen competition and to create a monopoly, and pursuant thereto, they:

1. agreed that non-exclusive licenses under the Robman patent would be issued only to the other respondents;
2. fixed and agreed upon the sale and resale prices of gripper;
3. contacted other gripper producers for the purpose of having such producers cease manufacturing and selling gripper;
4. Robco, with the consent of the other respondents, warned others to cease manufacturing and selling gripper and threatened to bring infringement suits.

The hearing examiner found that both charges had been sustained by probative evidence of record. From this determination the Roberts respondents appeal. Counsel supporting the Complaint cross-appeals, assigning as error the rejection by the Hearing Examiner of certain proposed findings, conclusions and provisions for inclusion in the order to cease and desist.

I. The Distributor Phase.

The objections of the Roberts respondents to the finding that they and their authorized distributors entered into a price-fixing agreement may be subsumed under four questions: (1) Did an agreement or understanding exist? (2) If so, was the agreement removed from the ambit of Section 5 of the Federal Trade Commission Act by operation of the McGuire Act and the state fair trade acts? (3) Was there evidence that the agreement had an adverse effect on competition? (4) If not, can the agreement be said to be illegal under Section 5?

Contending that no agreement or understanding existed, the Roberts Respondents rely upon *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) and *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208 (1921), saying that their conduct amounts to no more than a unilateral announcement, made in advance, of the terms and conditions upon which they would deal, and thus they are within the protective mantle of *Colgate*. We cannot agree. Especially is this so when the requirements of proof laid down in *Colgate* and *Frey* are considered in the context of the long line of decisions beginning with *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373 (1911), decided prior to *Colgate*, continuing with *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922), *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944) and capped by the recent decision in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 28 U.S.L. Week 4150 (U.S. February 29, 1960).

In *Dr. Miles*, the Supreme Court condemned an express restrictive agreement. However, it was soon established that there is unlawful combination where a manufacturer "enters into agreements—whether express *or implied from a course of dealing or other circumstances*—with all customers * * * which undertake to bind them to observe fixed resale prices." *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85, 99 (1920). [Emphasis supplied.] If the thrust of *Frey & Son* is against the grain of the *Schrader* case, then that case is a sport. The authority of *Frey & Son*" * * * has been seriously undermined by subsequent decisions * * *." *United States* v. *Parke, Davis & Co.*, 28 U.S.L. Week at 4153.

The *Beech-Nut* and *Parke, Davis* cases establish yet another way in which to establish the existence of an unlawful combination. The court in *Parke, Davis* states the principle in this manner:

> * * * an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. 28 U.S.L. Week at 4154.

Counsel supporting the complaint need only have established that the conduct of the Roberts respondents was of the kind condemned in *Parke, Davis*. Here the proof goes beyond that required in *Parke, Davis*. All avenues of proof laid out in the prior cases have been travelled. The record established that there was an exchange of mutual expectations at the onset of the relationships, and there were active steps taken to secure adherence to Robco's price lists. Parenthetically, it is interesting to note that the tag "suggested" was never appended to those prices. Robco's prices *were* the resale prices. The distributors' acquiescence in the prices set by Robco was not "* * * a matter of individual free choice prompted alone by the desirability of the product." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 28 U.S.L. Week at 4155.

The very pattern of distribution adopted by the Roberts group constitutes the first link in the chain of proof.

Prior to 1948 Robco sold directly to dealers, but in that year its management determined that a faster expansion of volume could be achieved by selling through a network of authorized distributors equipped with their own sales organizations. To aid in the implementation of this new plan of distribution Robco developed a sales policy which was embodied in a series of documents issued successively, each known as the Distributor Sales Policy. The terms of each of the policies are similar to all other policies issued in the series. A typical policy begins with this clause:

> This statement of policy cancels and supersedes any previous written or oral statements of Policy of The ROBERTS Co., or its representatives, insofar as they affect the sale of products manufactured or distributed by The ROBERTS Co. Any statement not specifically contained herein or appended hereto by supplement shall be of no force and effect.

The policy then states the characteristics of distributors sought by Robco, thus:

> For the purpose of definition, a Distributor is a firm or corporation identified with the carpet trade; maintaining warehouse facilities; operating its own selling organization; purchasing solely for resale to the trade; and listed as a Distributor (or Wholesaler) in Dun & Bradstreet's, or other nationally accredited directory.

Next comes a list of requirements "To qualify as a Distributor for The Roberts Co."

Paragraph XII of the policy provides:

> XII. CONDITIONS OF RESALE
>
> (A) Smoothedge Distributors may not sell Smoothedge Carpet Gripper or Gripperedge to another jobber, wholesaler, distributor, or retailer, for resale to the trade.
>
> * * * * * * *
>
> (C) Resale list prices and terms of products of The ROBERTS Co. are established in Authorized Price Lists.
>
> (D) Resale list prices and terms of all products manufactured or distributed by The ROBERTS Co. must be maintained by the Distributor.

It was also provided that "Copies of invoices of all Smoothedge Carpet Gripper and Gripperedge sales must be mailed daily to the Roberts Co. at its Home Office."

The first of these policies, issued in June, 1948 concludes with this admonition: "Distributorships are subject to immediate cancellation in the event that such minimum resale prices are not maintained by the Distributor."

Robco achieved nationwide distribution of its products by securing 146 authorized distributors. It should be noted that Robco did not make an indiscriminate offer available to all in the trade. Rather, it established an objective list of qualifications for a highly

599869—62——102

selective group who were expected to adhere to a set of terms for appointment and retention.

In paragraph 32 of his initial decision the Hearing Examiner found that: "Robco desired that each of the distributors read the Sales Policy so he would know and understand its contents. Solely to insure that the distributor did so, a form of memorandum was used which the dealer was requested to sign." We are unable to accept this characterization of the "form of memorandum." To be sure, there is testimony in the record by officers of Robco—notably Hopping, its president—which characterizes the document in the manner described by the Hearing Examiner. However, the form speaks for itself. The memorandum signed by Crockett and Buss, Inc., a New York distributor of Roberts Products, on January 19, 1955, provides in part:

DISTRIBUTOR SALES *AGREEMENT*

The ROBERTS Co.
1536 N. Indiana St.,
Los Angeles 54, California.
Gentlemen:

> We have read your Distributor Sales Policy No. 106 *and agree to adhere to the conditions outlined therein upon our appointment as an Authorized Roberts Distributor.* [Emphasis supplied.]

This form was prepared by Robco. Nothing could be plainer than that it was designed to memorialize an agreement. No contradictory explanation after the fact can overcome the clear terms of the document itself.

Respondents make much of the facts that only 60% of the distributors signed and returned the form to Robco, and that the designation as an authorized distributor was not withdrawn from those who did not sign. In addition, respondents point to the testimony of distributor witnesses (all but one of whom were current authorized distributors) to the effect that they did not consider the Distributor Sales Policy as embodying the terms of an agreement.

However, there are countervailing circumstances entitled to greater weight. First the Distributor Policy itself is, in the words of Cardozo, J., "* * * instinct with an obligation * * *" *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). Of great import is the conduct of the distributors after the commencement of their relationships with Robco. There was near-unanimous adherence to the resale prices established by Robco and to the other terms of the Distributor Sales Policy. A few minor deviations were cured by admonitions from Robco. The only serious deviation, that by I. Beck & Sons, resulted in the termination of the authorized distributorship. All of the distributor witnesses testified that they did in fact adhere to the resale prices fixed by Robco and to the other terms of the Distributor Sales Policy.

Moreover, the record contains a characterization of the Distributor Sales Policy as an agreement by an officer of Robco. De Stories, vice president of Robco, wrote Michael Halebian of New York on February 28, 1955, upon his appointment as a distributor:

> There are just a few points that really should be clarified in written form for the record; they are;
>
> The Roberts Co. is a "policy house"; this has been best exemplified by our recent action toward I. Beck & Sons.
>
> A distributor selling Smoothedge products can quote our price list (i.e. the resale price list) with full confidence that no other distributor can offer a better price.
>
> *I should like to ask you Mike to review once again our Sales Policy and Price List, understanding clearly that this constitutes the entire agreement.* [Emphasis supplied.]

Another letter written by De Stories to an authorized distributor in Allentown, Pennsylvania said in part: "* * * Policy violation will result * * * in cancellation of the existing distributorship."

We conclude, as did the Hearing Examiner, that an understanding and agreement by a prospective distributor that the terms of the Distributor Sales Policy would be strictly kept was a part of the appointment of a distributor.

But the chain of proof does not terminate with the appointment of distributors. There is evidence of a continuing course of conduct by Robco and the distributors maintaining adherence to the terms of the Distributor Sales Policy. The distributor witnesses testified that they regularly submitted copies of their invoices to the Robco home office. And Robco was well aware of the value of this practice as an aid to policing adherence. Thus, the assistant sales manager of Robco wrote to one of the authorized distributors in Hartford, commenting about a price reduction in the New York City area:

> * * * our New York Distributors understand and agree with our purpose, namely, to return lost volume taken from us by unfair competition. Fourth, we control the price list by invoice copies * * *

Robco's vice president in charge of sales wrote to an authorized dealer in Albany, New York, commenting about the New York City (Zone 1) price reduction, saying in part:

> No distributor in Zone 1 may sell in any other zone at the Zone 1 price.
>
> The policy provides that the distribution of the Smoothedge establishes the zone—not the pick up or delivery point. We control this through the invoice copies.

Robco engaged in a continuous process of admonition and correction. One Kofke, a Philadelphia authorized distributor, testified that his prices were like those of Penn-Shawnee Distributors, Inc., another Roberts distributor in Philadelphia. He then stated that although there was no difference in price there was at one time a difference in the cash discount allowed. Penn-Shawnee allowing 4% while his company granted only 2%. This differential was called to Penn-Shawnee's attention by Robco and the differential was then eliminated.

Robco was alerted to some possible deviations from the terms of the Distributor Sales Policy by complying distributors. Thus, Halebian, a New York distributor, wrote to Robco in January, 1956, stating that some of the carpet supply distributors in the New York City area were buying Gripperedge from Walter E. Selck & Company, a Roberts distributor in Chicago, at the dealers price of 6½ cents per foot. Halebian then said: "We would appreciate your letting us know as soon as possible whether it is permissible for us to do the same."

Robco then wrote to Selck:

> The resale of this product, like Smoothedge, is restricted to dealers in accordance with the terms and conditions of Section XII Paragraph (A) of our Sales Policy No. 107. This reads as follows: "Smoothedge Distributors may not sell Smoothedge Carpet Gripper or Gripperedge to another jobber, wholesaler, distributor or retailer, for resale to the trade."
>
> I know that you will instruct your staff to discontinue such sales now that it has been brought to your attention.

Robco's vice president, De Stories, wrote another letter on this same subject to Selck soon afterwards, stating that he did not give credence to Halebian's complaint because he was familiar with the way Selck operated. He then said: "However, when we receive correspondence of this nature we are obligated to follow through on it."

The ubiquitous enforcement of the resale price maintenance system by Robco is well illustrated by its treatment of requests by dealers to reduce resale prices in order to meet competition. The New York City experience is recounted by the hearing examiner in Paragraphs 40–45 of his initial decision. There are other illustrations. Robco's sales manager wrote to William Campbell, Inc., an authorized distributor in Philadelphia, stating that:

> * * * in order to protect your Smoothedge volume, as well as ours, against price cutting competition, we are, effective immediately, establishing the following policy for meeting competitive prices * * *

The policy specified that written proof of a competitor's lower price must be submitted to Robco before an order at a price below the authorized price would be honored. This policy effectively prevented price cutting. Kofke, the president of William Campbell, Inc., testified that he obtained a statement from a dealer which purported to prove that the dealer could buy gripper at a lower price. Kofke stated that he sent an order based on this statement to Robco, but Robco refused to let him sell at the mentioned price, saying that it was unprofitable for both Robco and the distributor to do so.

These facts establish that Robco completely dominated the pricing practices of its distributors. We are of the opinion that an unlawful combination proscribed by the Act existed in these premises.

The Roberts respondents next argue that even if an otherwise unlawful combination was formed and implemented, that combination was clothed with legality by the McGuire Act [13] and the State Fair Trade laws.

Respondents have failed to establish that their conduct comes within the exemption afforded.

First, the Robco resale price maintenance scheme was not limited in effect to those states which had valid fair trade statutes in effect; it was nationwide in scope. Thus, the price lists specify fixed prices for resale in Texas and Missouri, two of the states that do not have fair trade laws. In no event does the McGuire Act immunize the Robco scheme in those states which do not sanction fair trade agreements.

Second, there is no proof that Robco entered into fair trade agreements even in those states that sanction such agreements. Respondents rely upon the statement of Chief Judge Sweeney in *United States* v. *Socony Mobil Oil Co.*, 150 F. Supp. 202, 204 (D. Mass. 1957), *certified*, 252 F. 2d 420 (1st Cir. 1958), dismissed, 356 U.S. 925 (1958), to the effect that "I can find nothing in the McGuire Act which limits its exemptions to fair trade agreements." Even if this construction, for which no precedent is cited, be accepted as correct, it must still be established that the applicable state laws sanction the agreement actually employed. Thus Chief

[13] The pertinent part of the McGuire Act provides that:

"Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale." 15 U.S.C. §45(a)(2) (1958).

Judge Sweeney felt compelled to examine the Massachusetts statutes and decisions in the *Socony Mobil* opinion. The necessary predicate was not established here. The New York Feld-Crawford Act is set out in respondents' brief and we are referred to the Pennsylvania, Connecticut and Cailfornia statutes, but no attempt has been made to prove that the Robco Distributor Sales Policy is entitled to statutory protection in each state where fair trade laws are in effect, and this is not a matter for official notice.

Finally, respondents have not furnished proof that Roberts products were "in free and open competition with commodities of the same general class produced or distributed by others" required by the McGuire Act. See *Eastman Kodak Co.* v. *Home Utilities Co.*, 234 F. 2d 766 (4th Cir. 1956), *petition for cert. dismissed*, 352 U.S. 956 (1957). Indeed, the proof here affirmatively establishes that there was no free and open competition during most of the period under scrutiny. The president of Robco himself testified that Roberts products faced no active competition until 1953 or 1954. Moreover, in late 1955 Robco moved to eliminate price competition among the producers of gripper, and pursuant to this purpose it conspired with UST, Ace and Wenlyn, entering into licensing arrangements with them early in 1956. On this record it cannot be said that there was free and open competition with gripper produced by others.

