IN THE MATTER OF

SPIEGEL BROTHERS CORPORATION ET AL.

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

Docket C-673. Complaint, Dec. 31, 1963—Decision, Dec. 31, 1963

Consent order requiring a corporate importer of tools and hardware and its wholly owned sales subsidiary, both in Long Island City, N.Y., to cease misrepresenting imported drill sets by falsely stating in catalogs and on cartons that they were high speed drills, made of an alloy especially formulated for high speed drills, fully guaranteed, and regularly sold for $42.50 in the trade areas concerned; and to cease selling the drill sets with inadequate disclosure—such as the inconspicuous lettering employed—as to the foreign country of origin.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Spiegel Brothers Corporation, a corporation, Steelcraft Tool Corporation, a corporation, and Kurt J. Spiegel, individually and as an officer of each of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Spiegel Brothers 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 36–50 31st Street, Long Island City 6, New York.

Respondent Steelcraft Tool 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 36–50 31st Street, Long Island City 6, New York.

Respondent Kurt J. Spiegel is an individual and officer of each of the aforementioned corporate respondents. He formulates, directs and controls the acts and practices of each of the corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of the aforestated corporate respondents.

Respondents are engaged in a joint and common operation and business enterprise. Respondent Spiegel Brothers Corporation pur-

chases and imports tools and hardware including those hereinafter described, which said tools and hardware are then sold and distributed by respondent Steelcraft Tool Corporation, it wholly owned subsidiary.

PAR. 2. Respondents are now, and for sometime last past have been engaged in importing, advertising, offering for sale, sale and distribution of steel drill sets, and indexes therefor and other articles of merchandise to distributors and retailers for resale to the purchasing public.

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

PAR. 4. In the course and conduct of their business and for the purpose of inducing the sale of their products, respondents have made certain statements and representations with respect to the quality, composition, performance and price of their products in catalogs and on the cartons in which the products are packaged.

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

229 P. — 29 Piece Supreme Drill set 1/16" to 1/2" by 64ths Complete with Sturdy Rustproof Cadium Plated Drill Stand — $42.50 Value —— These Supreme High Quality Alloy Steel Twist Drills contain the Finest Combination of ● Crome ● Silicone ● Carbon ETC. For Use On ● Steel, Wood, Plastic ● Copper, Brass, Aluminum ETC. For Speed Drilling With Electric Drills.

On the inner wrapper in which the drill sets are enclosed inside the carton, the phrases "Fully Guaranteed" and "Chrome Vanadium Twist Drills" are placed thereon in large, heavy black letters, along with the words "West-Germany" in small and inconspicuous letters.

PAR. 5. Through the use of the aforesaid statements and representations, and others similar thereto but not specifically set out herein, respondents represent and have represented, that:

1. Said drills are not high speed drills;

2. Said drills are made of an alloy of chrome vanadium steel especially formulated for high speed drills;

3. Said drills are full guaranteed;

4. The usual and customary retail price of said drill set and index is $42.50 in all of the trade areas in which it is offered for sale.

PAR. 6. In truth and in fact:

1. Said drills are high speed drills;

2. Said drills are not made of an alloy of chrome vanadium steel especially formulated for high speed drills;

3. Said advertised guarantee fails to inform the purchasers of the said drill sets and indexes as to the nature and conditions of the advertised guarantee, the manner in which the guarantor will perform thereunder, and the identity of the guarantor;

4. The usual and customary retail price of said drill set and index is not $42.50 in all of the trade areas in which it is offered for sale.

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

PAR. 7. Respondents said drill sets are imported. The country of origin is set forth in small and inconspicuous lettering on the box, the drill bits and on the wrapper in which said drill sets are enclosed. Purchasers of said drill sets who fail to see the said inconspicuous lettering on the box can determine the country of origin only by opening the box and carefully examining the minute lettering on each drill or the wrapper in which the drill sets are enclosed. Said disclosure is, therefore, inadequate to apprise prospective purchasers of the country of origin of said drill sets.

PAR. 8. In the absence of an adequate disclosure that a product, including speed drill bits, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents failure clearly and conspicuously to disclose the country of origin of said articles of merchandise, is, therefore, to the prejudice of the purchasing public.

PAR. 9. The respondents by and through the use of the aforesaid acts and practices place the means and instrumentalities in the hands of retailers whereby said retailers may mislead and deceive the purchasing public in the manner herein alleged.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of drills and indexes of the same general kind and nature as those sold by respondents.

PAR. 11. The use by respondents of the foresaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondents Spiegel Brothers Corporation and Steelcraft Tool Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their office and principal place of business located at 36–50 31st Street, Long Island City 6, New York.

Respondent Kurt J. Spiegel is an officer of each of said corporations, and his address is the same as that of said corporations.

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

ORDER

It is ordered, That respondents Spiegel Brothers Corporation, a corporation, Steelcraft Tool Corporation, a corporation, and their respective officers, and Kurt J. Spiegel individually and as an officer of each of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of drills and indexes or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that their drill bits are speed drills or high speed drill bits: *Provided, however*, That it shall be a defense in any enforcement proceeding herein for the respondents to establish that said drill bits are composed of the materials and have the physical properties and performance characteristics generally required for and possessed by speed drill bits or high speed drill bits respectively;

2. Representing, directly or indirectly, that said drill bits are composed of an alloy of chrome vanadium steel or other materials: *Provided, however*, That it shall be a defense in any enforcement proceeding herein for the respondents to establish that said drill bits contain chrome vanadium steel or other materials in such amounts as to be significant to the durability, performance and other characteristics thereof;

3. Representing, directly or indirectly, that any amount is the retail price of the product in any trade area or areas in which it is offered for sale: *Provided, however*, That it shall be a defense in any enforcement proceeding herein for the respondents to establish that said price is the price at which the product has been usually and customarily sold at retail in the trade area or areas where the representation is made;

4. Offering for sale or selling any product which is in whole or in part of foreign origin, without clearly and conspicuously disclosing on such product or in immediate connection therewith, and, if such product is enclosed in a package or container on the front panel of the package or container, in such a manner that it will not be hidden or readily obliterated, the country of origin of the product or part thereof;

5. Representing, directly or by implication that their drills or other products, are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in

which the guarantor will perform thereunder are clearly and conspicuously disclosed;

6. Furnishing or otherwise placing in the hands of retailers or dealers in such products the means or instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

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

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

TOPPS CHEWING GUM, INC.

Docket 8463. Order and Opinion, July 2, 1963

Order dismissing several appeals from hearing examiner's rulings as to subpoenas as being premature and remanding such appeals to hearing examiner for further consideration.

Opinion and Order Disposing of Motions

The Commission now has before it the following applications for permission to file interlocutory appeals from rulings of the hearing examiner, pursuant to Section 4.18 of the Rules of Practice, and appeals from the hearing examiner's grant or denial of motions to issue, limit, or quash subpoenas, pursuant to Section 4.15(e) of the Rules:

1. Complaint counsel's request, filed March 6, 1963, for permission to file an interlocutory appeal from:

(a) The order of the hearing examiner of February 27, 1963, granting leave to respondent to take depositions of chewing gum manufacturers, and

(b) The order of the hearing examiner of February 28, 1963, denying complaint counsel's motion for reconsideration of his previous orders of January 18, granting leave to respondent to take depositions of bubble gum manufacturers, and of November 13, 1962, granting leave to respondent to take depositions of companies using baseball picture cards.

2. Respondent's appeal, filed March 8, 1963, from the examiner's denial of its motion for leave to take depositions of certain wholesalers and retailers. (This appeal was improperly filed under Section 4.15 (e) of the Commission's Rules and will be treated as an application for permission to file an interlocutory appeal under Section 4.18.)

3. Respondent's appeal, filed March 12, 1963, from the hearing examiner's order of March 1, 1963, limiting certain subpoenas *duces tecum* addressed to bubble gum manufacturers to the production of documents necessary to refresh the recollection of the deponents and denying to respondent the right to inspect such documents.

4. Respondent's appeal, filed April 3, 1963, from the hearing examiner's order quashing subpoenas directed to Frank H. Fleer Corporation.

5. The appeal of Ford Gum and Machine Company, Inc., filed April 8, 1963, from the examiner's order of March 29, 1963, denying Ford's motion to quash a subpoena directed to it.

6. The appeal of Philadelphia Chewing Gum Corporation, filed April 16, 1963, from the hearing examiner's order of April 11, 1963, denying Philadelphia's application to limit or quash a subpoena *duces tecum* directed to it.

7. The appeal of respondent, filed May 9, 1963, from the hearing examiner's order of April 30, 1963, granting the motion of Salada Foods, Inc., to quash a subpoena directed to it.

8. Complaint counsel's appeal, filed June 11, 1963, from the hearing examiner's order of June 6, 1963, granting respondent's motion for leave to take depositions of certain wholesalers. (This appeal was improperly filed under Section 4.15(e) of the Commission's Rules and will be treated as an application for permission to file an interlocutory appeal under Section 4.18.)

Certain basic considerations are relevant to the disposition of all of these matters. The conduct of adjudicative proceedings is primarily the responsibility of the hearing examiners, and, as Sections 4.15(e) and 4.18 of the Commission's Rules of Practice make clear, an examiner's rulings upon evidentiary or procedural matters arising in the course of such proceedings will not be reviewed or disturbed in the absence of unusual circumstances. It is therefore the examiner's duty to exercise firm direction over adjudicative proceedings to insure that the Commission's policy of orderly, expeditious, and continuous proceedings is not thwarted by either deliberate or inadvertent actions of the parties. The need for positive control of proceedings involving the trial of complicated issues of fact cannot be too strongly emphasized.

> It is not practical to proceed in these cases as in a lawsuit of ordinary complexity and bulk; that is, to let the parties exhaust the cross fire of pleading, to conduct open-court pre-trial hearings, or to let counsel try the case as they please. The potential range of issues, evidence and argument is so great, and the necessities of adversary representation so compelling, that the activities of counsel will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed. (Report of the Judicial Conference of the United States on Procedure in Anti-Trust and Other Protracted Cases, Sept. 26, 1951, p. 7.)

This admonition is repeated in the recent Handbook of Recommended Procedures for the Trial of Protracted Cases, 1961, 25 FRD 351, 383–84:

> The nature of the long or protracted case is such that strong control must be exercised from the time of filing to its disposition. The "remedy is for the trial

judge to take the case in hand at the outset, study it, and act as his best judgment dictates." Judge Prettyman coined the expression "Iron Hearted Judges" in an address before the New York State Bar Association in 1951. The phrases repeatedly found in the literature suggesting that the judge "take the case in hand at the outset," "gain control of the case in an early stage," take "full control of a case from the time of filing," and exercise "rigid control" all suggest that firmness and resolve [are] required of the trial judge in undertaking the pre-trial of the protracted case. "A judge must be willing to assume his role as the governor of a lawsuit. He can't be just the umpire."

Cf. First Draft of Recommended Procedures for the Trial of Protracted Cases Before Administrative Tribunals, Committee on Information and Education of the Judicial Conference of the United States, June 1962, pp. 10–11.

The exercise of this responsibility is particularly important in directing and limiting the scope of the deposition procedure afforded by the Commission's Rules. Properly used, depositions afford a valuable method for the preparation of the respondent's defense, thereby making possible the continuous hearings contemplated by the Commission's Rules. Cf. *L. G. Balfour Company*, Dkt. 8435, Order Directing Disclosure of Documents, May 10, 1963 [62 F.T.C. 1541]. At the same time, care must be taken that depositions are not substituted for the continuous hearings required by these Rules and that they are not used as a means to delay the disposition of the proceeding. Depositions may be taken only upon a showing of good cause. As we recently had occasion to point out in *Balfour*, *supra*, with regard to a similar requirement under Section 1.163 of the Commission's Rules, "It is neither necessary nor desirable to frame a firm rule of general application defining with particularity the elements of a showing of good cause * * *" In general, a determination of good cause for the taking of depositions requires a showing of the relevance and usefulness for defensive purposes of the information sought and of the need for eliciting it by deposition rather than by testimony at the hearings, together with appropriate consideration of claims of confidentiality, basic fairness to the parties, and the paramount need for avoiding delay.

Moreover, if the dangers of delay, confusion and an unwieldy record are to be avoided, depositions must be strictly limited to the questions actually in issue in the proceeding. This requires a clear delineation of the issues to be tried before depositions are permitted.

Definition of issues and control of discovery are closely interrelated and must be coordinated. * * * [D]iscovery cannot be kept within reasonable bounds until there is some understanding of the issues that must mark the bounds of possible discovery. And those bounds must be set early if confusion is to be avoided. The remedy suggested is that each side be required to submit promptly, in writing, its tentative statement of the issues. When these statements are discussed at a pre-trial conference, consideration can be given to limiting discovery, for

example as to subject matter, geographical area and period of inquiry. Initial discovery can then proceed within the bounds established. (First Draft of Recommended Procedures for the Trial of Protracted Cases Before Administrative Tribunals, Report of Committee on Information and Education of the Administrative Conference of the United States, June 1962, p. 14.)

Although the examiner here has required the filing of statements of issues and has entered an order, dated October 15, 1962, tentatively identifying the issues to be tried, the matters now before us indicate a need for further clarification before the scope of depositions can be determined. This is in part at least due to the narrow view indicated in the examiner's order as to his role in the definition of the issues in a proceeding of this sort. The examiner's duty under Sections 4.8 and 4.13(c) of the Commission's Rules of Practice is not limited to the passive recording of the assertions of the parties regarding the issues to be tried. He "must not be satisfied to accept counsel's statement of the issues without further analysis." Seminar on Procedures Prior to Trial, 20 FRD 485, 491 (1957). In a complicated proceeding the issues often cannot be deduced from the pleadings alone and the examiner must take an active role in their definition, overcoming the "reluctance of lawyers to be specific lest they thereby forego some advantage which might develop in the course of trial" or because of the lack of complete preparation of their case (Report of the Judicial Conference on Procedure in Anti-Trust and Other Protracted Cases, *supra*, p. 9).

The present case provides a good example of the need for affirmative action by the examiner to provide the clarity which is lacking in both the pleadings and the parties' statements of the issue. The allegations of the complaint are in terms of respondent's practices in the markets for (1) "bubble gum", (2) "picture cards", (3) "bubble gum packaged and sold in combination with baseball picture cards", and (4) "baseball picture cards sold separately". The allegations themselves, however, are relatively uncomplicated. They challenge as "unfair methods of competition and unfair acts and practices in commerce" in violation of Section 5 of the Federal Trade Commission Act, respondent's alleged practice of obtaining and enforcing contracts with baseball players granting respondent the exclusive right to use such players' pictures, names, and biographies on picture cards. The proposed order served with the complaint would require respondent to cease and desist from entering into such exclusive contracts for periods in excess of one year.

