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

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

IN THE MATTER OF

PLOUGH, INC., ET AL.

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

Docket 8563. Complaint, Mar. 19, 1963—Decision, Apr. 30, 1964

Order dismissing, in view of the Feb. 20, 1964, dismissal of a similar complaint in *Sterling Drug, Inc.*, Docket 8554, 64 F.T.C. 898, complaint charging the distributor of "St. Joseph Aspirin" and its advertising agency with representing falsely that "America's leading medical journal" reported that St. Joseph Aspirin was the best buy in pain relief.

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 Plough, Inc., a corporation, and Lake-Spiro-Shurman, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Plough, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3022 Jackson Avenue in the city of Memphis, State of Tennessee.

Respondent Lake-Spiro-Shurman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at Radio Center Building, Main and Union Streets, in the City of Memphis, State of Tennessee.

PAR. 2. Respondent Plough, Inc., is now, and for some time last past has been, engaged in the sale and distribution of a preparation which

comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent Plough, Inc., for said preparation, the formula thereof and directions for use are as follows:

Designation: "St. Joseph Aspirin."
Formula: Each tablet contains five (5) grains of aspirin.
Directions: (Take) one (1) or two (2) tablets with water. May be repeated every four (4) hours. If pains persist, or are unusually severe, see physician.

PAR. 3. Respondent Plough, Inc., causes the said preparation when sold, to be transported from its place of business in the State of Tennessee to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

Respondent Lake-Spiro-Shurman, Inc., is now, and for some time last past has been, the advertising agency of Plough, Inc., and now prepares and places, and for some time last past has prepared and placed, for publication, advertising material, including the advertising hereinafter referred to, to promote the sale of the said preparation. In the conduct of its business, at all times mentioned herein, respondent Lake-Spiro-Shurman, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the preparation referred to in Paragraph Two, above, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and magazines, and other advertising media and by means of television and radio continuities broadcast through stations located in various States of the United States and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of St. Joseph Aspirin; and have disseminated, and caused the dissemination of, advertisements concerning said St. Joseph Aspirin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce,

directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive thereof, of the statements and representations contained in said advertisements and television and radio broadcasts disseminated as hereinabove set forth are the following:

AMERICA'S LEADING MEDICAL JOURNAL REPORTS ST. JOSEPH ASPIRIN YOUR "BEST BUY" IN PAIN RELIEF!

Clinical Study Explodes Claims of So-called Extra Strength or Combination Drugs, the Principal Buffered Product and the High-priced Aspirin. It Proved There Is *No* Difference of Note in the Speed, Strength or Percentage of Relief of *Any* of These Products When Compared With St. Joseph Aspirin. It Also Showed the So-called Extra Strength Products Which Contain Phenacetin, Caused a *Significant Amount* of Stomach Distress—but St. Joseph Aspirin Was as Gentle to the Stomach as a Plain Sugar Pill.

* * * * * * *

"STOMACH UPSET" CLAIMS EXPLODED!

"Doesn't upset the stomach", "No stomach irritation", "Gentler than aspirin"—have you been puzzled by such scare claims? The fact is, St. Joseph Aspirin was shown to be as gentle to the stomach as a plain sugar pill. Actually, the ***only*** products which caused any noticeable stomach irritation in this test were the so-called "extra strength" or combination drugs containing phenacetin. * * *

(A reproduction of a newspaper advertisement containing the foregoing representations is attached hereto marked Exhibit 1 and incorporated herein.)*

Here's important news about pain relievers—just released by one of America's most highly respected medical journals. It reports on a clinical test of five leading pain relievers—the leading so-called extra strength combination drugs; a very highly advertised aspirin; the principal buffered product—and St. Joseph Aspirin. Now here's what this test showed. It proved that there is no difference of note in the speed, quality or percentage of relief of any of these products—when compared with St. Joseph Aspirin. It also showed the so-called extra strength products caused a significant amount of stomach distress—whereas pure St. Joseph Aspirin was as free of irritating effects as a plain sugar pill. So why pay more—especially for products that contain an added drug, phenacetin, that your doctor may not want you to take. This drug, barred in one country except on prescription, is found in most so-called extra strength combination drugs. So why risk more or pay more? Ask for pure St. Joseph Aspirin—clinically shown to be the best buy in pain relief. Get it today.

. . . Radio Station WBRC,
Birmingham, Alabama.

(A reproduction of the report referred to in the above-quoted advertisements is attached hereto marked Exhibit 2 and incorporated herein.)*

*Pictorial exhibit 1 is omitted in printing.
*Pictorial exhibit 2 is omitted in printing.

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

(1) That a report of a clinical study of pain relievers published in America's leading medical journal reflected the views of the medical association under whose auspices the said journal was published.

(2) That America's leading medical journal reported that St. Joseph Aspirin is the "best buy" in pain relief.

(3) That the clinical investigators who conducted the study and published the report in question found and reported that St. Joseph Aspirin causes no noticeable stomach irritation and that the said preparation is as gentle to the stomach as a plain sugar pill.

PAR. 7. In truth and in fact:

(1) The report of a clinical study referred to by respondents was published in The Journal of The American Medical Association, Vol. 182, No. 13, December 29, 1962. This said report was not a report of the American Medical Association. The opinions expressed in the said report were solely those of the clinical investigators who conducted the study reported on, and such opinions did not represent those of the American Medical Association (The American Medical Association's policy with regard to publication of articles in its Journal is set out in the Journal under the caption "Responsibility for Statements", as shown in a reproduction of page 156 of The Journal of The American Medical Association, Vol. 182, No. 13, December 29, 1962, attached hereto marked Exhibit 3 and incorporated herein.)*

(2) The Journal of The American Medical Association did not state, and the clinical investigators who conducted the study published in said Journal did not report therein, that St. Joseph Aspirin is the "best buy" in pain relief.

(3) The clinical investigators did not state as a finding in their report that St. Joseph Aspirin causes no noticeable stomach irritation, or that the said preparation is as gentle to the stomach as a sugar pill.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

*Pictorial exhibit 3 is omitted in printing.

ORDER GRANTING MOTION TO DISMISS COMPLAINT

On April 15, 1964, the examiner certified to the Commission a motion by respondents to dismiss the complaint on the ground that further proceedings upon it would not be in the public interest. The examiner recommends that the motion be granted, and complaint counsel have stated that they do not object to the motion. Respondents have accompanied their motion with affidavits by responsible officers that respondents have ceased using the particular advertisement upon which the complaint was based and do not intend to resume. It does not appear however that respondents either have abandoned or intend to abandon dissemination of another advertisement which contains almost all of the representations that were alleged in the complaint to be deceptive. Nevertheless the Commission has concluded that the deceptive practices alleged herein are substantially similar to those alleged in the complaint of *Sterling Drug, Inc.*, Docket No. 8554, and that in view of the Commission order of February 20, 1964 [64 F.T.C. 898 herein], dismissing the complaint in *Sterling Drug, Inc.*, further proceedings herein would not be in the public interest. The Commission takes note of the fact that, in its order of June 25, 1962, it placed upon the suspense calendar proceedings against respondent Plough, Inc., and other major disseminators of analgesic products pending further investigation. The Commission will take such actions in these matters as appear to be required by the public interest in the light of the information which is now available and which will become available. Accordingly,

It is ordered, That respondents' motion to dismiss the complaint be, and it hereby is, granted and that the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre concurring only in the result.

IN THE MATTER OF

GEORGE MACY COMPANIES, INC.

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

Docket C-740. Complaint, Apr. 30, 1964—Decision, Apr. 30, 1964

Consent order requiring a New York City mail order dealer in books and other publications, certain of which were sold under the name of The Heritage Club, to cease representing falsely in letters to purportedly delinquent customers that the delinquent's name had been transmitted to a bona fide credit

reporting agency or would be transferred to an attorney to institute suit for collection, and that if payment was not made his credit rating would be adversely affected, and, by use of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." on letterheads, that a bona fide organization by that name had prepared and sent the letters.

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 George Macy Companies, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent George Macy Companies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 595 Madison Avenue, in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of books and other merchandise to the general public by and through the United States mails.

PAR. 3. In the course and conduct of its business, respondent now causes and for some time last past has caused its said books and merchandise, when sold, to be shipped from its place of business and sources of supply 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 maintains, and at all times mentioned herein has maintained, a substantial course of trade in said books and merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent offers for sale certain books and publications through the United States mails under the name The Heritage Club. Said books and publications are distributed and payment made therefor through the United States mails.

For the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the aforesaid transactions, respondent has made certain statements and representations in letters and notices disseminated through the United States mails to purportedly delinquent customers.

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

a. On the letterhead of The Heritage Club:

The amount of money which you owe us is not large! We hope you will not let it create a rift in our pleasant relationship. * * *

It is not possible for us to determine whether you have been negligent, or whether you want to avoid paying for your books. * * * If you are a charming and honest person, then you will be insulted if we turn your account over to an attorney for collection. Yet since you have not paid our bill, and have not replied to the letters we sent you, we must turn your account over to an attorney if you will not write us now. * * *

b. On the letterhead:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.

CREDIT REPORTS—COLLECTIONS

NEW YORK 18, N.Y.

We have been notified by one of our members, The Heritage Club, of your failure to pay a past-due account of * * *

While ours is a credit and collection agency, our endeavor is that of mediator: between you a customer with a past-due account of $ and one of our members The Heritage Club.

* * * * * * *

The action on your part of either sending a payment or an explanation now is necessary to circumvent The Heritage Club from turning your account over to special counsel.

We have been notified by the Heritage Club that in five days they will file with special counsel your debt of $. Only your immediate remittance of this sum, to the Club at 595 Madison Avenue, will prevent this action.

Par. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondent represents and has represented that:

a. The delinquent customer's name has been transmitted to a bona fide credit reporting agency.

b. If payment is not made, the customer's general or public credit rating will be adversely affected.

c. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is a separate, bona fide collection and credit reporting agency located in New York City.

d. Respondent has turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", the delinquent account of the customer for collection and other purposes.

e. If payment is not made, the delinquent customer's account will be transferred to an outside attorney with instructions to institute suit to take other legal steps to collect the outstanding amount due.

f. The letters on the letterhead of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

a. The delinquent customer's name has not been transmitted to a bona fide credit reporting agency.

b. If payment is not made, the customer's general or public credit rating is not adversely affected.

c. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is not a separate, bona fide collection agency or credit reporting agency. Said organization is a fictitious name utilized by respondent and others for the purpose of disseminating collection letters.

d. Respondent has not turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customers for collection or any other purpose.

e. If payment is not made, the delinquent customer's account is not transferred to an outside attorney with instructions to institute suit or other legal steps to collect the oustanding amount due.

f. The letters on the letterhead of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have not been prepared and mailed by said organization. Said letters and notices have been prepared and mailed or caused to be mailed by respondent. Replies in response to said letters and notices are forwarded unopened to respondent.

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

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

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

1. Respondent George Macy Companies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 595 Madison Avenue, in the city of New York, State of New York.

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

ORDER

It is ordered, That respondent George Macy Companies, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books, or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. A customer's name has been or will be turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes where payment is not received, that the information of said delinquency is referred to separate bona fide credit reporting agency;

2. Delinquent accounts will be or have been turned over to a bona fide, separate collection agency or attorney for collection unless respondent in fact turns such accounts over to such agencies or attorney;

3. Delinquent accounts have been turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose;

4. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises any direction or control, is an independent, bona fide collection or credit reporting agency;

5. Notices or other communications which respondent has, or have caused to be, prepared, written or mailed, have been sent by "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", or any other person, firm or agency.

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

IN THE MATTER OF

POPULAR SCIENCE PUBLISHING CO., INC.

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

Docket C-741. Complaint, Apr. 30, 1964—Decision, Apr. 30, 1964

Consent order requiring New York City publisher of a "Popular Science Monthly" and "Outdoor Life Magazine", also operating the "Outdoor Life Book Club" and the "Popular Science Living Library", to cease representing falsely in letters to purportedly delinqent customers that if payment was not made the delinquent's account would be turned over to a bona fide collection agency with consequent injury to his credit rating, and by use of the fictitious letterhead "The Mail Order Credit Reporting Association, Inc.", that a separate organization had received the account for collection and prepared the notice.

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 Popular Science Publishing Co., Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Popular Science Publishing Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and

place of business located at 355 Lexington Avenue in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of publications, books and merchandise to the general public. Respondent publishes two monthly magazines, "Popular Science Monthly" and "Outdoor Life Magazine", and operates two book clubs, the "Outdoor Life Book Club" and the "Popular Science Living Library". The aforesaid publications, books and merchandise are advertised, sold and payment made therefor through the United States Mails.

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

PAR. 4. In the course and conduct of its business and for the purpose of inducing the payment of purportedly delinquent accounts, respondent has made certain statements and representations in letters and materials sent through the United States mails to purportedly delinquent customers who have purchased respondent's publications, books or merchandise.

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

a. On respondent's letterheads:

IMPORTANT—FINAL NOTICE

YOUR ACCOUNT IS BEING TURNED OVER TO A COLLECTION AGENCY UNLESS WE HEAR FROM YOU IMMEDIATELY

Dear Customer:
In order that there can be no misunderstanding concerning your failure to pay the enclosed statement, we are sending you this final letter. Unless we hear from you within the next ten days, your account will be turned over to THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC., which is a professional collection agency.

Dear Customer:
Your payment for the Outdoor Life Magazine subscription you ordered is now *TWO MONTHS PAST DUE* and we need your HELP to straighten out your account.

* * * * * * *

Otherwise, won't you please HELP us—and help keep your own credit standing in good shape—by sending your payment at once in the enclosed envelope.

FINAL NOTICE—This is the last letter we can send you about your unpaid account.

* * * * * * *

We do not like to turn over names of our subscribers to a collection agency, but if we do not receive your payment we will have no alternative. * * *

b. On the letterhead of:

The Mail Order Credit Reporting Association, Inc.

CREDIT REPORTS—SPECIAL INVESTIGATIONS—COLLECTIONS
NEW YORK 18, N.Y.

We have been notified by one of our clients, the POPULAR SCIENCE PUBLISHING COMPANY, INCORPORATED, of your failure to pay a long past-due account for a magazine subscription you ordered.

* * * * * * *

Before we proceed further, we are giving you a final opportunity to make payment. Although the amount involved is small, it is our business to collect our clients' delinquent accounts regardless of size. And we are organized for this purpose. * * *

Re: OUTDOOR LIFE BOOK CLUB

* * * * * * *

The above firm, as a member of THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC., has reported to us your long past due account so that we may inform other members of their experience with you upon request. * * *

PAR. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondent represents and has represented that:

a. If payment is not made, the delinquent customer's account is turned over to a separate, bona fide collection agency.

b. If payment is not made, the customer's general or public credit rating will be adversely affected.

c. "THE MAIL ORDER CREDIT REPORTING AGENCY, INC.," is a separate, bona fide collection and credit reporting agency located in New York City.

d. Respondent has turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION INC.," the delinquent account of the customer for collection and other purposes.

e. The letters and notices on the letterhead of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," have been prapared and mailed by said organization.