The Roberts respondents next contend that the record does not contain any evidence that the agreements between them and their distributors lessened or hindered competition. The short answer to this contention is that no evidence of this character is required. Price fixing is illegal *per se*. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211 (1951); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 309–310 (1956). (But even if such proof were needed it can be found in this record. There was no competition between the authorized distributors in the resale of gripper. The strictures of the prohibition against resale prevented other carpet accessory distributors from competing for the custom of dealers. In addition, authorized dealers could not meet the prices of competitors without the concurrence of Robco.)

The prohibition against selling to another for resale to the trade contained in the Distributor Sales Policy is not immunized by the decision of the Commission in *Roux Distributing Co., Inc.*, Docket 6636 (March 4, 1959). The facts in that case are far removed from those now before us. It should be emphasized that the *Roux* initial decision expressly notes that it was not a price-fixing case, such as the Bausch & Lomb case.. [*United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944)]. Further, the *Roux* case was not premised upon a charge of conspiracy or agreement, which is the crux of this case.

We conclude that the first charge of violation of Section 5 of the Act has been sustained.

II. The Licensee Phase.

The Roberts group was first faced with serious competition in 1953–1954. The major new entrants in the market were UST, Ace, Wenlyn and Edgemaster. Vigorous price competition soon became prevalent. The officers of the Roberts Companies were displeased by these developments. They felt that the competition furnished by the new entrants was unfair. The Roberts group had developed the market, educated the carpet layers in the new method of installation and engaged in a costly campaign to establish public awareness of the product. Then, in the words of Livie, president of Robman and director of Robco:

> Competition came in and sold only one little element of this entire method, which was the carpet gripper itself. They copied our carpet gripper, they copied every innovation we made in it * * * They copied our designation of types A, B, C and D, and in every way they just rode on our coattails and sold our (sic) products strictly on the approach of price.

The Roberts group first decided to fight this "unfair" competition by a vigorous program of patent enforcement, and by price reductions in the areas where competition was particularly keen. A suit was brought against UST and its principal West Coast distributor charging them with patent infringement, Ace was threatened with suit, and the Roberts group was later engaged in patent litigation with Edgemaster.

However, the policy soon changed, and the Roberts group embarked on a policy of licensing its competitors. Again, in the words of Livie:

> * * * we decided from a philosophical standpoint that maybe the thing to do is live with the competition at the present time, and try to influence them in better business and sounder business practice, which at the present time was ruining the industry.

It is the form that "influence" took which is the nub of the controversy in this phase of the case.

The licensing program began in late 1955. On March 1, 1956, UST and Ace were granted non-exclusive licenses to manufacture and sell the carpet gripper patented by Roberts. The licenses provided for a graduated royalty payment based on the amount of carpet gripper sold and the selling price. Selling direct to dealers rather than through distributors was penalized by the requirement of an additional royalty. The term of the license extended three years beyond the life of the basic Roberts patent grant. On May 1, 1956, Wenlyn was licensed on similar terms, except that the minimum royalty was reduced—a benefit later extended to UST and Ace. Edgemaster was granted a license as part of a settlement agreement terminating pending patent litigation in June, 1957.

A number of meetings were held between representatives of the Roberts Respondents and various representatives of the licensees. The meetings commenced in November 1955, and another was held in January, 1956—both of which occurred before the first license was issued. Subsequent meetings were held in June and July, 1956, and in January, June, July, August and October, 1957.

The theory of Counsel Supporting the Complaint is that the licensor-licensee relationship was used to cloak a conspiracy to hinder, lessen or eliminate competition in the sale of gripper and to create a monopoly in the Roberts respondents, UST, Ace and Wenlyn; that the conspiracy was formed and furthered at these meetings, that to implement the central purpose Robco attempted to suppress unlicensed manufacturers and the respondents agreed to fix the sale and resale prices of gripper.

The central question of proof is what transpired at those meetings. Stripped to bare essentials, the testimony of the representatives of the licensees is to the effect that the Roberts representatives used their influence as the dominant factor in the industry to require them to accept licenses, to suppress unlicensed manufacturers and to force their acceptance of an agreement to eliminate price competition. The testimony of the Roberts representatives is that they used their influence to enforce their patents and to educate their smaller rivals in the realities of the industry, and encouraged them to stop demoralizing price cuts by reiterating the Roberts Competitive Policy of meeting but not beating price competition, but that no agreement was reached.

The representatives of each of the licensees who appeared as witnesses are as follows:

UST	Harold Metal
	Edward Lieberman
Ace	William Fuhrman
Wenlyn	Jerome Kraut
	Marvin S. Howard
Edgemaster	Sol C. Stouman
	Irving Hellman

The Roberts respondents vigorously attack the credibility of these witnesses. With equal vigor, Counsel Supporting the Complaint asserts that the testimony of the Roberts representatives is self-serving in nature. The Hearing Examiner did not resolve this basic issue of credibility. Instead, he set forth the conflicting versions of what transpired at the meetings and concluded that "taking either version of what happened at the meetings" that fixed prices were established pursuant to a common understanding. The Hearing Examiner thus limited the scope of the case to the question of price fixing. However, the complaint charges a general conspiracy to lessen or eliminate competition and then charges that pursuant to this conspiracy the respondents acted in concert to do a number of things, one of which was to fix prices. The evidence that the Hearing Examiner refused to weigh dealt with the price fixing scheme, but it also dealt with other phases of the conspiracy and the effectuation of the purposes of the conspirators. While we do not quarrel with the limited finding of the Hearing Examiner, we prefer to ascertain whether the larger allegations of the complaint have been sustained by the evidence. To do this we must weigh the conflicting testimony and resolve the basic issue of credibility left unresolved by the Examiner.

Before launching an examination of the conflicts it is important to establish the facts with regard to the meetings that are uncontradicted.

All agree that the meetings took place at the times mentioned. All agree that the competitive climate and the price structure of the industry was the dominant theme of discussion. It is uncontradicted that the Roberts Respondents desired limited competition and a stabilized price structure, and sought to educate the licensees in effective methods to achieve it, including methods to limit the discretion of distributors with regard to price. It has been noted that the royalty features of the licenses encouraged selling through a distributor network. It is uncontradicted that the Roberts representatives sought to encourage increases in price by repeated emphasis on the Roberts Competitive Policy, which provided that the prices of competitors would be met but not beaten. That the licensees, particularly Fuhrman of Ace, argued at every meeting that their products should have a price advantage over the Roberts product and at every meeting this suggestion was rejected by the Roberts representatives is also uncontradicted. The Roberts witnesses also conceded they introduced the subject of what they called "deviations" or "variations" in price by certain distributors, some of whom were customers of the licensees. There is a conflict as to whether De

Stories of Roberts often used the word "violation" instead of "deviation."

In addition there is uncontradicted documentary and testimonial evidence that on July 8, 1956, UST raised its list price to dealers to 3.9 cents for standard gripper and 4.2 cents for prenailed gripper in 12,000 foot quantities and that Wenlyn raised its dealer prices to that level at the same time. Ace made its dealer prices identical with the others on August 30, 1956, and on September 4, 1956, Robco raised its New York City and adjacent area, Detroit area and Texas area prices to the 3.9 and 4.2 figures. (All other Robco zone prices had been at that level or a higher level previously.)

Each of the representatives of the licensees testified about the nature of the licensing arrangement, and about Roberts efforts against unlicensed manufacturers. Their testimony emphasized the coercion the Roberts group was able to exert due to its financial strength, dominant position in the industry and possession of the gripper patent. Each testified that some price fixing agreement was made at each of the six meetings that he had attended. All testified that the goal sought was uniform nation-wide prices of 3.9 cents for standard gripper and 4.2 cents for prenailed gripper in 12,000 foot quantities. The Roberts respondents first attack the credibility of the licensees' testimony on the basis that it is contradictory, both as to the making of an agreement and as to the terms of the agreement. The attack centers on the circumstances surrounding the meetings held in June and July 1956 and the July-September 1956 increases in price.

We cannot find that any of the licensees' testimony contradicts the fact that an agreement was reached at the June 1956 meeting. Five representatives of licensees testified regarding this matter. The Roberts respondents do not deny that Lieberman of UST and Howard and Kraut of Wenlyn all unequivocally stated that agreement was reached. With respect to the alleged price fixing agreement the Roberts respondents assert that Fuhrman of Ace "merely testified that the parties 'agreed that we were going to *aim* for 3.9 and 4.2.'" The full text of Fuhrman's answer to a question whether there was an agreement with respect to prices at the June meeting is as follows:

> *Yes, there was an agreement on prices.* We agreed that we were going to aim for a standard price for 12 thousand foot shipments or more for 3.9 for standard and 4.2 for prenailed and to go up to 5.2 for one carton. 5.2 per foot for standard and 5.5 for prenailed. [Emphasis supplied.]

Nor is there anything contradictory in the testimony of Metal of UST. The Roberts respondents assert that Metal did not claim any price agreements were reached at the June meeting. But a fair reading of Metal's testimony as a whole establishes that he stated that it was all understood that prices were to be set at the levels that had been put into effect in the Los Angeles and western states area in January and that the June meeting was merely a point in the continuum begun at the earlier meetings.

If UST and Wenlyn raised their prices two days before the meeting held on July 10, 1956, this does not assist in the establishment of contradictions in the licensees' testimony, in view of the uncontradicted testimony that the agreement was set at the June meeting.

The Roberts assertion that the licensees' testimony is contradictory as to the terms of any agreement centers on whether the agreement excluded the New York City marketing area, since there was no contradiction as to the projected 3.9–4.2 price structure. The witnesses did not testify that the New York City area was excluded. Rather, in the words of Howard of Wenlyn:

> * * * as far as the New York City prices were concerned, like I said, we had agreed on this 3.9 and 4.2, but we had decided that New York as a Zone 1 price wouldn't be raised as quickly as the rest of the country, to give the people in New York a chance to digest it, so to speak. We didn't want to raise it too high in New York to begin with.

When Howard was asked what he meant by the term "we" he said: "the licensees and the Roberts Company."

This explanation is reasonable, since on June 1, 1956, Robco's Zone 1 (New York, etc.) prices were 2.5 and 2.8. The next lowest prices were 3.9 and 4.2 in the West Coast area.

The thread of agreement is woven through the testimony of all the licensees' representatives. To be sure, there are minor inconsistencies, and there are occasional lapses of memory on the part of some, but when the testimony is viewed as a whole there are no such contradictions that would vitiate the credibility of this line of witnesses.

No inference of lack of agreement can be drawn from the fact that the price increases of UST, Ace, Wenlyn and Robco were spread over a two month period. It certainly cannot be said that there is any legal requirement that all the parties must put the prices agreed upon into effect at the same time in order to support a finding of conspiracy. See *United States* v. *General Motors Corp.*, 121 F. 2d 376, 408 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941). To the contrary, it is more logical to infer that UST, Wenlyn and Ace, small companies that had heretofore competed against the industry leader solely on the basis of price, would not have ordered sharp increases above the prices of Roberts products in the New York City and adjacent area, their home market and primary market, without an understanding that the Roberts prices would soon follow. The circumstances surrounding the West Coast price increase in January show that the Roberts group did not trust the licensees, and would require proof that they had raised their prices. This inference is reinforced by the illogic of DeStories' explanation of why Roberts prices were raised on September 4th.

The Roberts respondents next contend that the licensees' testimony is incredible because of their bias, hostility and prejudice against the Roberts interests.

That there was no love lost between the licensees and the Roberts group is readily apparent. The licensees felt themselves the victims of coercion. Lieberman and Metal of UST and Fuhrman of Ace all testified that they had not paid all royalties due Robman under the license agreements, and that they felt royalties should not be paid until the termination of these proceedings. However, the matter of past-due royalties cannot be said to color the testimony of Howard and Kraut, for at the time of the hearings Wenlyn had been declared bankrupt and these men had formed other associations. In any event, we cannot glean any positive and deliberate misrepresentations of fact from the testimony of *any* of these witnesses, and their testimony generally accords with the available documentary evidence and the reasonable inferences that can be drawn therefrom. Furthermore, it must be kept in mind that UST, Ace and Wenlyn were designated as parties respondent in this proceeding as well as the Roberts group. By revealing the nature and existence of the unlawful combination these men subjected their companies to the pains and penalties of an order to cease and desist in the same manner as the Roberts respondents. To this extent their statements were admissions against interest, and entitled to added weight for that reason.

Moreover, the sword of hostility cuts two ways here. The Roberts representatives resented the entry of the new companies into the market, they resented their "unfair" competition, their "rubber price lists," and their negligence in the matter of royalties. On balance, there is no cause for rejecting the testimony of the licensees because of bias, hostility or prejudice.

Considering the testimony of the licensees as well as the other testimonial and documentary evidence spread upon the record, we find that the allegations of the complaint charging a conspiracy between the Roberts group and its licensees to lessen competition are sustained by reliable probative evidence.

III. The Jurisdictional Issues.

The contention of the Roberts respondents that the evidence adduced fails to demonstrate the public interest necessary to support the Commission's jurisdiction may be disposed of summarily. The vertical combination and the horizontal combination revealed each "* * * necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the antitrust acts to maintain." *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 454 (1922). "To suppress elimination of competition and to prevent monopoly is in the public interest." *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511, 520 (6th Cir. 1944). See *California Rice Industry* v. *Federal Trade Commission*, 120 F. 2d 716, 719 (9th Cir. 1939); *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999, 1006 (7th Cir. 1939).

The contention that the Commission cannot exercise jurisdiction over Robcorp presents a more difficult question.

The history, ownership and management of Robcorp all attest to its status as an integral unit in the Roberts manufacturing-distributing system, as the Hearing Examiner found. It has been obligated by contract to deliver its entire output to Robco since its inception and has always done so. It is apparent from the testimony of the officers of the Roberts group that they themselves always regarded the three companies as a single entity. "We" and "our" run through this testimony like an insistent refrain. The hearing examiner found that, "Robcorp is only another arm of the same organization."

The Roberts contention is based upon the fifth section of the output contract signed by Robco and Robcorp. That section reads as follows:

Delivery: freight

Title and risk of loss to all Smoothedge sold and purchased under this agreement shall pass to The Roberts Co. upon delivery at Roberts Corporation's plant at Rio Piedras, Puerto Rico, to the carrier specified by The Roberts Co. The Roberts Co. agrees to pay the cost of transporting all Smoothedge sold and purchased under this agreement.