The trial of such an essentially simple case, directed primarily to the legality of certain exclusive arrangements, clearly should not require proof of the relevance and appropriateness of four separate and distinct markets. But, for whatever reason, complaint counsel has

made no effort to reduce this proliferation of issues and the resulting confusion has been embraced by respondent as a basis for its demands for extensive and time-consuming discovery.

The cutting of this knot and the isolation of the essential issues must thus be primarily the responsibility of the examiner, and it is he who must take the initiative. According to the complaint, respondent's exclusive arrangements have foreclosed to other companies the opportunity to obtain and use baseball picture cards. If, as the complaint implicitly alleges, such picture cards are sold both separately and in conjunction with other products, the legality of respondent's practices can be determined by examining their probable effect upon competition either in the sale of the picture cards themselves or in the sale of the products with which they are distributed. Thus, there are in this case two potential market issues: (1) whether baseball picture cards are sufficiently distinct from other kinds of picture cards or similar picture devices to make their foreclosure to others who might wish to sell them or use them for promotional purposes competitively significant; and (2) whether bubble gum, the product with which respondent distributed baseball picture cards, is sufficiently distinct from other gums, candies or confections to make competitively significant the foreclosure of a promotional device to other bubble gum manufacturers.

Depending upon what complaint counsel is prepared to prove, however, both of these market issues may be avoided. If complaint counsel is prepared to prove that baseball picture cards account for a sufficient share of all picture cards or devices so that respondent's exclusive arrangements foreclosed a substantial share of this larger market, the existence of a narrower market limited to baseball picture cards would be irrelevant, and depositions directed to this question should not be permitted. Similarly, if complaint counsel is prepared to prove, as the contract provision set out in the complaint indicates, that respondent's exclusive arrangements foreclosed the use of baseball picture cards to all producers of gums, candies and confections, the existence of a narrower market limited to bubble gum would be irrelevant, and depositions directed to this question should not be permitted.

The first step in narrowing the issues is to require complaint counsel to state what he intends to prove, and consequently what markets he intends to rely upon. Since the scope of the depositions which may be taken in this proceeding will of necessity depend upon the further delineation of the issues, the appeals from the examiner's rulings as to such depositions, which are now before the Commission, are clearly not ripe for determination at the present time. Accordingly,

It is ordered, That the applications for permission to file interlocutory appeals and the appeals from the examiner's rulings as to subpoenas, as set forth above, be, and they hereby are, dismissed as premature, and the questions as to the taking of depositions in this proceeding which are raised in such appeals be, and they hereby are, remanded to the hearing examiner for further consideration in the light of this opinion and order.

BECTON, DICKINSON & COMPANY

Docket 8493. Order, July 9, 1963

Order denying respondent's request for a conference for a settlement of this proceeding.

Order Denying Motion

Respondent, by motion filed June 24, 1963, having joined in the applications of respondents in certain related matters requesting a conference for the settlement of this proceeding or alternative relief, and counsel supporting the complaint having filed an answer in opposition thereto; and

The Commission having previously considered such a request in *White Laboratories, Inc.*, Docket No. 8500, and having issued the attached order denying said request; and

The Commission being of the opinion that the grounds stated in its order in Docket No. 8500 [62 F.T.C. 1538] for denial of that respondent's request are applicable in substance to the request herein and that therefore this motion must likewise be denied:

It is ordered, That respondent's motion of June 24, 1963, be, and it hereby is, denied.

Commissioner Elman concurring.

MAGNAFLO COMPANY, INC., ET AL.

Docket 8422. Order, July 12, 1963

Interlocutory order ruling on request for permission to file interlocutory appeal and defining the manner in which the case should be processed under the order of remand.

Order Ruling on Request for Permission To File Interlocutory Appeal

This matter having come before the Commission upon the request of counsel supporting the complaint to file an interlocutory appeal from certain rulings of the hearing examiner as set forth in an Order of

Directions After Pre-Hearing Conference, April 30, 1963, issued by the hearing examiner subsequent to the Commission's remand of this proceeding; and

It appearing that the purpose of said remand was to determine whether respondents' trade name, "Lifetime Charge," could be qualified so as to relieve any tendency to deceive or whether complete excision of said name is required, and that the hearing examiner was directed to receive such additional evidence as may be required for a finding on the issue of whether or not respondents' product will preserve an existing charge in a battery to the extent necessary to give a purposeful and truthful meaning to the word "Lifetime" in said trade name; and

It further appearing that the aforesaid Order of Directions of the hearing examiner would require, *inter alia*, that counsel for each side should present evidence on the issue of whether or not respondents' product will preserve an existing charge in a battery and that said evidence should be based on formal scientific tests of respondents' product; and

It further appearing that counsel supporting the complaint has averred that tests required by the aforesaid Order of Directions could not be completed in less than one year and that counsel for respondents has stated of record that respondents are not now in a position to present any test data in support of the contention that their product will preserve an existing charge in a battery and has estimated that respondents will require up to three years to conduct the necessary tests; and

The Commission having determined that the request of counsel supporting the complaint for permission to file an interlocutory appeal from said rulings of the hearing examiner should be granted and that, in view of an apparent misinterpretation of its order of remand, filing of the interlocutory appeal should be waived and the issues presented in said request should be considered on the merits; and

The Commission having previously determined that respondents' use of the trade name "Lifetime Charge" was deceptive and illegal, the burden rests upon respondents to show that a remedy short of excision would suffice to protect the public against deception; and

The Commission having further determined that the evidence to be received by the hearing examiner pursuant to the Commission's order of remand should be limited to that presently available to respondents to show that the aforesaid trade name may be qualified to relieve its capacity to deceive, and to rebuttal evidence, and that in the absence of a satisfactory showing by respondents, an order requiring complete excision of said trade name should be entered:

It is ordered, That the hearing examiner's Order of Directions After Pre-Hearing Conference be, and it hereby is, vacated and set aside.

It is further ordered, That the case be remanded to the hearing examiner for further proceedings in conformity with the views expressed herein.

GEORGE FROST COMPANY*

Docket C-229. Modified Order, July 17, 1963

Order reopening case and striking from order the last paragraph and substituting an order staying the effective date.

Order Reopening Proceeding and Modifying Order To Cease and Desist

Respondents having requested that the final order to cease and desist outstanding against them be modified by making the compliance provision thereof inoperative until the Commission has instituted action to correct certain alleged industry-wide practices; and

The Commission having concluded that a temporary cessation of respondents' duty to comply with the order to cease and desist will not be incompatible with the public interest and that respondents, by requesting reopening, have waived notice and opportunity for hearing thereon:

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

It is further ordered, That the decision and order of the Commission issued September 11, 1962 [61 F.T.C. 517], be, and it hereby is, modified by striking therefrom the entire last paragraph of the order and substituting therefor the following:

It is further ordered, That this order shall not become effective until further order of the Commission.

TOPPS CHEWING GUM, INC.

Docket 8463. Order, August 1, 1963

Order Denying Motion To Dismiss Complaint

Respondent has filed on July 23, 1963, a motion requesting the Commission to dismiss the complaint in this proceeding as not in the public interest and to conduct a supplemental investigation to determine whether a complaint against respondent would be in the public interest. In support of this extraordinary motion, respondent contends that the

*This order was made effective on Sept. 16, 1964.

complaint "never contained a proper description of the markets in which the violations were alleged" and that "new and changed competitive activities which have occurred since the issuance of the complaint . . . show that the Commission cannot and does not know whether the complaint is in the public interest."

Under the statute, Commission proceedings are initiated only when found to be in the public interest. It does not follow that, at every succeeding stage of the proceeding as the issues raised by the complaint are sharpened by pre-trial procedures and as changes in the industry may take place, the matter of "public interest" should be continually reexamined by interlocutory applications to the Commission. To entertain such applications would result in dragging the proceedings out interminably, and would only defeat the public interest in prompt disposition of the case. Moreover, although the matters urged here by respondent may be relevant to an ultimate determination as to its alleged violations of law, they clearly have no relevance to any issue of "public interest" independent of the question of violation, and are therefore not properly addressed to the Commission while the matter is before the hearing examiner.

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

Commissioner Anderson not concurring for the reason that he is in favor of dismissing the complaint.

DUOTONE COMPANY, INC., ET AL.*

Docket C-87. Order and Opinion, Aug. 19, 1963

Order granting respondents leave to file briefs and present oral argument on their motion to reopen and modify a consent order regarding the foreign origin of phonograph needles.

On Request for Oral Argument and Motion for Modification of Consent Order by the Commission

This matter is before us on the motion and affidavit of respondents to amend the consent order in this proceeding filed June 10, 1963, which is opposed by the answer of complaint counsel filed June 18, 1963. By letter of June 19, 1963, respondents' counsel requested permission to appear before the Commission and present an oral argument in support of the motion.

Respondent Duotone Company and the individual respondents, Stephen Nester and Virginia Nester, are primarily engaged in the

*Respondents' request for modification of the consent order of Feb. 28, 1962, 60 F.T.C. 453, denied but clarified by order of Feb. 17, 1964.

manufacture, importation and distribution of phonograph needles and accessories to wholesalers or distributors for resale to retailers. The complaint in this matter issued February 28, 1962 [60 F.T.C. 453], and alleges that respondents engaged in practices violative of Section 5 of the Federal Trade Commission Act, by not disclosing the origin of their products, misrepresenting the composition of their phonograph needles, engaging in deceptive pricing practices and misrepresenting the guarantees on their products. On the same date, the Commission accepted a consent agreement disposing of the allegations of the complaint.

The issues raised by respondents' motion relate to the construction of the first three paragraphs of the order which require respondents to disclose the foreign origin of their products to prospective purchasers on the packages of their products as well as in the display of point of sale material used to promote the products in question, and in any case to refrain from selling in such a manner as not to clearly disclose the place of origin of their products to prospective customers.

In their affidavit respondents argue that the Commission's compliance division has improperly construed the scope of the order. Duotone interprets the phrase in the order "any such product" to mean a "completely finished imported article sold in the same condition as imported." Duotone argues that the term "products" in the order does not encompass articles made of parts originating in various countries and assembled in the Duotone factory or needles made in the Duotone factory of foreign as well as domestic parts. The consent agreement entered by respondents has the standard provision that the complaint may be used in construing the terms of the order. We have examined the allegations of the complaint and these on their face apparently relate only to finished phonograph needles.[1]

In the light of the foregoing, we are persuaded a serious question exists whether the term "any such product" in the order covers phonograph needles made wholly or in part of foreign components assembled in the United States. We will therefore grant the request of respondents for oral argument on this issue. Both complaint counsel and respondents' counsel should therefore be prepared to enlighten the Commission as to the proper scope of the term "any such product" as used in paragraphs 1 to 3 of the order.

Counsel for both sides, in addition, should be prepared to give the Commission their views on whether the proceeding should be reopened and the complaint amended in the event it is decided that the consent

[1] "PARAGRAPH SIX: Said statements and representations were and are false, misleading and deceptive. In truth and in fact:

1. All of said phonograph needles are not manufactured in the United States. Some of said phonograph needles are manufactured in Japan or other foreign countries and this fact is not clearly or adequately disclosed so as to give the purchasing public notice of the countries of origin of said phonograph needles."

order in this proceeding does not encompass the practices described in respondents' affidavit namely the sale and distribution of articles made wholly or in part of components originating in foreign countries and assembled in the Duotone factory.

Finally, counsel for both sides should be prepared to discuss whether the representation on respondents' wall charts "Needles Of Foreign Origin Will Be So Designated On The Individual Packages" adequately discloses the foreign origin of either completely finished imported needles or of needles constituted of foreign parts to varying degrees, but assembled in respondents' factory.

An order will therefore issue granting respondents and complaint counsel permission to file briefs and present oral argument on the issue of whether the proceeding should be reopened for modification of the order and whether it should be reopened for the purpose of amending the complaint and the reception of evidence.

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

Order Granting Leave to File Briefs and Present Oral Argument on Reopening Proceeding

Respondents having filed in motion requesting modification of their consent order and counsel supporting the complaint having filed an answer in opposition thereto whereupon respondents filed a request for oral argument on their motion; and

The Commission having decided for the reasons stated in the accompanying opinion that it will entertain briefs and listen to oral argument on the issue of whether the case should be reopened for modification of the order and/or whether it should be reopened for amending the complaint and further proceedings;

It is ordered, That opposing counsel may file briefs within thirty (30) days from the date of the service of this order upon them.

It is further ordered, That opposing counsel may present oral argument on the date set by the Secretary of the Commission.

Commissioner Elman not participating.

SHELL OIL COMPANY

Docket 8537. Order, Sept. 6, 1963

Order denying respondent's motion to dismiss the case or postpone the filing of the initial decision.

Order Denying Motion

This matter is before the Commission for consideration of respondent's "Motion To Dismiss Without Prejudice Or, In The Alternative,

To Postpone Time For Filing The Hearing Examiner's Initial Decision," originally filed with the hearing examiner but certified by him to the Commission. Complaint counsel has filed an answer, urging the Commission to deny respondent's motion.

Specifically, respondent's motion urges the Commission to dismiss this proceeding without prejudice to referral of the matter to the Attorney General for institution of a proceeding in a United States district court having concurrent jurisdiction of the subject matter and party. As grounds for the granting of such unusual relief, respondent charges that the Commission is disqualified from deciding the merits of this proceeding by statements in its opinion in the *American Oil Company*, Docket No. 8183, issued June 27, 1962 [60 F.T.C. 1786, 1804], and in the statements of Commission counsel contained in the Commission's brief filed before the Seventh Circuit in *American Oil Company* v. *Federal Trade Commission*, No. 13,879. It is urged that said statements indicate that the Commission has prejudged that certain prices granted by Shell to dealers in Smyrna, Georgia, in October 1958, were unlawful.

It should be unnecessary to point out that pursuant to the judicial process in general and the Administrative Procedure Act in particular, the Commission is required to reach its decisions solely upon the basis of the record before it. This was done in the *American* case and it will, of course, be done in this case. Shell Oil Company was not a respondent in the proceeding against the American Oil Company, and evidence in defense of its prices was not there introduced. The facts surrounding respondent Shell's pricing have been given full an extensive airing in this proceeding, and the Commission's decision will be based on them alone.

Moreover, this proceeding is not only concerned with Shell's operations in Smyrna, Georgia, but encompasses alleged price discriminations in Seattle, Washington. It also involves a separate charge of price fixing in violation of Section 5 of the Federal Trade Commission Act. Respondent's motion presents no grounds whatsoever for dismissing these charges. Splitting up the complaint charges between the Commission and a United States district court may avail respondent only additional expense, for an order requiring it to cease discriminating in price may be justified by its activities in Seattle, Washington, alone. Of course, the Commission at this juncture makes no finding whatsoever as to the lawfulness of Shell's pricing and related activities.