PAR. 6. In truth and in fact:

a. If payment is not made, the delinquent customer's account is not turned over to a separate, bona fide collection agency.

b. If payment is not made, the customer's general or public credit rating is not adversely affected.

c. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," is not a separate, bona fide collection or credit reporting agency. Said organization is a name utilized by respondent and others for the purpose of disseminating collection letters.

d. Respondent has not turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," the delinquent account of the customer for collection or any other purpose.

e. The letters and notices on the letterhead of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," have not been prepared or mailed by said organization. Said letters and notices have been prepared and mailed or caused to be mailed by respondent. Replies in response to said letters and notices are forwarded unopened to respondent.

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

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

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

1. Respondent Popular Science Publishing Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 355 Lexington Avenue, in the city of New York, State of New York.

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

ORDER

It is ordered, That respondent Popular Science publishing Co., Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books, magazines or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. Delinquent customer's accounts will be or have been turned over to a bona fide, separate collection agency for collection unless respondent in fact turns such accounts over to such an agency;

2. A customer's name has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes that where payment is not received, the information of said delinquency is referred to a separate, bona fide credit reporting agency;

3. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," for collection or any other purpose;

4. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," any fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises any direction or control, is an independent, bona fide collection or credit reporting agency;

5. Notices or other communications which respondent has or has caused to be prepared, written or mailed, have been sent by "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," or any other person, firm or agency.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission

a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

LOUIS FURS INC., ET AL.

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

Docket C–742. Complaint, Apr. 30, 1964—Decision, Apr. 30, 1964

Consent order requiring retail furriers in Hammond, Ind., to cease violating the Fur Products Labeling Act by labeling, invoicing and advertising furs improperly as "Broadtail," failing to show the true animal name of furs on invoices, failing to disclose when furs are used or second-hand; falsely representing that prices are reduced, and failing to keep adequate records as a basis for pricing claims.

COMPLAINT

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

PARAGRAPH 1. Respondent Louis Furs Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana.

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

Respondents are retailers of fur products with their office and principal place of business located at 5258 Hohman Avenue, city of Hammond, State of Indiana.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received

in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(b) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appeared in issues of the Hammond Times, a newspaper published in the city of Hammond, State of Indiana.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show that fur products were composed of used fur, when such was the fact.

PAR. 8. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that certain of said fur products were falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

Among such falsely and deceptively advertised fur products, but not limited thereto, were fur products advertised as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein respondents falsely and deceptively advertised fur products in violation of Section 5(a)(5) of the Fur Products Labeling Act in that the said advertisements represented through statements such as "Public Sale of Fur Cancellations and uncalled for storage." "A large number of fur coats, fur capes, stoles and scarfs which were partly paid in layaway and storage. On sale at 10 a.m. Tomorrow, payment of balance due—Makes it yours" either directly or by implication, that the prices of such fur products were reduced from the prices at which the respondents regularly and usually sold such fur products in the recent regular course of business and the amount of such purported reduction constituted savings to the purchasers of respondents' products, when in fact such fur products were not fur cancellations uncalled for or partly paid in layaway and storage and were not reduced in price from the price at which the respondents regularly and usually sold such

fur products and savings were not afforded purchasers of respondents' products as represented.

PAR. 10. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth in the manner required, in violation of Rule 10 of the said Rules and Regulations.

(b) The term "natural" was not used to describe fur products which were not pointed, bleached dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

(c) The disclosure "second-hand", where required, was not set forth, in violation of Rule 23 of the said Rules and Regulations.

(d) All parts of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder were not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of the aforesaid Rules and Regulations.

PAR. 11. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under 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 Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Louis Furs Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 5258 Hohman Avenue, in the city of Hammond, State of Indiana.

Respondent Louis Carmen is an officer of said corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent Louis Furs Inc., a corporation, and its officers, and respondent Louis Carmen, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

4. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Failing to set forth on invoices the item number or mark assigned to fur products.

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

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Falsely or deceptively identifies any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

3. Fails to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

4. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Fails to disclose that fur products contain or are composed of second-hand used furs.

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

7. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

8. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

9. Represents directly or by implication contrary to fact that any such fur products are fur cancellations, uncalled for or partly paid in layaway and storage.

D. Making claims and representation of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

STEVE MILLNER ET AL. TRADING AS STYLECRAFT CLOTHING CO.

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

Docket C-743. Complaint, May 7, 1964—Decision, May 7, 1964

Consent order requiring New York City manufacturers of suits, jackets and pants for men and boys to cease violating the Textile Fiber Products Identification Act by labeling as "80% rayon, 20% acetate" and "70% rayon, 30% acetate", clothing which contained substantially different amounts of fibers than so represented, and failing to maintain proper records showing the fiber content of their products; to cease violating the Wool Products Labeling Act by labeling as "All Wool except ornamentation", clothing which contained a substantial quantity of non-woolen fibers; and to cease violating both Acts by failing to label certain of their products with required information and in the required form.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, and the Wool Products Labeling Act, and by virtue of the authority vested in it by said Acts,

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the Federal Trade Commission having reason to believe that Steve Millner and Kiwa Karsh, individually and as copartners trading as Stylecraft Clothing Co., hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act and the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Steve Millner and Kiwa Karsh are individuals and copartners, doing business as Stylecraft Clothing Co., with their office and principal place of business located at 58 Canal Street, New York, New York.

Respondents Steve Millner and Kiwa Karsh are now, and have been for a considerable period, engaged in the manufacture and sale of suits, jackets and pants for men and boys, at their principal place of business at 58 Canal Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name and amount of the constituent fibers contained therein.

Among such textile fiber products were men's and boys' clothing labeled as 80% rayon, 20% acetate, and 70% rayon, 30% acetate, whereas in truth and in fact such clothing contained substantially different amounts of fibers than represented.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(b) of

the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

PAR. 5. Respondents have failed to maintain proper records showing the fiber content of the textile fiber products manufactured by them, in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Rules and Regulations promulgated thereunder.

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

PAR. 7. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 8. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of said Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were men's and boys' clothing labeled as "All Wool except ornamentation", whereas, in truth and in fact, said clothing contained a substantial quantity of non-woolen fibers apart from those of which the ornamentation was composed.

PAR. 9. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as required by the Rules and Regulations promulgated under said Act.

PAR. 10. The acts and practices of the respondents as set forth above in Paragraphs Seven, Eight and Nine were and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

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, the Textile Fiber Products Identification Act and the Wool Products Labeling Act and certain of the Rules and Regulations of the latter two Acts, 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, and 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 Steve Millner and Kiwa Karsh are copartners trading as Stylecraft Clothing Co., with their office and principal place of business located at 58 Canal Street, New York, New York, which office and principal place of business was formerly located at 2 Allen Street, New York, New York.

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

ORDER

It is ordered, That respondents Steve Millner and Kiwa Karsh, individually and as copartners trading as Stylecraft Clothing Co. or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate, or other device, in connection with the introduction, delivery for introduction, sale, advertising or offering for sale, in commerce, or in the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale,

offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act do forthwith cease and desist from:

A. Misbranding textile fiber products by:

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

2. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Failing to maintain records of fiber content of textile fiber products manufactured by them, as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations thereunder.

It is further ordered, That respondents Steve Millner and Kiwa Karsh, individually and as copartners trading as Stylecraft Clothing Co. or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate, or other device, in connection with the introduction or manufacture for introduction in commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, of men's and boys' woolen clothing or other "wool products" as such products are defined in and subject to said Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

2. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

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

IN THE MATTER OF

SCOTT PAPER COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 6559. Complaint, June 1, 1956—Decision, May 8, 1964

Order modifying a divestiture order of December 16, 1960, 57 F.T.C. 1415, by prohibiting respondent from acquiring any manufacturer of sanitary paper products, without prior Commission approval; converting any paper-making equipment of any manufacturer it might acquire, within 10 years, to the production of sanitary paper products, or using any pulp mill it might acquire for such purpose; and dispose of, to an approved purchaser, two rebuilt sanitary paper products machines.

MODIFIED ORDER

Scott Paper Company, having filed in the United States Court of Appeals for the Third Circuit a petition to review and set aside the order of divestiture issued herein on December 16, 1960 [57 F.T.C. 1415]; and the Court on March 27, 1962 [7 S. & D. 448], having rendered its decision remanding the case to the Commission for the purpose of taking additional evidence; and the Commission having added this evidence and having issued a further opinion on December 26, 1963 [63 F.T.C. 2240]; and the Court, by order of January 29, 1964, having reopened the case and reinstated it on the Court's calendar for filing of supplemental briefs and presentation of oral argument; and the Commission and Scott Paper Company having subsequently agreed upon the provisions of a final order modifying the order entered by the Commission on December 16, 1960; and the Court, on April 23, 1964 [7 S.&D. 898], having issued its final order enforcing said order as submitted by the Commission and Scott Paper Company;

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

1. *It is ordered,* That from the date of the Court's order [April 23, 1964] Scott Paper Company (hereinafter referred to as Scott) shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the regular course of business) of any concern engaged in the manufacture or converting and sale in the United States of toilet tissue paper, facial tissue paper, paper napkins, paper towels or household waxed paper (hereinafter referred to as sanitary paper prod-

ucts), without the prior approval of the Federal Trade Commission. For the purposes of this paragraph a subsidiary is a company owned fifty percent or more by Scott. This paragraph shall not apply (a) to the acquisition of stock, share capital or assets of any company which is already a subsidiary of Scott on the date of the Court's order; (b) to the acquisition of assets of any concern which are not being utilized or capable of being rebuilt for use in the conversion or manufacture of said sanitary paper products; or (c) to the acquisition of facilities covered by paragraphs 2 and 3 below.

2. *It is further ordered*, That if within a period of ten (10) years from the date of the Court's order Scott shall acquire the whole or any part of any concern (other than products sold in the regular course of business) in the United States, Scott shall not thereafter for a period of ten(10) years rebuild or convert any of the papermaking equipment so acquired for the manufacture of paper to be used or the converting of paper to be used for the production of said sanitary paper products in the United States without the prior approval of the Federal Trade Commission.

3. *It is further ordered*, That if within a period of ten (10) years from the date of the Court's order Scott shall acquire a pulp mill from a concern operating such mill in the United States, Scott shall not during such period of ten (10) years use any of the output of such pulp mill in its manufacture of said sanitary paper products in the United States without the prior approval of the Federal Trade Commission.

4. Commencing not later than five (5) years from the date of the Court's order and thereafter until the expiration of seven (7) years from the date of the Court's order, Scott shall use its best efforts to sell the two rebuilt sanitary paper product machines (Nos. 7 and 10) acquired from Detroit Sulphite Pulp & Paper Company to a purchaser approved by the Federal Trade Commission who will utilize such machines for the manufacture and sale of sanitary paper products in the United States. At the end of a period of seven (7) years from the date of the Court's order Scott shall discontinue utilizing any paper machines acquired from Detroit Sulphite Pulp & Paper Company for the manufacture of sanitary paper products in the United States, provided, however, that Scott may continue to manufacture wax base stock with facilities so acquired and may continue to use the output of the pulp mill located at Detroit for any purpose.

Commissioner MacIntyre not participating.

IN THE MATTER OF

DIANA STORES CORPORATION

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

Docket C-744. Complaint, May 13, 1964—Decision, May 13, 1964

Consent order requiring a New York City corporate operator of numerous department stores in various States under the trade name "Great Eastern Mills" to cease representing falsely that it manufactured the clothing and other merchandise it sold, by use of the word "Mills" in its corporate or trade name or in any other manner.

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 Diana Stores Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Diana Stores 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 450 West 41st Street, New York 36, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the operation, in various States of the United States, of numerous department stores using "Great Eastern Mills" as a trade name.

Said Great Eastern Mills stores are operated as a division of Diana Stores Corporation. They are self-service operations which include the use of shopping carts and central check-out systems. Through said stores respondent sells clothing and other merchandise to the purchasing public

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said merchandise to be shipped from its headquarters in New York to its several stores in various other States of the United States, for sale to the purchasing public. In such instances shipments are made to respondent's stores in States other than that in which such shipments have originated, and respondent maintains and at all times mentioned herein has main-

tained, a substantial course of trade in said merchandise, in commerce as "commerce" is defined in the Federal Trade Commission Act.

Respondent also causes advertisements and other promotional material to be shipped from its place of business in the State of New York to its stores in various other States and maintains a substantial commercial intercourse between its headquarters in New York and its stores in other States consisting of the transmission and receipt of numerous commercial documents, reports and information. Respondent's buying, merchandising and advertising departments, warehousing operations and receiving inspecting, packing and shipping departments, serving all of its stores, are located at its headquarters.

PAR. 4. In the course and conduct of its business, as aforesaid, and and for the purpose of inducing the purchase of its merchandise which had been shipped and received in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has used the name "Great Eastern Mills" in advertisements of its merchandise in newspapers having general circulation in various States of the United States.

PAR. 5. Through the use of the word "mills" as part of the respondent's trade name, respondent represents that it owns or operates a mill or factory in which the clothing and other merchandise sold by it are manufactured.

PAR. 6. Said representation is false, misleading and deceptive. In truth and in fact respondent does not own or operate the mill or factory in which the clothing and other merchandise sold by it are manufactured but buys from manufacturers and others for resale to the purchasing public.

PAR. 7. There is a preference on the part of many members of the purchasing public to buy merchandise, including clothing, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them, a fact of which the Commission takes official notice.

PAR. 8. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing and other merchandise of the same general kind and nature as that sold by respondent.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial

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

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

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

1. Respondent Diana Stores Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 450 West 41st Street in the city of New York, State of New York.

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

ORDER

It is ordered, That respondent Diana Stores Corporation, a corporation, and its officers and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of clothing or any other merchandise in commerce, as "commerce" is defined in the Fed-

eral Trade Commission Act, do forthwith cease and desist from using the word "Mills" or any other word of similar import or meaning in or as a part of respondent's corporate or trade name or representing in any manner that respondent is a manufacturer of the clothing and other merchandise sold by it unless and until respondent owns and operates or directly and absolutely controls a manufacturing plant wherein such clothing or other merchandise is made; provided, however, that should respondent so desire for reasons of continuity, it may use the identifying phrase "formerly Great Eastern Mills" or words of similar import in its advertising for a period not to exceed six months from the effective date of this order.

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

IN THE MATTER OF

AMERICAN FOODS, INC., ET AL.

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

Docket C-745. Complaint, May 13, 1964—Decision, May 13, 1964

Consent order requiring three associated corporations with headquarters in St. Paul, Minn., and operating in Minnesota, Iowa, and North Dakota, respectively, to cease making false representations in advertising by radio in connection with their sale of freezers and foods by means of a "Freezer-Food Plan," including claims of savings to purchasers, wholesale prices for their food, guarantees, assistance of "food consultants" in planning food orders, financing and size of operations.

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 American Foods, Inc., a corporation of St. Paul, Minnesota (formerly American Food Plant of Minnesota, Inc.), American Food Plan of Iowa, Inc., a corporation, American Foods of North Dakota, Inc., a corporation, and Walter L. Lange, individually and as an officer of said corporations, trading and doing business as American Foods, Inc., American Foods, American Food Plan, American Foods Plan, Inc., and American Foods Service, Inc., hereinafter referred to as respondents, have vio-

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

PARAGRAPH 1. Respondent American Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business located at 1255 East Highway 36, St. Paul, Minnesota, which corporation was formerly known as American Food Plan of Minnesota, Inc.