On the basis of this section it is argued that Robcorp's activities take place exclusively within the territorial limits of Puerto Rico; therefore, it is not engaged in interstate commerce; therefore, the Commission has no jurisdiction over it.

This line of reasoning bears a marked similarity to that employed by the Northwestern Portland and Superior Portland companies in *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948). We think the Court's refutation of that argument applies here.

The charge against these respondents was not that they, apart from the other respondents, had engaged in unfair methods of competition and price discriminations simply by making intrastate sales. Instead, the charge was * * * that these respondents in combination with others agreed to maintain a delivered price system in order to eliminate price competition in the sale of cement in interstate commerce * * * The fact that one or two of the numerous participants in the combination happen to be selling only within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction. *The important factor is that the concerted action of all of the parties to the combination is essential in order to make wholly effective the restraint of commerce among the states.* The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. [333 U.S. at 695–696. Emphasis supplied.]

Here, the close integration of Robcorp into the operations of the Roberts group through common ownership and related management dispels any inference that it was not chargeable with knowledge of, and acquiescence in, both of the conspiracies. Even if it be assumed, *arguendo*, that Robcorp was a completely separate entity, its acquiescence was "essential in order to make wholly effective the restraint of commerce among the states." For example, at the time that the horizontal combination was implemented in the Summer of 1956, Robcorp, by the terms of its contract had the right of cancellation upon six months written notice to Robco. It is inconceivable that Robman and Robco would have pressed home a scheme to stabilize industry prices at the desired level for an indefinite period by pressing agreement upon the licensee respondents without assurance that Robcorp would not upset the market by cancelling its contract with Robco and selling its output on the open market in free competition.

The holding of the Court of Appeals for the Seventh Circuit in *National Lead Co.* v. *Federal Trade Commission*, 227 F. 2d 825, 829 (7th Cir. 1955), *dismissed*, 351 U.S. 921 (1956) has no application here. The question presented in that case was whether a complaint against a parent company which had never engaged in the industry under scrutiny as a producer, distributor or in any other manner should be dismissed even though a subsidiary of the parent had engaged in a conspiracy violative of Section 5. The Court held that in order to hold the parent for the acts of the subsidiary:

* * * there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction. * * * Such a finding has no substantial support in this record. (227 F. 2d at 829).

The obvious distinction is that the relationship involved here is not that of a non-operating parent and an operating subsidiary. Robco was actively engaged in the industry as a manufacturer, and was an integral unit in the manufacturing, distributing and sales structure of the Roberts group. Moreover, even if a finding of unitary identity were required here the facts heretofore set out provide ample basis for such a finding.

We hold that Robcorp was a proper party respondent in these premises.

IV. The Order.

The Roberts respondents object to the inclusion of paragraphs 2 and 3 of the part of the order relating to the licensee part of the case. These paragraphs proscribe:

2. Limiting the customers of respondents to persons known as distributors or wholesalers or to any other particular category of persons;

3. Fixing or assessing penalties by contract or otherwise for the sale of said products by respondents to users or to any other class or classes of persons;

The objection is based upon an assertion that paragraphs 8 and 9 of the Complaint do not include an allegation relating to the activities prohibited in the challenged paragraphs.

Paragraph 8 charges a horizontal conspiracy to lessen or eliminate competition. There is undisputed evidence that the patent licenses issued by Robman contained a penalty for direct sales to dealers. At each of the meetings the Roberts respondents continually exhorted the licensees to sell only through distributors, since the use of that channel simplified the task of maintaining prices. They recommended that the licensees require their distributors to submit invoices in the same manner that the Roberts authorized distributors did, saying this was the best device to secure adherence to published price lists. The licensees acquiesced in all of the Roberts proposals, but stated that they could not control their distributors to the same degree that Robco controlled its distributors. Thus, the prohibitions contained in the questioned paragraphs of the order reach devices consciously employed by Roberts to further the conspiracy charged in the complaint. The order does not go beyond the scope of the complaint. Even if it be conceded that there was a variance, it cannot be said that the variance was "* * * an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet." *Armand Co., Inc.* v. *Federal Trade Commission*, 84 F. 2d 973, 974–975 (2d Cir. 1936).

Counsel supporting the complaint also objects to the order proposed by the hearing examiner, contending that it is inadequate since it deals only with the price-fixing aspect of the conduct of respondents. Giving due weight to the testimony of the licensees, and in view of our determination that the evidence of record supports a finding of conspiracy substantially as alleged in paragraphs eight and nine of the complaint, we are of opinion that the proposed order is inadequate. The order proscribes any future conspiracy to fix prices by these respondents, but it does not address itself to the coercive conduct of the Roberts respondents.

Remedying this lack is a task not without difficulty. The principal tool used by the Roberts respondents in engineering the conspiracy was the gripper patent. In drafting an order proscribing the abuse or misuse of a patent a careful balance must be struck between the private inventor's legitimate reward and the public interest in the elimination of undue restraints upon competition. The patentee may take proper measures to protect the nature and scope of his grant, but nothing is clearer than the fact that lawful means are capable of being used to achieve unlawful ends. When the fact of such an abuse is proven in a proper case, it is the duty of the Commission and the courts to fashion a remedy that will effectively terminate it. See *Hartford Empire Co.* v. *United States*, 323 U.S. 386 (1945), 324 U.S. 570 (1945); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947); *United States* v. *United States Gypsum Co.*, 340 U.S. 76 (1950); *Besser Mfg. Co.* v. *United States*, 343 U.S. 444 (1952).

Three elements of the conduct of the Roberts respondents merit proscription here. First, there is the dominant theme of the coercive conduct of the Roberts respondents. Second, there is the use of the license agreements as a cloak for the establishment of the agreement to fix prices, and the use of the royalty provisions of the licenses themselves to implement the scheme to establish prices by encouraging the licensees to channel their products through distributors. The license agreements also allow for undue perpetuation of illegal conduct by extending the terms of the licenses three years beyond the term of the patent grant. Mindful of the desirability of preserving the reward of the inventor as much as is possible while effectuating the public interest, we are of opinion that the terms of the proposed order supplemented by a proscription against coercion and a proscription against the extension of licenses beyond the term of the patent grant will terminate the abuses shown in this record.

Finally, the use by the Roberts respondents of the threat or institution of patent infringement suits as a device for the implementation of a conspiracy to lessen or eliminate competition must be considered. One or many infringement suits, without more, do not constitute a violation of antitrust law or policy. But a pattern of infringement suits or threats of suits as part of a larger plan to unduly restrain or eliminate competition furnishes another example of the use of a lawful means in an unlawful manner. *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416 (10th Cir. 1952), *cert. denied*, 334 U.S. 837 (1952); *Lynch* v. *Magnavox Co.*, 94 F. 2d 883 (9th Cir. 1938). See *Noerr Motor Freight* v. *Eastern Railroad Presidents Conference*, 155 F. Supp. 768, 829 (E.D. Pa. 1957). This unlawful use, like all others used to implement the conspiracy before us, must be proscribed.

If these prohibitions are to effectively remedy the trade restraining conspiracy in which the Roberts respondents participated, they must be directed to the three members of the Roberts group as individual corporations in so far as they relate to coercion of competitors, and to the Roberts Manufacturing Company, the holder of the gripper patent, as an individual corporation in so far as they relate to patent abuse. The considerations dictating the framing of the order in this manner are the same as those found by the Commission to have existed in *National Lead Co.*, 49 F.T.C. 791, 884–889 (1953). Chairman Mead's conclusion in that case applies here as well: "Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device[s] which made their combination effective, an order merely prohibiting the combination may well be a useless gesture." *Id.* at 885. The method employed in that case, and to be employed here, was specifically sanctioned by the Supreme Court in *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957). It is axiomatic that in fashioning a remedy the Commission has power to "* * * effectively close all roads to the prohibited goal * * *" *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

V. Conclusion.

The appeal of the Roberts respondents is denied. The appeal of Counsel supporting the Complaint is granted in part and denied in part. The initial decision, to the extent that it is contrary to the views expressed in this opinion, is modified to conform with such views. An appropriate order will be entered.

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

599869—62——103

FINAL ORDER

This matter having come on to be heard upon the cross-appeals of respondents and counsel supporting the complaint from the hearing examiner's initial decision; and

The Commission, for the reasons stated in the accompanying opinion, having denied the appeal of respondents and granted in part and denied in part the appeal of counsel supporting the complaint, and having modified the initial decision to the extent it is contrary to the views expressed in the said opinion:

It is ordered, That the initial decision be modified by inserting the following provisions immediately before the last paragraph thereof:

It is further ordered, That respondents The Roberts Company, Roberts Manufacturing Company and Roberts Corporation, all corporations, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale and distribution of carpet gripper or other products used in laying wall-to-wall carpeting in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from urging, inducing or coercing, or attempting to urge, induce or coerce any other manufacturer of such products to sell them at any particular prices or under any particular methods, terms or conditions of sale or resale, or to sell or refrain from selling said products to any particular person or group or class of persons.

It is further ordered, That respondent Roberts Manufacturing Company, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale and distribution of carpet gripper or other products used in laying wall-to-wall carpeting in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from performing any of the following acts:

1. Threatening to bring patent infringment suits, for the purpose of restraining or eliminating competition, against competitors or prospective competitors who have not practiced the invention claimed by the patent.

2. Granting, continuing in effect or enforcing any license to practice inventions covered by letters patent whereby the term of the license agreement is sought to be and is extended beyond the expiration date of the patent grant.

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

It is further ordered, That respondents, The Roberts Company, Roberts Manufacturing Company, Roberts Corporation, Ace Tackless Corporation, and United States Tackless, Incorporated, corporations, 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.

Commissioner Tait not participating.

IN THE MATTER OF

AUDIVOX, INC., ET AL.

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

Docket 7345. Order, June 30, 1960

Order modifying desist order of Sept. 3, 1959, in hearing aid case, by dividing paragraph (a) into two parts, to correspond with the similar order in *Beltone Hearing Aid Co.*, p. 387 herein.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. K. P. Kratz for the Commission.

Mr. A. Benjamin Cohen, of Boston, Mass., for respondents.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Commission upon its review of the whole record, including briefs and oral argument; and the Commission having rendered its decision and having issued its order to cease and desist on September 3, 1959; and

Respondents having filed in the United States Court of Appeals for the First Circuit their petition to review and set aside the order to cease and desist issued herein, and that Court having rendered its decision and, on March 14, 1960, issued its final decree, modifying said order of the Commission; and the time allowed for filing a petition for certiorari having expired and no such petition having been duly filed:

Now therefore, it is hereby ordered, That the aforesaid order to cease and desist be modified to read as follows:

It is ordered, That respondents Audivox, Inc., a corporation, and its officers, and Rolf Stutz and R. R. Wagner, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hearing aid devices now known as Models 75, 78, 8750 or any other air conduction hearing aid device, whether sold under the same or any other model designation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, any advertisement, by means of United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products, which advertisement represents, directly or by implication, that:

(a) There are no buttons attached to said hearing aids unless in close connection therewith and with equal prominence it is disclosed that an ear mold or plastic tip is inserted into the ear;

(b) There are no wires or cords attached to said hearing aids, unless in close connection therewith and with equal prominence it is disclosed that a plastic tube runs from the device to the ear;

(c) Any of their hearing aids are invisible when worn;

(d) Any of their hearing aids are either completely hidden behind the ear or completely concealed within an eyeglass temple;

(e) Their booklet known as Hearing Aid Digest is offered to the public as a public service; or that any other booklet or publication is so offered, unless such is the fact;

(f) That an executive of Respondent Audivox, Inc., invented their hearing aid model 8750; or that any other hearing aid was invented by anyone connected with Respondents, unless such is the fact;

2. Disseminating any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Respondents' said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to Respondents R. C. Alexander and W. Walters individually, but not as officers of said corporation.

IN THE MATTER OF

ANN J. WACKSMAN TRADING AS ALLIED INFORMATION SERVICE, ETC.

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

Docket 7537. Complaint, July 14, 1959—Decision, June 30, 1960

Order requiring an individual in Washington, D.C., to cease obtaining current information of delinquent debtors through such subterfuges as representing falsely that debtor recipients of her questionnaires would receive a substantial sum of money after filling them out and returning them, and that an agency of the U.S. Government was requesting the information.

Mr. Michael J. Vitale for the Commission.
Jacobs & Jacobs, of Atlanta, Ga., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

THE PROCEEDINGS

The respondent herein is charged in the Commission's complaint issued on July 14, 1959, with violating the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in interstate commerce, through the sale and dissemination of a deceptive printed form designed to entice defaulting debtors to furnish certain information about themselves.

The form states in substance that there is a sum of money on deposit for the recipient not in excess of $1,000 and that upon receipt of the information requested on the form, the respondent will send such money registered in recipient's name to the address given. The form also sets forth questions which, if answered, provide information which is considered to be of value in the collection of accounts owed or alleged to be owed by the addressee. Imprinted on the form is the picture of an eagle which appears beneath the caption "Deposit System Certificate."

The complaint also alleges in substance that the format of the form used is not only otherwise deceptive but that it imputes that information is sought by an agency or branch of the United States government, acting as a depository of a reasonably substantial sum of money to be delivered to the recipient of said form upon proper identification.

The allegations of the complaint further aver that the object of respondent's printed form is to obtain information by subterfuge, all to the prejudice and injury of the public.

The respondent, by her counsel Joseph Jacobs, interposed a formal written answer to the complaint dated August 24, 1959. This answer is essentially a general denial except that it admits the respondent is not connected with the United States government and asserts in substance that the use of such form is essentially in the public interest rather than a disservice to the public.

Pursuant to notice a hearing on the charges was held in Washington, D.C., on October 22, 1959, before the undersigned hearing examiner, theretofore duly designated to hear this proceeding. At said hearing testimony and other evidence were offered in support of and in opposition to, the allegations of the complaint, the same being duly recorded and filed in the offices of the Commission. All parties were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard and to crossexamine witnesses.

Pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order were filed by counsel supporting the complaint and counsel for respondent. No request for oral argument was made by any of the parties. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Upon consideration of the entire record herein and from his observation of the witnesses, the undersigned concludes this proceeding is in the public interest and makes the following:

FINDINGS OF FACT

I. The Business of Respondent and Interstate Commerce

1. Respondent, Ann J. Wacksman, is an individual trading and doing business as Allied Information Service and National Deposit System, with her office and principal place of business located at 527 Woodward Building, Washington, D.C. Respondent formulates, controls and directs the policies, acts and practices hereinafter set forth.