Alternatively, respondent asks the Commission to postpone the time within which the hearing examiner's initial decision must be filed until the United States Court of Appeals for the Seventh Circuit has rendered its decision in the *American Oil Company* matter. It is urged that the hearing examiner has been placed in an untenable position

by the circumstances surrounding the Commission's opinion and appeal in the *American* case and that he has been placed in "an atmosphere not conducive to the exercise of impartial and independent judgment."

This argument overlooks the point that the hearing examiner, as the Commission, is required to render his decision solely upon the basis of the record before him. As a matter of fact, the hearing examiner has already indicated on the record that he does not consider himself bound by any of the Commission's findings in the *American Oil Company* case and that he is going to make an independent judgment based upon the facts before him. By so stating, the examiner was announcing his recognition of his clear duty to arrive at an initial decision without consideration of any extrinsic materials, as required by Section 7(d) of the Administrative Procedure Act.

The fact that a decision is pending in the circuit court in a proceeding involving facts common to this proceeding does not place the examiner in an untenable position and whatever affect his initial decision may have upon the appeal now pending before the United States Court of Appeals for the Seventh Circuit is no concern of this respondent.

It is the Commission's conclusion and decision that the respondent has not shown good cause or adequate grounds for the relief which it requests and, therefore:

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

Commissioners Anderson and Higginbotham concurring in the result, and Commissioner Elman not participating.

OXWALL TOOL COMPANY, LTD., ET AL.

Docket 7491. Order, Sept. 9, 1963

Order modifying a previous order regarding the disclosure of country of origin on packages.

Order Amending Final Order of the Commission

Respondents by their "Motion to Re-Open and Modify", pursuant to § 5.7 of the Commission's Rules of Practice effective June 1962, having requested that the final order of the Commission issued December 26, 1961 [59 F.T.C. 1408] be modified; and

The Commission on consideration of the aforesaid motion having determined that its final order of December 26, 1961 should be modified in certain respects:

It is ordered, That the Commission's final order of December 26, 1961 [59 F.T.C. 1408] be, and it hereby is, modified to read as follows:

It is ordered, That respondents Oxwall Tool Company, Ltd., a corporation, and its officers, and respondents Max J. Blum and Sidney

Blum, 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 and distribution of imported merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing in a conspicuous place on the products themselves the country of origin thereof.

2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment. Provided, however, that in those instances where (a) two or more products imported from two or more foreign countries or places are packaged together in the same container, where (b) the imported articles themselves are clearly and conspicuously marked with the country of origin, and where (c) the container is unsealed and the articles may be readily removed therefrom for examination by a prospective purchaser prior to purchase, the disclosure, in a conspicuous place on the container, that all or a portion of the contents of such package are imported and that the country or place of origin of foreign made products is set forth on each product, shall constitute compliance with the terms of this order.

It is further ordered, That respondents, Oxwall Tool Company, Ltd., Max J. Blum and Sidney Blum, 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 as modified.

TOPPS CHEWING GUM, INC.

Docket 8463. Order, Sept. 24, 1963

Order denying respondent's appeals from hearing examiner's denials of applications for certain subpoenas and depositions.

Order Disposing of Appeals From Hearing Examiner's Orders of August 29, 1963.

The Commission now has before it the following appeals from certain orders of the hearing examiner entered August 29, 1963, concerning the taking of depositions in this proceeding: (1) respondent's appeal from the hearing examiner's denial of certain of its applica-

tions for subpoenas and depositions; (2) complaint counsel's request for permission to appeal from the examiner's granting of certain other of respondent's applications for subpoenas and depositions; and (3) an appeal by Salada Foods, Inc., from the examiner's order permitting respondent to take the deposition of that company.

It does not appear that the rulings appealed from involve substantial rights and will materially affect the final decision or that a determination of their correctness before conclusion of the hearing will better serve the interests of justice—the requirements for an interlocutory appeal under Section 3.17(f) of the Commission's Rules of Practice. The Commission notes, however, the following statement in the examiner's memorandum:

> that under the rules presently in effect governing the taking of depositions, (a) there must be a showing that the deposition will constitute or contain evidence relevant to this issue, (b) that there is a definite risk that the witness to be deposed will not be available at the hearing, (c) that exceptional circumstances exist within the meaning of Part V of Section 3.10(e)(2) of the rules, or within the probable utilization under Section 3.10(e)(1).

This erroneously confuses the requirements for the taking of depositions, set out in Section 3.10(a) of the Commission's Rules, with the requirements, set out in Section 3.10(e), for their use at the hearing. Since the examiner's denial of certain of respondent's applications for depositions may possibly be based in part upon this erroneous interpretation of the Commission's Rules, the examiner is directed to reconsider the matter. Accordingly,

It is ordered, That the appeals and the request for permission to file an interlocutory appeal from the examiner's rulings be, and they hereby are, denied.

It is further ordered, That the examiner be, and he hereby is, directed to reconsider respondent's applications for subpoenas and depositions in the light of this order.

Commissioner Anderson not participating for the reason he is of the opinion there should not have been a complaint.

FRED ASTAIRE DANCE STUDIOS, WASHINGTON, D.C., INC., ET AL.

Docket 8560. Order, Oct. 7, 1963

Order denying respondent's motion to dismiss the complaint or suspend the proceeding pending a trade-practice hearing.

Order Denying Request To File Interlocutory Appeal, and Denying Motion To Dismiss Complaint or Suspend Proceeding

The Commission has before it a request by respondent Fred Astaire Dance Studios Corporation, under Section 3.20 of the Commission's

Rules of Practice, for permission to file an interlocutory appeal, and a motion by said respondent to dismiss the complaint or alternatively to suspend the proceeding.

Respondent seeks an interlocutory review of an order of the hearing examiner, made under Section 3.11 of the Rules, for the production of certain documents in respondent's possession. Such review will be granted only "in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest". Cf. the test contained in Section 3.17(f), which governs immediate appeals to the Commission from rulings granting or denying applications to issue, or motions to limit or quash, any subpoena or order requiring access; such an appeal will be entertained "only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice". Under neither test has respondent established grounds for an immediate appeal to the Commission. Responsibility for the protection of parties and witnesses from unjustified demands for documents is primarily the hearing examiner's, and respondent's application discloses no abuse of discretion by the examiner of such nature as to warrant, under the standards governing interlocutory appeals set forth in the Rules, the Commission's intervention at this time. In so ruling, the Commission expresses no view on the merits of respondent's objections to the examiner's order.

Respondent's motion to dismiss the complaint or suspend the proceeding while a trade practice rule-making proceeding is convened (see Sections 1.66–.67 of the Rules) must be denied for essentially the reasons stated in the Commission's recent order in *Topps Chewing Gum, Inc.*, F.T.C. Docket 8463, issued August 1, 1963, p. 2203 herein.

It is ordered, That respondent's request for leave to file an interlocutory appeal and its motion to dismiss the complaint or suspend the proceeding be, and they hereby are, denied.

ART NATIONAL MANUFACTURERS DISTRIBUTING CO. ET AL.

Docket 7286. Order, Oct. 7, 1963

Order denying respondent's request to modify a cease and desist order entered May 10, 1961, 58 F.T.C. 719, on the ground of alleged change of law.

Order Denying Petition To Reopen

Counsel for respondents having petitioned the Commission to reopen this proceeding for the purpose of determining whether or not

the final order to cease and desist entered May 10, 1961 [58 F.T.C. 719], should be modified, alleging as grounds therefor that the Commission on July 15, 1963, dismissed its complaint against *National-Porges Co., et al.*, Docket No. 8428 [p. 163 herein]; and

It appearing that dismissal of the complaint in Docket No. 8428 was based solely on an application of the law to the facts of record in that case, having no connection with the facts of record in this proceeding, and that contrary to respondents' counsel's contention, dismissal of said complaint does not represent a change in law applicable to the acts and practices prohibited by the order to cease and desist herein; and

The Commission, therefore, having concluded that respondents' counsel has failed to allege sufficient and proper grounds for a reopening of this proceeding:

It is ordered, That respondents' petition for reopening of this proceeding be, and it hereby is, denied.

CROWN CENTRAL PETROLEUM CORP.

Docket 8539. Order, Oct. 9, 1963

Order denying request of a third party to quash a subpoena duces tecum issued at instance of respondent in this case.

Order Denying Appeal From Order Denying Motion To Quash Subpoena Duces Tecum

Harry Waller, as an individual and as President of A & H Transportation, Inc., appearing *pro se*, appeals the hearing examiner's order denying his motion to quash a subpoena *duces tecum* issued at the instance of respondent in the above-captioned matter. Under Section 3.17(f) of the Commission's Rules, an appeal to the Commission from the hearing examiner's order denying a motion to quash a subpoena "will be entertained by the Commission only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice." Under this Rule, prime responsibility for the protection of witnesses from overbroad or otherwise improper subpoenas rests with the hearing examiner, and the Commission will intervene at an interlocutory stage in the proceeding only upon a clear and concrete showing of the necessity for such intervention.

Appellant has made no such showing. He alleges in vague and conclusional terms that the examiner's order was erroneous and that irreparable injury will be inflicted upon him if he must comply with the subpoena. However, no facts are alleged, in support of these claims, that would enable the Commission to determine whether appellant is entitled to an immediate appeal. Consequently, the appeal must be denied. In so ruling, the Commission expresses no view on the correctness of the hearing examiner's order or the merits of appellant's position.

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

O. K. RUBBER WELDERS, INC., AND THE B. F. GOODRICH COMPANY

Docket 8571. Order, Oct. 17, 1963

Order denying respondent's requests to appeal the hearing examiner's denial of a stay of proceedings.

Order Denying Request for Permission To File Iterlocutory Appeal

Respondents in the above-captioned matter, pursuant to Section 3.20 of the Commission's Rules of Practice, have filed separate requests for permission to file an interlocutory appeal from an order of the hearing examiner denying a motion for stay of proceedings. The ground of that motion, and of the present requests, is that there are common issues of law between this case and several other cases decided by the Commission and presently pending on appeal in the Federal Courts of Appeals. It is urged that, should any of these courts disagree with the Commission's view of the basic issues in those cases, the Commission would want to reconsider its action in issuing a complaint in the instant case, and that therefore all further proceedings in this case should be stayed until decision of the pending appeals.

A motion to stay proceedings before the Commission on such a ground is, properly, a motion addressed to the Commission in its administrative, rather than its adjudicative, capacity. Therefore, the hearing examiner had no power to pass upon the motion, see Section 8 of the Commission's Statement of Organization, and should instead have certified it to the Commission for its determination. See Section 3.15(c)(9) of the Rules of Practice; *Drug Research Corp.*, F.T.C. Docket 7179 (decided October 3, 1963) [p. 998 herein].

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However, considering the motion for a stay of proceedings in this matter as properly before it, the Commission finds that good and sufficient cause for such a stay has not been shown. Accordingly,

It is ordered, That respondents' requests for permission to file an interlocutory appeal be, and they hereby are, denied.

THOMASVILLE CHAIR COMPANY

Docket 7273. Order and Opinion, Oct. 22, 1963

Order dismissing complaint upon remand by the Fifth Circuit of order prohibiting the passing on of a reduction in brokerage to favored buyers, without acquiescence by the Commission on the Court's opinion.

Memorandum Accompanying Final Order

By the Commission:

This matter is before the Commission upon remand from the United States Court of Appeals for the Fifth Circuit. We read the Court of Appeals' decision as holding that the Commission, in a case in which it is alleged that a seller has violated Section 2(c) of the Clayton Act by passing on a reduction in brokerage to favored buyers in the form of a discriminatory price reduction, may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price. The Commission does not, however, acquiesce in the opinion of the Court of Appeals as such, which contains dicta with which the Commission does not necessarily agree. Since the Commission does not believe that the public interest would be advanced by a further proceeding to establish whether respondent has violated Section 2(c), the complaint must be dismissed.

Order Dismissing Complaint

The United States Court of Appeals for the Fifth Circuit having, on August 14, 1962 [7 S.&D. 515], entered its judgment setting aside the Commission's order to cease and desist and remanding the matter to the Commission for further proceedings not inconsistent with its opinion of the same date, and the Commission after full consideration having determined that the complaint should be dismissed for the reasons stated in an accompanying memorandum;

It is ordered, That the Commission's complaint be, and it hereby is, dismissed.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order and Opinion, Oct. 22, 1963

Interlocutory order denying respondents' request for appeal from hearing examiner's denial of motion for disclosure of additional "missing" documents and for subpoena *ad testificandum* to complaint counsel.

INTERLOCUTORY OPINION OF THE COMMISSION

By DIXON, *Commissioner:*

This matter is before the Commission as to (a) a request by respondents, filed September 5, 1963, for permission to file an interlocutory appeal from the hearing examiner's order denying their motion to compel compliance with the Commission's order of May 10, 1963 [62 F.T.C. 1541], directing disclosure of documents; and (b) an order of the hearing examiner filed September 16, 1963, certifying to the Commission a motion by the respondents for issuance of a subpoena *ad testificandum* for the appearance of complaint counsel in regard to the furnishing of documents under the aforesaid Commission's order. Both the request for interlocutory appeal and the order of certification relate to essentially the same subject matter.

The issues here raised developed over the Commission's order of May 10, 1963, above referred to, directing disclosure of certain documents in the Commission's files. Respondents, in their original request for access to the materials, made only the most general description of what they were seeking, and the hearing examiner, in referring the question to the Commission, noted "In sum, what counsel for the respondents seeks is a broad fishing license to examine everything in the Commission's files with the hope that something *may* be found that in some way may be used to aid him in the presentation of his defense." Nevertheless, the Commission granted broad access to records in the Commission's files, reasoning that respondents were trying to recover only their own documents for which they had not retained copies and that to deny such a request probably would cause some hardship.

Complaint counsel, pursuant to the Commission's order, made a thorough search of the Commission's files and turned over what they believe to be all the documents called for under the Commission's order. They assert that they have reviewed all the Commission files in their possession which might in any way contain documents which the Commission directed to be disclosed to respondents and that in addition they requested Commission employees responsible for cataloging, indexing and maintaining Commission records to conduct a

thorough and exhaustive search of Commission files for any and all material relating to respondents and to give it to complaint counsel. Items selected from this material covered by the Commission's order, some 900 or more exhibits, were thereafter turned over to the respondents. Complaint counsel, in their answer to respondents' motion to compel compliance, state: "Complaint counsel have fully complied with the Commission's order of May 10th. There has been no withholding or suppression of documents."