Respondent American Food Plan of Iowa, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal place of business located at 337 University Avenue, Des Moines, Iowa.

Respondent American Foods of North Dakota, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Dakota, with its principal office and place of business located at 737 20th St. N., Fargo, North Dakota.

Respondent Walter L. Lange is the chief executive officer of all the corporate respondents and he formulates, directs and controls the acts and practices of said respondents including the acts and practices hereinafter set forth. In addition, in his individual capacity from time to time, he has traded and done business as American Foods, Inc., American Foods, American Food Plan, American Food Plan, Inc., and American Foods Service, Inc. His business address is the same as that of the corporate respondents. His home address is 1282 Sherburne Avenue, St. Paul 4, Minnesota.

PAR. 2. Respondents are now and for some time last past, have been engaged in the advertising, offering for sale, sale and distribution of freezers and foods by means of a so-called Freezer-Food Plan.

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

PAR. 4. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce with corporations, firms and individuals in the sale of freezers, food and freezer-food plans.

PAR. 5. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements

concerning the said food and freezer-food plan by the United States mails, and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements by means of circulars, brochures, and by radio broadcasts, by stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of food, as the term "food" is defined in the Federal Trade Commission Act; and have disseminated and caused the dissemination of advertisements by various means, including those aforesaid, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of food and freezers in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of advertisements disseminated, as aforesaid and by the oral statements of sales representatives, respondents have represented, directly or by implication:

1. That "food counselors" or "consultants" will assist purchasers of the aforesaid freezer-food plan in planning their food orders;

2. That the freezer or any part thereof and the food are fully and unconditionally guaranteed under the contract;

3. That purchasers of the aforesaid freezer-food plan will receive their food requirements and a freezer for the same or less money that they have been paying for food alone;

4. That purchasers can save enough on the purchase of food to pay for the freezer;

5. That purchasers can become a member of a freezer-food plan on a trial basis;

6. That respondents sell their food at wholesale prices;

7. That respondents are the oldest and largest food service in the Midwest serving more than 18,000 families in Minnesota, Wisconsin, Iowa and North Dakota;

8. That purchasers participation in the aforesaid freezer-food plan will continue for a "lifetime";

9. That respondents have established a reserve fund or posted a bond, the benefits of which are available to purchasers as a guarantee of continuous service;

10. That purchasers will realize savings in their food purchases of 25 to 40% on food purchases under the aforesaid freezer-food plan;

11. That installment contracts for the purchase of the aforesaid Freezer-Food Plan, freezers or food, are financed or carried by corporate respondents and will not be sold or discounted to others;

12. That sales contracts offered to purchasers for signature contain all the terms or conditions of sale.

PAR. 7. In truth and in fact:

1. The individuals sent to help purchasers of the aforesaid freezer-food plan in planning their food orders are not "food counselors" or "consultants". They have not had sufficient or proper training or experience to warrant being referred to as "food counselors" or "consultants" or any other name which would imply special qualifications in the field of home economics.

2. The freezer or any part thereof and the food are not fully or unconditionally guaranteed under the contract.

3. Purchasers of the aforesaid freezer-food plan do not receive a freezer and their food requirements for the same or less money than they had been paying for food alone.

4. Purchasers of the aforesaid freezer-food plan cannot save enough money on the purchase of food to pay for the freezer.

5. Purchasers of the aforesaid freezer-food plan will not be able to enter the plan on a trial basis, but they are bound by the original provisions of the contract.

6. Respondents do not sell their food to purchasers of the aforesaid freezer-food plan at wholesale prices.

7. The respondents are not the oldest or the largest food service in the Midwest, moreover, respondents do not serve more than 18,000 families in Minnesota, Wisconsin, Iowa and North Dakota.

8. Purchasers are not assured that they will be able to purchase food from the aforesaid freezer-food plan for a "lifetime".

9. Respondents have not established a reserve fund or posted a bond, the benefits or proceeds of which are available to purchasers as a guarantee of continuous service.

10. Purchasers of the aforesaid freezer-food plan do not realize savings of 25 to 40% on their food bills.

11. Respondents have sold or discounted purchasers' installment contracts to others despite their representation to the contrary.

12. All of the terms and conditions of sale are not always disclosed at the time of a sale, and in many instances contracts are not completely filled in at the time of a sale and when later filled in and sent to purchasers, the terms or conditions thereof are not the same as previously agreed to by the purchasers.

Therefore, the advertisements referred to in Paragraph Five were, and are misleading in material respects and constituted, and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations referred to in Paragraph Six were, and now are, false, misleading and deceptive.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now

has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of freezers, food and freezer-food plans from respondents by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination by respondents of false advertisements as aforesaid, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce within the intent and meaning of the Federal Trade Commission Act, and in violation of Sections 5 and 12 of said Act.

DECISION AND ORDER

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

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent American Foods, Inc., formerly known as American Food Plan of Minnesota, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 1255 East Highway 36, St. Paul, Minnesota.

Respondent American Food Plan of Iowa, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its office and principal place of business located at 337 University Avenue, Des Moines, Iowa.

Respondent American Foods of North Dakota, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Dakota, with its principal place of business located at 737 20th Street N., Fargo, North Dakota.

Respondent Walter L. Lange is the chief executive officer of all of the corporate respondents. The business address of the said Walter L. Lange is the same as the corporate address of American Foods, Inc., and his home address is 1282 Sherburne Avenue, St. Paul 4, Minnesota.

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

PART I

It is ordered, That respondents American Foods, Inc., a corporation, American Food Plan of Iowa, Inc., a corporation, American Foods of North Dakota, Inc., a corporation and their officers, and Walter L. Lange individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of freezers, food or freezer-food plans, or other merchandise, 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:

(a) A "food counselor" consultant or other formally trained individual will assist purchasers of the aforesaid Freezer-Food Plan in planning their food orders;

(b) The freezer or any part thereof or the food are guaranteed in any manner, unless the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction with any such representation;

(c) By purchasing their Freezer-Food plan purchasers can purchase their food requirements and a freezer for the same or less money than they have been paying for food alone;

(d) Purchasers of their freezer-food plan can save enough money on the purchase of food to pay for a freezer;

(e) Purchasers can enter the Freezer-Food Plan on a trial basis;

(f) Purchasers of a freezer-food plan can buy their food from respondents at wholesale prices.

2. Representing that respondents are the oldest food service in the Midwest.

3. Representing that respondents are the largest food service in the Midwest.

4. Representing that purchasers are entitled to participate in the freezer-food plan for a "lifetime."

5. Representing that respondents serve any stated number of families unless respondents actually serve the number represented.

6. Representing that respondents have established a reserve fund or posted a bond the benefits of which are available to purchasers as a guarantee to continuous service unless respondents do in fact have such a fund or bond available and unless the said fund or bond is made available to all purchasers of respondents' product as a guarantee to continuous service.

7. Representing, directly or by implication, that purchasers' contracts: (a) Are financed or carried by corporate respondents and (b) will not be sold or discounted to others unless respondents establish in every instance, where the representation has been made that the installment contract has been carried by corporate respondents and has not been sold or discounted to others.

8. Misrepresenting in any manner the savings realized by the purchase of the freezer-food plan.

9. Obtaining purchasers' signatures on sales contracts which contracts do not at that time contain all of the terms or conditions of sale.

PART II

It is further ordered, That respondents American Foods, Inc., a corporation, American Food Plan of Iowa, Inc., a corporation, American Foods of North Dakota, Inc., a corporation, and their officers, and Walter L. Lange individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of any food or purchasing plan involving food, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation or misrepresentation prohibited in Paragraphs 1 through 8 of Part I of this order.

2. Disseminating or causing the dissemination of any advertisement by any means for the purpose of inducing or which is

likely to induce, directly or indirectly, the purchase of any food, or any purchasing plan involving food in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs 1 through 8 of Part I of 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.

IN THE MATTER OF

TRADE ADVERTISING ASSOCIATES, INC., ET AL. TRADING AS TRADE UNION NEWS

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

Docket 8582. Complaint, June 28, 1963—Decision, May 15, 1964

Order requiring New York City publishers of a tabloid monthly newspaper known as "Trade Union News"—deriving a large part of their income from the sale of advertising space therein to business concerns—to cease representing falsely to prospective advertisers that their said newspaper was endorsed by, or was an official publication of a labor union, and by a prominent display on the front page that the paper was the "Winner of the National Trade Union Advertising Award" and "* * * of International Editorial Excellence Award"; and to cease their practice of placing advertisements of various concerns in their paper without authorization and then seeking to exact payment therefor.

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 Trade Advertising Associates, Inc., a corporation, Joseph Lash and Eugene Serels, individually and as officers of said corporation, and as copartners trading and doing business as Trade Union News, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Trade Advertising Associates, Inc., is a corporation organized, existing and doing business under and by virtue

of the laws of the State of New York, with its principal office and place of business located at 251 West 42nd Street, New York City, New York.

Respondents Joseph Lash and Eugene Serels are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent. Respondents Joseph Lash and Eugene Serels are also copartners, trading and doing business as Trade Union News, whose principal office and place of business is also located at 251 West 42nd Street, New York City, New York.

PAR. 2. Respondents Joseph Lash and Eugene Serels, as copartners, are now, and for some time last past have been engaged in the publication of a tabloid-size newspaper known as Trade Union News.

Respondents Trade Advertising Associates, Inc., and Joseph Lash and Eugene Serels, individually and as officers of said corporation, perform the advertising functions of Trade Union News, including the solicitation of advertisements appearing in said publication.

All of the respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 3. The publication Trade Union News is published monthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other States of the United States.

Further, respondents in the course and conduct of their business, engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. A large part of respondents' income is derived from the sale of advertising space in the Trade Union News to business concerns. Respondents and their duly authorized agents and representatives contact said business concerns by telephone and other means and seek to induce them to purchase advertising space in said publication. In the course of said solicitations, respondents and their agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication is endorsed by, affiliated with or an official publication of a labor union.

PAR. 5. In truth and in fact, Trade Union News is not endorsed by, affiliated with or an official publication of a labor union, or in any

manner connected with a labor union, but is independently organized and operated.

Therefore, the statements and representations referred to in Paragraph Four hereof are false, misleading and deceptive.

PAR. 6. Prominently displayed on the front page of Trade Union News appear the following statements: "Winner of the National Trade Union Advertising Award" and "Winner of International Editorial Excellence Award."

PAR. 7. By and through the aforesaid statements and representations, respondents represent, directly or by implication;

(a) That Trade Union News was adjudged the most outstanding publication in competitive contests in which a representative number of competing publications were considered and in which all competitive publications were afforded an equal opportunity to compete.

(b) That the winner of said "awards" was elected by a group of impartial and qualified individuals.

PAR. 8. In truth and in fact:

(a) Trade Union News has not been adjudged the most outstanding publication because no competitive contests were held in which a representative number of competing publications were entered, nor were all competitive publications afforded an equal opportunity to be considered.

(b) The winner of said "awards" was not selected by a group of impartial and qualified individuals, but was selected by respondents Trade Advertising Associates, Inc., Lash and Serels.

Therefore, the statements and representations referred to in Paragraphs Six and Seven hereof are false, misleading and deceptive.

PAR. 9. In the course and conduct of their business respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

PAR. 10. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and repre-

sentations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of non-existent debts.

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, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. William A. Arbitman, for the Commission.
Mr. Norman Turk, Brooklyn, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

DECEMBER 6, 1963

In General—History of the Litigation

The complaint in this proceeding charges respondents with three types of unfair methods of competition in commerce and unfair acts in commerce in violation of Section 5 of the Federal Trade Commission Act. These alleged practices set forth in three separate charges of the complaint are: (1) procurement of subscriptions of advertisements in respondents' publication the "Trade Union News" by false, misleading, and deceptive representations to prospective advertisers that said publication is endorsed by, affiliated with, or an official publication of, a labor union; (2) respondents' false, misleading, and deceptive statements displayed on the front page of said "Trade Union News" representing that such publication is a winner of national advertising and international editorial awards in its field; and (3) that respondents place unauthorized advertisements in said publication and then seek to exact payment therefor from such alleged advertisers. Respondents, while admitting many of the allegations of the complaint, in substance have denied such charges in their joint answer. The issues are not complicated and the pleadings will be more specifically hereinafter referred to in connection with the particular findings of fact to which they relate.

The complaint herein issued June 28, 1963, and was duly served upon respondents who filed their joint answer August 8, 1963. The evidence in support of the complaint and respondents' evidence in defense were presented at three hearings held in New York, New York, September 12, 13, and 16, 1963, at the conclusion of which all parties rested and

the case was closed for taking evidence. Proposed findings of fact, conclusions of law and order were duly filed. And, pursuant to leave granted all parties, they respectively filed memoranda in opposition to their opponents' proposed findings. In this initial decision it is held and determined that the material allegations of the complaint, upon all three charges, have been fully sustained by the evidence, and an appropriate cease and desist order is accordingly issued.

The trial record is short, the testimony of 16 Commission witnesses and that of the two respondents being set forth in 302 pages. There were 43 Commission exhibits and one respondents' exhibit received in evidence. It is to be noted that by reason of the pleadings and briefs there is no dispute as to many of the facts and but little dispute as to others. There are a number of conflicts of testimony, however, on the verbal statements purported to have been made by the respondents to various prospective advertisers in the Trade Union News, and most naturally, wide differences of opinion as to the inferences to be drawn from certain basic evidence and the ultimate factual inferences drawn with respect to the guilt of the respondents as charged.

The hearing examiner has given full, careful and impartial consideration to all the testimony, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All documents, stipulations of fact, and those facts alleged in the complaint which are admitted in the answer also have been duly considered. And all statements, arguments, proposals, and briefs of counsel have been closely studied in the light of all the evidence.

All proposed findings of fact, conclusions of law, and orders submitted by the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected; and any pending offers of evidence, motions or objections made during the course of the proceedings not heretofore expressly granted, denied, or overruled are hereby denied or overruled.

Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint has fully sustained the burden of proof incumbent upon him, and has established by a preponderance of the reliable, probative and substantial evidence and the fair and reasonable inferences drawn therefrom, each and all the material allegations of the complaint to justify the findings hereinafter made, which findings, together with the conclusions of law applicable thereto, fully warrant the order herewith issued. The hearing examiner further finds generally that the evidence submitted by respondents is insufficient to establish any valid defense to the material violations of law charged in the complaint and established by the evidence. More specifically,

upon consideration of the whole record, the hearing examiner makes the following findings:

Undisputed and Substantially Undisputed Facts

The following facts alleged in Paragraph One of the complaint are admitted by paragraph 3 of the answer, as well as conceded in respondents' answering brief (p. 2), and are therefore found to be true.

Respondent Trade Advertising Associates, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 251 West 42nd Street, New York City, New York.

Respondents Joseph Lash and Eugene Serels are individuals and officers of the corporate respondent. * * * Their address is the same as that of the corporate respondent. Respondents Joseph Lash and Eugene Serels are also copartners, trading and doing business as Trade Union News, whose principal office and place of business is also located at 251 West 42nd Street, New York City, New York.