2. Respondent is now, and for some time last past has been, engaged in the business of selling a printed mailing form. Respondent causes said printed form, when sold, to be transported from her place of business in Washington, D.C. to purchasers thereof at their respective points of location in various other states of the United States. Respondent maintains a course of trade in said form in commerce as "commerce" is defined in the Federal Trade Commission Act.

II. The Unfair and Deceptive Practices

A. *The Printed Form Sold*

The printed form sold by respondent is designed and intended to be used and has been used by collection agencies, merchants and others to whom it is sold for the purpose of obtaining information concerning delinquent debtors with the aid and assistance of respondent. This form uses the name "National Deposit System" and contains rectangular holes on the card. The picture of an eagle appears beneath the caption "Deposit System Certificate." The form is designed to be forwarded to addressees in envelopes provided by the respondent in which are enclosed envelopes addressed to "National Deposit System, 527 Woodward Building, Washington 5, D.C., ATT: Department of Disbursements."

The form states that: "There is a sum of money on deposit for you not in excess of $1,000. Complete the reverse side of this form in full so as to expedite prompt mailing of your disbursement to the address given registered in your name." The form then sets out questions which, if answered, provide information which is considered to be of value in the collection of accounts owed or alleged to be owed by the addressee. The purchasers of respondent's printed form fill in the appropriate data in the spaces provided, including the name of the alleged debtors and their addresses and enclose said form in open window envelopes and deliver them to respondent at her office in Washington, D.C. The respondent then meter-mails the individual envelopes from her office in Washington, D.C. If the addressees complete the forms and mail them to respondent in Washington, D.C., a small brown envelope containing two pennies is sent to the persons filling in the form. Respondent then processes the forms and forwards them to the purchasers.

B. *The Representations Made*

Through the use on said form of the terms "National Deposit System Certificate," and also through the use of the picturization of an eagle, similar in design to that used on the seal of the United States Government, official looking building and the format and phraseology of said form, respondent represented, and placed in the hands of purchasers of the form, the means and instrumentalities whereby they represent and imply, to those to whom said form are mailed that the request for information is made by an agency or branch of the United States Government, acting as a depository of a reasonably substantial sum of money to be delivered to the recipients of said form upon proper identification by furnishing all of the information requested. The fact that said forms are meter-mailed from Washington, D.C. enhances said implication.

C. *The Falsity of the Representations*

The aforesaid representations and implications were, and are, false, misleading and deceptive. In truth and in fact, respondent is not connected with the United States Government in any respect and is not engaged in any fiduciary or other capacity to receive money for the persons to whom the form is sent, and the only money sent them is two cents. Said form is used to obtain information concerning alleged delinquent debtors by subterfuge. This practice constitutes a scheme to mislead and conceal the purpose for which the information is sought.

The use, as hereinbefore set forth, of said form has had, and now has, the tendency and capacity to mislead persons to whom said form is sent into the erroneous and mistaken belief that the said representations and implications are true and to induce the recipient thereof to supply information which they otherwise would not have supplied.

CONTENTIONS AND CONCLUDING FINDINGS

1. It is the position of the respondent who purports to be a credit expert that the persons to whom such form is sent are not deserving of public protection by reason of their debt delinquency and that the practices used are justified means to the legitimate end to procure payment of debts by such persons. The argument which respondent makes here is one which, in the main, has been fully considered, both by the Commission and the courts, and has been found to be without merit. The legitimate objective of seeking to induce debtors to pay their debts does not justify the use of illegitimate and unlawful means. There is no lack of public interest in the protection of such persons merely by reason of their delinquency. *Silverman* v. *FTC*, 145 F. 2d 751; *Rothchild* v. *FTC*, 200 F. 2d 39; *National Service Bureau*, v. *FTC*, 200 F. 2d 362; *Dejay Stores, Inc.* v. *FTC*, 200 F. 2d 865; and *National Research Company*, etc., Docket No. 6236, June 1, 1956.

2. With regard to the use of an imprinted eagle on the form sold by the respondent, respondent's counsel points out that the government has no sole right or patent for its use. Nevertheless, the American eagle has, throughout the life of this nation, been employed as a symbol of government power and authority and its picturization on any document has the tendency, therefore, to suggest the

government authority of the United States. When an eagle is used on private documents its tendency to suggest such government authority may be increased or lessened by the manner and form in which it appears thereon. In the present case respondent's eagle is used in such a manner as to increase its tendency towards deception rather than to lessen it. This is particularly so since the terminology "National Deposit System Certificate," is used and the enclosed envelopes in which the forms are to be returned are addressed to "National Deposit System, 527 Woodward Building, Washington 5, D.C., ATT: Department of Disbursements."

Furthermore, there is no merit to respondent's contention that the eagle used on its form to locate delinquent debtors is considerably different in at least twelve particulars than that used by the United States Government and is therefore not deceptive. In this connection it should be observed that the eagle appearing on the Great Seal of the United States is not the only eagle design officially used by the United States Government. Judicial notice is taken of the fact that at least four different eagle designs are officially used by the United States Government on its coinage, all of which differ materially than that appearing on the Great United States Seal. In order, therefore, to eliminate the tendency toward deception inherent in respondent's use of an eagle on its form, it would be necessary for the public at large to have specialized knowledge of the picturization of the eagle appearing not only on the Great Seal of the United States, but otherwise. Although the respondent made no direct representation of connection with the United States Government, the form and manner of use may reasonably impute such connection.

The hearing examiner is, therefore, compelled to conclude that all of the foregoing facts in combination constitute a deception for the purpose of inducing recipients of the form to furnish information about their personal affairs.

CONCLUSION OF LAW

It is concluded that the acts and practices of the respondent as hereinabove found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, Ann J. Wacksman, an individual, trading and doing business as Allied Information Service and National Deposit System, or trading and doing business under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the business of obtaining information concerning delinquent debtors, or the offering for sale, sale or distribution of forms or other materials, for use in obtaining information concerning delinquent debtors, or in the collection of, or attempting to collect accounts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the names "National Deposit System" and "Deposit System Certificate," or any other name of similar import to designate, describe, or refer to respondent's business.

2. Representing, directly or by implication, that money has been deposited with them for persons from whom information is requested unless or until the money has in fact been so deposited, and then only when the amount so deposited is clearly and expressly stated.

3. Representing, directly or by implication, that request for information concerning delinquent debtors is from the United States Government or any agency, or branch thereof, or that their business is in any way connected with the United States Government.

4. Using, or placing in the hands of others for use, any forms, questionnaires or other materials, printed or written, which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

The complaint in this matter charges respondent with having violated Section 5 of the Federal Trade Commission Act by using unfair and deceptive acts and practices in the sale and dissemination of printed mailing forms designed and intended to be used in obtaining information concerning delinquent debtors. The hearing examiner found that the charges were sustained by the evidence and ordered respondent to cease and desist from the practices found to be unlawful. From this decision respondent appeals.

One of the principal arguments advanced by respondent is that the Commission is without jurisdiction in this matter by reason of the enactment of Public Law 86-291 by Congress on September 21, 1959. This law imposes a penalty for the misuse of names, emblems, and insignia to indicate a Federal agency by those engaged in the business of collecting or aiding in the collection of private debts or obligations. Respondent contends that this later statute pre-empts from the Commission the authority to proceed against the practices prohibited therein.

First, it should be noted that respondent's contention properly can be addressed only to those portions of the initial decision and order dealing with representations of a connection with the Federal Government. In so far as the order proscribes false and misleading representations that respondent holds substantial sums of money for the person sought to be contacted in a fiduciary capacity Public Law 86–291 cannot be said to oust the Commission's jurisdiction in any respect, since that law deals only with representations of Federal connections.

It is a well-settled principle of statutory construction that a general statute and a later specific statute should be read together and harmonized if possible and that the specific statute will prevail over the general only to the extent they are in conflict. *Purdy* v. *United States*, 146 F. Supp. 762 (D. Alaska, 1956); *Stevens* v. *Biddle*, 298 Fed. 209 (8th Cir. 1924); *in re Ayson*, 14 F. Supp. 488 (N.D. Ill. 1936); *Federal Trade Commission* v. *A.P.W. Paper Co., Inc.*, 328 U.S. 193 (1945). We find no provisions in Public Law 86–291 which are so repugnant to the provisions of Section 5 of the Federal Trade Commission Act that they cannot stand together. Moreover, legislation is presumed to be passed with deliberation and with a knowledge of all existing laws on the same subject. *Purdy* v. *United States*, *supra; In re Ayson*, *supra*. The facts and circumstances surrounding the passage of Public Law 86–291 are in accord with the presumption. The House Report accompanying the bill enacted into law quotes a letter from the Commission expressing its views on the proposed legislation which concludes with the following paragraph:

Ordinarily enforcement of such orders can only be had under Section 5(1) of the Federal Trade Commission Act in civil suits seeking penalties for violations. It is the Commission's view that S. 355 would be an effective auxiliary means of expeditiously eliminating the objectionable practices in the area where the materials indicate some Federal connections. Its enactment would not defeat the Commission's jurisdiction in the same field. [H.R. Rep. No. 874, 86th Cong., 1st Sess. 4 (1959)]

Congress, knowing of the Commission's activity in this field, did not indicate any intent to pre-empt the Commission's authority. To the contrary, we think the Congressional intent was to supplement the Commission's actions in this field. Respondent's contention in this respect must therefore be rejected.

The remaining issues raised by respondent's appeal have been considered and are rejected upon the authority of *Dejay Stores, Inc.* v. *Federal Trade Commission*, 200 F. 2d 865 (2d Cir. 1952); *Lester Rothschild* v. *Federal Trade Commission*, 200 F. 2d 39 (7th Cir. 1952); *National Service Bureau* v. *Federal Trade Commission*, 200 F. 2d 362 (D.C. Cir. 1952); *David Bernstein* v. *Federal Trade Commission*, 200 F. 2d 404 (9th Cir. 1952); and *National Clearance Bureau* v. *Federal Trade Commission*, 255 F. 2d 102 (3d Cir. 1958).

Although no appeal has been taken on the point, we note that in his initial decision the hearing examiner took "judicial notice" concerning the four different eagle designs that are officially used by the United States on its coinage. In our view, it was not necessary for the hearing examiner to take official notice of this fact as the evidence of record fully supports the allegation in the complaint. Accordingly, the initial decision will be modified by striking therefrom the second full paragraph of paragraph 2 of that part of the hearing examiner's initial decision headed "Contentions and Concluding Findings."

As so modified, the initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

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

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision; and

The Commission for the reasons stated in the accompanying opinion, having denied the aforementioned appeal, and having modified the initial decision to the extent necessary to conform to the views expressed in the said opinion:

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

It is further ordered, That the respondent, Ann J. Wacksman, shall, within sixty (60) days after service upon her of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which she has complied with the order contained in said initial decision.

Commissioner Tait not participating.

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY ET AL.

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

Docket 7542. Complaint, July 14, 1959—Decision, June 30, 1960

Consent order requiring a manufacturer and its wholly owned subsidiary, together constituting the leading producer in the United States of soap and detergent products, among other things, to cease entering into unlimited exclusive "free sampling" contracts with manufacturers of automatic washing and dishwashing machines to pack samples of its soaps, detergents, or bleaches in the appliances, and entering into similar free sampling agreements with distributors, demonstrators, and dealers, to whom they paid 75¢ or $1.00 for using their products in a demonstration and for recommending only such product to the prospective purchaser; and to cease representing falsely in advertising that manufacturers of aforesaid appliances recommended and inserted free samples of respondents' detergents in their machines because they were better than competitive products, that they desired respondents' said products to be used exclusively in their machines, recommended them as the best in the market, and voluntarily selected them to be placed in their respective machines.

Mr. William J. Boyd, Jr. and *Mr. Martin F. Connor* for the Commission.

Mr. Frederick W. P. Lorenzen and *Mr. Richard W. Barrett*, of *Royall, Koegel, Harris & Caskey*, of New York, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on July 14, 1959, issued its complaint herein, charging the respondents The Procter & Gamble Company and The Procter & Gamble Distributing Company, corporations, with having violated the provisions of the Federal Trade Commission Act, and respondents were duly served with process.

On April 12, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by respondents, their counsel, and counsel supporting the complaint, under date of April 12, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondents The Procter & Gamble Company and The Procter & Gamble Distributing Company are corporations existing and doing business under and by virtue of the laws of the State of Ohio, with their offices and principal place of business located at 301 East Sixth Street, Cincinnati, Ohio.

2. 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.

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

4. Respondents waive:

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

5. 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.

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

7. This 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.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. 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 latter is hereby approved, accepted and ordered filed. 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 respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act against the respondents, 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:

It is ordered, That respondents, The Procter & Gamble Company and The Procter & Gamble Distributing Company, corporations, and their officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, distribution or sampling of soap, detergent or bleach products, including the detergent products known as Tide, Dash and Cascade, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into contracts, agreements, or understandings with manufacturers or marketers of appliances for washing clothes or dishes, whereby the right is acquired, directly or by implication, to pack or have packed respondents' soap, detergent or bleach products in said appliances to the exclusion of the products of other soap, detergent or bleach manufacturers, except that with respect to a new product and to a single product in each product classification (e.g., high sudser, low sudser, light duty, dishwasher and bleach) respondent may have a single commitment of exclusivity within a calendar year when the duration of such commitment is ninety days or less;

2. Representing, or causing the representation to be made, in any advertisement or commercial in any medium that any manufacturer or marketer of appliances for washing clothes or dishes packs any of respondents' soap, detergent, or bleach products in its appliances unless said advertisement or commercial also includes, clearly and conspicuously, an explicit disclosure that the product samples and/or the advertisement or commercial, as the case may be, are supplied by respondents, pursuant to an agreement with the appliance manufacturer or marketer, in every instance in which there is an agreement, express or implied, to feature or mention said appliances in advertisements or commercials or to provide cash consideration in lieu thereof;

3. Failing to reveal plainly on the packages of respondents' soap, detergent or bleach products placed in appliances for washing clothes or dishes that such products are supplied free for such placing by and at the initiative of respondents in cooperation with the manufacturer or marketer of such appliances, if such is the fact;

4. Paying or agreeing to pay any party for using or recommend-

ing the use of respondents' soap, detergent or bleach products in demonstrations of appliances for washing clothes or dishes, unless the party so demonstrating said appliances discloses at the time of said demonstration that it was made by said party in cooperation with respondents.