Among the documents handed over to the respondents are a few which contain references indicating that the Commission apparently had in its possession at one time certain other documents which were not made available to the respondents. It is as to these missing documents that respondents have raised the issues now before us. Complaint counsel advises that further additional search was made by them to uncover the missing documents but they were not to be found. They state flatly that "Such material simply cannot be located."

Respondents were given broad access to records in the Commission's files even though "there was a serious question" whether they had at that time made the necessary showing of "good cause" as required by Commission procedure. The disclosure was ordered for the respondents' convenience, since the request involved a large number of respondents' own records collected over a long period of time, copies of which had not been retained by them. It is clear that the Commission ruling referred only to a large mass of generally described records and did not pass upon the materiality or relevance to respondents' defense of any specific record. Moreover, there is no question that the Commission's order dealt only with records available in its files. It reads in part:

> IT IS ORDERED that complaint counsel have copies made of all documents *in the Commission's files.* * * * (Emphasis supplied.)

Respondents assert that the narrow issue here is whether they can be accorded their basic rights to a fair and impartial trial when documents relevant and material to the issues in the proceeding have been lost or destroyed after having been given into the custody of the Commission. Respondents cite the cases of *United States* v. *Consolidated Laundries Corporation*, 291 F. 2d 563 (2d Cir. 1961), and *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), to support their position that they have been prejudiced, but the facts in those cases are so different from the facts herein that they cannot be considered controlling precedents.

Although we refrain from deciding the issue at this time, we doubt that respondents can show they will be in any way prejudiced by the unavailability of the records. For one thing, it appears that the documents cover matters about which available witnesses can testify or about which information can be obtained from other sources. Moreover, so far as we can determine, no part of complaint counsel's case has been built on the missing records. The precise way in which the respondents are allegedly prejudiced by the unavailability of the documents has not been made clear. Respondents are not foreclosed from raising this issue at a later time, if necessary, and we do not see that any prejudice will result to them by deferring the decision in the matter. Under § 3.20 of the Commission's Rules of Practice, the interlocutory appeal will not be granted unless a showing is made of extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest. Since no such showing has been made here, respondents' request for permission to file such appeal will be denied.

As to the subpoena *ad testificandum*, respondents are apparently seeking to make an issue of the circumstances of the disappearance of the documents. We have no grounds for doubting the assertions of complaint counsel that everything has been done which could be done to locate such records. Since they simply cannot be found, we see no reason for further inquiry into the matter. We will therefore deny respondents' request for the issuance of a subpoena directed to complaint counsel.

ORDER DENYING RESPONDENTS' REQUEST FOR INTERLOCUTORY APPEAL AND SUBPOENA

This matter having come on to be heard upon respondents' request for permission to file an interlocutory appeal from an order of the hearing examiner denying their motion for disclosure of documents and upon an order of the hearing examiner certifying respondents' request for a subpoena *ad testificandum* directed to complaint counsel; and

The Commission, for the reasons appearing in the accompanying opinion, having determined that both requests should be denied:

It is ordered, That respondents' request for permission to file an interlocutory appeal, filed September 5, 1963, be, and it hereby is, denied.

It is further ordered, That respondents' request for a subpoena *ad testificandum* directed to complaint counsel be, and it hereby is, denied.

C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Docket 4589. Order and Memorandum, Nov. 4, 1963

Order denying respondent's request to dismiss investigational hearing into alleged violation of an earlier order, but granting a motion for a clarification of the order.

MEMORANDUM IN DISPOSITION OF PETITION FOR CLARIFICATION OF ORDER

Nash-Finch Company, by petition filed October 14, 1963, has requested the Commission to dismiss the investigational hearing initiated by the Commission's order of February 1, 1963 [62 F.T.C. 1486], on the ground that such investigation is not within the Commission's statutory right and authority. In the alternative, petitioner requests clarification of the order, asserting that it wishes to determine the precise nature and scope of the proceeding and the procedure to be followed in the conduct thereof.

The Commission's order of February 1, 1963, directs that a "public investigational hearing" be conducted to ascertain the extent to which C. H. Robinson Company and Nash-Finch Company may have violated the provisions of the order to cease and desist entered against these parties on January 6, 1947. It is well settled that the conduct of such a proceeding is within the authority of the Commission,[1] and petitioner's request for dismissal of the investigation is hereby denied.

We next consider the alternative request for clarification of the order. This order is in virtually the same language as that used in the Commission's order directing a formal investigation to determine compliance with the order to cease and desist in *Washington Fish & Oyster*.[2] As a part of its application to the Court for enforcement of the order to cease and desist in that case, the Commission filed a report in which it found, on the basis of its investigation, that the company had violated the order. The company moved to strike that part of the application pertaining to the investigation, including the filing of the record thereof in the enforcement action. The Court, after observing that Congress provided for the Commission to apply to a United States Court of Appeals for enforcement "if such person fails or neglects to obey a cease and desist order," pointed out that Congress must, therefore, have expected the Commission to first determine the "fact of

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[1] "We hold that by virtue of the statutes cited the Commission had authority to conduct the questioned formal investigation as to violations of the cease and desist order of March 25, 1946." *Federal Trade Commission* v. *Washington Fish & Oyster Co., Inc.*, 271 F.2d 42 (9th Cir. 1959).

[2] *Ibid.*

violation." Noting that the procedure to be followed by the Commission in determining the fact of violation is not spelled out in the Clayton Act, the Court declared that any reasonable and fair method or procedure not forbidden by statute would be appropriate. The Court then ruled that in the Commission's investigational hearing there had been compliance with all requirements of statute and rule concerning procedure in that the company had full opportunity to cross-examine all witnesses and examine all documents and had full opportunity to contest the issue of violation of the order by introducing evidence. Additionally, the Court held that this record constituted "pleadings, evidence, and proceedings before the agency" within the meaning of Section 2112(b) of Title 28, United States Code,[3] and that it was properly filed as a part of the enforcement action.

The order herein directs that the parties under investigation be accorded all of the rights and privileges provided in the Commission's Rules of Practice governing hearings in adjudicative proceedings[4] which may be appropriate in a formal investigation. This, of course, includes the rights referred to by the Court in *Washington Fish & Oyster*, as well as others, one of which is the right of interlocutory appeal. Thus, if one of the parties is of the view that a particular ruling by the examiner is not in accordance with the Commission's direction or is otherwise improper, the rules prescribe the procedure for obtaining a review of such ruling.

Since the issuance of its order herein on February 1, 1963, the Commission has made certain revisions in its Rules of Practice.[5] The rules revised include those specifically referred to in the order, and for the purpose of removing any question as to which rules now apply to this proceeding:

It is ordered, That the Commission's order issued herein on February 1, 1963, 62 F.T.C. 1486, be, and it hereby is, amended by striking "Rule No. 1.34" from line two on page 1488 thereof and substituting therefor "Section 1.35," and by striking "Section 4.13" in line six on page 1488 thereof and substituting therefor "Section 3.15."

Commissioner MacIntyre not concurring.

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[3] "(b) The record to be filed in the court of appeals in such a proceeding [to review or enforce an order of an administrative agency] shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, * * *."

[4] Rules of Practice, Procedures and Organization, 27 Fed. Reg. (1962), Part 4, Subpart E.

[5] Rules of Practice, Procedures and Organization, 28 Fed. Reg. (1963).

SUN OIL COMPANY

Docket 6641. Order, Nov. 12, 1963

Order reopening proceedings and remanding to hearing examiner to comply with directions of the Court of Appeals.

Order Reopening Proceeding and Remanding Case to Hearing Examiner

The United States Court of Appeals for the Fifth Circuit having on October 9, 1963 [7 S.&D. 191, 808], with the consent of the Commission, entered judgment remanding this proceeding to the Commission with specific directions, and the Commission having considered the matter,

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

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Robert L. Piper for such further proceedings as are necessary to comply fully with the said judgment of the Court of Appeals.

It is further ordered, That the Hearing Examiner, upon completion of the hearings contemplated by the Court's said judgment, shall file with the Commission a revised initial decision based upon the additional evidence adduced.

OXWALL TOOL COMPANY, LTD., ET AL.

Docket 7491. Order, Nov. 13, 1963

Order granting respondent's request for a stay of the effective date of the order to preserve right of appeal.

Order Staying Effective Date of Final Order

This matter has come before the Commission on respondents' motion filed November 1, 1963, for a clarification of the final order issued September 9, 1963 [p. 566 herein] and a request for an extension of time within which to file their report of compliance as well as a request for a stay of the effective date of the order to preserve their right of appeal to the Court of Appeals pending Commission action on their motion. Respondents further request an opportunity to be heard before the Commission on this motion. The Commission has determined that under the circumstances the effective date of the order should be stayed, but that there is no necessity for oral argument on the issues presented by respondents' motion. Accordingly,

It is ordered, That the effective date of the Commission's final order be, and it hereby is stayed, until further order of the Commission.

It is further ordered, That respondents be, and they hereby are, authorized to defer filing their report of compliance until sixty (60) days from the effective date of the final order in this proceeding.

It is further ordered, That the request of respondents for oral argument on their application be, and it hereby is, denied.

SHELL OIL COMPANY

Docket 8537. Order, Nov. 15, 1963

Interlocutory order denying respondent's motion requesting the Commission to disqualify itself from reviewing the initial decision on the ground that it had prejudged the matter.

Order Denying Motion To Disqualify Commission

Respondent has filed, on October 18, 1963, a motion requesting the Commission to disqualify itself from reviewing the initial decision issued by the hearing examiner on October 1, 1963, and from any further judicial or quasi-judicial participation in this proceeding other than to grant said motion, contending that the Commission had prejudged the matter even before the complaint issued, and that, therefore, respondent has been deprived of due process of law from the outset and will be further deprived of due process of law if the Commission reviews the hearing examiner's initial decision.

In support of its charge of prejudgment, respondent points to (1) our opinion in the matter of *American Oil Company*, Dkt. 8183 (June 27, 1962) [60 F.T.C. 1804], in which certain references were made to respondent's pricing practices; (2) the Commission's denial, on February 1, 1963, of respondent's motion for an order requiring counsel supporting the complaint to produce certain documents from the Commission's files [62 F.T.C. 1488]; (3) the Commission's denial, on September 6, 1963, of respondent's motion to dismiss the proceeding [p. 2206 herein]; (4) the hearing examiner's issuance, on October 1, 1963, of an initial decision finding respondent in violation of Sec. 2(a) of the amended Clayton Act (but not of the Federal Trade Commission Act); and (5) the fact that the Chairman of this Commission, testifying before a Subcommittee of the Committee on Appropriations, House of Representatives, 88th Congress, 1st Session, on January 22, 1963, in reply to questions regarding the Commission's proceedings against various oil companies, particularly *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505 (1963) [7 S. & D. 621], stated: "We have other cases. We have had a case decided against the American Oil Co. and against Shell Oil Co., and Atlantic, and many others. *They are on the way.*" (Emphasis added.)

The Chairman's reference to this respondent, and to the Atlantic Refining Company, and to other unnamed oil companies in the quoted testimony before the Appropriations Subcommittee was intended to, and did, merely advise the Subcommittee of some of the oil company matters that were then in the process of litigation.

Respondent's challenge to the other actions cited are but an attack upon the administrative process itself. The Commission's opinion in *American Oil* was based upon the facts established by the evidence received in that case. That evidence, along with other evidence developed subsequently, gave the Commission "reason to believe" (Sec. 11(b) of the Clayton Act, 15 U.S.C. 21(b); Sec. 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b)) the respondent, Shell Oil Company, was also violating the law, and that a proceeding against it would be in the public interest. Such a preliminary determination does "not necessarily mean that the minds of its members [are] irrevocably closed on the subject of the [respondent's] practices" but simply forms the basis for the initiation of an adjudicative hearing at which the respondent is free to demonstrate, on the record, "by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which [it thinks keeps] these practices within the range of legally permissible business activities." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 701 (1948). See also *Campbell Taggart Associated Bakeries, Inc.*, Dkt. 7938 (Memorandum, May 7, 1963, p. 13) [62 F.T.C. 1498, 1506]. Certainly the Commission is not precluded from bringing an action to suppress an apparent violation of law merely because part of the information that forms the statutory prerequisite for such an action came to the Commission's attention in the course of one of its own adjudicative proceedings.

The Commission's denial of the two motions referred to by respondent was in accordance with well-settled principles of law. The papers respondent sought to secure from our files were not only lacking in any materiality or relevance to the issues, but were of the most confidential nature. The effort to secure them was, as the Commission pointed out in its denial of the motion, "an obvious attempt to probe the mental processes of the Commission, a practice universally condemned by administrative agencies and the courts." *E.g.*, *United Airlines, Inc.* v. *Civil Aeronautics Board*, 281 F. 2d 53, 56 (D.C. Cir. 1960).

Similarly, respondent's motion to dismiss was denied for equally sound reasons, all of which were set forth at considerable length in the Commission's order of September 6, 1963 [p. 2206 herein].

The fact that the hearing examiner has issued an initial decision finding that respondent has discriminated in price in violation of

Section 2(a) of the amended Clayton Act, but dismissing the complaint as to the charge that it has also engaged in resale price fixing in violation of Section 5 of the Federal Trade Commission Act, in no way suggests that the Commission has prejudged the matter. In conformity with our prescribed procedures, respondent has filed its notice of appeal to the Commission from the findings, conclusions, and order of the hearing examiner. In briefing and arguing the case before us, respondent will have ample opportunity to demonstrate any alleged prejudgment or impropriety in the proceeding. And in the event the Commission's decision should be adverse to respondent, respondent will then have an absolute, statutory right to a review of the proceeding in the appropriate United States Court of Appeals.

Respondent having advanced no reason why the Commission should regard itself as disqualified from deciding this case, and the Commission itself being aware of none:

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

Commissioner Elman not participating.

TOPPS CHEWING GUM, INC.

Docket 8463. Order, Nov. 15, 1963

Order denying respondent's supplemental request to appeal hearing examiner's refusal of permission to take certain depositions.

Order Denying Supplemental Request For Appeal

Respondent has filed on October 31, 1963, a supplemental request to appeal, pursuant to Section 3.17(f) of the Commission's Rules of Practice, from the hearing examiner's order of October 21, 1963, denying respondent permission to take certain depositions. The Commission has determined that respondent's supplemental request does not show "that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice", as required by Section 3.17(f).