Respondents, however, deny in paragraph 3 of their answer the other allegations of Paragraph One of the complaint, hereinabove omitted, which are that said individual respondents, as corporate officers "formulate, direct and control the acts and practices of the corporate respondent, including" those particularly complained of in this proceeding. In the answering brief of respondents, while conceding the individual officer-respondent's general overall control of the business involved, there is also specific denial that either Lash or Serels personally practiced or authorized their employees to engage in the unlawful practices charged (p. 2). The evidence of respondent Joseph Lash definitely conceded the truth of respondents' general overall control (R. 15), and he further testified that he trains those whom respondents employ in the art of selling ads in the respondents' publication, the Trade Union News (R. 36–39). Respondent Eugene Serels also testified that he likewise trains their salesmen (R. 276–7). The methods used by each of these two respondents themselves, in obtaining or seeking to obtain ads for their publication, were credibly testified to by several witnesses who were solicited by interstate telephone calls (Douglas T. Johnson, president of Shoreline Washed Sand and Stone Company of Madison, Connecticut (R. 187–99) and David Cohen, formerly vice president of Comus Manufacturing Company of New Bedford, Massachusetts, more recently manager at that place of Miller Brothers Industries, also of New Bedford, Massachusetts, and currently vice president of the latter corporation (R. 215–7)). There is further some evidence from witnesses who received similar, although intrastate, telephone solicitations in the State of New York from persons stated, or believed, to have been one of the respondents (William E. Shreiber, vice presi-

dent of Paul A. Straub and Company (R. 63, 67–71) and David Friedman, president of City Wide Home Alterations Co. (R. 175)). Upon all of such evidence it is necessarily found that both of the individual respondents personally used the sales methods charged in the complaint as well as training their salesmen to employ such practices. As urged by counsel supporting the complaint, in any event it is well established that as the owners of the business involved, respondents Lash and Serels are responsible for the unauthorized, as well as for any authorized, activities of their salesmen. Such respondents therefore are properly included, both as corporate officers and as individuals, in the cease and desist order. See *F.T.C.* v. *Standard Education Society*, (1937) 302 U.S. 112, 120; *Parke, Austin & Lipscomb, Inc.* v. *F.T.C.*, (C.C.A. 2, 1944) 142 F. 2d 437, 440; and *Standard Distributors, Inc.* v. *F.T.C.*, (C.A. 2, 1954) 211 F. 2d 7, 13.

It is therefore found as alleged in Paragraph 3 of the complaint, although denied by Paragraph 3 of the answer and again denied in respondents' answering brief, that respondents Lash and Serels formulate, direct and control the acts and practices of the corporate respondent, including the particular types of acts and practices charged in the complaint and hereinafter more fully referred to and found to be unlawful.

The following facts alleged in Paragraph 2 of the complaint are admitted by Paragraph 2 of the answer and are therefore found to be true.

Respondents Joseph Lash and Eugene Serels, as copartners, are now, and for some time last past have been engaged in the publication of a tabloid size newspaper known as Trade Union News.

Respondents Trade Advertising Associates, Inc., and Joseph Lash and Eugene Serels, individually and as officers of said corporation, perform the advertising functions of Trade Union News, including the solicitation of advertisements appearing in said publication.

All of the respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

It will be noted that the respondents' admission of the last above quoted sentence is inconsistent with their special denial of certain allegations of Paragraph One of the complaint above referred to. But, since the evidence referred to herein so substantially sustains such allegation in any event, detailed analysis of one such inconsistency of respondents' answer is wholly unnecessary.

While naturally not alleged in the complaint, relevant evidence received over respondents' objections (R. 10–13) shows that immediately following the service of the complaint upon them on July 10, 1963, respondents Lash and Serels organized a new and different corporation in New Jersey called Trade Union News of New Jersey, Inc.,

which began business on July 15, 1963. Respondent Lash claimed that it is also being published as a labor newspaper, its business address being 20 Branford Place, Newark, New Jersey (R. 13). The evidence further shows that the officers of this newly organized New Jersey corporation, the respondent Trade Advertising Associates, Inc., as well as the respondent New York corporation, are Lash as president and Serels as secretary-treasurer (R. 13–15). Also the evidence shows that the only stockholders and directors of each of the two corporations, Trade Advertising Associates, Inc., and this newly organized one, are the respondents Lash and Serels and the wife of each of them, each of the four holding one-fourth of the stock in each (R. 13–15). Both corporations are definitely close corporations, but there is no claim or proof that either of the wives took any active part in their husbands' businesses. Serels corroborated Lash and stated that the first issue of Trade Union News of New Jersey had been published in September 1963 and that both respondents, together with two employees, solicited advertising for this new publication (R. 262–4).

The following facts alleged in Paragraph 3 of the complaint are admitted by Paragraph 2 of the answer and are therefore found to be true.

The publication Trade Union News is published monthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other States of the United States.

Further, respondents in the course and conduct of their business, engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

There is substantial undisputed evidence that respondents chiefly use the long-distance telephone in communicating with prospective purchasers of advertising in the Trade Union News and also in seeking subsequent ads from former advertisers. In addition to the testimony of the 16 advertiser and non-advertiser witnesses, both respondents Lash (R. 36–38, 292–3) and Serels (R. 253–8, 273–4) testified extensively as to the use of the telephone by them and their salesmen. It is further undisputed that the United States mails were used by respondents in billing and collecting, or attempting to collect, amounts claimed by them to be due from persons whose advertisements had been placed in such publication (R. 34–35, 273–4).

Some of the communications by telephone and by mail were made wholly within the State of New York, but seven of the witnesses called by the Commission testified to interstate communication by respond-

ents with them by means of these two media, such witnesses being located respectively in the several States of Connecticut (Douglas T. Johnson, R. 186–99, CX 38; and Clarence H. Riedle, R. 199–211, CX 39–42), Massachusetts (David Cohen, R. 214–9), New Jersey (Charles Kane, R. 113–8, CX 1, p. 14; and A. E. Cooper, R. 212–4, CX 2, p. 13, CX 29–A&B), Pennsylvania (George W. Frey, R. 154–62, CX 24–28), and Maryland (Edward J. Baney, R. 225–38, CX 43). And further, not only is respondents' use of such media admitted as being general throughout the United States, but numerous advertisements appearing in various issues of the Trade Union News, in evidence, are confirming and convincing evidence of the widespread use of such media in 1962 and 1963, as well as of the substantial public interest involved herein (CX 1, 2, 3, 4, 35, 48 and 49). These issues of the Trade Union News show that each carries an average of about ten advertisements per page and the seven issues in evidence show advertisements from all states of the Union except Alaska, Hawaii, and several of the small Rocky Mountain area states. Since these publications occur 12 times a year, and contain from 24 to 36 pages at an advertising rate of $1,100 per page (about one-half of each publication being advertisements), the gross annual income of respondents therefrom has been substantially in excess of $100,000, plus annual subscriptions which respondents were unable to estimate. Other allegedly substantial businesses of respondents (R. 15–16), which are not involved in this proceeding, have not been considered.

The allegations in the first part of Paragraph 4 of the complaint are admitted by Paragraph 4 of the answer. Upon such admission as well as upon the foregoing evidence, the following facts are found to be true.

> A large part of respondents' income is derived from the sale of advertising space in the Trade Union News to business concerns. Respondents and their duly authorized agents and representatives contact said business concerns by telephone and other means and seek to induce them to purchase advertising space in said publication. * * *

First Charge of Complaint Sustained

With respect to the first charge of the complaint that respondents have falsely claimed union support or connection for their publication, a substantial number of witnesses credibly testified that respondents, or their sales representatives, either directly or by implication, had stated, and represented to them as prospective advertisers in order to induce and persuade them to buy advertising space in the Trade Union News, that such publication was endorsed by, affiliated with, or an official publication of a labor union (Maurice Pigrish, R. 120–3; George W. Fry, R. 155; David Friedman, R. 176; Douglas T. Johnson, R. 188,

190–1; Clarence H. Riedle, R. 204–5; David Cohen, R. 216–7; and Edward J. Baney, R. 127). These solicitations included, among other representations, statements that respondents were representing the C.I.O., or labor unions generally, and could help out if the solicited person or his company were ever in any trouble or had problems with labor unions. Also, such statements implied that the respondents might influence the depositing of union funds into a savings and loan association, and by way of cajolement, that "the [union] boys" would appreciate the purchase of an ad (R. 204), and even by way of implied threat that "there might be a time when you need help" (R. 176). Respondents' counsel argues that some of these statements either were not positive or were withdrawn, but from a fair consideration of each of such testimonies as a whole no other conclusion can be reached than that respondents claimed to have union connections or authority.

While respondents Serels and Lash both categorically and repeatedly denied that they had ever personally represented to prospective advertisers, or that they had ever authorized their salesmen to represent, that the Trade Union News is endorsed by, affiliated, or associated with any trade union (Serels, R. 272–3, 276–9; Lash, R. 285, 287–8, 289–90), considering their interest as opposed to that of the witnesses who testified to the contrary, the great weight of the credible evidence on the subject strongly contradicts them. It is therefore found that the following allegations of Paragraph Four of the complaint are factually true although specifically denied in Paragraph 4 of the answer:

In the course of said solicitations [for advertisements], respondents and their agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication is endorsed by, affiliated with or an official publication of a labor union.

Certain allegations of Paragraph 5 of the complaint are admitted in Paragraph 5 of the answer. It is therefore found as so alleged and admitted "that in truth and in fact, Trade Union News is not endorsed by, affiliated with, or an official publication of, a labor union, or in any manner connected with a labor union, but is independently organized and operated."

Respondents, however, in Paragraph 5 of their answer, deny the further allegations of Paragraph 5 of the complaint which are as follows:

Therefore, the statements and representations * * * [of respondents that their said publication is endorsed by, affiliated with, or an official publication of, a labor union] * * * are false, misleading and deceptive.

It is found from the evidence that such allegations are true and correct statements of fact, despite their denial by respondents. Such evidence is as follows.

Respondent Lash testified that he had acquired Trade Union News in 1959 when it was a dormant operation, although it had been published intermittently for 4 years prior thereto; that respondent Serels had joined him as a partner about the end of 1960 (R. 16–17); that Trade Union News had no employees except a free-lance writer and an editor, who are only occasionally employed; that the current editor at the time of hearing being one Eli Morrison, who is paid by the partnership Trade Advertising Associates (R. 14, 17–18); that the copy is sent to an outside printer who prints the paper (R. 18); and that both Lash and Serels solicit advertising (R. 15, 18). Lash claims in his testimony that this publication "is the nation's leading independent newspaper" (R. 13).

Respondent Lash testified that he had worked briefly, twice, for the Trade Union Courier in Newark, New Jersey, the first time as an advertising salesman for six or seven months in 1946, and the second time about five months in early 1960 (R. 19) as a manager and salesman (R. 23–24), and that Serels had also been a salesman for such publication (R. 24). Serels testified that he had been such an advertising salesman for the Trade Union Courier for a long period from about 1940 until 1959 (R. 251) and that he and Lash had been associated in such work for one month in 1959 (R. 251–2).

Upon this premise, counsel supporting the complaint invites attention to the case wherein the Trade Union Courier was found to have engaged in some of the same type of practices charged against respondents in the proceeding here, 51 F.T.C. 1275 (1955), *affirmed* in *Trade Union Courier Publishing Corporation* v. *F.T.C.* (C.A. 3, 1956) 232 F. 2d 636. The Commission's cease and desist order was enforced in 1960 by the Court of Appeals for the Third Circuit where a unanimous panel imposed extremely heavy fines on all respondents but one. This decision is unreported except in Vol. VI, Statutes and Court Decisions, Federal Trade Commission, 750 (6 S.&D. 750).

Counsel urges in substance that by reason of their prior employment by Trade Union Courier Publishing Corporation, respondents Lash and Serels necessarily had knowledge of the unlawfulness of the same or similar types of activities here alleged to be unlawful. The respondents object to any such inference. There certainly is no direct proof that respondents had knowledge of the proceedings and decisions in that litigation although if material it might well be inferred that they did know all about it. Lash and Serels each appeared to the examiner during the hearings to be a very sharp and knowledgeable person. And each had been with the Trade Union Courier during a part of the time of its said unlawful practices.

Early in the hearings, while respondent Lash was testifying, he called attention to the presence in the hearing room of a competitor, whom Lash claimed had also been formerly employed by the Trade Union Courier, and stated that some of the things he, Lash, was testifying to might be brought back to competitors and suggested the removal of such person from the room (R. 32). Such suggestion was overruled for good and sufficient reasons stated on the record (R. 32–33); and respondents were thereafter protected while testifying from giving any undue exposure to their alleged business secrets by stipulations that their business was substantial (R. 28–29, 32–33, 259–62). Also, previous to this, respondents' counsel had insisted upon inviting attention on the record to irrelevant pending litigation between the respondents and Trade Union Courier as a supplement to his objections to any inquiry with reference to the prior employment of respondent Lash by Trade Union Courier (R. 19–23).

These circumstances while irrelevant to the issues in this case, nevertheless indicate that there has been unpleasantness and misunderstanding, culminating in litigation, between respondents and Trade Union Courier; and such matters, added to the evidence already referred to, might well lead one to the conclusion that the practices followed by the respondents were known by them to be essentially similar to those used by Trade Union Courier. But knowledge and intent are not essential elements in the type of proceeding now before the examiner for decision; and it is not necessary to establish or find any such actual knowledge on respondents' part. Respondents, however, must be held to notice that in the Trade Union Courier case such types of practices had been held to be unlawful. This is pursuant to the ancient maxim that every man is presumed to know the law. That case and several other Commission and judicial decisions are officially noticed as the applicable law. Such decisions unmistakably hold that it is violative of the Federal Trade Commission Act for publishers to represent falsely that their publication has been endorsed by labor unions or organizations. See *Bernstein, d.b.a. American Labor Digest*, (1953) 50 F.T.C. 354, 357–358; *Ernest Mark High*, (1959) 56 F.T.C. 625, 628, 630, 633–635; *Brondabrooke Publishers, Inc. etc. et al.*, F.T.C. Docket No. 8546 (October 11, 1963) [63 F.T.C. 1023], mimeograph opinion of the Commission affirming the initial decision of the hearing examiner, particularly his findings of fact 4 and 5 and his conclusion of law (pp. 1026, 1027 of such initial decision filed August 7, 1963). In the opinion in *Ernest Mark High*, *supra*, Commissioner Kern, speaking for the entire membership of the Commission, laid the clear parallel between

that case and the first charge herein, where, *inter alia*, it was stated and held (56 F.T.C. at p. 630):

The record discloses numerous overt efforts on the part of respondent's agents to sell advertising in a labor sponsored periodical with the idea that the advertiser would thereby purchase labor's good will, the clear implication being that otherwise the whiplash of labor's ill will might be incurred. * * * [R]espondent's counsel's brief * * * seems to indicate that one can buy friendship, and second, that labor's friendship is for sale. We prefer to believe that both of these conclusions are false and that responsible labor elements will reject such arguments even as we do.