The term "respondents" as used herein is intended to include either or both The Procter & Gamble Company and The Procter & Gamble Distributing Company, whether acting separately or jointly.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on April 14, 1960, having filed an initial decision wherein he accepted an agreement containing a consent order to cease and desist, theretofore executed by the respondents and counsel in support of the complaint, and issued his order in conformity with the provisions of said agreement; and

The respondents, by motion filed May 6, 1960, having requested (1) an extension of time within which to appeal from said initial decision, and (2) a remand of the proceeding to the hearing examiner, which motion was withdrawn and superseded by another motion, filed June 24, 1960, wherein the Commission was requested to modify the initial decision by deleting therefrom the following language which the respondents state was not included in the agreement of the parties:

"That the complaint states a legal cause for complaint under the Federal Trade Commission Act against the respondents, both generally and in each of the particulars alleged therein"; and

The Commission having considered the matter and having concluded that the complained-of statement, while not found *in haec verba* in the agreement, represents a conclusion which is fully justified by the other statements and admissions included therein, and thus does not constitute a departure from the agreement for consent order; and, accordingly:

It is ordered, That the respondents' motion for modification of the initial decision be, and it hereby is, denied.

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

It is further ordered, That the respondents, The Procter & Gamble Company and The Procter & Gamble Distributing Company, corporations, 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 contained in the aforesaid initial decision.

INTERLOCUTORY ORDERS, ETC.

P. LORILLARD COMPANY

Docket 4922. Order, July 15, 1959

Order reopening case and directing hearing examiner, upon completion of hearings, to certify record to Commission with his recommendation.

Respondent having filed a petition seeking to modify the order to cease and desist heretofore entered in this proceeding, and counsel supporting the complaint having filed an answer thereto wherein he does not oppose the granting of said petition; and

The Commission being of the opinion, on the basis of the showing made in respondent's petition and supporting affidavit, that the proceeding should be reopened to determine whether conditions of law or fact have so changed as to require modification of the order or if the public interest so requires:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That a hearing examiner be designated for the purpose of receiving such evidence as may be offered by the respondent with respect to the aforesaid question.

It is further ordered, That the hearings shall be conducted in accordance with the Commission's Rules of Practice for Adjudicative Proceedings insofar as such Rules are applicable; that the hearing examiner shall have all the powers and duties as provided for in said Rules, except that of making and filing an initial decision; and that counsel supporting the complaint shall have the usual rights of due notice, cross-examination and the presentation of evidence in rebuttal.

It is further ordered, That upon completion of the hearings the hearing examiner shall certify the record to the Commission with his report and recommendation thereon.

ADMIRAL CORPORATION

Docket 7094. Order and Opinion, July 15, 1959

Interlocutory order upholding hearing examiner's denial of respondent's motion for issuance of subpoenas duces tecum to 26 competitors, as lacking specificity.

OPINION OF THE COMMISSION

The complaint in this proceeding, in two counts, charges respondent with violation of subsections (a) and (d) of Section 2 of the

599869—62——104

Clayton Act, as amended, in its sales as a distributor of Admiral televisions, radios and appliances to dealers who re-sell them to the general public. Counsel in support of the complaint completed their case-in-chief and thereafter respondent applied to the hearing examiner for issuance of subpoenas duces tecum which would have required 26 of its competitors in three competitive areas to produce documents assertedly relating to respondent's defenses to both counts of the complaint.

As to the 2(a) count, respondent sought this evidence with respect to the following issues:

1. The issues as to injury to competition.
2. The issues as to respondent's defense of meeting competition in good faith.
3. Issues with respect to the lack of injury to the public interest.
4. Issues raised by respondent's answer based upon the decision in Moog Industries, Inc. v. F.T.C., 355 U.S. 411.

As to the 2(d) count, respondent asserted the same reasons except for those dealing with injury to competition.

On March 3, 1959, the hearing examiner granted in part and denied in part respondent's motion for subpoenas. The part denied was that part seeking documentary material to show, in connection with the 2(d) count, that respondent was "meeting competition." Upon respondent's interlocutory appeal from that ruling, the Commission, on May 29, 1959, affirmed the hearing examiner.

In due course the subpoenas duces tecum were served upon respondent's competitors and thereafter, on April 7, 1959, the hearing examiner granted motions to quash the subpoenas on the ground that the subpoenas lacked the degree of specificity required under controlling case law. The April 7, 1959, order stated, however:

> If respondent's counsel will present new subpoenas narrowed and defined as indicated, consideration of their issuance will be given * * *.

Respondent did not appeal from the April 7, 1959, ruling and, on April 17, 1959, moved for issuance of 22 subpoenas duces tecum, advancing the same grounds in support thereof as had been relied upon in its original motion for subpoenas.

On April 27, 1959, the hearing examiner denied respondent's motion of April 17, 1959, stating in his order that it "* * * does not comply in specificity with this Hearing Examiner's order of April 7, 1959."

Respondent is entitled to the production of the documents sought if their relevance and the reasonableness of the scope of the subpoenas are established. As to respondent's 2(b) defense particularly, the hearing examiner in his order of April 7, 1959, stated in pertinent part that:

Section 2(b) reads in the singular; it is concerned with individual competitive situations, particular prices on particular sales by particular competitors at particular times on specified products—not with meeting competition in general.[1] Respondent cannot fish around in the files of nonparties to locate prices which in time, product, and source, fit or seem to fit, prices which it has been shown to have itself charged. Here the case against it has been completed. Respondent knows from the record by now and from its own files also, the prices or sales which it claims to have been "made in good faith to meet an equally low price of a competitor." I see no reason why these subpoenas should not so specify.

In his order of April 27, 1959, the subject of this appeal, the hearing examiner denied respondent's motion to issue subpoenas "because such motion does not comply in specificity" with his order of April 7, 1959, quoted above. The Commission agrees with this ruling and has determined that respondent's motion of April 17, 1959, patently failed to comply with the hearing examiner's order of April 7, 1959. The specifications therein failed to describe with reasonable particularity the documents sought. Any subpoena duces tecum based upon such specifications would be entirely unreasonable in scope in that documents sought are related to competition generally and are not identified with specific offers by respondent's competitors to customers to whom respondent gave the lower prices which are the basis for the price discrimination charges in the complaint. The Commission holds, therefore, that the hearing examiner's ruling of April 27, 1959, insofar as it went to documents sought to aid respondent to establish its asserted 2(b) defense to the charges of price discrimination under Section 2(a) of the Act, was correct; that it was made in the exercise of his sound discretion; and that there has been no showing of abuse of that discretion. In fact, the discretion of the hearing examiner as to that ruling has been unquestioned.[2]

Respondent also asserts in this appeal that the documents sought are material and relevant to the so-called "Moog Issue" of what should be the effective date of any cease and desist order that might be entered, which issue was set forth as a prayer for relief in respondent's answer in this proceeding. In effect, respondent contends that the documents sought under the subpoenas are relevant to establish the validity of its request for postponement of the effective date of any order to cease and desist that might be entered until similar orders are issued against its competitors. Such

[1] *U.S.* v. *A. E. Staley Co.*, 324 U.S. 746, 753; *Standard Oil Co. of Indiana* v. *F.T.C.*, 340 U.S. 231; *F.T.C.* v. *C E. Niehoff*, 241 F. 2d 37; *Standard Motor Products, Inc.*, 50 F.T.C. 624.

[2] The Commission by its order of May 29, 1959, denying respondent's earlier interlocutory appeal determined that the defense afforded in Section 2(b) of the Act is not available as a defense to charges under Section 2(d) of the Act and we do not here reconsider or revise that ruling in any respect insofar as respondent's present interlocutory appeal might be intended or construed to re-raise that issue.

a contention is, of course, no defense to the charges contained in the complaint in this case, and it has no relevancy or materiality to any of the issues raised in this proceeding. It is true that the Supreme Court has held it to be within the Commission's "discretionary determination" to set the effective date of its orders to cease and desist, *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411. The exercise of that discretion, however, should speak as of the time of issuance of an order to cease and desist. Such an order has not yet been issued against respondent, and until a violation of law as either proved or admitted no useful purpose would be served in considering the effect of a hypothetical order upon the relationship of respondent to its competitors. At the present stage of this case, the question of the effective date of any order that might be issued against respondent is completely speculative.

For the foregoing reasons, and particularly since respondent's contention in this regard has no relevancy or materiality to the issues in this proceeding, the hearing examiner's ruling denying respondent's motion for the issuance of the subpoenas in question here was proper.

Respondent's interlocutory appeal from the hearing examiner's order of April 27, 1959, is, therefore, denied. In view of the foregoing, respondent's request for oral argument also is denied. An appropriate order will issue.

ORDER

Respondent having filed an interluctory appeal from the hearing examiner's order of April 27, 1959, denying respondent's motion for issuance of subpoenas duces tecum; and

The Commission having considered said appeal, briefs of counsel, and pertinent portions of the record herein, and being of the opinion, for the reasons appearing in the accompanying opinion, that said appeal should be denied, and being of the further opinion that the oral argument requested by respondent is unnecessary:

It is ordered, That the aforesaid interlocutory appeal and the request for oral argument be, and they hereby are, denied.

THE ATLANTIC REFINING COMPANY, INC.

Docket 7471. Order, July 15, 1959

Denial of respondent's motion to dismiss Counts I and II of the complaint, stating that it should have been directed to the hearing examiner.

Respondent having, on June 30, 1959, filed with the Commission a motion to dismiss Counts I and II of the complaint in this proceeding for lack of jurisdiction and having requested oral argument before the Commission thereon; and

The Commission being of the opinion that any jurisdictional issue can best be determined upon the basis of relevant facts developed on the record in the course of hearings herein and that said motion to dismiss properly should have been directed to the hearing examiner pursuant to §3.8 of the Commission's Rules of Practice:

It is ordered, That respondent's motion to dismiss and its request for oral argument be, and they hereby are, denied.

NELS IRWIN TRADING AS SCREEN-PRINT PRODUCTS COMPANY

Docket 6924. Order, July 17, 1959

Order modifying desist order by adding qualifying clause.

It appearing that respondent Nels Irwin, individually and trading as Screen-Print Products Company, and respondent's counsel entered into an agreement with counsel supporting the complaint for a consent order which was accepted by the hearing examiner and which became the decision of the Commission on March 21, 1958, 54 F.T.C. 1209; and

Respondent on June 12, 1959, having filed a motion seeking in effect to reopen this proceeding and to have modified the order to cease and desist heretofore entered against said respondent by inserting at the end of Paragraphs 8 and 9 of said order the additional words "unless such is the fact"; and

It appearing further that counsel supporting the complaint does not oppose the granting of said motion; and

The Commission having concluded that the modifications sought are warranted:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist heretofore entered herein be, and it hereby is, modified by inserting at the end of each of Paragraphs 8 and 9 thereof the additional words "unless such is the fact," so that said paragraphs now will read as follows:

"8. Prospective customers may examine respondent's course and kits at home without any cost to said prospective customers unless such is the fact.

"9. On the payment of a deposit or down payment the entire course and kit will be sent to the prospective customers unless such is the fact."

ASHEVILLE TOBACCO BOARD OF TRADE, INC., ET AL.

Docket 6490. Order, July 20, 1959

Order—following remand of the case by the Court of Appeals for the Fourth Circuit—reopening proceeding and remanding case for evidence re the current situation on the Asheville tobacco market.

The Commission on March 19, 1959, having issued and thereafter served upon the respondents an order granting the respondents leave to file an appropriate memorandum or brief setting forth any objections they may have to the tentative action of the Commission on remand of this case from the United States Court of Appeals for the Fourth Circuit, a copy of which tentative action was issued and served with said order; and

The respondents on June 2, 1959, having filed their objections to the aforesaid tentative action of the Commission, and having requested that the case be reopened for the receipt of evidence concerning developments on the Asheville tobacco market subsequent to the date on which the record was closed, which the respondents contend will demonstrate the inappropriateness of the Commission's tentative action; and

The Commission having considered said request and the answer filed by counsel in support of the complaint, and having concluded that the evidence to which the respondents refer may have a material bearing on the form of order to cease and desist which would best serve the public interest in this matter:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for the purpose of receiving such evidence as the respondents may offer tending to prove by facts subsequent to the closing of the record the current competitive situation on the Asheville tobacco market.

It is further ordered, That counsel in support of the complaint shall have the usual rights of due notice, cross-examination and the presentation of evidence in rebuttal.

It is further ordered, That after the receipt of such evidence, the hearing examiner shall file with the Commission a report thereon.

LESTER B. PATTERSON ET AL. TRADING AS SKIL-WEAVE CO. ET AL.

Docket 7318. Order, July 24, 1959

Order vacating initial decision and remanding case to develop a record for disposal of the matter as to certain respondents.

The Commission having considered the hearing examiner's initial decision, filed June 9, 1959, wherein it was ordered that the complaint be dismissed as to the respondents Grant, Schwenck & Baker, Inc., a corporation, and Paul Grant, individually and as an officer of said corporation, service of which was completed on June 26, 1959; and

It appearing that said initial decision was based on a motion to dismiss as to said respondents, filed by counsel in support of the complaint, in which it was alleged that the Commission has entered a final order against the respondents, Lester B. Patterson and Edythe F. Patterson, copartners trading as Skil-Weave Co., and that the complained of practices have all been proscribed by said order and are effectively eliminated; and

The Commission being of the opinion that the aforesaid allegations do not constitute adequate grounds for dismissal as to the other respondents named in the complaint:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That the case be, and it hereby is remanded to the hearing examiner for the development of a record on the basis of which the matter may be disposed of on the merits as to the respondents Grant, Schwenck & Baker, Inc., and Paul Grant, individually and as an officer of said corporation.

ART NATIONAL MANUFACTURERS DISTRIBUTING COMPANY, INC., ET AL.

Docket 7286. Order, July 28, 1959

Interlocutory order denying respondents' motion to vacate order designating a substitute hearing examiner to replace one deceased.

Counsel for respondents having filed a motion to vacate an order designating a substitute hearing examiner to replace Examiner Joseph Callaway, deceased, together with a motion for interlocutory appeal and stay of proceedings pending disposition thereof; and

The Commission being of the opinion that respondents have made no showing that they are prejudiced in any respect by the substitution or that the newly designated hearing examiner will not protect respondents' rights to a full and fair hearing on the merits of this case and in the procedural aspects of the proceeding:

It is ordered, That the aforesaid motions of respondents, and their request for oral argument thereon, be, and they hereby are, denied.