As pointed out in our earlier Opinion and Order Disposing of Motions in this proceeding (issued July 2, 1963) [p. 2196 herein], the "conduct of adjudicative proceedings is primarily the responsibility of the hearing examiners, and, as Sections 4.15(e) and 4.18 [now Sections 3.17(f) and 3.20] of the Commission's Rules of Practice make clear, an examiner's rulings upon evidentiary or procedural matters arising in the course of such proceedings will not be reviewed or disturbed in the absence of unusual circumstances." The showing required for the entertainment by the Commission of an

interlocutory appeal is analogous to that applied to appeals from the interlocutory orders of district courts in judicial proceedings, pursuant to 28 U.S.C. § 1292(b), i.e., that the order appealed from "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The need for affording wide discretion to hearing examiners in the conduct of adjudicative proceedings is particularly clear with respect to the handling of pretrial procedures, including requests for depositions. The proper disposition of such requests cannot be determined by reference to abstract legal principles or "controlling question[s] of law", but depends upon an intimate knowledge of the facts of the proceeding, and a careful balancing of the needs of the parties, together with the public interest in the fair and expeditious disposition of the proceedings. For the Commission to entertain interlocutory appeals from every such pretrial ruling of the examiner would, in effect, require the Commission to take over the entire conduct of the proceeding and would result in delaying the proceeding to the same extent as if the appeal had been deliberately taken for that purpose.

The only reason urged by respondent in support of its request that the Commission entertain its appeal is that the denial of the depositions which it has requested would be reversible error. This is obviously insufficient; any procedural ruling may ultimately constitute reversible error if it is later determined to be incorrect and if it has resulted in substantial prejudice. The test for interlocutory review under Rule 3.17(f) is not whether the examiner's ruling could result in reversible error but whether the question presented is of the type which should be considered by the Commission in interlocutory, piecemeal appeals prior to the termination of the proceeding before the examiner.

Moreover, under the Commission's Rules of Practice, respondent need not request an interlocutory appeal in order to preserve its right to show that it has been prejudiced by the examiner's ruling when and if this proceeding should come before the Commission upon appeal from the initial decision of the hearing examiner. At such time, when the entire proceeding is before the Commission, the Commission will be able to determine whether any prejudice to respondent has resulted from the examiner's conduct of the proceeding and to take such action as may be necessary and appropriate to remedy any prejudice found to exist. Accordingly,

It is ordered, That respondent's supplemental request to appeal be, and it hereby is, denied.

FURR'S INC.

Docket 8581. Order and Opinion, Nov. 18, 1963

Interlocutory order setting forth guiding principles for hearing examiner as to procedure in dealing with respondent's requests for production of documents in possession of complaint counsel concerning affairs of competitors.

Opinion Accompanying Order

By the Commission:

In *Grand Union Co.*, FTC Docket 8458 (Order of February 11, 1963) [62 F.T.C. 1491], followed in *Columbia Broadcasting System, Inc.*, F.T.C. Docket 8512 (Order of February 26, 1963) [62 F.T.C. 1518], the Commission outlined certain conditions and safeguards governing the production of documents in the possession of complaint counsel sought by respondent in aid of preparing its defense, in circumstances where the Commission found that there was a substantial danger of unnecessary or improper disclosure of information, contained in such documents, concerning the operations and affairs of respondent's competitors. Respondent in the instant matter, in its request for permission to file an interlocutory appeal, raises substantial questions as to the proper application of the procedure established by the Commission's order in *Grand Union Co., supra.* However, rather than entertain an appeal at this time, the Commission deems it appropriate to return the matter to the hearing examiner for reconsideration in the light of the following principles, which should guide examiners in dealing with the kind of problem presented here.

First. The procedure established in *Grand Union* is not to be inflexibly or invariably followed in all cases in which a respondent seeks production of documents containing information concerning the operations or affairs of competitors. Whether the procedure used in *Grand Union*, as opposed to unconditional production, is necessary or appropriate depends on the circumstances of the particular case. The danger of improper or unnecessary disclosure must be balanced against the respondent's interest in the practical and expeditious preparation of its defense. Other relevant interests must also be taken into account, such as the public interest in preventing undue delay or confusion in the conduct of Commission proceedings. The number and kind of documents involved may have a bearing on the applicability of the *Grand Union* procedure. Furthermore, the circumstances of a particular case may require appropriate modification of the procedure.

Second. The question whether and to what extent the procedure established in *Grand Union* shall be followed in a particular case is a matter within the sound discretion of the hearing examiner. This is

made clear by Section 3.11 of the Commission's Rules of Practice and Procedure, which provides that the examiner's order for production "may prescribe such terms and conditions as the circumstances require." Orderly procedure requires that matters so intimately connected with the conduct of hearings as the terms and conditions of production of documents be left very largely to the responsible judgment of the examiner. See Rule 3.15(c).

Third. In exercising his discretion in this area, the hearing examiner should bear in mind the interplay between Rules 3.11 and 1.132 (5). The latter rule provides in part that "all documents received in evidence or made a part of the record in adjudicative proceedings (except evidence received *in camera*)" are public information. Accordingly, where documents sought to be produced under Rule 3.11 are intended to be introduced in evidence, it will rarely be appropriate to condition their production upon observance of the procedure established in *Grand Union*, since the documents will, in any event, eventually become a matter of public record. In *Grand Union* itself, respondent sought production not of documents which complaint counsel intended to introduce into evidence, but of documents supplying underlying information.

Fourth. In exercising his discretion in this area, the hearing examiner should further bear in mind that the Commission's order in *Grand Union* intended to make no distinction between documents obtained by orders issued under Section 6(b) of the Federal Trade Commission Act, and documents obtained through other means, whether or not compulsory. Where there is a substantial danger, not outweighed by other considerations, of unnecessary or improper disclosure, the use of the *Grand Union* procedure will be appropriate irrespective of how the documents in question were obtained.

Commissioner MacIntyre did not participate.

Order Remanding to Hearing Examiner for Further Consideration of Motion

Upon consideration of respondent's request, filed on November 4, 1963, pursuant to Section 3.20 of the Commission's Rules of Practice and Procedure, for permission to file an interlocutory appeal from the hearing examiner's order of October 29, 1963, denying respondent's "Motion For Order Delineating Rights of Counsel for Respondent With Respect to Documents to be Offered in Evidence by Counsel Supporting the Complaint", and it appearing that the questions raised by respondent's motion should be given further consideration by the hearing examiner in the light of the opinion accompanying this order,

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

Commissioner MacIntyre not participating.

AMERICAN HOME PRODUCTS CORPORATION d/b/a WHITEHALL LABORATORIES

Docket 8478. Order and Opinion, Nov. 22, 1963

Order denying petition for reconsideration of final order of Sept. 27, 1963, p. 933 herein, which objected to its requirements of conspicuous disclosure of limitations in the properties and effectiveness of its medicinal product "Outgro", represented to afford relief from the pain or discomfort caused by ingrown toenails and protection against infection caused thereby.

Opinion Accompanying Order Denying Petition for Reconsideration

By the Commission:

The Commission issued its decision and final order in this matter, involving the alleged false and misleading advertising of a medicinal preparation, "Outgro", used for the treatment of ingrown toenail, on September 27, 1963 [page 933 herein]. On October 28, respondent filed a petition for reconsideration, pursuant to Section 3.25 of the Commission's Rules of Practice and Procedure, seeking modification of the Commission's order in certain respects. An answer to the petition, opposing the requested modifications in the order, was filed by complaint counsel on November 7. The petition complies with the requirements of Rule 3.25, in that it is "confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." However, the modifications of the final order requested in the petition are, in our opinion, without merit.

Respondent objects to paragraph (A) (2) of the order, which forbids respondent to represent that "Outgro" can or will relieve the pain or discomfort caused by ingrown toenail "unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that such relief is partial and temporary only and is not complete or permanent". Respondent points to a line of decisions by the Court of Appeals for the Seventh Circuit in which Commission orders limiting representations of relief of pain to "temporary" or "temporary and partial" relief were modified to excise such limitations. The court reasoned that such terms were impermissibly vague. Respondent fails to point out, however, that the most recent of these decisions, *Rhodes Pharmacal Co.* v. *F.T.C.*, 208 F.2d 382 (1953)

[5 S.&D. 582], was reversed by the Supreme Court. 348 U.S. 940 (per curiam) [5 S.&D. 728]. The Court held that the Court of Appeals' modification of the Commission's "temporary and partial" form of order was improper, and ordered the Commission's order reinstated.

Respondent also objects to the affirmative disclosures required by paragraph (A)(4) of the order, which forbids respondent to represent that "Outgro" can or will "protect, prevent or guard against . . . infection [caused by or accompanying ingrown toenail], unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that said product is preventive only and cannot relieve, improve or cure an already existing infection, and should not be used if infection has already set in". Respondent would modify this provision to read, "protect, prevent or guard against such infection, unless respondent clearly and conspicuously states that said product should not be used if infection has already set in." However, the additional disclaimers required by the Commission's order are necessary and proper to dispel possible confusion among consumers and ensure understanding that "Outgro" is not a treatment for infection. In the area of false drug advertising, where Congress has expressed its particular concern with deception by means of omission of material facts (see Section 15(a)(1) of the Federal Trade Commission Act), and where confusion or misunderstanding on a purchaser's part might lead to physical injury as well as economic loss, it is the Commission's duty to require forthright and unambiguous disclosure of material limitations of a product's advertised properties.

Respondent objects, finally, to paragraph (B) of the order, which requires certain disclaimers in immediate conjunction with use of the term "Outgro" or a similar-sounding or similar-appearing word suggestive of growth. Respondent argues that it would be impractical for it to make the required disclaimers every time the name of the product was mentioned in an advertisement, and it requests that the paragraph be modified to read, "contains the word 'Outgro' or any similar-sounding or similar appearing word suggestive of growth, unless respondent clearly and conspicuously states, once in any advertisement in which such name is used, that said product does not affect in any way the growth, shape or position of the toenail." In our opinion, such a modification would be unwise, since, depending on the length and content of a particular advertisement, a single statement of the required disclaimers might be inadequate to ensure against the deceptive possibilities inherent in the term "Outgro". On the other hand, we do not read the order (and neither does respondent in its petition) as establishing an inflexible requirement that the disclaimers be made in every instance in which the name "Outgro" is mentioned. How frequently or in what form the disclaimers must be made depends

on the particular advertisement, and cannot be prescribed in the order itself without the order becoming needlessly cumbersome. These are details of compliance, which respondent will have ample opportunity to resolve after the Commission's order becomes effective. For the order "is only the beginning of a 'marriage' under which the Commission is obliged to afford the respondent definitive advice as to whether proposed conduct would meet the requirements of the order." *Foremost Dairies, Inc.*, F.T.C. Docket No. 7475 (decided May 23, 1963), p. 7 [62 F.T.C. 1344, 1363]. See Section 3.26 of the Commission's Rules of Practice and Procedure; *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F.2d 480, 488 (2d Cir. 1962) [7 S. & D. 583, 592].

ORDER DENYING PETITION FOR RECONSIDERATION

A petition for reconsideration was filed by respondent on October 28, 1963, pursuant to Section 3.25 of the Commission's Rules of Practice and Procedure, requesting the Commission to modify in certain respects the final order in the above-captioned matter issued on September 27, 1963. For the reasons stated in the accompanying opinion, the Commission concludes that good cause to modify it has not been shown. Accordingly,

It is ordered, That the petition for reconsideration be, and it hereby is, denied.

EMPIRE SPORTING GOODS MFG. CO., INC., ET AL.

Docket C-294. Order, Dec. 5, 1963

Order reopening proceeding and suspending until further order, enforcement of deceptive pricing prohibitions of desist order of Jan. 8, 1963, 62 F.T.C. 11, requiring New York City manufacturers of athletic uniforms and accessories to cease listing fictitious prices in catalogs and other printed matter, as well as violating provisions of the Textile Fiber Products Identification Act.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

Upon consideration of respondents' petition, filed October 11, 1963, requesting reopening of this proceeding for the purpose of suspending the enforcement of the price misrepresentation prohibitions of the Commission's final order, issued January 8, 1963 [62 F.T.C. 11]; and

The Commission having concluded that a temporary cessation of respondents' duty to comply with the provisions of the above-mentioned paragraph of the order to cease and desist will not be incompatible with the public interest and that such relief will be equitable in the light of all attending circumstances:

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It is ordered, That this proceeding be, and it hereby is, reopened for the sole purpose of effecting the relief hereinafter ordered.

It is further ordered, That the enforcement of the below-quoted provision of the order of January 8, 1963 [62 F.T.C. 11, 16], and respondents' duty to comply therewith be, and they hereby are, suspended until further order of the Commission.

The suspended provisions would require respondents to cease and desist from:

"1. Representing, directly or by implication, through the use of catalogs, brochures, price lists, other point-of-sale material or by any other means, that any amount is the usual and customary retail price of merchandise in the trade area or areas where the representations are made when it is in excess of the generally prevailing retail price or prices at which said merchandise is sold in said trade area or areas.

"2. Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited."

It is further ordered, That with the exception of the above-quoted prohibition the decision and order of the Commission, entered January 8, 1963 [62 F.T.C. 11, 16], shall in all respects and for all purposes remain final and unaffected by this reopening.

Commissioner MacIntyre not concurring for the reason he believes it inappropriate for the Commission to take this action unilaterally in the form of an order in a consent settlement. His non-concurrence is not an expression of his judgment on the merits of the matter. He merely expresses the thought that the more appropriate method to change the terms of a consent settlement would be through the negotiation of a new consent settlement to replace the old.

STANDARD MOTOR PRODUCTS, INC.

Docket 5721. Order and Opinion, Dec. 5, 1963

Order remanding to hearing examiner respondent's motion for clarification as to violations of desist order under investigation.

Opinion Accompanying Order

By the Commission:

On February 1, 1963 [62 F.T.C. 1485], the Commission, stating that it "has reason to believe that * * * [respondent] may have violated the provisions" of an order to cease and desist entered by the Commission against respondent on December 27, 1957 [54 F.T.C. 814], ordered that public hearings be conducted "to ascertain the

extent to which such violation may have occurred". The Commission further ordered

> that the Director of Hearing Examiners shall designate the hearing examiner to preside at and conduct such public hearings with all the powers and duties provided in the Commission's Rules of Practice For Adjudicative Proceedings as though a formal complaint had been issued and an answer had been filed except that he shall certify the entire record to the Commission and shall not be required to make and file an initial decision; and that he shall grant respondent * * * all appropriate rights under the Commission's Rules such as, but not limited to, the following: due notice, pre-hearing conference, cross-examination and production of evidence in rebuttal.

Pursuant to this order, hearings were held between February and July 1963, and Commission counsel completed the presentation of his case. Defense hearings have not yet commenced. On October 30, 1963, respondent filed with the Commission a "Motion for a Clarification of the Commission's Order Dated February 1, 1963 [62 F.T.C. 1485] or in the Alternative to Dismiss the Investigation and for Other Relief." A reply by Commission counsel was filed on November 7, 1963.