The respondents nevertheless contend, in substance, that no one could be deceived into believing that the Trade Union News was in any way connected with a labor union because of its masthead. This consists of the capitalized words "Trade" and "Union", in 60 point extra-bold-face type, between which is a picture of a globe [portraying the western hemisphere with parallels of latitude and longitude] upon which the word "News" in 36 point extra-bold-face type is superimposed, while on the line below appears the capitalized legend, "The Nation's Leading Independent Labor Newspaper" in 14 point bold-face type. As counsel supporting the complaint ably argues, since the initial sale of advertising is always made by telephone, the masthead reveals nothing to any such prospect. And even where the advertiser has actually seen the publication's masthead, the language used in it would not reveal to the average reader that such newspaper was not connected with a union or unionism generally. It is noted that the masthead used on the editorial page omits the words "The Nation's Leading Independent Labor Newspaper" altogether and merely says "Dedicated in general to the cause of Trade Unionism" (CX 1, p. 5; CX 2, p. 5; CX 3, p. 2; and CX 4, p. 2). Elsewhere in such issues there is no qualification whatsoever to the paper's name (CX 1, pp. 2, 11 (bottom of right hand column), 16; CX 2, pp. 1 (bottom of right hand column), 2, 16; CX 3, pp. 1 (bottom of right hand column), 16; and CX 4, pp. 1 (bottom of right hand column), and 16). In substance, the said legend "The Nation's Leading Independent Labor Newspaper" is not an integral and indispensable part of the newspaper's name although that language is employed on respondents' letterheads, statements of account, and various other business documents for external use (CX 5–8, 11, 15–19, 21, 24–28, 30 b and c, 31(b), 32(b), 33 (b) and (c), 34 (b), (c) and (d), 36, 38, 39, 41, 43, 45 and 46).

The respondents have further argued in this connection that each of their two publications, the Trade Union News published for three years past by the partnership of such name in New York and the Trade Union News of New Jersey published since August 1963 by the individual respondents' new corporation, clearly states on its mast-

head that it is an "Independent Labor Newspaper" and that no one could be misled by the words "Trade Union" in the title into believing that either of such newspapers was in any way connected with a labor union. But the words "trade union" mean a "union", not a private business partnership or corporation for profit. The words "trade union" and "labor union" are used interchangeably in the law as well as in common parlance. For example, see 87 CJS, p. 762, Trade Unions, § 1: "A trade or labor union is a combination of workmen of the same trade or of allied trades for the purpose of securing by united action the most favorable conditions with respect to wages, hours of labor, etc. for its members." To the same effect, see 31 Am. Jur. 394, Labor, §§ 13, 14; and Black's Law Dictionary, p. 1015, Labor Union, and p. 1666, Trade Union. It is not clear whether there is any such thing as an "independent labor union", but there certainly is no such thing as a private labor union. It is, of course, common practice of trade unions to use newspapers to present their causes to the public. See 87 CJS, p. 779, Trade Unions, § 15, note 87 and cases cited. It therefore follows that the respondents even by claiming to be an "independent labor newspaper" in the second line of the mastheads of their publications could not erase the impression necessarily conveyed to their advertisers and other readers by the words "Trade Union News" in the first line thereof that they were publications either endorsed by, affiliated with, or officially published by a labor union.

Second Charge of Complaint Sustained

It is alleged in Paragraph 6 of the complaint that there appear "[p]rominently displayed on the front page of Trade Union News * * * the following statements: 'Winner of the National Trade Union Advertising Award' and 'Winner of International Editorial Excellence Award'."

In Paragraph 6 of the answer, respondents, while in general denying the said allegations of Paragraph 6 of the complaint, in effect admit that their said publication did display the said statements as alleged by further pleading that such statements do not currently exist or appear on the front page of said publication. It is uncontradicted in fact, however, that the alleged awards during the 12-month period of their publication in the front page masthead of the Trade Union News were pure fiction devised by the respondent Serels. Respondent Lash, strangely, claimed to have no knowledge of how such "awards" came to be, and referred to respondent Serels as authority for the use of such language in the masthead (R. 53–54). Serels freely admitted that he himself, together with a couple of respondents' editors, determined that the "International Editorial Excellence Award" should be given

to the paper by Serels and that no independent board existed which held a bona fide contest and made such award upon a fair and unbiased comparison of various labor newspapers, including respondents' Trade Union News. Serels testified quite cavalierly and freely to some extent on this subject (R. 267–71), among other things saying that in making such "award" he had not considered comparing the Trade Union News with any other labor newspaper because "I felt it was our baby. If I wanted to give them [sic] a present, I would. I liked it." (R. 267.) He also awarded the publication a trophy (R. 268) and further testified that the National Trade Union Advertising Award was conceived and devised by him under similar circumstances (R. 269–70). Serels also testified that he had looked at a certain labor paper which claimed in its masthead to have received such awards and had "felt ours was far superior and we were not invited to their competition". He decided to give a similar award to respondents' paper. The labor paper he referred to is in the record as respondents' exhibit 1 and is a copy of the "AFL–CIO Milwaukee Labor Press", Vol. XXII, No. 10, issue of September 12, 1963, carrying in its masthead the identical award language plagiarized verbatim by the respondents—quite evidently from an earlier issue of said Milwaukee paper. There is no evidence as to whether the statements in the masthead of respondents' exhibit 1 are true or not, but that is immaterial. The unvarnished fact remains that the respondents seems to consider the purloining and use of such plagiarized langauge perfectly proper although Serels frankly conceded that he did not feel the so-called awards had any merit or meaning, such being "just a new suit that we put on the new baby" (R. 269–70).

These purely fictitious statements respecting such awards had appeared in about 12 issues of the Trade Union News, but after the filing of the complaint in this proceeding [because "the Federal Trade Commission objected to it"], such statements were removed from subsequent issues (R. 268–71). Respondent Lash testified to the same effect (R. 50–51).

Because these false cliches were thus eradicated, respondents' counsel contends that his clients voluntarily discontinued the use of such statements "without any order of the Federal Trade Commission or any other administrative agency". But under numerous judicial and Commission decisions this does not constitute any defense. The principles are too well established and the cases too numerous to warrant extensive citation and quotation here. They are collated in Vol. 3, C.C.H. Trade Regulation Reporter, § 9641.36–38, pp. 16, 147–16, 149. For a very recent judicial decision citing several earlier cases see *Carter Products, Inc.* v. *F.T.C.* (C.A. 7, Sept. 27, 1963) 323 F. 2d 523,

Part III. The discontinuance or abandonment of an unfair practice is not an absolute defense in any case but one which must be determined by the Commission in the exercise of sound discretion. Among the basic elements necessary to maintain such a defense are: self-recognition of wrongdoing, voluntary discontinuance of unfair practices as well as demonstrated good faith, and the intent not to resume the same. None of these elements exist here. There is not a word in the record to indicate the slightest belief by respondents that it was wrong for them to falsely represent to their subscribers, advertisers, and the public generally that they had received high awards of merit based on the excellence of their advertising or editorials. Their discontinuance of these representations came belatedly and only after they had been served with the complaint herein. And certainly their almost instant organization of the new publication in New Jersey after such complaint was served shows anything but a good faith desire to refrain from any such unfair practice in the future; but to the contrary infers they believed they could and would use such language again with impunity in the masthead or elsewhere in a new publication issued by a corporation not made a respondent herein.

It is further charged in Paragraph 7 of the complaint with respect to the use of such language relating to these nonexistent awards that:

> By and through the aforesaid statements and representations, respondents represent, directly or by implication: * * * That Trade Union News was adjudged the most outstanding publication in competitive contests in which a representative number of competing publications were considered and in which all competitive publications were afforded an equal opportunity to compete. * * * That the winner of said "awards" was elected by a group of impartial and qualified individuals.

Respondents, in Paragraph 7 of the answer, deny generally these allegations. Since the awards were admittedly absolutely false and self-bestowed, however, such statements and representations of respondents can have no other effect upon the reader who is not informed of the true facts than as their meaning and import is alleged in the language last above quoted.

As alleged in Paragraph 8 of the complaint, which is only qualifiedly denied in Paragraph 7 of the answer, upon the evidence hereinbefore recited it is necessarily found that "[i]n truth and in fact:

> * * * Trade Union News has not been adjudged the most outstanding publication because no competitive contests were held in which a representative number of competing publications were entered, nor were all competitive publications afforded an equal opportunity to be considered.
>
> * * * The winner of said "awards" was not selected by a group of impartial and qualified individuals, but was selected by respondents Trade Advertising Associates, Inc., Lash, and Serels.

Therefore the said statements and representations, so pleaded in the second charge and admitted by respondents, are false, misleading, and deceptive. While there is no direct evidence that such false statements have actually misled any advertiser or other person, such deliberately untrue statements unquestionably did have the capacity and tendency to mislead and deceive anyone not conversant with the true facts into believing respondents' Trade Union News was actually an outstanding labor newspaper of recognized outstandingly superior merit. The second charge of the complaint is therefore fully sustained. No precise precedent has been either cited or found. This does not, however, foreclose a finding that respondents' practices are unlawful as the Federal Trade Commission Act was particularly framed broadly in order to encompass practices found by the Commission upon substantial evidence to be unfair. See *F.T.C.* v. *R. F. Keppel & Bro., Inc.*, (1934) 231 U.S. 304, 309–311; *F.T.C.* v. *Standard Education Society et al.*, (C.C.A. 2, 1936) 86 F. 2d 692, 695–696; and *Goodman* v. *F.T.C.*, (C.A. 9, 1957) 244 F. 2d 584, 588–591 and cases cited.

Third Charge of Complaint Sustained

It is charged in Paragraph 9 of the complaint that:

In the course and conduct of their business, respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

This charge, while denied in its entirety by respondents in Paragraph 1 of their answer and in their testimony, is strongly upheld by abundant testimony and exhibits offered and received in support of the complaint. Nine witnesses testified credibly that ads were placed in respondents' Trade Union News without their authority, were published therein, and that they received bills therefor. While some of these witnesses refused to pay the bills, others did so for various reasons and were, in substance, buying their peace. The three witnesses who received interstate communications with reference to the placement of ads, and subsequent requests therefor, were: Charles Kane (R. 115); Edward J. Baney (R. 227); and A. E. Cooper (R. 212). Similar testimony with reference to intrastate communications from respondents was given by six New York witnesses who were: William E. Schreiber (R. 63–70); Margaret E. Neil (R. 77–83); Maurice Pigrish (R. 126); John J. Delaney (R. 135–6); Irving Stachel (R. 146–50); David Friedman (R. 172–3); Herbert Baner (R. 220–2); and Harold F. Klein (R. 229–44). A number of these witnesses identified various documents in support of their statements as to respondents repeated requests for payment of unauthorized bills (CX 5–11, 15–22,

24–28, 36, 38, 39, 41, 43, 45–47) and several identified checks given respondents in payment for such purported obligations (CX 23, 37, 40(a), (b) and 42(a), (b)). Such acts on the part of respondents were not accidental or only occasional. They were the follow-ups on thousands of telephone calls. Each edition of the Trade Union News carried an average of 160 or more ads. Serels testified that respondents had had about eight salesmen all told (R. 276), only one of which had been discharged for misrepresentation (R. 281). While unable to give a definite answer as to how many calls he personally made per day, an average would be more than five calls per week per man (R. 283). On that assumed basis alone, the two respondents, with several salesmen making calls on business days throughout the year, made literally many hundreds of telephone calls annually seeking advertisements for respondents' publications.

There is abundant precedent that the placing of advertising without authority and seeking to exact payment therefore constitute unfair competition and unfair practices in violation of the Federal Trade Commission Act. *Bernstein d.b.a. American Labor Digest, supra*, 50 F.T.C. at pp. 354 (syllabus (c)) and 358; *Trade Union Courier Publishing Corp. et al., supra*, 51 F.T.C. at pp. 1275 (syllabus), 1287–1290, 1293, 1294 and 1299–1300, *affirmed* and *enforced* 232 F. 2d 636, *supra; Ernest Mark High, supra*, 56 F.T.C. at pp. 625–626 (syllabus), 627–628; and *Brondabrooke Publishers, Inc. et al., supra, Docket No. 8546* [63 F.T.C. 1023], *initial decision*, p. 1027, par. 6.

It is therefore found that the allegations of Paragraph 9 of the complaint are factually true and that the third charge of the complaint is abundantly sustained.

Competition Admitted by Respondents

The allegations of Paragraph 10 of the complaint are admitted in Paragraph 2 of the answer and it is therefore found that:

In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

It may be added that in the course of the testimony of respondent Lash, he made reference to the existence of competitors as hereinbefore stated.

Summary

Paragraph 11 of the complaint is denied by respondents in Paragraph 1 of the answer. But from the facts hereinabove found, and

from inferences fairly and reasonably drawn therefrom, it necessarily follows and is therefore found that these allegations in said paragraph 11 of the complaint are factually true.

The use of respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of nonexistent debts.

Upon all the facts hereinabove found and for the reasons hereinafter stated, the hearing examiner draws the following:

Conclusions of Law

1. *Jurisdiction*

The respondents were not only duly served with process but answered the complaint and the individual respondents also appeared at the hearings. All respondents have been represented by counsel and have vigorously contested the proceeding throughout, thereby completely submitting their respective persons, individual, official and corporate, to the jurisdiction of the Commission.

As to the Commission's jurisdiction over the subject matter, the evidence indicates that while a very large part of the acts and practices of the respondents took place wholly within the State of New York, their numerous and repeated communications in interstate commerce by telephone and through the United States mails initiated, carried on, and brought to fruition the acts and practices complained of in this proceeding in such commerce between their place of business in New York and practically every other State of the United States. It is, of course, basic that violations of the Federal Trade Commission Act must not merely affect interstate commerce but "must be *in* such commerce", *Asheville Tobacco Board of Trade, Inc. et al.* v. *F.T.C.*, (C.A. 4, 1959) 263 F. 2d 502, 507, 508. See also *Holland Furnace Company* v. *F.T.C.*, (C.A. 7, 1959) 269 F. 2d 203, 208, 209, *cert. den.* (1960) 361 U.S. 932. These two comparatively recent cases both rely upon the landmark case of *F.T.C.* v. *Bunte Bros.* (1941) 312 U.S. 349. Considerable evidence of what took place in New York State was received in corroboration of the general type of practices respondents were charged with and herein found to have carried on extensively in interstate commerce. In addition to soliciting and obtaining advertising in these various States of the Union, respondents also obtained advertising in Puerto Rico (CX 49, p. 7) which for purposes of the

antitrust acts may be also considered as a State (Section 48, U.S.C.A. § 734, construed in *People of Puerto Rico* v. *Shell Co. (P.R.), Limited et al.*, (1938) 302 U.S. 253, 260. Although the record shows respondents have also obtained advertising from at least three provinces of the Dominion of Canada (Ontario, CX 1, p. 8; CX 2, pp. 3, 10; CX 4, p. 11; CX 48, p. 6; Newfoundland, CX 2, p. 4; and Alberta, CX 48, p. 5), the charges in this proceeding are premised solely upon interstate commerce, and there is no special evidence relating to respondents' Canadian activities. Therefore, no finding has been herein made in respect to foreign commerce or violations of the Federal Trade Commission Act with reference thereto. If pleaded, however, the Commission would have had jurisdiction to hear and determine whether any such violations had occurred in foreign commerce. See *Branch* v. *F.T.C.* (C.A. 7, 1944) 141 F. 2d 31, 34–35.