FORSTER MFG. CO., INC., ET AL.

Docket 7207. Order, Sept. 10, 1959

Interlocutory order upholding hearing examiner's granting of motion to amend complaint and denying respondents' motion for bill of particulars.

This matter having come on to be heard by the Commission upon respondents' interlocutory appeal from the hearing examiner's ruling granting the motion of counsel supporting the complaint to amend the complaint and the hearing examiner's ruling denying respondents' motion for a bill of particulars, and the answer of counsel supporting the complaint in opposition to the appeal; and

It appearing that the amendment allowed by the hearing examiner serves to clarify the complaint and that such amendment is within the scope of the proceeding initiated by the complaint and does not in any way change the original cause of action stated in the complaint; and

It further appearing that the complaint sufficiently informs the respondents as to the nature of the statutory violation with which they are charged and that the hearing examiner properly denied respondents' motion for further particulars:

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That respondents may, within thirty (30) days after service upon them of this order, file answer to the complaint herein, as amended by the hearing examiner's order of June 30, 1959.

SPERRY RAND CORPORATION

Docket 6701. Order, Sept. 11, 1959

Order denying motion to reopen Clayton Act proceeding—disposed of by a consent order on Nov. 3, 1958, 55 F.T.C. 655—following amendment of the Act to provide for more expeditious enforcement of orders and imposition of penalties for violations.

Respondent, Sperry Rand Corporation, having filed a motion requesting the Commission to reopen this proceeding for the purpose of modifying (in a manner not specified) the order to cease and desist entered herein on November 3, 1958; and

Said respondent having alleged in support of its motion (1) that certain bona fide questions exist as to the propriety of the respondent's pricing practices under the terms of the order, (2) that since the entry of said order, the Clayton Act has been amended by the enactment of Public Law 86–107, approved July 23, 1959, to provide for the more expeditious enforcement of orders issued under said Act, and (3) that it would be inequitable for the legality of the respondent's pricing practices to be determined under the procedures set forth in said Public Law 86–107, providing for the imposition of civil penalties of not more than $5,000 for each violation of an order issued under the Clayton Act which has become final, rather than under the procedures in effect prior to the amendment, whereunder there were no such penalty provisions; and

It appearing that the order to cease and desist was entered in disposition of this proceeding pursuant to and in strict conformity with a voluntary agreement theretofore executed by the respondent and counsel in support of the complaint expressly providing for the entry thereof, and in which agreement the respondent, among other things, expressly waived all of the rights it may have had to challenge or contest the validity of the order; and

The Commission being of the opinion that the changes in the procedures for the enforcement of orders to cease and desist issued under the Clayton Act brought about by the enactment of Public Law 86-107 afford no basis for the modification of a previously entered order and that the respondent has not otherwise demonstrated a reasonable probability that the order entered herein should be modified:

It is ordered, That the respondent's motion to reopen this proceeding be, and it hereby is, denied.

Commissioner Kern not participating.

PREMIER KNITTING CO., INC., ET AL.

Docket 7366. Order, Sept. 11, 1959

Interlocutory order upholding hearing examiner's granting of complaint counsel's motion for permission to withdraw two orlon sweaters, entered as exhibits, for testing.

Respondents, Premier Knitting Co., Inc., a corporation, and Arnold A. Saltzman, Sanford Forster and Irving Saltzman, having filed an interlocutory appeal from the hearing examiner's ruling of May 27, 1959, granting a motion of counsel in support of the complaint for permission to withdraw two orlon sweaters entered in evidence as Commission Exhibits 3 and 6 for the purpose of having the sweaters subjected to certain tests; and

No showing having been made that said ruling involves substantial rights or that it will materially affect the final decision of the case; and

The Commission being of the opinion that the appeal is not one to be granted under the provisions of §3.20 of the Commission's Rules of Practice:

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

SCHICK INCORPORATED ET AL.

Docket 6892. Order, Sept. 14, 1959

Order denying motion to reopen Clayton Act proceeding—disposed of by a consent order on Nov. 3, 1958, 55 F.T.C. 665—following amendment of Act to provide for more expeditious enforcement of orders and imposition of penalties for violations.

Respondents, Schick Incorporated and Schick Service, Inc., having filed a motion requesting the Commission to set aside the order to cease and desist entered herein on November 3, 1958; and

Said respondents having alleged in support of their motion (1) that since the entry of the order, Section 11 of the Clayton Act has been amended by the enactment of Public Law 86-107, approved July 23, 1959, to provide for the automatic "finalization" of orders issued under the Clayton Act and for the imposition of civil penalties of not more than $5,000 for each violation of an order which has become final, and (2) that the procedures thus established for the enforcement of orders issued under the Clayton Act deprive the respondents of the "warning feature" and the "protective system" inherent in the enforcement procedures available under the statute prior to the amendment, whereunder a respondent could not be penalized until after the Government had, on two successive occasions, satisfied a Court of Appeals that the respondent had violated or was about to violate the order; and

It appearing that the order to cease and desist was entered in disposition of this proceeding pursuant to and in strict conformity with a voluntary agreement theretofore executed by the respondents and counsel in support of the complaint expressly providing for the entry thereof, and in which agreement the respondents, among other things, expressly waived all of the rights they may have had to challenge or contest the validity of the order; and

The Commission being of the opinion that the changes in the procedures for the enforcement of orders to cease and desist issued under the Clayton Act brought about by the enactment of Public Law 86–107 afford no basis for the Commission to set aside a previously entered order.

It is ordered, That the respondents' motion be, and it hereby is, denied.

BAKERS FRANCHISE CORPORATION ET AL.

Docket 7472. Order and Opinion, Sept. 14, 1959

Interlocutory order denying respondents' application for release of questionnaires and investigators' reports of interviews in the Commission's files.

By the COMMISSION:

Respondents have made application under §1.134 of the Commission's Rules of Practice for the release of certain documents allegedly contained in the files of the Federal Trade Commission. Alternatively, they request the Commission to declare that such documents do not constitute or contain confidential materials.

The documents sought, it appears, are (1) the printed forms, questionnaires and written instructions to an investigating attorney of the Commission, relating to interviews to be conducted by him with members of the public in this case, and (2) the written reports of said attorney upon his interviews with said members of the public. Respondents, while indicating that they desire the documents in connection with their defense, do not state precisely how they propose to use them. The inference is, however, that they hope to show that the testimony of the members of the public who appeared as witnesses in support of the complaint may have been influenced by the kind and sequence of questions they were asked during the previous interviews.

Under the Commission's Rules of Practice (§1.333), adopted for the protection of material and information coming into the possession of the Commission, or within the knowledge of any of its officers or employees in the performance of their official duties, the documents in question are clearly confidential. Moreover, and more importantly, such documents consist of questionnaires prepared and reports of interviews recorded by Commission attorneys in the preparation of this case for trial. The documents thus constitute the "work-product of the lawyer" and as such are privileged. (*Hickman* v. *Taylor*, 329 U.S. 495 (1947)).

Respondents' application for release of the documents in question was filed on August 3, 1959, after the case in support of the complaint had been closed. The public witnesses whose interview statements respondents desire had appeared and testified at hearings held on June 24 and 25, 1959. These witnesses at that time testified under oath as to their understanding and interpretation of certain of respondents' advertisements. Each of them was subjected to such cross-examination as respondents' counsel cared to make. No contention was then made, and none is now asserted, that the cross-examination was impaired in any way by the absence of the interview reports. On June 25, also, pursuant to a request of counsel for respondents, said counsel was given the name of the investigating attorney who had interviewed these witnesses, and over the objection of counsel in support of the complaint, the attorney was called as a witness for respondents. In response to questions by respondents' counsel this witness described in full his interviews, including the substance of the questions asked of the interviewees and the answers he received.

In the circumstances, it is difficult to understand what more respondents could hope to accomplish by an examination of the interview reports. In any event, the public policy underlying the privacy of the attorney's files and work papers precludes their production.

An appropriate order denying respondents' application will be entered.

ORDER

Respondents having made application for the release of certain documents allegedly contained in the files of the Federal Trade Commission and having further requested as an alternative that the Commission declare that any such documents do not constitute or contain confidential materials; and

The Commission, for the reasons stated in the accompanying opinion, having directed that an appropriate order denying respondents' application for the release of the aforesaid documents be entered:

It is ordered, That respondents' application for the release of certain documents and the alternative request for the Commission to declare that such documents do not constitute or contain confidential materials be, and they hereby are, denied.

GULF OIL CORPORATION

Docket 6689. Order, Sept. 15, 1959

Order denying—as an attack upon the weight and probative value of new evidence allegedly sought by complaint counsel through an economic survey—respondent's motion for rehearing and reconsideration of the Commission's order vacating the hearing examiner's ruling fixing final date for presentation of evidence in support of complaint.

This matter having come on to be heard upon respondent's motion for rehearing and reconsideration of the Commission's order of December 14, 1958, which, among other things, vacates the examiner's ruling fixing December 31, 1958, as the final date for presentation of evidence in support of the complaint, and upon the motion of counsel in support of the complaint to strike the aforesaid motion or, in the alternative, for an extension of time in which to answer the motion; and

It appearing that respondent's motion is, in substantial part, an attack upon the weight and probative value of certain new evidence allegedly sought by counsel in support of the complaint through the conduct of a proposed economic survey, rather than a demonstration of the incorrectness of the order of December 14, 1958; and

It further appearing that the events and circumstances cited by respondent as having occurred since the issuance of the order of December 14, 1958, have no substantial bearing on the propriety of said order when issued:

It is ordered, That respondent's motion for rehearing and reconsideration be, and it hereby is, denied.

It is further ordered, That the motion of counsel in support of the complaint to strike respondent's aforementioned motion and the alternative motion to extend the time for said counsel to answer respondent's motion be, and they hereby are, denied.

THE PURE OIL COMPANY

Docket 6640. Order, Sept. 25, 1959

Order remanding price discrimination case for additional evidence re respondent's prices to dealers in areas other than Birmingham, Ala.

This case having come on for hearing upon the cross-appeals filed by the respondent and counsel supporting the complaint from the initial decision of the hearing examiner in which he held that the respondent had engaged in territorial price discrimination in violation of Section 2(a) of the Clayton Act, as amended, and wherein he dismissed the complaint's additional charges alleging an unlawful combination and planned common course of action between the respondent and its retail dealers to fix resale prices; and

It appearing that the evidence introduced is insufficient for informed determinations of whether the prices charged by the respondent in the area of Birmingham, Alabama, were lower than those charged by the respondent to dealers elsewhere, and the Commission having determined that the proceeding should be reopened for the reception of additional evidence respecting respondent's prices to dealers:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of additional evidence relating to prices charged by the respondent in areas other than Birmingham during the period to which the charges relate.

It is further ordered, That after the receipt of such additional evidence, the hearing examiner indicate any changes he may wish to make in the initial decision in the light thereof.

B. D. RITHOLZ ET AL.

Docket 1554. Order, Sept. 30, 1959

Order denying motion to vacate desist order of Feb. 15, 1930, 13 F.T.C. 240, prohibiting false advertising in the sale of spectacles.

This matter having come on to be heard upon respondents' motion to vacate and set aside an order to cease and desist entered by the Commission in this proceeding on February 15, 1930, and upon the answer in opposition to said motion filed by counsel supporting the complaint; and

The Commission having fully considered said motion and supporting affidavit and the answer in opposition thereto and having concluded that respondents have made no adequate showing that changed conditions of fact or of law justify reopening the proceeding looking towards modification or the setting aside of the aforesaid order to cease and desist, or that the public interest so requires:

Accordingly, it is ordered, That the motion, filed on behalf of respondents on September 3, 1959, seeking to vacate the order to cease and desist heretofore entered against respondents be, and the same hereby is, denied.

B. D. RITHOLZ ET AL.

Docket 2069. Order, Sept. 30, 1959

Order denying motion to vacate desist order of Apr. 6, 1934, 18 F.T.C. 348, prohibiting false advertising in the sale of spectacles.

This matter having come on to be heard upon respondents' motion to vacate and set aside an order to cease and desist entered by the Commission in this proceeding on April 6, 1934, and upon the answer in opposition to said motion filed by counsel supporting the complaint; and

The Commission having fully considered said motion and supporting affidavit and the answer in opposition thereto and having concluded that respondents have made no adequate showing that changed conditions of fact or of law justify reopening the proceeding looking towards modification or the setting aside of the aforesaid order to cease and desist, or that the public interest so requires:

Accordingly, it is ordered, That the motion, filed on behalf of respondents on September 3, 1959, seeking to vacate the order to cease and desist heretofore entered against respondents be, and the same hereby is, denied.

IN THE MATTER OF

GULF OIL CORPORATION

Docket 6689. Order, Sept. 30, 1959

Interlocutory order denying respondent's request for an order directing complaint counsel to serve upon it any application, etc., they might make for an economic survey under authority of Sec. 6, Federal Trade Commission Act, seeking information for possible use in this proceeding; stating that the investigative function is wholly separate and distinct from the quasi-judicial function of conducting adversary proceedings, and that respondent's appearance as a party in interest would be clearly detrimental to the public interest.

The respondent, by motion filed September 18, 1959, having requested an order directing counsel in support of the complaint to serve upon said respondent any motion, application or other written request they may make to the Commission for the conduct of an economic survey or investigation under the authority of Section 6 of the Federal Trade Commission Act seeking information for possible use in connection with this proceeding, as well as any motion, application or other request to the Bureau of the Budget in connection with any such proposed survey or investigation; and

It appearing that the ground for the motion is that the consideration by the Commission or the Bureau of the Budget of an *ex parte* application for such a survey or investigation would deprive the respondent of its lawful right to be heard on the legality, necessity and propriety thereof; and

The Commission having considered the matter and being of the opinion that any action taken by it for the purpose of obtaining information under the authority of Section 6 of the Federal Trade

Commission Act is an exercise of a function which is wholly separate and distinct from its quasi-judicial function of conducting adversary proceedings; that the decision as to when and under what circumstances such function should be exercised is a matter solely within the administrative discretion of the Commission; and that the respondent not only has no right to be heard in connection therewith, but that its appearance as a party in interest would seriously impede the Commission in the performance of its continuing duty to enforce the laws administered by it and thus be clearly detrimental to the public interest:

Accordingly, it is ordered, That the respondent's motion be, and it hereby is, denied.

NORTH AMERICAN PHILIPS COMPANY, INC.