In its motion, respondent asks, in essence, whether it is entitled, in a proceeding such as the present one, to a detailed statement from Commission counsel of the acts or practices of respondent which the Commission has reason to believe may violate the cease and desist order, and which are the basis of the proceeding. The reason for uncertainty as to whether respondent is entitled to such a statement appears to be that, while the hearings herein are governed by the rules governing adjudicative proceedings, as the order of February 1, 1963 [62 F.T.C. 1485], makes clear (see also *C. H. Robinson Co.*, F.T.C. Docket 4589 (Order of November 4, 1963)) [p. 2218 herein], there is no complaint. We think that, although a formal complaint is not appropriate in an investigational proceeding such as the present one, a respondent in such a proceeding is entitled to a statement of the Commission's basis for believing a violation may have occurred, and should not be compelled to proceed wholly in the dark as to the nature and extent of the Commission's case. In such a proceeding, as in adjudicative proceedings, the factual and legal issues should be clearly formulated before the commencement of evidentiary hearings. To this end, a prehearing conference will ordinarily be necessary, and, in addition, it may on occasion be appropriate to compel Commission counsel to furnish a statement containing the information that would ordinarily be included in a complaint or such other information as may be proper in the circumstances. Respondent is entitled to all the rights it would have in a formal adjudicative proceeding, except for the narrow exceptions specified in the order of February 1, 1963; and such exceptions do not impair respondent's right to obtain clarification of the issues prior to commencement of evidentiary hearings.

The hearing examiner ruled that he had no power to compel clarification of the issues in this proceeding as requested by respondent. Since that ruling was erroneous, the matter must be remanded to the examiner for reconsideration, in light of this opinion, of respondent's request for clarification. In so remanding, the Commission expresses no view on whether, in the particular circumstances and present posture of this proceeding, respondent is entitled to a statement from Commission counsel, or what form such statement should take. These questions are, in the first instance, within the sound discretion of the hearing examiner. Cf. Rule 3.15(c) of the Commission's Rules of Practice and Procedure.

All of the remaining contentions made by respondent in this motion either are without merit or should properly be addressed to the hearing examiner, rather than to the Commission. We repeat that, in the conduct of the present proceeding, the hearing examiner is clothed with all the powers possessed by hearing examiners in formal adjudicative proceedings, except for the very limited exceptions clearly enunciated in the order of February 1, 1963 [62 F.T.C. 1485].

Commissioner MacIntyre did not concur.

ORDER REMANDING TO HEARING EXAMINER FOR FURTHER CONSIDERATION

Upon consideration of respondent's motion for clarification of the Commission's order of February 1, 1963 [62 F.T.C. 1485], and for other relief, filed October 30, 1963, and the reply thereto, the Commission has determined that the matters raised in respondent's motion should be given further consideration by the hearing examiner in accordance with the principles set forth in the accompanying opinion. Accordingly,

It is ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further consideration in light of the accompanying opinion.

Commissioner MacIntyre not concurring.

HUMBLE OIL & REFINING COMPANY

Docket 8544. Order and Opinion, Dec. 5, 1963

Interlocutory order ruling negatively on question certified by hearing examiner as to whether Commission's accountant should be subpoenaed at instance of respondent to determine compliance with earlier order calling for production of documents; and denying, as unnecessary at this time, request of complaint counsel for data underlying respondent's cost study.

OPINION OF THE COMMISSION

This matter is before the Commission on the question certified by the hearing examiner of whether a subpoena should issue, at the request

of respondent for the appearance of William S. Opdyke, an accountant of the Commission's staff, and on complaint counsel's request for permission to file an interlocutory appeal from the examiner's ruling of October 24, 1963, denying complaint counsel's motion for the production of certain documentary materials underlying Humble's proffered cost justification defense and respondent's answer in opposition thereto.

Both the question certified by the examiner and the request for permission to file an interlocutory appeal relate primarily to the issue of whether complaint counsel has been given adequate opportunity to examine documents basic to Humble's cost study.

Respondent desires to subpoena Mr. Opdyke for the purpose of showing:

(1) That counsel supporting the complaint had been derelict in using the time allowed by the hearing examiner to examine the documents used in the cost study of respondent.

(2) That the hearing examiner's order for production of documents used in the cost study had been complied with.

(3) That the testimony of Mr. Opdyke would show that the cost study had been properly made.

The examiner has recommended that the Commission permit Mr. Opdyke's testimony at the instance of respondent on the ground that this might permit him to determine more accurately the need for deferred cross-examination of expert witnesses called by respondent as well as the necessity for the production of additional records from Humble.

The issues presented by the examiner's certification and complaint counsel's request for permission to file an interlocutory appeal are interrelated and should be considered together.

The examiner will not be authorized to issue a subpoena for the appearance of Mr. Opdyke for the purposes specified by the respondent. Obviously, as a general rule, an accountant assigned to assist an attorney in the preparation of his case should not be called to testify concerning the alleged sins of omission or commission of counsel at the instance of the opposing party. Permitting a procedure of this nature would inevitably disrupt collaboration between counsel and persons assisting in a professional capacity in the preparation of cases for trial. Under the circumstances of this case, respondent is not entitled to call on the Commission's expert for his expert opinion to support its cost justification or to corroborate its own expert witness.

Under Rule 3.15 of the Commission's Rules of Practice it is the examiner's duty to regulate the conduct of counsel appearing before him. He has initiated no disciplinary action against complaint counsel and we must therefore assume that he has found no cause for steps of this nature. We agree with the examiner. Although respondent

made available certain documentary material as of September 25, 1963, the cost study itself was not received by complaint counsel until October 14, 1963, approximately nine or ten days before Humble sought to introduce this document in the course of the hearings. Nor has complaint counsel been furnished to date with the work papers of respondent's witness, Robert Field, who prepared the study in question. Furthermore, respondent's representatives were apparently instructed to answer no questions relating to the documentary material examined prior to the hearing. Under the circumstances, there is no reason to question complaint counsel's diligence in examining the documents made available in the period preceding the October 23 hearing.

There is no necessity for calling Mr. Opdyke to the stand to determine whether the examiner's order of August 15, 1963, calling for the production of documents has been complied with. There is apparently no factual dispute on the identity of the documents made available pursuant to the order of August 15, 1963, in Humble's Mount Vernon, New York office. The conclusion as to whether this constituted compliance with his order must necessarily be drawn by the examiner; the testimony of Mr. Opdyke cannot properly be substituted for his judgment on this point.

Mr. Opdyke should not be subpoenaed at the instance of respondent because, as an incidental matter, such testimony might give the examiner additional information on the necessity for deferred cross-examination of expert witnesses as well as for the production of additional records by Humble. There are more direct approaches available to the examiner if he requires further information for resolving these issues. Under the Commission's rules, the examiner may call a conference of counsel to assist him by furnishing him with information on these points. Should that course prove unproductive, the examiner may permit further testimony from Mr. Field, who, as the expert responsible for the study, is of necessity more intimately acquainted than accountants on the Commission's staff with those of Humble's records basic to his computations. At any rate, we note that the examiner at this point is apparently by no means unacquainted with the problems of complaint counsel in preparing for cross-examination of Mr. Field.[1]

Complaint counsel request permission to file an interlocutory appeal from the hearing examiner's refusal to grant their oral motion that respondent be ordered "to produce those documents which Mr. Field used in making the study, as well as his work papers."[2] In their

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[1] The examiner has previously stated:
HEARING EXAMINER HINKES: "* * * Some of the testimony of the witness already indicates that complaint counsel had no way of knowing how the witness [Field] reached certain conclusions." Tr. 1865.

[2] Tr. 1934, 1935.

motion to the Commission, complaint counsel indicate that they will request the Commission to instruct the examiner to issue an order requiring respondent to:

(1) produce and permit the inspection and copying of such documents, papers, books or other physical exhibits which constitute or contain evidence relevant to the respondent's proffered cost justification, including all materials underlying those documents, papers, books or physical exhibits used as the basis for the cost study summary marked as RX 56 for identification.

(2) produce and permit the inspection and copying of the work papers of witness Robert Field which are considered and held to be documents underlying the said cost study summary offered but not as yet received in evidence as RX 56.

Complaint counsel's request will be denied. The examiner indicated during the course of the November 4 hearing that with the exception of Mr. Field's work papers he had not ruled with finality on complaint counsel's requests.[3] In the course of that hearing, he advised complaint counsel that for the sake of orderly procedure they should file a written motion requesting an order for the production of the desired documents and at that time, despite a previous statement apparently to the contrary, he indicated further that complaint counsel was not precluded from again raising the issue of the production of Field's work papers in such a motion directed to him.[4]

Complaint counsel apparently has the opportunity of filing a written motion to the hearing examiner consolidating the various requests for data underlying Humble's cost study. This procedure should enable the examiner to consider more fully and carefully the issues involved than was possible in the course of the hearings. A written ruling by the examiner on these questions and his reasons therefor, moreover, would be of great value to the Commission should it once again be faced with these questions during the course of this proceeding.[5] There is no necessity for granting the request for permission to file the interlocutory appeal at this time; the examiner's mind, as far as we can determine, is not closed to complaint counsel's arguments.[6]

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[3] As we understand it, upon a reading of complaint counsel's request and the transcript of the October 23, 24 and November 4 hearings, complaint counsel in addition to Mr. Field's work papers desire to re-examine the documentary material previously made available in Humble's Mount Vernon office in the period preceding the October hearings. These documents apparently were the documents "used" by respondent's witness, Mr. Field, in preparing the cost study. Complaint counsel contend that in addition respondent should produce other material which, although it may not have been "used" by Field in making the computations going into the study, is nevertheless basic to the records actually utilized and essential to an understanding of respondent's cost defense. To identify documents in this category, complaint counsel, it appears, may have to refer again to that material already examined in October.

[4] Tr. 2074.

[5] In the November 4 hearing, complaint counsel restated his reasons for requesting production of Field's work papers. A ruling by the examiner taking account of complaint counsel's and respondent's arguments on this point would undoubtedly be helpful to both sides in this proceeding.

[6] See footnote [1], *supra*.

Absent a showing of abuse of discretion, the Commission will not disturb an examiner's rulings on procedural and evidentiary issues. Orderly procedure is best served by leaving to the examiner, who is intimately acquainted with the conduct of the proceeding, the resolution of questions relating to the scope, terms, and conditions of the production of data underlying prospective exhibits. For example, the question of whether in a particular case complaint counsel should merely be given access to documentary materials or whether the records in question should be produced for inspection and copying is peculiarly within the discretion of the examiner, since by necessity he is more closely acquainted with the situation of the parties than any reviewing body. While the hearings in this case may have engendered more than the usual share of acrimony, the examiner should not be deterred from assuming firm control of the proceeding. Clear-cut rulings by the examiner on evidentiary and procedural points are a critical factor in insuring the expeditious and orderly trial of Commission proceedings.

ORDER RULING ON QUESTION CERTIFIED BY THE HEARING EXAMINER AND DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter has come before the Commission on the question certified by the examiner of whether William S. Opdyke, an accountant of the Commission's staff, should be subpoenaed at the instance of respondent and the request, filed October 31, 1963, by complaint counsel, for permission to file an interlocutory appeal from the hearing examiner's denial on October 24, 1963, of their oral motion for the production of documentary materials used in support of respondent's proffered cost justification defense and on respondent's answer in opposition thereto. The Commission has determined, for the reasons stated in the accompanying Opinion, that a subpoena should not issue against Mr. Opdyke at the instance of respondent on the grounds stated in the examiner's certification and that complaint counsel's request for permission to file an interlocutory appeal should be denied. Accordingly:

It is ordered, That the hearing examiner be, and hereby is, instructed not to issue a subpoena for the appearance of Mr. Opdyke for the reasons stated in the certification.

It is further ordered, That complaint counsels' request for permission to file an interlocutory appeal from the hearing examiner's ruling of October 24, 1963, be, and it hereby is, denied.

ATLANTIC PRODUCTS CORPORATION ET AL.

Docket 8513. Order and Opinion, Dec. 13, 1963

Order withholding the issuance of a cease and desist order prohibiting violations of Sec. 2(d) of the Clayton Act pending the completion of an industry-wide proceeding.

OPINION OF THE COMMISSION

BY ELMAN, *Commissioner:*

The complaint in this matter charges respondents, a corporation engaged in the manufacture of a variety of machine-sewn products, including luggage, and its sales subsidiary, with having violated Section 2(d) of the Clayton Act, as amended, in failing to make advertising and promotional allowances available to all competing customers on proportionally equal terms. The complaint specifically challenges that feature of respondents' 5% advertising allowance on "regular line" luggage whereby minimum purchases of $1,500 over specified six-month periods are required in order for the customer to qualify for the allowance. After hearings, the hearing examiner filed an initial decision in which he found that the minimum-purchases requirement had the effect of making the allowance unavailable on proportionally equal terms to competing customers, and concluded that respondents had violated Section 2(d). Respondents have appealed generally from the initial decision; complaint counsel has appealed the scope of the order to cease and desist contained in the decision.

We agree with the examiner that a violation of Section 2(d) has been proved, and we adopt the initial decision as the decision of the Commission on the issue of violation of law. While the inclusion of a minimum-purchases requirement in an advertising allowance plan is not *per se* a violation of 2(d), where, as here, 85–90% of the seller's customers do not purchase in sufficient amounts to qualify for the allowance, and it is not demonstrated that a lower minimum, under which a great many more such customers would qualify, would be impractical or burdensome for the seller, the conclusion seems inescapable that the seller has not made his allowance available to competing customers on proportionally equal terms, as required by the statute.

We disagree with the examiner, however, with respect to the scope of the cease and desist order. The order contained in the initial decision would prohibit respondents from "paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondents as compensation or in consideration for any advertising or promotional services (pursuant to a minimum-purchase requirement plan) furnished by or through such customer in connection

with the sale or offering for sale of respondents' line of luggage, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products." In two respects, we think this order is not adequate to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88).

In the first place, we perceive no difference in the distribution or marketing of luggage, as compared with the distribution and marketing of other products manufactured and sold by respondents—golf bags, picnic cases, bowling ball bags, etc.—, such as to support an inference that respondents are not likely to extend the practice of granting advertising allowances to customers for their other products in the future. Indeed, respondents sell their golf bags to the same retailers who carry their luggage line. In the circumstances, limitation of the product coverage of the order to luggage is unwarranted. *Niresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960).

Secondly, we think the examiner erred in limiting the order to allowance plans containing a minimum-purchases requirement. An order so limited would invite easy circumvention. For example, if respondents were to modify their plan by abolishing the minimum-purchases requirement, yet at the same time provide that a customer who purchased below a certain level was entitled to only a very small allowance, the plan seemingly would conform to the order contained in the initial decision, though plainly evasive in purpose and effect.