It is therefore concluded that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the persons of all the respondents herein.

2. *Public Interest*

Paragraph 12 of the complaint alleges conclusions of law which are denied by respondents in Paragraph 1 of the answer. The first of these conclusions relates to the question of public interest. Respondents' counsel contends, *inter alia*, (Answering brief, pp. 10–12) that although there was a "huge amount of advertisements" in Trade Union News, the small number of complaining persons who testified are such "an infinitesimal percentage of the total number of advertisers" that there is no substantial proof of prejudice to the public. It is, of course, impossible within reasonable limits of time and expenditures to take the testimony of a very large number of complaining witnesses in numerous places, as to which procedure, if followed, the respondents would be the first to complain of, and justly so. The complaining witnesses who testified to respondents' practices, hereinbefore found to be unlawful, came from several different states in the northeastern part of the country and were corroborated as to the generality of such practices by a number of witnesses in New York State. Respondents' practices were sufficiently spread in time and space to establish that they were habitually and generally followed by respondents.

From the facts which have been found, it is necessarily concluded as a matter of law that, as alleged in Paragraph 12 of the complaint, "The acts and practices of respondents * * * were, and are, all to the prejudice and injury of the public * * *." There is, therefore, public interest in this proceeding which is specific and substantial with respect to each of the three charges of the complaint.

3. *Violations of Federal Trade Commission Act*

While respondents contend there is no evidence of any injury to respondents' competitors (Answering brief, p. 12), it is, of course, well established that since the 1936 amendments to the Federal Trade Commission Act, it is unnecessary to prove injury to competitors where findings of unfair practices have been made. See *Parke, Austin & Lipscomb, Inc.* v. *F.T.C.*, *supra*, at 142 F. 2d 441, *Cert. den.* (1944) 323 U.S. 753; and *Koch et al.* v. *F.T.C.*, (C.A. 6, 1953) 206 F. 2d 311, 319. Therefore, upon the findings hereinbefore made, the examiner necessarily concludes that, as alleged in Paragraph 12 of the complaint, the respondents' said acts and practices "were and are all to the prejudice and injury * * * of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act."

Upon the foregoing findings and conclusions, which warrant a broad order, the following is herewith issued:

ORDER

It is ordered, That respondents Trade Advertising Associates, Inc., a corporation, and its officers, and Joseph Lash and Eugene Serels, individually and as officers of said corporation, and as copartners trading and doing business as Trade Union News, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the soliciting, offering for sale or sale in commerce of advertising space in the newspaper now designated as Trade Union News, or any other publication, whether published under that name, or any other name, and in connection with the offering for sale, sale or distribution of said newspaper, or any other publication, 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 said newspaper is endorsed by, affiliated with, or an official publication of, or otherwise connected with a labor union or trade union.

2. Representing that said newspaper was the "Winner of the National Trade Union Advertising Award" or "Winner of International Editorial Excellence Award", or otherwise misrepresenting that any of respondents' publications has been presented with an award or distinction as a result of a competitive contest.

3. Misrepresenting in any manner that competitive contests are or have been conducted by impartial and qualified individuals to determine the relative quality or merits of any of respondents' publications in comparison with competing publications.

4. Placing, printing or publishing any advertisement on behalf of any person, firm, or corporation, in any of respondents' publications without a prior order or agreement to purchase said advertisement.

5. Sending bills, letters or notices to any person, firm, or corporation, with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person, firm, or corporation, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

Decision of the Commission and Order to File Report of Compliance

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

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel supporting the complaint, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

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

It is further ordered, That the hearing examiner's initial decision, filed December 6, 1963, be, and it hereby is, adopted as the decision of the Commission.

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

In the Matter of

ROY WEAVING COMPANY, INC., ET AL.

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

Docket C-746. Complaint, May 20, 1964—Decision, May 20, 1964

Consent order requiring Brooklyn, N.Y., manufacturers to cease violating the Wool Products Labeling Act by such practices as labeling as "100% all wool", piece goods which contained a substantial quantity of other fibers,

and failing to show on labels the registered identification number of the manufacturer and the true generic names of fibers present in certain fabrics, as well as the percentages thereof; and to cease violating the Federal Trade Commission Act by statements on invoices and shipping memoranda which falsely represented the different fibers and quantities thereof present in certain fabrics.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Roy Weaving Company, Inc., Perth Woolen Company, Inc., and Weldon Woolens Inc., corporations, and Emanuel Seideman and Bella Seideman, individually and as officers of said corporations hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939 and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Roy Weaving Company, Inc., Perth Woolen Company, Inc., and Weldon Woolens Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their principal place of business located at 71-07 60th Lane, Brooklyn, New York. Individual respondents, Emanuel Seideman and Bella Seideman are officers of said corporations and cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondents including the acts and practices hereafter referred to. The addresses of the individual respondents are the same as that of the corporate respondents.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since 1963, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

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

Among such misbranded wool products, but not limited thereto, were certain piece goods labeled or tagged by respondents as "100%

all wool" whereas in truth and in fact said products contained a substantial quantity of fibers other than wool.

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

Among such misbranded wool products, but not limited thereto, were wool products with labels which failed:

1. To show the name or registered identification number of the manufacturer of the wool product or of a person subject to Section 3 of the Wool Products Labeling Act with respect to such wool product.

2. To show the true generic names of the fibers present; and

3. To disclose the percentage of such fibers.

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

PAR. 6. Respondents are now, and for sometime last past, have been engaged in the offering for sale, sale and distribution of products, namely fabrics, to manufacturers. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Respondents in the course and conduct of their business as aforesaid, have made statements on their invoices and shipping memoranda to their customers misrepresenting the character and amount of the constituent fibers present in such products. Among such misrepresentations, but not limited thereto, were statements representing certain fabrics to be "30% Mohair, 15% Wool, 45% Viscose, 10% Cotton" whereas in truth and in fact the said fabrics contained substantially different fibers and quantities of fibers than were represented.

PAR. 8. The acts and practices set out in Paragraphs Six and Seven have had, and now have, the tendency and capacity to mislead and deceive purchasers of said fabrics as to the true content thereof and to cause them to misbrand products manufactured by them in which said materials are used.

PAR. 9. The acts and practices of the respondents set out in Paragraphs Six and Seven were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now

constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Decision and Order

The 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 Wool Products Labeling Act of 1939, 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 Roy Weaving Company, Inc., Perth Woolen Company, Inc., Weldon Woolens Inc., 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 at 71–07 60th Lane, Brooklyn, in the city of New York, State of New York.

Respondents Emanuel Seideman and Bella Seideman are officers of all of the above corporations and their 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 Roy Weaving Company, Inc., Perth Woolen Company, Inc., and Weldon Woolens Inc., corporations, and their officers, and Emanuel Seideman and Bella Seideman, individually and as officers of said corporations, their agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment in commerce, of wool fabrics or other wool prod-

ucts, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding of such products by:

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

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

It is further ordered, That respondents Roy Weaving Company, Inc., Perth Woolen Company, Inc., and Weldon Woolens Inc., corporations, and their officers, and Emanuel Seideman and Bella Seideman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of fabrics or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

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

IN THE MATTER OF

PACIFIC MOLASSES COMPANY ET AL.

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

Docket 7462. Complaint, Apr. 1, 1959—Decision, May 21, 1964

Order requiring a San Francisco importer and distributor of "offshore" and domestic molasses throughout the United States, to cease discriminating in price in the sale of "blackstrap" molasses by allowing its favored customer-distributors a discount of ½¢ to 1¢ per gallon—the latter being a reduction of nearly 10% from the published prices charged other customers—while selling to nonfavored customers at the established market price without any discount, which difference, because of the highly competitive nature of the business, readily determined the loss or retention of resale customers.

COMPLAINT

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

PARAGRAPH 1. Pacific Molasses Company, respondent herein, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 215 Market Street, San Francisco, California. Respondent corporation is a wholly owned subsidiary of the United Molasses Company, London, England.

Respondent James M. Ferguson is president, respondent F. W. Earnhardt is vice president, secretary and treasurer, and Bascom Doyle is branch manager of respondent corporation with their address the same as that of the corporate respondent. Said individual respondents formulate, direct and control the policies, acts and practices of the corporate respondent herein named.

PAR. 2. Respondents are principally engaged in the importation, distribution and sale of "offshore" and domestic molasses throughout the United States. Respondent corporation's total sales in 1955 were approximately $15,600,000.

Respondents maintain a number of storage terminals at various locations throughout the United States and sell and ship said molasses to customers located in several of the States of the United States. Respondents, in the sale of said molasses, have at all times relevant herein been, and are now, engaged in commerce, as "commerce" is defined in the amended Clayton Act.

PAR. 3. In the course and conduct of their business, the respondents have been and are now in substantial competition in the sale of "blackstrap" molasses with other sellers of such product. In many areas respondents sell their products to two or more molasses distributors who are in substantial competition each with the other in the resale of said product.

PAR. 4. In the course and conduct of their business in commerce, the respondents have been and are now, in each of several trading areas, and in particular in the Houston, Texas, area, discriminating in price in the sale of "blackstrap" molasses of like grade and quality by selling said product to favored distributor-customers at significantly lower prices than they are selling to non-favored distributor-customers

who are competitively engaged, each with the other, in the resale of said product. One or more of the sales involved in such discriminations have been and are now in commerce, and said commodity has been and now is sold for resale within the United States.

Respondents have effected said discriminations between and among their customers in the manner and by the method hereinafter described.

In the course and conduct of their business in commerce, respondents sell "blackstrap" molasses to their favored customers-distributors at the established market price of said product less a specified discount of ¼¢ to ½¢ or more per gallon while respondents sell their non-favored distributor-customers at the established market price of said product without any discount whatsoever. Because of the highly competitive nature of the particular business, ¼¢ to ½¢ discount per gallon readily determines the loss or retention of resale customers by the distributor-customers of the respondents.

PAR. 5. The effect of respondents' discrimination in price, as above alleged, may be substantially to lessen, injure, destroy or prevent competition in the line of commerce in which respondents are engaged, and between and among distributor-customers of the respondents.

PAR. 6. The acts and practices of respondents, as above alleged, constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Mr. Eugene Kaplan, supporting the complaint.

Orrick, Dahlquist, Herrington & Sutcliffe, by *Mr. Christopher M. Jenks*, *Mr. William D. McKee*, and *Mr. Robert A. Keller*, of San Francisco, Calif., and *Mr. John E. Shea*, of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

DECEMBER 17, 1962

Statement of Proceedings

The Federal Trade Commission issued its complaint against the above-named respondents on April 1, 1959, charging them with having violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C., Sec. 13), by discriminating in price betweeen and among their customers in the sale of "blackstrap" molasses. After being duly served with said complaint respondents appeared by counsel and served their answer

in which they denied, in substance, the violations charged and alleged, as affirmative defenses, that any granting of lower prices to certain customers resulted from a good-faith meeting of competition or was in return for different services or functions performed by the customers.

Hearings on the charges were held in abeyance on request of complaint counsel, pending the disposition of a companion proceeding against a competitor of the corporate respondent. On motion of respondents, a prehearing conference was convened in Washington, D.C., on July 14, 1960. By agreement of counsel for the parties the transcript of said conference was made a part of the record of this proceeding. On motion of counsel supporting the complaint, made at the prehearing conference, Paragraph Four of the complaint was amended so as to alleged discrimination in price between and among so-called favored customers, in addition to discrimination between and among favored and non-favored customers.[1] Hearings were tentatively scheduled to begin in November 1960, but were delayed pending disposition of the companion case referred to above, other commitments of counsel and, finally, the death of former senior counsel supporting the complaint.

Pursuant to notice duly given, hearings for the reception of evidence in support of and in opposition to the complaint were commenced on May 28, 1962, in Houston, Texas. At the outset of said hearings respondents moved for a 15-day continuance due to the failure of counsel supporting the complaint to furnish them with a list of witnesses and of the documentary evidence to be offered, 15 days prior to the hearing, as agreed to at the prehearing conference. It appearing that seven of the eight witnesses proposed to be called by counsel supporting the complaint were customers of the corporate respondent (the eighth being respondent Doyle), that complaint counsel had supplied respondents with names of five of such witnesses at least four days prior to the hearing, that the documentary evidence proposed to be offered consisted largely of documents obtained from respondents' files or data submitted by their counsel, that respondents had delayed their motion until the day of hearing at which time all arrangements for the hearings had been completed, and that the nature of the issues and the evidence to be presented was such that there was a minimum possibility of surprise on the part of respondents, the undersigned denied the motion for a continuance and ordered the

[1] In its original form, the complaint alleged that respondents had granted discounts to certain "favored customer-distributors" which were not granted to "their non-favored distributor-customers". As amended, it alleged that respondents had also discriminated in price "between and among the aforesaid favored customer-distributors by granting higher discounts to some of them than are granted to others".

hearings to proceed. However, this ruling was made without prejudice to the right of respondents to request the recall of witnesses for completion of cross-examination in the event of surprise, and to request a recess in the hearings at the close of the case-in-chief in order to prepare for defense. Hearings on the charges thereafter proceeded from May 28 to June 1, 1962, in Houston, Texas.

At the close of the case-in-chief on May 29, 1962, respondents moved for a dismissal of the complaint based on an alleged failure of proof, which motion was denied by the undersigned. Respondents were granted a recess of one day to permit them to subpoena certain witnesses in support of their defense. After the calling of witnesses on May 31 and June 1, 1962, respondents represented that they had been unable to secure all of the witnesses whom they had sought to subpoena during the brief time alloted and requested a continuance in order to complete the presentation of their defense. Said motion was granted by the undersigned and hearings were recessed until July 10, 1962, at which time they were resumed in San Francisco, California, on request of respondents, and continued therein until July 16, 1962, for the reception of further evidence in opposition to the complaint.

All testimony taken in this proceeding was duly recorded and has been filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence, bearing on the issues.[2] At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order, together with supporting briefs, were filed by complaint counsel and respondents on August 30, 1962, and reply memoranda were filed on September 10, 1962.

After having reviewed the entire record in this proceeding, and the proposed findings and conclusions,[3] and the supporting briefs and

[2] Respondents contend that they were denied due process of law because of the examiner's refusal to grant them a continuance of 15 days from the date of the initial hearing. As indicated above, the examiner's denial of respondents' motion reserved to them the right to move to recall witnesses for further cross-examination. Respondents did not request the recall of any of the witnesses, with one exception. In the latter instance, without initially demonstrating surprise or inability to cross-examine the witness, respondents moved that cross-examination be postponed. Said request was denied. However, as indicated above, respondents later received a continuance of 40 days in order to interview additional witnesses and prepare for completion of their defense. Respondents had full opportunity to subpoena any of the witnesses who had been called by complaint counsel but, with one exception, elected not to do so. The record fails to establish that respondents were in any way prejudiced, either in the cross-examination of witnesses or in the presentation of their defense, because of the failure of complaint counsel to furnish them with a list of witnesses and exhibits 15 days prior to the initial hearing.

[3] Proposed findings and conclusions not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

memoranda, and based on his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

Identity of Respondents

1. Respondent, Pacific Molasses Company (sometimes referred to herein as Pacific), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 215 Market Street, San Francisco, California. Said respondent is a wholly owned subsidiary of United Molasses Company Ltd., of London, England.