Docket 6900. Order, Sept. 30, 1959

Order denying motion to reopen Clayton Act proceeding—disposed of by a consent order on Nov. 3, 1958, 55 F.T.C. 682—following amendment of Act to provide for more expeditious enforcement of orders and imposition of penalties for violations.

Respondent, North American Philips Company, Inc., having filed a motion requesting the Commission to set aside the orders to cease and desist entered herein on November 3, 1958; and

Said respondent having alleged in support of its motion that since the entry of the orders, Section 11 of the Clayton Act has been amended by the enactment of Public Law 86–107, approved July 23, 1959, that under the statute prior to amendment respondent had the right to a hearing before a Court of Appeals on the terms of the orders before being subjected to any penalty proceedings, and that under the amended statute it is denied this opportunity; and

It appearing that the orders to cease and desist were entered in disposition of this proceeding pursuant to and in strict conformity with voluntary agreements theretofore executed by the respondent and counsel in support of the complaint expressly providing for the entry thereof, and in which agreements the respondent, among other things, expressly waived all of the rights it may have had to challenge or contest the validity of the orders; and

The Commission being of the opinion that the changes in the procedures for the enforcement of orders to cease and desist issued under the Clayton Act brought about by the enactment of Public Law 86–107 afford no basis for the Commission to set aside a previously entered order:

It is ordered, That the respondent's motion be, and it hereby is, denied.

THE GRAND UNION COMPANY

Docket 7344. Order and Opinion, Oct. 14, 1959

Interlocutory order remanding to hearing examiner for consideration and appropriate action, as clearly within the scope of his authority, joint motion to amend complaint by substituting wholly owned subsidiaries for original respondent.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission on an interlocutory appeal filed by counsel supporting the complaint from the hearing examiner's order denying a joint motion of counsel to amend the complaint by substituting Square Deal Market Co., Inc., and Super Market Wholesalers, Inc., as parties respondent in lieu of The Grand Union Company. The reason given for the order was that "the proposed amendment is not reasonably within the scope of the proceeding initiated by the original complaint."

In so ruling the hearing examiner was in error. Square Deal Market Co., Inc., it appears, is a wholly owned subsidiary of the respondent, The Grand Union Company, and Super Market Wholesalers, Inc., is in turn a wholly owned subsidiary of Square Deal Market Co., Inc. The acts and practices alleged in the complaint to have been unlawful, instead of having been engaged in by The Grand Union Company, as alleged, were actually engaged in by Square Deal Market Co., Inc., acting through Super Market Wholesalers, Inc. In such circumstances, as the Commission recognized in Docket No. 6486, *The Goodyear Tire and Rubber Company et al.* (Order Affirming Hearing Examiner's Order Amending Complaint —issued October 26, 1956), an order amending the complaint by a substitution of the parties is clearly within the scope of the hearing examiner's authority. See also the Commission's opinion of June 4, 1958, in Docket No. 6961, *Hafner Coffee Company*, in disposition of a motion for amendment certified to the Commission by the hearing examiner.

The motion for amendment will be remanded to the hearing examiner for consideration and appropriate action in conformity with the foregoing.

ORDER

Counsel supporting the complaint having filed an interlocutory appeal from the hearing examiner's order of September 21, 1959, denying a joint motion of counsel supporting the complaint and counsel for the respondent for an amendment of the complaint herein; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that the ruling appealed from was erroneous:

It is ordered, That the appeal of counsel supporting the complaint be granted.

It is further ordered, That the aforesaid motion for amendment of the complaint be, and it hereby is, remanded to the hearing examiner for appropriate action in conformity with the Commission's opinion.

ALLCHEM MANUFACTURING CO., INC., ET AL.

Docket 7502. Order, Oct. 22, 1959

Order denying request to reopen proceeding for reception of evidence, by individual respondent who had defaulted in filing answer to complaint and failed to appear at hearing.

It appearing that respondent Charles Goldberg, named as an individual respondent in this proceeding, filed a request on September 28, 1959, seeking in effect to have the matter reopened for the reception of evidence submitted with said request; and

It appearing further that Charles Goldberg defaulted in filing answer to the complaint herein and that he failed to appear at the time and place fixed for hearing; and

It appearing further that the hearing examiner's initial decision herein was duly served upon said Charles Goldberg on August 26, 1959, and that he did not file notice of intention to appeal or otherwise perfect an appeal from said initial decision within the time required by the Commission's Rules of Practice; and

The Commission having concluded that said respondent has made no showing justifying his default in the respects noted and further that the evidence he proposes to submit, viewed in its most favorable light, would not materially affect the final result in the case:

It is ordered, That the request of respondent Charles Goldberg that this proceeding be reopened be, and it hereby is, denied.

OUTDOOR SUPPLY CO., INC.

Docket 7482. Order and Opinion, Oct. 27, 1959

Order vacating initial decision and remanding case for lack of evidence in the record to support complaint charging a manufacturer of outdoor supply equipment in Long Island City, N.Y., with misrepresenting the size of sleeping bags by giving as "cut size" or "full cut size" on attached labels, sizes larger than the actual dimensions of the sleeping bags.

599869—62——105

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission upon its review of the hearing examiner's initial decision. The complaint charges that respondent has misrepresented the finished size of sleeping bags which it manufactures by setting forth on labels attached thereto certain dimensions, designated as "cut size" and "full cut size," which are greater than the actual dimensions of the finished product.

The record shows that the measurements which respondent places on the label are in fact the dimensions of the fabric from which the sleeping bag is made and are not the true dimensions of the bag itself. The record also contains an admission by respondent that the measurements of the fabric, known in the trade as the "cut size," are invariably larger than the finished size of the sleeping bag.

The hearing examiner concluded from this evidence that the buying public, being unaware of the significance of the terms "cut size" and "full cut size," would be led to believe that the dimensions set forth on labels attached to respondent's sleeping bags are the finished sizes of such products. He held, therefore, that respondent's practice of disclosing the "cut size" of sleeping bags on labels and in advertising has the tendency and capacity to mislead and deceive purchasers of such products. The record, however, does not support these conclusions. There is no evidence that the public is unaware of the significance of the terms "cut size" and "full cut size" or that the public believes that the dimensions shown on respondent's labels as "cut sizes" are the actual dimensions of its sleeping bags.

Since evidence adduced thus far in the proceeding is not adequate to sustain the allegation that respondent's practice of marking sleeping bags to show the cut sizes thereof has the tendency and capacity to mislead the public into believing that these dimensions are the actual dimensions of the finished product, the initial decision will be vacated and the case remanded to the hearing examiner for the purpose of receiving such evidence as may be available on this point.

ORDER

This matter having been considered by the Commission upon its review of the hearing examiner's initial decision, filed September 16, 1959; and

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

It was ordered, On the 27th day of October, 1959, that the aforesaid initial decision be vacated and set aside.

It was further ordered, That this case be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the aforesaid opinion.

It was further ordered, That after such proceedings have been terminated the hearing examiner shall forthwith make and file, in accordance with the provisions of §3.21 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

GEORGE McKIBBIN & SON ET AL.

Docket 7245. Order and Opinion, Oct. 29, 1959

Interlocutory order denying motion for trial de novo following death of hearing examiner, for lack of showing of any conflict in the testimony—principally that of expert witnesses—which needed to be resolved on the basis of the witnesses' credibility as evidenced by their demeanor or conduct while testifying.

OPINION OF THE COMMISSION

By the COMMISSION:

This is an interlocutory appeal by the respondents from the hearing examiner's denial of their motion for a trial *de novo*.

The complaint charges respondents with making false, misleading and deceptive representations in connection with the offering for sale and sale of an encyclopedic dictionary in violation of Section 5 of the Federal Trade Commission Act. Hearings presided over by the hearing examiner originally appointed to take testimony in this proceeding were held in New York, New York, and Washington, D.C., at which time testimony and other evidence in support of and in opposition to the allegations of the complaint was introduced. After counsel supporting the complaint had rested his case but prior to the completion of the respondents' defense, the hearing examiner, before whom the testimony had been taken, died. Thereafter, a substitute hearing examiner was designated to preside in the proceeding. By motion filed July 20, 1959, respondents requested that the testimony taken and the record made before the original hearing examiner be stricken and that all evidence be received *de novo* before the substitute hearing examiner. Respondents argued in support of this motion that a determination of material questions of fact which had arisen or which might possibly arise, would depend upon an evaluation of the credibility of the witnesses and that the substitute hearing examiner should, therefore, have an opportunity to see and hear all witnesses in order to make this evaluation. The hearing examiner denied the motion and respondents have now filed an appeal from this denial.

The argument on appeal is based primarily on the court's interpretation of Section 5(c) of the Administrative Procedure Act in *Gamble-Skogmo, Inc., et al.* v. *Federal Trade Commission*, 211 F. 2d 106. This section provides that "The same officers who preside at the reception of evidence * * * shall make the recommended decision or initial decision * * * except where such officers become unavailable to the agency." As interpreted in the aforementioned decision, the primary purpose of this provision was to set forth a procedural guaranty that the hearing examiner who presides at the hearings and receives the testimony of the witnesses will prepare the recommended or initial decision as a means of insuring that the parties will be afforded the benefit of proper credibility evaluation. The court held, therefore, that even in the event of examiner unavailability, the substitute hearing examiner must engage in a *de novo* receiving of evidence in those cases where, as a result of conflicting testimony, the evaluation of the credibility of witnesses constitutes a material factor in the reaching of a recommended or initial decision.

This case cannot be considered as authority for respondents' broad position that a trial *de novo* must be granted whenever the credibility of witnesses who have testified before the original hearing examiner is in issue. The court's ruling was merely to the effect that when a substitute hearing examiner must make a choice between the testimony of conflicting witnesses and such choice may affect his decision, he must see and hear these particular witnesses testify in order that he may be able to evaluate their truthfulness. Since the only reason for recalling such witnesses is to afford the substitute hearing examiner an opportunity to observe their demeanor while testifying, it is believed that in most instances the parties' procedural rights would be fully protected if the witnesses who have given conflicting testimony are recalled solely for the purpose of cross-examination.

The evidence received before the original hearing examiner in this proceeding consists primarily of the testimony of expert witnesses. The respondents have failed to show, and the record does not disclose, any conflict in this testimony which should properly be resolved on the basis of the witnesses' credibility as evidenced by their demeanor or conduct while testifying. The argument that there should be a *de novo* receiving of evidence at this time is, therefore, without merit.

Respondents also argue that in subsequent hearings they will produce witnesses whose testimony may be at variance with that of the witnesses who appeared in support of the complaint. We think, however, that a satisfactory solution to such a situation, should it occur, is set forth in the order from which this appeal was taken. The hearing examiner has advised therein that if it should appear that the credibility of witnesses who had previously testified is in issue, these witnesses would be recalled for further examination.

The respondents' appeal will be denied and an appropriate order will be entered.

ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's ruling denying respondents' motion for a trial *de novo;* and

The Commission, for the reasons stated in the accompanying opinion, having concluded that this appeal should be denied:

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner for further proceedings.

PURE OIL COMPANY

Docket 6640. Order, Oct. 30, 1959

Order broadening scope of remand to include reception of evidence in defense of charges of geographical price discriminations and rebuttal.

The Commission, by order issued September 25, 1959, having remanded this proceeding to the hearing examiner for the reception of additional evidence as to prices charged by the respondent to customers located in areas other than Birmingham, Alabama, during the period of time covered by the allegations of Count I of the complaint; and

The respondent on October 6, 1959, having filed a motion and affidavit stating that by reason of the remand it has reconsidered its prior decision to rest its case and not offer evidence in opposition to the aforesaid allegations and requesting the Commission to now permit it to introduce evidence in defense of certain of such charges, which motion is opposed by counsel supporting the complaint; and

The Commission having determined that in the circumstances the respondent's request for leave to present its defense should be granted, but that further direction to the hearing examiner as to the form of decision or report to be submitted by him after receipt of the additional evidence, as suggested by the parties, is not necessary:

It is ordered, That the scope of the Commission's remand of this case to the hearing examiner under its order of September 25, 1959, be, and it hereby is, broadened to include the reception of any relevant evidence which may be offered by the respondent in defense of the charges of geographical price discriminations together with such relevant rebuttal evidence as may be offered by counsel supporting the complaint.

LIFETIME CUTLERY CORP. ET AL.

Docket 7292. Order and Opinion, Oct. 30, 1959

Order remanding case for additional evidence on the merits of the charge challenging use of the expression "24 karat gold plated" to describe products surfaced with gold by the electrolytic process, and for a finding of violation of the Federal Trade Commission Act by failure of respondents to disclose the foreign origin of the carving fork heads of their cutlery.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

Should the Commission's order to cease and desist include a prohibition against respondents' use of the term "gold-plated" to describe cutlery which has been surfaced with gold by an electrolytic rather than a mechanical process? The hearing examiner found that there was no evidence that respondents' use of this term was false or deceptive and refused, despite the urging of counsel supporting the complaint to the contrary, to include any reference to this matter in the order to cease and desist contained in his initial decision. We have concluded that the matter should be remanded for the receipt of further evidence, inasmuch as the Commission cannot, upon the present record, make an informed determination on the merits of the question raised by this appeal.

Paragraph 10 of the complaint alleged that respondents represented parts of their products as "24 karat gold plated." The complaint further alleged that "in truth and in fact, such parts are not 24 karat gold plated since the gold deposited thereon is not a substantial surface plating of gold alloy applied by a mechanical process but is an electrolytic application." There is now no dispute that respondents have referred to their products as "24-Karat Gold-Plated"; there is also now no dispute that these products were surfaced with gold by an electrolytic application; but the conclusion assumed in Paragraph Ten of the complaint that these products are not in truth and in fact 24 karat gold plated has not been shown.

As the Commission stated in *Silf Skin, Inc.*, Docket 6772, decided June 19, 1959, "The manufacturing process by machine methods is not a static but a growing and constantly changing art. To require a term or terms which give prestige to a product to be restricted in their use to products manufactured on a particular type of machine is a matter of serious concern. In all the circumstances, we are aware of the opinion that the allegations of the complaint in this connection have not been supported by substantial evidence." The same reasoning is equally applicable here. Restriction of the use of the words "24 karat gold plated" to gold alloy applied by a mechanical process should only be adopted as a result of facts and evidence of record.