In disapproving, in the circumstances of this case, an order narrowly confined to the exact conduct found to be in violation of law, we emphasize that respondents' violation was not technical, isolated, inadvertent, or insignificant (see, e.g., *Quaker Oats Co.*, F.T.C. Docket 8119 (decided April 25, 1962)) [60 F.T.C. 798]. On the contrary, the record shows that respondents have engaged in the unlawful practice of granting nonproportional advertising allowances to competing customers for many years and on a large scale. We also emphasize that, although an order broad enough to ensure adequate protection to the public against the recurrence of respondents' unlawful conduct may be somewhat less specific or precise in its coverage than an order confined to the particular practice found to be unlawful, respondents need not act at their peril in seeking to comply with the order. They are entitled to obtain from the Commission, in advance, definitive advice as to whether a proposed course of conduct would comply with the order. *Foremost Dairies, Inc.*, F.T.C. Docket 7475 (decided May 23, 1963), p. 7 [62 F.T.C. 1344, 1364]; Section 3.26(b), Rules of Practice and Procedure, effective August 1, 1963. See *Vanity Fair Paper*

Mills, Inc. v. *F.T.C.*, 311 F.2d 480, 488 (2d Cir. 1962) [7 S. & D. 583].

The Commission has reason to believe that the practice of granting unlawful advertising allowances may be widespread among luggage manufacturers, including major competitors of the instant respondents. Accordingly, the Commission has determined forthwith to institute an industry-wide proceeding looking to the promulgation of a Trade Regulation Rule or Rules, as provided for in Section 1.63 of the Commission's Rules of Practice and Procedure, which would prohibit clearly, uniformly, and equitably, such unlawful advertising allowance practices as may be found to exist in the industry.

As the Supreme Court has stated, "the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. * * * [A]lthough an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries* v. *F.T.C.*, 355 U.S. 411, 413 [6 S.&D. 382, 384].

Responsible exercise of the Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order, so that a general practice may be dealt with more comprehensively, may involve consideration of circumstances going beyond those reflected in the particular record. In the circumstances here, we are inclined to withhold entry of a cease and desist order against the instant respondents pending the outcome of the projected industry-wide proceeding. Respondents have already discontinued the minimum-purchases requirement challenged by the complaint in this matter, and the Commission has received sworn assurances from the responsible officers of respondents that it will not be resumed in the future. In light of these assurances, and of the apparent industry-wide incidence of practices such as those challenged in the complaint, we have determined, as a matter of administrative discretion, that it would be in the public

interest to withhold entry of a cease and desist order to await developments in the projected industry-wide proceeding. Upon the termination of that proceeding, and in light of the conditions then obtaining, the Commission will, upon application, consider whether further action herein is required.

Commissioner Anderson did not participate.

ORDER MODIFYING AND ADOPTING HEARING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND DEFERRING OTHER RELIEF

This matter has been heard by the Commission on cross-appeals by complaint counsel and respondents from the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission has determined that (1) the findings of fact and conclusions of law contained in the initial decision should be adopted by the Commission insofar as they concern the question of violation; (2) the order contained in the initial decision should be rejected as too narrow and restricted; and (3) pending the termination of an industry-wide proceeding, being initiated at the Commission's direction, the issuance of an order to cease and desist herein will be withheld. Accordingly,

It is ordered, That the findings of fact and conclusions of law contained in the initial decision be modified to the extent described in the accompanying opinion, and as so modified, they are hereby adopted as the decision of the Commission.

It is further ordered, That entry of a final order to cease and desist be withheld pending termination of the industry-wide proceeding described in the accompanying opinion.

Commissioner Anderson not participating.

IN THE MATTER OF

SCOTT PAPER COMPANY*

Docket 6559. Opinion on remand, Dec. 26, 1963

In a supplementary opinion based on a post-remand survey of market shares, the Commission concluded that although there was no great increase of business immediately after acquisition, the respondent was able to maintain its existing dominant position in the market and this effect is violative of the antimerger statute.

OPINION OF THE COMMISSION ON REMAND

BY THE COMMISSION:

This case is before the Commission for the second time, on remand from the Court of Appeals for the Third Circuit [7 S.&D. 448].

*Case before Commission reported at 57 F.T.C. 1415.

The case involves the acquisition by respondent, a leading manufacturer of household waxed paper and various sanitary paper products (toilet paper, paper towels, facial tissues and paper napkins), of three corporations engaged, at the time of the acquisitions, in the production of raw materials for the finished paper products respondent makes and sells. The acquisitions in question occurred between 1951 and 1954. In 1956, the Commission issued its complaint, challenging the lawfulness of the acquisitions under Section 7 of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. After extended proceedings, the Commission, in 1960, held the acquisitions unlawful and entered an order of divestiture.[1]

Although the acquisitions were "vertical" in form, being acquisitions of raw-materials suppliers by a firm manufacturing the finished products, the case was not brought or decided on a conventional vertical theory, i.e., foreclosure of a substantial segment of the market to competitors of the acquiring or acquired firms. Rather, the theory of the case was that the acquisitions had enabled respondent to increase its productive capacity and thereby to enhance its already dominant position in many of the markets in which it was active. Specifically, the Commission found that prior to the acquisitions, respondent, although the dominant firm in household waxed paper and sanitary paper products—both highly concentrated industries characterized by high barriers to new competition—was "oversold", i.e., lacked sufficient productive capacity to enlarge further, or even maintain, its dominant market position.[2] By acquiring raw-materials suppliers, respondent obtained both advantageous plant sites and useful equipment and personnel—and obtained them with no cash outlay, but simply through the issuance of new stock. Respondent invested some $109 million in the properties which it acquired. It built new plants on the property of the acquired corporations, thereby taking advantage of the proximity to raw materials provided by such plant sites, and converted the existing productive capacity of the acquired companies (for example, by rebuilding the existing machinery) to the production of respondent's finished products. In this fashion, respondent was enabled to preserve its leading position in household waxed paper and sanitary paper products during a period of sharply rising demand.

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[1] 57 F.T.C. 1415. The Commission based its finding of unlawfulness exclusively on Section 7, and dismissed the complaint as to Section 5.

[2] In the words of a vice president of respondent:

"'* * * having been in an oversold position for 14 years, we were determined to correct that situation in 1955 with Everett, Detroit and the H & W locations, machines and people to help out. [This is a reference to the three acquisitions.] A business should not be continuously oversold. Because our customers are inclined to feel they can't rely on us for the goods they need when they need them. So they feel obliged to carry one or more competitive lines for protection—to make sure they'll always have merchandise available for their customers. Those competitive lines take some business away from us * * *.'" 57 F.T.C., at 1425.

The Commission did not rest with this showing of how respondent's acquisitions had enabled respondent substantially to strengthen its hand, but sought in addition to show that respondent's percentage shares of the relevant markets had actually increased as a result of the challenged acquisitions. To this end, the Commission relied on a survey of the market shares of respondent and its competitors in 1950 and 1955. The survey showed a substantial increase in respondent's shares between those two years, but contained no figures for the intervening years.

On appeal to the Court of Appeals for the Third Circuit from the Commission's decision, respondent contended that the data from the survey did not support the Commission's finding that the increase in respondent's market shares was due to the acquisitions, since all or a large part of the increase might have occurred between 1950 and 1954; and 1954 was the first year in which productive capacity located on the acquired properties was actually utilized by respondent in the manufacture of its finished products. The Court of Appeals concluded that the case raised "novel issues of law of transcending importance in the interpretation and application of the anti-trust laws" which required assessment on a more "definitive and revealing" record. Accordingly, without expressing any opinion on the merits of these issues, the court remanded the case to the Commission for completion of the survey for the years 1951–1954.[3]

The Commission desires to state, however, that the findings, conclusions and opinion of the Commission in its 1960 decision give weight, but by no means exclusive or decisive weight, to the survey evidence.

I.

The Commission has prepared the survey ordered by the Court of Appeals, and it has been made a part of the record. A summary of the survey is appended to this opinion.[4] The survey shows that, overall, respondent's market shares in the relevant product categories increased most steeply between 1950 and 1952, and more moderately, though steadily, between 1952 and 1955. The increase between 1954 and 1955 was the smallest annual increase during this period: .34%.

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[3] 301 F.2d 579, 584 (1962). The court stated,

"On this review the Commission lays great stress, almost to the exclusion of other considerations, on what it terms 'a comprehensive market survey' on which it premised its ultimate fact-finding that Scott, by the challenged acquisitions, 'has substantially increased its shares in those markets over their prior high levels' to a degree 'that the effect of the acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant lines of commerce.'" *Id.*, at 582.

[4] Tables I and II. In processing the new survey, the Commission has discovered errors in the original survey data ranging from a fraction of a percent to several percent. We have tabulated the revised 1950 and 1955 data along with the 1951–1954 data, to facilitate comparison of the several figures on the same basis.

Respondent contends that the survey is wholly untrustworthy. It argues that, on the average, 18% of the tonnage totals in each product category for each year consist of "estimates", rather than "precise figures", and urges that this element of approximation vitiates a survey which purports to calibrate respondent's market-shares increase within fractions of a percent.

The post-remand survey was conducted in the same fashion as the original survey, the accuracy of which has not been challenged. Pursuant to Section 6(b) of the Federal Trade Commission Act, all of the competitors of respondent in the relevant product categories were ordered to file sworn reports in writing setting forth their tonnage totals for the years in question. These 6(b) orders did not specify how the reporting companies were to obtain such information, or demand that underlying or source data be submitted to the Commission for purposes of verification. To have imposed any such requirement would have defeated the purpose of the Section 6(b) procedure, which is to enable the Commission to obtain comprehensive and reliable business information quickly, inexpensively, and without subjecting the business community to burdensome reporting requirements.[5] The information sought by the surveys in this matter was not complex or recondite. It could easily be ascertained by the reporting companies either from their normal business records or on the basis of the personal knowledge of their officers and employees. There is no reason to believe that such information was not furnished in the reports in good faith and is not substantially accurate.[6]

Respondent concedes, as we think it must,[7] that a market-shares survey is not vitiated for the purposes of a Section 7 proceeding simply because it contains a substantial element of estimation. Most business statistical data contain an element of estimation, and the line between an "estimated" and a "precise" figure is impossible to draw and vir-

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[5] "Of course, there are limits to what, in the name of reports, the Commission may demand. Just what these limits are we do not attempt to define in the abstract. But it is safe to say that they would stop the Commission considerably short of the extravagant example used by one of the respondents of what it fears if we sustain this order—that the Commission may require reports from automobile companies which include filing automobiles. In this case we doubt that we should read the order as respondents ask to require shipment of extensive files or gifts of expensive books." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653. See *United States* v. *St. Regis Paper Co.*, 181 F. Supp. 862 (S.D.N.Y.), rev'd on other grounds, 285 F.2d 607 (2d Cir. 1960), aff'd, 368 U.S. 208.

[6] Any willfully false statement made in a Section 6(b) report would, of course, constitute a federal crime. See Section 10 of the Federal Trade Commission Act, and also 18 U.S.C. § 1001.

[7] See, e.g., *A. G. Spalding & Bros.* v. *F.T.C.*, 301 F.2d 585, 611 (3d Cir. 1962); *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F.2d 800 (9th Cir. 1961). In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 342, n. 69, the Supreme Court accepted statistical procedures involving a margin of error of up to 6%, stating that "precision in detail is less important than the accuracy of the broad picture presented."

tually meaningless.[8] But respondent does contend that the post-remand survey was not sufficiently exact to support a reliable finding that respondent's overall market position increased by a fraction of 1% between 1954 and 1955. While it can be shown that not all of this increase can reasonably be accounted for by mistakes in estimation by the reporting companies,[9] there may be merit to respondent's position that the actual increase may not have been precisely .34%

We think it unnecessary to labor the issue of the trustworthiness *vel non* of the post-remand survey further, since that issue plainly has little bearing, at this point, on the central question of whether respondent has violated Section 7. Even if the post-remand survey were completely accurate, it would lend no substantial support to the theory that respondent's increased market shares are due to the challenged acquisitions. Since, in the year following respondent's first use of the acquired properties for production, its overall market position increased less than in any of the four previous years, it would be pure speculation to attribute that increase to the new productive facilities made possible by the acquisitions.

II.

The results of the survey ordered by the Court of Appeals place this case in a rather unusual posture. The purpose of the remand was to enable the record to be shored up on one of the principal grounds relied upon by the Commission, and challenged by respondent, on the appeal, in a case which, the court stated, raised "novel issues of law of transcending importance in the interpretation and application of the anti-trust laws". However, it is now clear that the Commission cannot rely on this ground, but must abandon it as unsupported by the evidence.

When this case is returned to the Court of Appeals, that court will be faced with the choice of deciding the appeal then and there on the basis of the remaining grounds advanced by the Commission in its decision, which are unaffected by the remand, or soliciting the views of the Commission on whether the remaining grounds support a finding of unlawfulness. The second alternative would necessitate remanding this case once again to the Commission. While we cannot predict which of these alternative courses of action will commend itself to the court, the second cannot be ruled out as a possibility, especially in view of the novelty and difficulty of this case and of the important

[8] The economist who conducted the post-remand survey testified that it would often happen that a reporting company, out of an abundance of caution and conservatism, would report as "estimates" what actually were highly precise figures.

[9] We have prepared Tables III and IV (appended to this opinion), the last column of which shows the percentage which the estimating companies would have had to overestimate their actual sales of each product if the entire increase in respondent's market share is to be explained by errors of overestimation.

Section 7 decisions—two of them by the Supreme Court [10]—which have occurred since this matter was last before the Court of Appeals.

In the interest of expediting this already protracted proceeding, we have decided to include in this opinion a brief statement of our view of the merits of the case in its present posture. In doing so, we desire only to clarify the rationale of the Commission's decision, so as to enable disposition of the appeal by the Court of Appeals without the necessity of a further remand to the Commission.[11]

We believe that the facts of this case, shorn of all evidence of market share trends during the period 1950–1955, nevertheless compel a finding that respondent's acquisitions violate Section 7 of the amended Clayton Act.

It is elementary market economics that a highly concentrated industry—one in which a very few firms account for a high percentage of total sales—, characterized by high barriers to entry by new competitors, is, from the stand-point of effective competition, unhealthy. The Commission has been gravely concerned with the increasing tendency toward undue concentration in the paper industry in general, a tendency that appears to be due largely to mergers.[12] As the Supreme Court recently pointed out, where an industry has already become competitively unhealthy and oligopolistic, even a slight further increase in the market power of the leading firms is extremely dangerous. It may eliminate what little competitive play remains in the industry; it may bring monopoly palpably closer; above all, it may eliminate or seriously retard, any possibility of an eventual movement toward deconcentration, toward a restoration of competitive health to the industry—the objective of antitrust policy.[13] If such a slight further

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[10] *Brown Shoe Co.* v. *United States*, 370 U.S. 294; *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

[11] See note 3 above. The duty of an agency whose actions are subject to judicial review to explicate the grounds of its decisions clearly is well recognized. In the words of Mr. Justice Cardozo, the court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago M., St. P., & P. R. R.*, 294 U.S. 499, 511; and see *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94; *Erie Sand & Gravel Co.* v. *F.T.C.*, 291 F.2d 279 (3d Cir. 1961).