2. Respondent James M. Ferguson is president, respondent F. W. Earnhardt is a vice president and secretary-treasurer, and respondent Bascom Doyle is a vice president of the corporate respondent. The business address of respondents Ferguson and Earnhardt is the same as that of the corporate respondent, and the address of respondent Doyle is 3036 Chartres Street, New Orleans, Louisiana. Respondent Ferguson, as president of the corporate respondent, formulates, directs and controls the policies, acts and practices of said respondent. The responsibilities of respondent Earnhardt as a vice president and secretary-treasurer relate principally to accounting financial and tax matters. Respondent Bascom Doyle is the corporate respondent's vice president in charge of its Gulf Division and, at the time of the events at issue, was branch manager of its New Orleans branch office having supervision over sales in the Mississippi Valley area.

Business of Pacific

3. Respondent Pacific is principally engaged in the importation and purchase of molasses in bulk quantities, and in the distribution and sale throughout the United States of "offshore" and domestic molasses, including blackstrap molasses. In the operation of its said business, it maintains a number of terminals at various locations throughout the United States where it stores molasses imported from abroad or purchased from domestic sources, and from which it sells and ships molasses to customers located in a number of the states of the United States. Its sales of molasses in 1955 amounted to approximately $15,600,000.

4. Blackstrap molasses is primarily a by-product of the production of raw sugar, but is also obtained from the production of refined sugar. Its principal uses are as an additive in making livestock feed (where it acts as a flavoring agent and source of energy), and as a raw material for the distillation of industrial alcohol. It is also used for fer-

mentation into yeast and vinegar, and for certain pharmaceutical purposes.

5. Molasses as produced at a plantation or refinery contains some water, and its specific gravity may therefore vary. If molasses has too much water, the feed to which it is added will tend to mold. For this reason certain standards have been set up in the industry to define the water and solid content of molasses as sold commercially. These standards are expressed in terms of the "Brix" content of the molasses, which is stated in degrees. Brix refers to the specific gravity of the molasses solution and is a measure of the total solid content in the blend of molasses and water. The standard brix content of commercially sold blackstrap molasses is 79.5°. Price quotations for blackstrap molasses are normally based on a 79.5° brix content. Molasses containing lesser amounts of water and consequently more solids is referred to as having a "heavier brix content" and, where desired by particular customers, is ordinarily sold at a higher price than standard molasses of 79.5° brix.

6. Among the terminals operated by respondent Pacific are those at Houston, Texas, and New Orleans, Louisiana, which are part of its Gulf Division and are under the direct supervision of respondent Bascom Doyle. The molasses stored at these terminals is imported principally from the Caribbean area, including a number of the offshore islands and Mexico, and to a lesser extent is purchased from plantations and sugar refineries in Louisiana. The offshore molasses is shipped to Pacific's terminals in ship cargoes, and that from Mexico is also shipped in rail tank cars. It is then resold, in lesser quantities, to various users and distributors.

7. The issues in this proceeding relate mainly to Pacific's pricing policies at its Houston, Texas terminal. Its customers at such terminal fall into two principal categories: (a) users of blackstrap molasses such as feed mills and feed lot operators, and (b) distributors engaged in the resale or redistribution of blackstrap molasses to the users thereof. The charge of price discrimination involves only the distributor-customers of respondent Pacific. Such customers generally purchase blackstrap molasses f.o.b. Pacific's Houston terminal, where they pick up the molasses in their own trucks or that of a contract carrier and haul it to their own customers located in various States of the United States, including Texas, New Mexico, Oklahoma, Colorado, Kansas, Nebraska, Missouri, and Arkansas. It is charged that respondents have discriminated in price by selling blackstrap molasses at discounts of ¼¢ to ½¢ or more, per gallon, to certain favored distributor-customers, and by granting higher discounts to certain of such customers than those granted to others.

Evidence of Price Discrimination

8. Pacific's prices to its distributor-customers in the sale of blackstrap molasses are based on its announced prices for molasses of 79.5° brix content, f.o.b. Houston. The price is announced to the trade and may change periodically in accordance with market conditions. Customers are generally notified in writing of such price changes. Prices are announced on both a per gallon and a per ton basis, sales being made on the basis of 171 gallons per ton of molasses. A price differential of 1/4¢ a gallon is equivalent to 43¢ a ton; a differential of 1/2¢ a gallon is equivalent to 85¢ a ton; and a 1¢ per gallon differential is equivalent to $1.71 a ton.

9. The evidence of the prices charged by Pacific to its customer-distributors involves principally the year 1955, and discloses that at various times during the year Pacific charged some customers prices below its quoted f.o.b. Houston price. The departures from the announced prices took three principal forms. One involved the granting of a fixed discount or price below the quoted Houston price. Such discounts generally varied from 1/4¢ to 1/2¢ per gallon below the Houston price, but at times ran as high as 1¢ below the announced Houston price. One customer consistently received a discount of between 1/2¢ and 1¢ from January to October 1955, while several other customers received intermittent discounts of between 1/4¢ to 1/2¢. The second form of price deviation arose out of contracts for future delivery or, as they were referred to in the record, "forward booking" contracts, under which various customers received a guaranteed ceiling price for deliveries made over a specified period of time. Under this arrangement the guaranteed ceiling price was periodically below Pacific's quoted price at the time of delivery, the amount of the differential generally being between 1/4¢ to 1/2¢ per gallon. A third form of price deviation involved the granting of so-called "price protection" to certain customers who had previously made sales to their own customers on the basis of Pacific's lower quoted price prior to a price change.

10. The purchases of various of Pacific's distributor-customers, the prices paid by them, and the extent of the deviations from Pacific's quoted Houston prices during 1955 are set forth in tabular form at the end of this decision, as Table 1. As appears from Table 1, the principal beneficiary of such price deviations was Fort Worth Molasses Company (sometimes referred to herein as Fort Worth). The price concessions received by Fort Worth were based mainly on a letter-agreement between it and Pacific, dated January 13, 1955, which provided that in consideration of Fort Worth's purchasing all of its molasses requirements from Pacific for the year 1955 (estimated at 30/40,000 short tons), Pacific would supply it with blackstrap molasses "on the

basis of our prevailing New Orleans price in effect at the time of each delivery". Historically, the New Orleans price is lower than the Houston price. This differential is usually at least ½¢ a gallon but, as appears from Table 1, at times is as much as 1¢ per gallon (which is the equivalent of $1.71 a ton). On September 26, 1955, the arrangement between Pacific and Fort Worth was modified and it was agreed that effective that date, on sales made f.o.b. Pacific's Houston terminal, the molasses "will be priced to you at ½¢ per gallon below our prevailing Houston price". This arrangement continued for a brief period until October 1, 1955, following which Fort Worth ceased purchasing its blackstrap molasses from Pacific and began buying from Pacific's competitor, Southwestern Sugar & Molasses Company. Forth Worth resumed purchases from Pacific in 1956, but the nature of the price arrangement does not appear from the record.

11. As appears from Table 1, during the period from January 17 to October 1, 1955, the total amount of the price concessions received by Fort Worth from Pacific was $24,487.70. Except for half of the allowances made on March 1 and from March 19–31, 1955 (which respondents contend were granted either as price protection or pursuant to a forward contract), substantially all of this amount was admittedly granted by Pacific as discounts from its regular Houston quoted price, involving either the receipt by Fort Worth of the benefit of Pacific's lower New Orleans price or, at the end, a flat ½¢ reduction from the Houston price.[4]

While, as indicated in Table 1, some of the other customers did receive periodic price concessions, these concessions were granted for relatively brief periods and were, with a few exceptions, not as large as those received by Fort Worth. Thus, Marco Chemical Company (sometimes referred to herein as Marco) received total price concessions of $791.59, of which all but $86.37 was received during the same period as those received by Fort Worth.[5] Of the total amount of the price concessions received by Marco, $546.09 is accounted for by discounts of ¼¢ a gallon, which were received during the period between March 19 and July 28, 1955. The balance of the differentials received by Marco consisted of price reductions resulting from forward-booking or price-protection arrangements. Whether such arrangements also reflect dis-

[4] According to respondents' computations (appearing in Table B of their proposed findings) the total amount of the discounts received by Fort Worth was $29.189.68. not including savings due to forward contracts or price protection. The total amount of the discounts according to the computations of complaint counsel is $24,316.63. It is immaterial to the conclusions reached herein which set of figures is used since, on any basis, it is apparent that the total amount of the discounts was substantial.

[5] The record contains price information beginning January 1, 1955. However, Table 1 does not reflect any price information prior to January 17, 1955, since that is the date of the first purchase by Fort Worth. The $86.37 saving referred to above occurred after October 1, 1955, when purchases by Fort Worth had ceased.

criminatory pricing as contended by counsel supporting the complaint, or are nondiscriminatory as contended by respondents, will be hereafter discussed. Despite the fact that Marco did receive price concessions totaling almost $800, the price concessions received by Fort Worth during a large part of the period at issue were even greater, ranging from ¼¢ to 1¢ in excess of those received by Marco. Based on the quantity which it purchased between January 17 and October 1, 1955, Marco would have received an additional saving of $3,677.09 if it had paid the same prices as Fort Worth.

As indicated in Table 1, C. & R. Molasses Company (sometimes referred to herein as C. & R.), received total price reductions of $947.50 between January 17 and October 1, 1955. Substantially all of this amount is accounted for by reductions resulting from forward-booking contracts, and did not involve the granting of discounts as such. Despite the savings realized by C. & R., Fort Worth had a price advantage of between ¼¢ and ½¢ during substantial portions of this period, except during the period from April 1 to May 2, when C. & R. had a price advantage of ¼¢ a gallon on 320 tons purchased by it. Based on the total amount of its purchases between January 17 and October 1, 1955, C. & R. would have received an additional $1,593.35 in savings if it had received the benefit of the discounts granted to Fort Worth.

Parris Molasses & Feed Company (sometimes referred to herein as Parris) is another distributor-customer which received some price concessions from Pacific. As indicated in Table 1, the total amount of the concessions received by Parris during the period at issue was $943.60. Approximately 40% of the savings realized by Parris was due to periodic discounts of ¼¢ per gallon, and the balance was the result of forward-booking contracts. Despite such savings by Parris, Fort Worth had a price advantage of between ¼¢ to ½¢ per gallon during most of the period, except between March 2 and April 15 when Parris had a price advantage of ¼¢ a gallon on 373 tons. Based on the quantity which it purchased between January 17 and October 1, 1955, Parris' net price disadvantage compared to Fort Worth amounted to $484.08, after making due allowance for substantial savings realized by Parris on forward-booking contracts.

The only other distributor-customer to receive any price concessions during the period at issue was B. G. Thompson. Thompson received a saving of $12.30 based on a differential of ½¢ a gallon on the purchase of 14 tons on March 1, 1955, which was granted as price protection against Pacific's price change occurring February 28, 1955. On the basis of the total amount which Thompson purchased between

January 17 and October 1, 1955, his net price disadvantage vis-a-vis Fort Worth was $1,611.65.

As indicated in Table 1, three other distributor-customers received no price concessions from Pacific during the period at issue. W. L. Hunt's price disadvantage vis-a-vis Fort Worth was between ½¢ and 1¢ per gallon, and amounted to $681.66 on the total amount which he purchased between July 6 and October 1, 1955. J. C. Barnes had a similar price disadvantage in comparison with Fort Worth, the total amount thereof being $624.53 on his purchases between January 17 and October 1, 1955. Yoakum Grain & Feed Company likewise had a disadvantage of between ½¢ to 1¢ a gallon compared to the prices paid by Fort Worth, which amounted to $121.06 from January 15 to September 12, 1955, on Yoakum's total purchases.

In addition to the distributor-customers as to which there is evidence of prices charged and quantities sold, as reflected in Table 1, the record also reveals that there were a number of other distributors to which Pacific sold molasses out of its Houston terminal.[6] Among these was Houston Molasses Company, which purchased 243 tons of molasses from Pacific in 1955 on none of which, according to credited testimony of its principal owner, did it receive any discount. In addition, Pacific sold to at least eight other distributors during 1955 in amounts varying from 347 tons to over 4,000 tons. So far as appears from the record, none of these distributors received a discount.

Differences Resulting from Forward-Booking Contracts

12. Complaint counsel makes no distinction between price differences which took the form of outright discounts from Pacific's quoted price, f.o.b. its Houston terminal, and those which resulted from forward-booking contracts or price-protection arrangements. While respondents apparently concede that some of the straight discounts were discriminatory (albeit claiming they were nonsubstantial in amount and without the required statutory effect), they contend that the other forms of price concession which were received by various of Pacific's customers were made available to substantially all of them on a nondiscriminatory basis.

13. As already indicated, Pacific did periodically enter into so-called forward-booking contracts with various of its distributor-customers. Such contracts provided for the delivery of specified quantities of

[6] Table 1 is based on CX 1 to 8, which were prepared by respondents for counsel supporting the complaint and purport to show in detail the prices charged, the quantities sold and the dates of sales to a number of Pacific's customers. In addition, the record contains evidence of total sales made by Pacific to all its distributor-customers during 1955 (RX 71 and 20).

blackstrap molasses[7] over some future time period, which might vary from 30 to 90 days. The pricing arrangement usually provided for a specified ceiling price and, in the alternative, for the seller's regular quoted price on the date of shipment (referred to as the s.p.d.s. price), if lower than the specified ceiling price. Under such a contract the customer could receive a price advantage if Pacific's quoted price at the time of delivery had risen above the ceiling price specified in the contract. Such contracts, in effect, gave the customer the guarantee that he would not have to pay any more than the ceiling price specified in the contract even though Pacific's quoted price had risen at the time of delivery, while at the same time giving the customer the opportunity of receiving a lower price in the event Pacific's quoted price had declined at the time of delivery. The contracts usually reserved to Pacific the option of cancelling as to "any unshipped portion of this contract not withdrawn according to schedule".

14. Pacific's practice of entering into forward-booking contracts generally involved periods of contemplated oversupply of blackstrap molasses when Pacific was, in effect, an "anxious seller" eager to enter into contracts with customers calling for substantial future deliveries. It was its usual practice, on such occasions, to contact its distributor-customers, either by telegram or telephone, advising them of its offer to enter into forward-booking contracts. Thus, for example, in January 1955 it made an offer, which was subject to acceptance between January 5 and February 27, to deliver molasses through the month of March at a ceiling price of 10½¢ per gallon, f.o.b. Houston, or its price on the date of delivery if lower. Its quoted price, f.o.b. Houston, between January 5 and February 27 was 10½¢ per gallon (the ceiling price in the offer), but rose to 11¢ between February 28 and March 18, and to 11½¢ between March 19 and May 2. Thus, a customer who had accepted Pacific's offer would have received a price advantage of ½¢ on deliveries between March 1 and March 18, and 1¢ on deliveries between March 19 and March 31.