On the basis of this record, we cannot distinguish between mechanically plated and electrolytically plated products. One witness testified briefly and ambiguously on the subject. Although he stated that in the industry "gold plate or gold filled * * * typically * * * mean * * * rolled gold plate," (a mechanical process), he also stated that "gold electro-plated" and "gold-plated" are "synonymous," and "no one in the electro-plating industry will ever be misunderstood by saying 'plated,' in contrast to 'electro-plated.'"

Counsel supporting the complaint urges us to decide this question adversely to the respondents on the basis of trade practice rules adopted by the Commission for the jewelry, watchcase, and fountain pen and mechanical pencil industries. We believe that the hearing examiner correctly disposed of this contention when he stated that "* * * the Commission's trade practice rules were designed to be helpful guides to the various industries for which they have been promulgated, and were not intended to be regarded and recognized as substantive rules of law, or as factual conclusions which might be cited or accepted in an adjudicative proceeding as a substitute for evidence."

In view of the foregoing, the appeal of counsel supporting the complaint will be denied, but the matter will be remanded for the taking of further evidence on this point. We have noticed, also, that in one respect not mentioned in this appeal the initial decision is incomplete. One of the facts of which the hearing examiner in his order of February 19, 1959, took official notice, but of which no mention is made in the initial decision, is that a substantial portion of the purchasing public maintains a preference for products of domestic manufacture. This is a material fact in support of the finding that the respondents have violated the Federal Trade Commission Act by failing to disclose the foreign origin of the carving-fork heads of their cutlery. Since, as provided in Sec. 7(d) of the Administrative Procedure Act, respondents were afforded an opportunity to present evidence controverting this material fact but presented no such evidence and made no request to do so, paragraph 3 of the findings should be amended to make appropriate reference to this fact.

ORDER

This matter having come on to be heard upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner; and

The Commission having determined, for reasons stated in the accompanying opinion, that the record in this proceeding does not afford adequate basis for informed decision on the merits of the charge challenging respondents' use of the expression "24 karat gold plated" to designate and describe products surfaced with gold by the electrolytic process, and the Commission having further determined that the proceeding should be reopened for the reception of additional evidence with respect to such charge:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such evidence as may be offered in support of and in opposition to such charge.

It is further ordered, That after receipt of such additional evidence, the hearing examiner indicate any changes he may wish to make in the initial decision in the light thereof.

ELLIOT KNITWEAR, INC., ET AL.[1]

Docket 6637. Order, Nov. 6, 1959

Order reopening proceeding—following remand by Court of Appeals for the Second Circuit for additional evidence in support of finding of deceptive labeling of "Cashmora" sweaters and on choice of remedy.

Counsel in support of the complaint, by motion filed on October 20, 1959, having requested that this proceeding be remanded to the hearing examiner for the reception of additional evidence; and

It appearing that the United States Court of Appeals for the Second Circuit, on June 11, 1950, entered its decree in the case of *Elliot Knitwear, Inc., a corporation, et al., Petitioners v. Federal Trade Commission, Respondent*, Docket No. 25239, setting aside the Commission's order to cease and desist issued on April 25, 1958, and remanding the case to the Commission for further proceedings not inconsistent with the opinion of the Court rendered on May 6, 1959; and

It further appearing from the Court's opinion that the reason for such action was that the record as presently constituted does not contain substantial evidence in support of the Commission's finding that the label appended to sweaters sold by the respondents is deceptive; and

The Court having indicated that the record may be supplemented by the introduction of additional evidence bearing on the aforesaid question, as well as on the choice of remedy to be applied in the event deceptiveness of the label is established:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, re-

[1] Order to cease and desist reported in 54 F.T.C. 1398.

manded to the hearing examiner for the receipt of such additional relevant, material and reliable evidence as may be offered on the two questions above-mentioned.

It is further ordered, That after the receipt of such additional evidence the hearing examiner shall forthwith make and file, in accordance with the provisions of §3.21 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

THOMASVILLE CHAIR COMPANY

Docket 7273. Order and Opinion, Nov. 6, 1959

Interlocutory order upholding denial of motion for subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from Commission files and alternative application for release of confidential information.

OPINION OF THE COMMISSION

By the COMMISSION:

This is an interlocutory appeal by the respondent from the hearing examiner's denial of its motion for issuance of a subpoena.

In the presentation of its defense to a complaint charging violation of Section 2(c) of the Clayton Act, respondent attempted to introduce in evidence certain documents which it claimed would show the practices and customs in the furniture industry regarding the granting of quantity discounts and the payment of commissions by furniture manufacturers to their sales representatives at or about the time respondent's pricing policy was initiated and subsequent thereto. It was apparently respondent's position that it could be established through these documents that the majority of furniture manufacturers, including respondent, have employed quantity pricing systems and that such a showing would tend to rebut any inference which could be drawn from the evidence adduced in support of the complaint that respondent is passing on to favored customers a discount in lieu of brokerage. These documents consisted of a copy of a report on the House Furnishings Industries (Vol. I, Household Furniture) made in 1923 by the Federal Trade Commission, a copy of a Department of Commerce monograph entitled "The Manufacturers Agent as a Marketing Institution," published in 1952, and copies of excerpts from Department of Commerce publications "Furniture Distribution in the West Mid-Continent" and "Furniture Distribution in the Midwest," published in 1932. The hearing examiner refused to receive these documents on the ground that they were not relevant or material to any of the issues presented and on the additional ground that they were hearsay. Respondent thereafter moved the hearing examiner to issue a subpoena duces tecum directing the Secretary of the Commission to produce field reports, work papers, questionnaires and other documents underlying the aforementioned Commission report on the House Furnishings Industries. The hearing examiner denied this request and respondent has now filed an appeal from the denial and, in the alternative, has made application for the release of the same information under §1.134 of the Commission's Rules of Practice. Respondent has also appealed from the hearing examiner's ruling as to the admissibility of the Commission report and Department of Commerce publications.

Respondent's request for issuance of a subpoena duces tecum directing the Secretary to produce certain documents, classified as confidential under the Commission's Rules of Practice, falls within our ruling denying a similar appeal in the matter of *Postal Life and Casualty Insurance Company*, Docket No. 6276. The proper procedure to be used by respondent in requesting the release of the documents specified in its application for a subpoena is set forth in §1.134 of the Rules of Practice. The hearing examiner was without authority to require the production of such information by compulsory process and he properly refused, therefore, to issue the subpoena requested by respondent. The appeal on this point is denied.

As an alternative to its request for a subpoena, respondent seeks to obtain the same documents by making application for release of information pursuant to §1.134 of the Rules of Practice. As we stated in *Postal Life and Casualty Insurance Company*, *supra*, the Commission in determining the action to take upon such a request will consider not only the confidential or privileged nature of the information or material sought, but also the purpose for which the applicant intends to use such information or material. The Commission has a public duty not to disclose certain information which it has obtained in the performance of its official duties, and it will not release information which it considers to be confidential in the absence of some good reason for doing so. Respondent's purpose in requesting the information under the aforementioned section, according to its brief, is to establish a defense to the charge that it has violated Section 2(c) of the Clayton Act. It is necessary, therefore, to determine whether the information requested may successfully be used to accomplish this purpose.

The complaint herein alleges in effect that part of the sales commission paid by respondent on sales made to certain customers, designated as "carload" customers, reaches other customers, designated as "jobber" customers, in the form of a reduced price. The hearing examiner ruled at the conclusion of the case-in-chief that a prima facie case had been established and this ruling was upheld on appeal to the Commission. Respondent now wishes to introduce evidence which it claims will show that at the time it began selling chairs, furniture manufacturers were generally employing quantity discount pricing systems and that respondent had adopted a similar pricing system. Its argument seems to be that if it had been using a quantity discount system 35 to 40 years ago, its lower prices at that time would not have reflected a discount in lieu of a sales commission or brokerage.

This argument must be rejected. Even assuming that the documents in question would show that respondent instituted its pricing policy to conform with industry practice and custom, such a showing of conditions existing 35 to 40 years ago would have no bearing on the legality of respondent's present pricing practices, nor would a showing that respondent employed a quantity discount pricing system 35 to 40 years ago negate the possibility that it was at that time passing on to favored customers a discount in lieu of a commission or brokerage. We cannot assume that respondent's pricing practices, or those generally prevailing in the industry at that time, complied with the provisions of a law which had not yet been enacted. We are of the opinion, therefore, that the documents specified in respondent's application would not be relevant or material to any issue in this proceeding and thus would not be helpful to respondent in establishing a defense to the violation with which it is charged. Respondent has shown no real or actual need for the disclosures requested and its application for release of this information, therefore, is denied.

Respondent has also appealed from the hearing examiner's refusal to admit the aforementioned Federal Trade Commission report and Department of Commerce publications. This appeal was not made within the time prescribed by §3.20 of the Rules of Practice and is being considered at this time only because the issue raised thereby is similar to that involved in respondent's application for release of confidential information. Our comments with respect to the relevance and materiality of the documents specified in respondent's request for release of information are, for the most part, applicable to the documents referred to in this appeal. No showing has been made to satisfy the requirements of §3.20(b)(2) of the Rules of Practice. The appeal from these rulings is also denied.

An appropriate order will be entered.

ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's ruling denying respondent's motion for issuance of a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from the Commission's files and, in the alternative, application for release of confidential information, upon respondent's appeal from the hearing examiner's refusal to receive in evidence certain other documents offered by respondent, and upon the answer of counsel supporting the complaint in opposition thereto; and

The Commission having concluded that the appeals and application for release of information should be disposed of in the manner indicated in the accompanying opinion of the Commission:

It is ordered, That respondent's appeal from the hearing examiner's ruling denying its motion for a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information and respondent's appeal from the hearing examiner's rulings excluding certain other documents offered by respondent be, and they hereby are, denied.

It is further ordered, That respondent's application for release of confidential information be, and it hereby is, denied.

BAKERS FRANCHISE CORP. ET AL.

Docket 7472. Order, Nov. 6, 1959

Interlocutory order upholding the hearing examiner's denial of application for confidential documents in F.T.C. files already denied by Commission.

The respondents having filed an interlocutory appeal from the hearing examiner's ruling of September 2, 1959, denying their application for a subpoena duces tecum directing the Secretary of the Commission to appear at a designated hearing and produce certain documents allegedly contained in the files of the Commission; and

Said respondents, acting under §1.134 of the Commission's Rules of Practice, having previously filed with the Commission an application requesting the release of the same documents or, in the alternative, requesting the Commission to declare that any such documents do not constitute or contain confidential materials; and

The Commission, on September 14, 1959, having entered its order denying said application, which order was supported by an accompanying opinion setting forth the reasons therefor and clearly recognizing the confidential status of the requested documents; and

The hearing examiner being without authority to require the production of confidential information or material from the Commission's files, and it thus appearing that his ruling denying the respondents' application for subpoena was the only ruling he could have made:

It is ordered, That the respondents' appeal from said ruling be, and it hereby is, denied.

BERGER WATCH COMPANY ET AL.

Docket 6894. Order, Dec. 7, 1959

Order denying, as untimely, application to intervene by respondent in a similar proceeding, currently pending (p. 991 herein).

Counsel for Sheffield Merchandise, Inc., by letter dated November 13, 1959, having made application for leave to intervene in this proceeding and, in the alternative having requested that the Commission defer its ruling on one of the charges in this proceeding until such time as it has rendered its decision in the matter of Sheffield Merchandise, Inc., Docket 6627; and

It appearing that petitioner has stated as grounds for such application and request that the same issue is involved in both cases and that a decision on the merits thereof could more appropriately be made in the matter of Sheffield Merchandise, Inc.; and

It further appearing that both cases are now before the Commission for decision and that petitioner's application for leave to intervene is, therefore, untimely; and

The Commission being of the opinion that since each of these cases will be decided on its own record, the request for deferment is inappropriate:

It is ordered, That the application for leave to intervene in this proceeding be, and it hereby is, denied.

It is further ordered, That the request for a deferment of the Commission's ruling on one of the charges in this proceeding be, and it hereby is, also denied.

MORRIS LOBER & ASSOCIATES, INC., ET AL.

Docket 7003. Order, Dec. 11, 1959

Order denying request to reopen case on the ground that the hearing examiner erred, in the early stages of the hearings, in denying respondents' demand of the right to examine a Commission investigator's report.

The Commission, on August 14, 1958, having adopted as its own decision the hearing examiner's initial decision wherein the hearing examiner made his findings of fact and entered his order to cease and desist in disposition of this proceeding, which decision of the Commission became final by reason of expiration of the statutory period for court review on October 11, 1958; and

Counsel for the respondents, by letter dated November 6, 1959, having requested the Commission to reopen the proceeding on the ground that the hearing examiner, during the course of the trial, erred in denying the respondents' demand of the right to examine a Commission investigator's report, which report, it is said, was desired for use in the cross-examination of the investigator who had testified in support of the complaint; and

It appearing from the record that the ruling referred to occurred during the early stages of the hearings and that the respondents made no attempt to obtain a review thereof either by way of an interlocutory appeal to the Commission under the provisions of §3.20 of the Rules of Practice or by way of an appeal from the initial decision under the provisions of §3.22 of said rules, but, on the contrary, permitted said ruling to remain unchallenged until the present time; and

It further appearing that the respondents have made no showing of changed conditions of fact or of law which would or might require a modification of the Commission's decision and have made no showing that the public interest would or might require such action; and

The Commission being of the opinion that, in the circumstances, no further consideration of the respondents' request for reopening of the proceeding is warranted:

It is ordered, That said request be, and it hereby is, denied.

In the Matter of

MODERN METHODS, INC., ET AL.

Docket 7568. Order, Dec. 31, 1959

Interlocutory order upholding hearing examiner's denial of motion to dismiss, holding the prior dismissal by the Solicitor of the Post Office Department, primarily because of inadequacy of the record, could not bar proceeding under the principles of *res judicata*.

The Commission having considered the respondents' appeal from the hearing examiner's order of November 18, 1959, denying the respondents' motion to dismiss the complaint or, in the alternative, to strike therefrom paragraphs five through eight, inclusive; and

It appearing that the question for determination is whether this proceeding is barred under the principles of *res judicata* by an order of the Solicitor of the Post Office Department, dated July 18, 1958; and

It further appearing that the Solicitor of the Post Office Department by the aforesaid order reversed an initial decision of a hearing examiner and dismissed "without prejudice" a proceeding against the corporate respondent, allegedly instituted in connection with the sale of the same correspondence courses of instruction as those involved herein, in which proceeding the respondent was charged with having conducted a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of Title 39, U.S. Code, §§259 and 732; and