[12] See, e.g., *St. Regis Paper Co.* v. *United States*, 368 U.S. 208; *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F.2d 800 (9th Cir. 1961); *F.T.C.* v. *International Paper Co.*, 241 F.2d 372 (2d Cir. 1956), 53 F.T.C. 1192; *Union Bag & Paper Corp.*, 52 F.T.C. 1278; *Inland Container Corp.*, F.T.C. Docket 7993; *Union Bag-Camp Paper Corp.*, F.T.C. Docket 7946. See also Mergers and Superconcentration, Staff Rep. of H.R. Select Comm. on Small Business, pp. 27–29 (1962); 1954 Census of Manufactures, MC–26A–1.

[13] The Supreme Court recently stated, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank, supra*, at 365, n. 42. See also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D.N.Y. 1958); *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), pp. 57–60 [pp. 1574–1577 herein]; *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided March 22, 1963), p. 21 [62 F.T.C. 961]. The House Report on the bill to amend Section 7 expressed concern specifically with an "increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive". H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

increase in market power is the product of corporate acquisition, the acquisition is clearly unlawful under Section 7.

At the time of the acquisitions challenged in this case, respondent was the dominant firm in a broad spectrum of important paper-product markets, each of these markets being highly concentrated and characterized by formidable entry barriers. Thus, respondent in 1950 had a 40% share of the household waxed paper market (52% in 1955), a 37% share of the toilet paper market (40%, 1955), and a 27% combind share of all the relevant product markets (33%, 1955). In 1950, the top 4 firms enjoyed a combined share of 76.5% of household waxed paper (85%, 1955), 59% of toilet paper (66%, 1955), and 48% of all the relevant products (58%, 1955). For the top 8 firms, these figures are 91% (96%, 1955), 70.5%, (78%, 1955), and 62% (72%, 1955).

But, because respondent was "oversold", its market position was vulnerable, its dominance insecure. In order to increase its productive capacity and so preserve its market control, respondent acquired three substantial going concerns in another branch of the paper industry. It thereby acquired strategic sites, proximate to raw-materials supplies, for new plant construction, and functioning organizations which could be, and were, integrated into respondent's production activities; and it did not have to pay cash (or incur obligations) for these assets, which had a value in excess of $100 million.[14] In fact, by 1958 38% of re-

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[14] Respondent's own documents (quoted in the Commission's factfindings, 57 F.T.C., at 1428–29) graphically describe the purpose and effect of the acquisitions:

"'* * * in November [1951] we consummated the most significant move in our history when we merged the Soundview Pulp Company of Everett, Washington into Scott. * * * [It] will not only go a long way toward solving the raw material problems in our present paper mills these next 5 years, but in addition provides us with the long-desired location for a West Coast paper mill, and under the most advantageous and efficient conditions * * *.

"'Invaluable assets contributed by Soundview to this merger are the high competence of its management and the demonstrated skill of its technicians and operating personnel. If Scott had to start from scratch in the building of such a large West Coast pulp plant, it would take years and large expenditures of money for the selection and training of such an organization.

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"'The additions of the Detroit and Hollingsworth & Whitney Divisions in 1954 brought us productive facilities at a cost far lower than that for new construction of comparable plants. We also joined forces with two experienced and trained organizations which could only have been developed to their present high degree of proficiency through the expenditure of thousands of dollars and many years of effort.

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"'* * * The Detroit plant is already producing and successfully finishing one Scott brand in addition to the paper stock for Cut-Rite wax paper. * * *

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"'For better control of costs, improved customer service and more efficient operations, it is imperative to have integrated plants located near controlled timber reserves and with transportation facilities available to carry finished products economically to the principal markets of the country.

"'The strategic locations of the newly added plants provide the opportunity not only for improving the efficiency of the Company's operations but for its further development and growth. National advertising and sales activities are more effective with the support of production facilities located in key areas throughout the country * * *.'"

spondent's total output of trademarked products was manufactured on the acquired properties. The conclusion seems inescapable that respondent not only maintained but actually increased its market power substantially through these acquisitions.

To be sure, respondent might have increased its productive capacity by other means, had the merger route been unavailable. But it is hardly likely that such other means would have been as practicable and effective. The chances are remote that, without acquiring the assets of substantial firms already active in the paper industry, respondent could have (1) obtained plant sites adjacent to a captive supply of raw materials, (2) obtained full corporate establishments, in being, which could be readily converted to respondent's production needs, and (3) avoided a prohibitively large cash outlay.

In short, had respondent taken the route of internal growth, its success in preserving its market dominance would have been less assured, and the prospects that its market power might be eroded and competition thereby increased would have been greater. Section 7 was intended to foreclose the easy path, through corporate acquisitions, to maintaining or achieving market dominance, and to encourage firms to take the harder, but socially more beneficial, path of internal growth.[15] In our view, the critical fact is that the cumulative effect of respondent's acquisitions was to expand its production capacity and competitive resources in a manner which would have been impossible had it relied entirely on internal growth, and which was absolutely essential if respondent was to preserve its position of market power. For the early 1950's were a period in which the market for household waxed paper and sanitary paper products was expanding rapidly, as can be seen from a comparison between Tables I and II: respondent's shipments of all relevant products in the period 1950–1955 increased almost 60%, while its market-shares increase was less than 25% (from 27% to 33% overall).

Of course, the antitrust laws are not designed to punish the successful competitor. "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 430 (2d Cir. 1945). But even under the Sherman Act, the methods of growth employed by a firm have been considered intensely relevant to the question of the legality of its conduct; and methods innocuous in themselves may be forbidden where they are shown to be steps in a plan or scheme to monopolize a market. *Id.*, at 429–31. Here, respondent used the technique of mergers to achieve what it could not achieve by

[15] As the Supreme Court recently said, "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank, supra*, at 370.

"natural", internal growth, that is, the entrenchment of its market control to the detriment of competition. And respondent's merger behavior was part of a larger, industry-wide pattern of merger activity (see note 12 above), the probable result of which, if allowed to continue, would be to transform the entire structure of the paper-products industry in a direction inimical to free and vigorous competition.

Had respondent's merger activity been shown to have been accompanied by an intent to monopolize the markets in which it was interested, respondent might well have been found to have engaged in a forbidden attempt to monopolize under Sherman Act principles. The amended Section 7 of the Act goes beyond the Sherman Act. Congress recognized that mergers were a unique method of growth, and that the various merger movements in American history had brought about grave and irreversible changes in the structure of the American economy. It therefore forbade all mergers whose probable effect was to lessen competition substantially, or tend to create a monopoly. Congress did not intend Sherman Act principles to govern the interpretation and application of the amended Section 7. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318. Nor was its concern limited to any particular type of mergers; it was concerned with the probable effects on competition of any merger, vertical, horizontal, or other. We think that respondent's merger activity, while falling short of a Sherman Act attempt to monopolize, clearly violates Section 7.

Our conclusion is unaffected by the fact, as it now appears, that respondent's percentage shares in the relevant markets did not suddenly spurt upward in the year following respondent's first use of the new productive capacity obtained through the challenged acquisitions. It is now clear, as it may not have been when this proceeding was commenced, that evidence of post-acquisition anti-competitive effects is not essential to a finding of a Section 7 violation.[16] If an acquisition increases market power in the degree forbidden by the section, it is unlawful whether or not the anti-competitive effects of the increase are immediately apparent in changed market shares; and this principle holds true whether the challenged acquisition be classified as "horizontal", "vertical", "conglomerate", or other, since the legal test of Section 7 is identical for all corporate acquisitions.[17] In this, as in most Section 7 cases, what evidence of post-acquisition

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[16] See, e.g., *Brown Shoe Co., supra,* at 322–23 and nn. 38–39; *Philadelphia National Bank, supra,* at 362; cf. *Standard Oil Co.* v. *United States,* 337 U.S. 293, 308–09. In fact, as the Commission recently observed, evidence of post-acquisition competitive effects is not only not necessary, but rarely is it of much probative value. *Procter & Gamble Co.,* F.T.C. Docket 6901 (decided November 26, 1963), p. 38 [p. 1559 herein].

[17] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949); *Brown Shoe Co.* v. *United States, supra,* at 317; *Procter & Gamble Co., supra,* pp. 20–21.

Table I: Shipments by Scott (in tons)

	1950(rev.)	1951	1952	1953	1954	1955(rev.)
All Products Covered by the Survey	317, 213	354, 056	366, 521	414, 684	451, 077	504, 216
All Resale Products	278, 070	306, 271	324, 113	367, 231	406, 399	452, 668
All Industrial Products	39, 143	47, 785	42, 408	47, 453	44, 678	51, 548
All Toilet Paper	194, 029	222, 658	221, 182	247, 108	259, 829	280, 125
Resale	185, 199	208, 199	211, 464	236, 383	248, 987	267, 423
Regular Grade	146, 735	169, 022	165, 693	182, 613	190, 589	205, 127
Facial Grade	38, 464	39, 177	45, 771	53, 770	58, 398	62, 296
Industrial	8, 830	14, 459	9, 718	10, 725	10, 842	12, 702
All Paper Towels	61, 479	67, 210	75, 502	87, 786	95, 328	113, 879
Resale	31, 166	33, 884	42, 812	51, 058	61, 492	75, 033
Industrial	30, 313	33, 326	32, 690	36, 728	33, 836	38, 846
Facial Tissue	24, 033	25, 165	24, 719	30, 126	33, 770	38, 901
All Paper Napkins	0	7	134	1, 267	8, 376	17, 509
Resale	0	7	134	1, 267	8, 376	17, 509
Regular Grade	0	0	0	0	0	0
Facial Grade	0	7	134	1, 267	8, 376	17, 509
Industrial	0	0	0	0	0	0
Household Waxed Paper	36, 672	39, 016	44, 984	48, 397	53, 774	53, 802

anti-competitive effects there is is equivocal. Respondent's relatively stable market position during 1954–1955 may be consistent with an inference that its acquisitions did not enhance its market power; but it is equally consistent with an inference that they enabled respondent to maintain its market shares at their existing high level.

Finally, we wish to emphasize that our conclusion that respondent has violated Section 7 is not founded on any *per se* rule of unlawfulness. It is not the Commission's view that, merely because respondent is a leading firm in a number of oligopolistic markets, any corporate acquisition it may make is violative of, or necessarily suspect under, Section 7. This case was not tried or decided on any such theory. Rather, an extensive record was compiled, establishing in great factual detail the probable effects of the challenged acquisitions on the market power of respondent. See 57 F.T.C., at 1416–34. Our finding of unlawfulness rests on an appraisal of the particular facts of this case; no short-cuts have been attempted. The Commission has not relied upon, and does not urge adoption of, any sweeping theories of Section 7 liability.

Commissioner Anderson concurred in the result and Commissioner MacIntyre did not participate.

Table II: Scott's Percentage Share of Market

	1950 (rev.)	1951	1952	1953	1954	1955 (rev.)
All Products Covered by the Survey	27. 05	29. 18	31. 51	32. 12	32. 76	33. 10
All Resale Products	32. 56	35. 89	38. 60	39. 05	40. 36	40. 74
All Industrial Products	12. 28	13. 27	13. 10	13. 53	12. 07	12. 51
All Toilet Paper	36. 89	40. 38	42. 84	42. 56	41. 82	40. 23
Resale	41. 00	44. 99	47. 54	47. 29	46. 51	44. 49
Regular Grade	45. 06	49. 90	51. 77	51. 82	51. 48	49. 53
Facial Grade	30. 53	31. 58	36. 70	36. 48	35. 36	33. 34
Industrial	11. 88	16. 31	13. 59	13. 27	12. 61	13. 34
All Paper Towels	23. 55	23. 67	27. 86	29. 33	29. 82	31. 35
Resale	41. 28	47. 47	56. 06	56. 59	60. 97	63. 42
Industrial	16. 34	15. 68	16. 80	17. 57	15. 46	15. 86
Facial Tissue	14. 05	16. 11	16. 42	17. 43	18. 79	20. 34
All Paper Napkins	0	0. 01	0. 10	0. 91	5. 47	10. 34
Resale	0	0. 01	0. 18	1. 63	9. 55	17. 99
Regular Grade	0	0	0	0	0	0
Facial Grade	0	0. 09	1. 59	11. 40	43. 67	60. 21
Industrial	0	0	0	0	0	0
Household Waxed Paper	40. 70	40. 88	47. 31	48. 47	52. 11	52. 12

Table III: Comparison of 1953–1955

Item	Scott's market share		Percentage of total tonnage represented by estimating companies	Overestimation required as a percent of actual tonnage [1]
	1953	1955		
Toilet tissue	42. 56	40. 23	19. 8	----------
Towels—Total	29. 33	31. 35	12. 9	98. 4
Facial tissue	17. 43	20. 34	15. 9	890. 1
Napkins—Total	0. 91	10. 34	25. 3	[3]
Household waxed paper	48. 47	52. 12	13. 6	106. 6
Combined	32. 12	33. 10	17. 8	20. 3

Footnotes at end of table

Table IV: Comparison of 1954–1955

Item	*Scott's market share*		*Percentage of total tonnage represented by estimating companies*	*Overestimation required as a percent of actual tonnage* [2]
	1954	*1955*		
Toilet tissue	41. 82	40. 23	19. 4	----------
Towels—Total	29. 82	31. 35	13. 5	57. 0
Facial tissue	18. 79	20. 34	15. 8	92. 7
Napkins—Total	5. 47	10. 34	24. 3	[3]
Household waxed paper	52. 11	52. 12	14. 0	0
Combined	32. 76	33. 10	17. 7	5. 9

[1] Assuming that Scott's "true" market share in 1953 is equal to that of 1955, this is the extent of the net total *overestimation*, by those companies submitting estimates, required to depress Scott's 1953 market share to that shown above.

[2] Assuming that Scott's "true" market share in 1954 is equal to that of 1955, this is the extent of the net total *overestimation*, by those companies submitting estimates, required to depress Scott's 1954 market share to that shown above.

[3] Scott's 1955 market share of paper napkins sales would have been greater than its 1953 and 1954 shares even if the estimating companies' sales were excluded entirely from the universe in 1953 and 1954.

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