15. During 1955 Pacific made five general offerings to customers to enter into forward-booking contracts. So far as appears from the record, the offers were identical as to the period each offer was in effect, the period when delivery was to be made under it, and the pricing formula (*i.e.*, the specified ceiling price or, in the alternative, the s.p.d.s. price if lower). Likewise, so far as appears from the record, it was the usual practice of Pacific in making offers for forward-booking contracts to make them to all or substantially all of its distributor-

[7] The quantities were usually specified in the contracts in approximate amounts, such as: "Forty (40) Tank Truckloads—Approx. 20 Tons Each" (CX 29).

customers.[8] To the extent that it did so, and to the extent that it entered into contracts which conformed to the terms of its offers, it is the opinion and finding of the examiner that Pacific's practice in this regard was nondiscriminatory. However, the record does reveal that in at least two instances, involving forward-booking contracts with Parris Molasses, the contracts provided for an additional ¼¢ discount from the ceiling and s.p.d.s. price which had been generally offered.[9] To the extent that the price provisions of the contracts deviated from the price offered to other customers, the contracts were obviously discriminatory.

16. The contention of complaint counsel that Pacific entered into discriminatory forward-booking contracts is not based on contracts entered into pursuant to general offerings of the type discussed above, but rather on the admitted fact that Pacific has periodically accepted bids from individual customers to enter into forward contracts at times when it had no general invitation outstanding. The record discloses that Pacific does not accept such offers as a matter of routine, but makes its decision based on the current market situation and the reliability of the customer making the offer, *i.e.*, whether the customer has usually fulfilled his contracts. In accepting such offers Pacific does not necessarily accept all the terms offered, but may negotiate different terms, such as price, quantity or time of delivery.

The only example in the record of such a forward contract is one involving Parris Molasses, with which Pacific entered into a contract on July 27, 1955, for 20 tank truckloads of molasses, of approximately 20 tons each, to be delivered between July 27 and September 30, 1955, at 12¢ per gallon. Unlike the usual forward-booking contracts previously discussed, the price was firm and the contract did not provide for

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[8] The record discloses that telegrams containing offers to enter into forward-booking contracts were not sent to all of Pacific's distributor-customers (RX 72A–E). However, respondent Doyle testified that "[w]e would call a lot of the customers by telephone" (R. 895). While Doyle at first suggested that the offers were limited to those customers to whom he thought he "had an opportunity to sell" (R. 895), he later claimed that he sent telegrams or telephoned all distributor-customers concerning offers to enter into forward contracts (R. 898, 899). Respondent Ferguson testified that it was Pacific's policy to make forward offerings to "customers or any potential customer, anyone that is a molasses user. * * * [A]s anxious sellers we attempt to publicize as much as possible the fact that we are interested in making forward contracts" (R. 950). While the matter is not free from doubt, the examiner concludes, in the absence of substantial countervailing evidence, that the offers were made generally available to Pacific's customers.

[9] On January 17, 1955, Pacific entered into a forward contract with Parris calling for a price of 10½¢ per gallon or s.p.d.s. if lower, on shipments between January 17 and March 31, 1955 (CX 29). This price conformed to the price in Pacific's general offering (RX 65) and was Pacific's current price at the time of the offer (RX 64). However, on February 15, 1955, the price provision of the contract was modified to read: "10½ cents per gallon less ¼ cent per gallon or seller's price date of shipment whichever lower less ¼ cent per gallon" (RX 60). This ¼¢ reduction was subsequently embodied in a later forward contract calling for deliveries between March 22 to June 30, 1955, which was extended to July 31, 1955 (RX 61–A).

payment of the seller's price on day of delivery if lower. At the time the contract was entered into, Pacific's quoted price was the same as that provided for in the contract and it did not change during the period of delivery so that, in actuality, Parris received no price advantage. The record fails to establish that Pacific has entered into any substantial number of such individually negotiated forward contracts or that it has favored any particular customer or group of customers in entering into such arrangements.

Complaint counsel also cites the requirements contract of January 13, 1955, between Pacific and Fort Worth, as another example of a discriminatory forward-booking contract. This contract, in the opinion of the examiner, is not a forward-booking contract in the sense of a contract in which the buyer receives the benefit of a fixed ceiling price over a given future period. The price provided for in the contract with Fort Worth varied in accordance with changes in the New Orleans price. To the extent that the New Orleans price was always ½¢ or more below the Houston price, Fort Worth received the equivalent of a discount from the Houston price, a matter which has been heretofore fully discussed. The legality of such discount must stand or fall on its own bottom, separate and apart from any forward-booking aspect.

The record does disclose that Pacific made a separate forward-booking arrangement with Fort Worth on March 4, 1955, guaranteeing it a price of 10½¢ per gallon or Pacific's New Orleans price if lower, on shipments made during the month of March. Since the same offer was made to Pacific's New Orleans customers generally the contract is not discriminatory as a forward-booking contract. However, to the extent that it gave Fort Worth the benefit of the lower New Orleans prices, which were not made available to Pacific's other Houston customers, it involved a discrimination in price of the same type as that involved in the basic contract of January 13, 1955, between Pacific and Fort Worth.

Price Protection

17. Another form of price concession given by Pacific involves the periodic granting of price protection to individual distributor-customers. The instances thereof appearing in the record occurred during periods when Pacific had announced a general increase in its quoted price, f.o.b. Houston. Such increases were sometimes announced by telegram, effective immediately. When this occurred there might be some customers who had already committed themselves to resell molasses to one of their own customers at a price which was based on Pacific's previous price. Such customers would advise Pacific of their predicament, and ask it to enable them to fill the outstanding order on the basis of its previous price. If, upon investigation, Pacific was satis-

fied as to the bona fides of the customer's claim, it would give him the benefit of its former price for a bief period of a few days in order to fill existing commitments. The record fails to establish that Pacific favored any particular customer or group of customers in the granting of periodic price protection under the circumstances described above.

Discrimination in Sale of High-Brix Molasses

18. Although not specifically alleged in the complaint, counsel supporting the complaint contends that respondents discriminated in favor of Fort Worth and several other customers by selling them molasses of high-brix content (ranging from 85.4° to 89.2° brix). Since such molasses has more solids and less water than standard 79.5° brix the customer, in effect, is able to save approximately 10% in transportation costs by not paying freight on the additional water contained in standard brix. The customer can add the necessary water after the molasses has been received, so as to bring the solution down to 79.5° brix and then resell it to its own customer, thereby receiving the benefit of an approximately 10% saving in transportation costs.

19. The record fails to establish that Pacific engaged in any discrimination in price, as such, in the sale of high-brix molasses. The price at which such molasses is sold to distributor-customers by Pacific is based on an established formula, in which the basic price of 79.5° brix molasses is adjusted upwards in accordance with the additional brix content of the molasses being sold. To the extent that any customer may have received a lower basic price (in terms of the price of standard brix) this would, of course, be reflected in the price of the high brix molasses, but in the absence of any discrimination in the basic price, there is no additional price advantage obtained from the sale of high-brix molasses as such.

20. While it is true that a customer purchasing high-brix molasses does achieve a saving in transportation costs, the record fails to establish that Pacific has discriminated among the customers to whom it sold high-brix molasses. Not every customer can use high-brix molasses since it requires certain storage facilities and other special equipment to add the water, so as to convert high-brix molasses to 79.5° brix, after it has been received by the customer. Many distributors do not have the equipment necessary for this operation and have no interest in purchasing it. The record is lacking in substantial evidence that Pacific failed to offer high-brix molasses to any customer who was equipped to use it or that it refused to sell such molasses to any customer who wished to buy it.

Competition Among Distributor-Customers

21. The complaint charges that the competitive effects of respondents' discriminations extend to both the line of commerce in which

respondents are engaged and that in which their distributor-customers are engaged. However, at the prehearing conference complaint counsel indicated that they were restricting their claims to the line of commerce of the distributor-customers, or to the so-called "secondary" line of commerce. The proposed findings submitted by complaint counsel claim an adverse competitive effect only in the secondary line of commerce. The question which is, therefore, presented is as to the extent to which competition exists between and among Pacific's distributor-customers. Since the complaint, as amended, charges that respondents discriminated in price by granting discounts to some distributors and not to others and by granting higher discounts to some favored customers than to others, the matter of the existence of competition among distributors involves not only a determination of whether competition exists between favored and nonfavored distributors, but also whether it exists between and among favored distributors receiving higher discounts than other favored distributors.

22. As previously noted, the evidence of alleged price discrimination among Pacific's distributor-customers involves customers purchasing molasses from its Houston terminal and reselling such molasses to customers located in Texas and in some of the surrounding states. The distributor-customers concerning which evidence was offered, purporting to show the extent of the discriminations in price and of competition with other distributors, include Fort Worth Molasses, Marco Chemical, C. & R. Molasses, Parris Molasses, B. G. Thompson, W. L. Hunt, J. C. Barnes, Yoakum Grain, and Houston Molasses. These distributors are all located in the East-Texas area. Fort Worth, Marco, Parris, and C. & R. have their headquarters in Fort Worth. Houston Molasses and Barnes are located in Houston. Thompson has his place of business in Madisonville, and Hunt has his in Georgetown, both communities being located between Fort Worth and Houston. Yoakum Grain is located in Yoakum, which is south of Fort Worth and east of Houston.

23. Fort Worth Molasses, the most favored customer pricewise, sells and delivers in most of Texas east of Abilene, and in Oklahoma, Kansas, Arkansas and Missouri. According to the credited testimony of its principal owner, it was in competition in 1955 with Marco Chemical, Parris Molasses and C. & R. Molasses. Marco sells in substantially the same states or areas as Fort Worth Molasses, except that it does not sell in Missouri and, in addition, sells in areas of Colorado, Nebraska and New Mexico where Fort Worth does not sell. Competition between C. & R. and Fort Worth existed mainly in Texas. C. & R. also sold in Colorado where Fort Worth did not sell, but where Marco did. Parris sold both in Texas and Kansas in competition with Fort

Worth, C. & R., and Marco. The credible testimony of other distributor-customers, in addition to Marco, Parris and C. & R., establishes that they also competed with Fort Worth in 1955. Houston Molasses,[9a] Thompson, Yoakum and Hunt competed with Fort Worth Molasses in various parts of the East-Texas area, while Barnes competed not only in East Texas but in Kansas, Missouri and Arkansas. The record also establishes that some of the nonfavored customers competed with others of the favored cutomers, in addition to competing with Fort Worth. Thus, Hunt, Thompson and Barnes sold in competition with Marco, while Houston Molasses sold in competition with Parris.

24. The complaint alleges, and respondents admit in their answer, that Pacific "sells its products to two or more distributors who were at all times mentioned in the complaint and now are in substantial competition with each other in the resale of molasses." However, respondents now contend that "only in the East Texas area was there any significant competition between Fort Worth and other secondary distributors [and that] there is no showing that such competition was intensive."[10] Contrary to the position which respondents now urge despite the admission in their answer, the record does establish that competition between many of Pacific's distributors was significant, substantial and, indeed, intensive (assuming arguendo that a showing of "intensive" competition is necessary).

Respondents' argument concerning the insubstantiality of competition is based, in part, on the fact that some of the distributors did not resell to the same customers as Fort Worth, or that some of them tended to concentrate their sales efforts in different portions of the territory than Fort Worth. In the opinion of the examiner the fact that Fort Worth and some of the other distributors did not, at any particular moment, happen to be selling to the same customers, or that portions of their business were concentrated in somewhat different areas does not negate the existence of substantial competition. Most of the distributors were ready, willing and able to sell to as many customers as possible within the same areas and, despite some differences in areas of concentration, many of the areas in which they sold were located within the same general trade territories.

[9a] Respondents contend that Houston Molasses cannot be considered a competitor of Fort Worth and other secondary distributors because it imported most of the molasses which it sold. However, to the extent that Houston bought molasses from other importers, such as Pacific, and resold it to ultimate users in competition with secondary distributors, it occupied a dual position, and was in competition with the secondary distributors. In fact, Pacific itself was regarded as a competitor by some of its own distributors, since it sold to ultimate users in competition with them. Several of the distributors also referred to Houston as being among their competitors.

[10] Proposed Findings, page 63.

Respondents also cite the fact that there were only about 34 distributors serving some 3,000 feed mills and feed lots located in Texas and the seven nearby states, as raising "the inference that competition could not have been intensive." [11] In the opinion of the examiner no inference as to the level of intensity of competition in an industry can be drawn merely on the basis of the proportion of sellers to buyers in the industry. Additional information, such as the geographic distribution of buyers and sellers, and the relative size and demand of the buyers, would be necessary before an informed judgment could be made that competition was not intense.

Contrary to the position which is now being urged by respondents, in April 1953 respondent Doyle acknowledged to respondent Ferguson that "[w]e * * * find ourselves operating in an extremely competitive market." [12] If anything, competition in the industry had become even more intense in 1955 than it was in 1953. While it is true that Doyle was referring to competition between Pacific and certain distributors who were receiving discounts from Pacific's competitor, Southwestern Sugar & Molasses, it is clear that his statement is also applicable to competition between distributors since the latter compete with the primary importers, such as Pacific and Southwestern, to the extent that both groups sell to users of molasses.

25. Based on the facts discussed above and from the record as a whole, it is concluded and found that there is substantial competition between and among many of Pacific's distributor-customers in the resale of blackstrap molasses purchased from it. Such competition exists both between customers who received favorable price treatment from Pacific and those who were not so favored, and between and among customers who received differing degrees of price favoritism.

Competitive Effect

26. As has previously been found, Pacific granted discounts to certain of its distributor-customers, while selling to others at its quoted Houston price, and granted to certain distributor-customers higher discounts than it granted to others among the favored distributor-customers. The variations in price among its customers, both favored and nonfavored, ranged from ¼¢ to ½¢ and 1¢. The complaint charges that because of the highly competitive nature of the molasses business a discount of as little as ¼¢ or ½¢ "readily determines the loss or retention of resale customers" by respondents' customers, and that the effect of respondents' price discriminations may

[11] *Id.*, at page 26.
[12] RX 21–A.

be substantially to lessen, injure, destroy or prevent competition between and among respondents' distributor-customers.[13]

27. While not denying, in the answer filed by them, the importance of such discounts in the retention of customers, respondents deny, in both their answer and their proposed findings, that any adverse competitive effect may be anticipated from the discounts which Pacific granted. The question to be determined at this point, therefore, is whether price differentials of the order of magnitude indicated fall within the proscription of the statute, insofar as having the requisite competitive effect. In order to resolve this question, it is necessary to consider whether the differentials are substantial in relation to prices and margins, and whether, as alleged in the complaint, they readily determine the loss or retention of customers. To a consideration of these matters the examiner now turns.

(a). *Pricing Structure and Profit Margins*

28. The price at which distributors sell molasses is determined basically by the price they pay for the molasses and the cost of delivering the molasses to the customer's place of business. Many of Pacific's distributor-customers charge their customers a basic price based on their cost f.o.b. Houston, plus freight to point of destination. Some charge a flat price which does not break out the distributor's cost and the freight charges separately, but even this price is essentially computed on the basis of the Houston price plus freight.[14] To the extent that distributors use the cost-plus-freight method in billing their customers, they base their cost on Pacific's price to them f.o.b. Houston. In the case of those distributors who received a discount or other price differential from Pacific, most passed this on to the customer in the form of a lower basic price, but some pocketed the differential. The distributor's profit is generally made on the freight charges, except to the extent that some distributors do not pass on to the customer the benefit of a lower price received from Pacific. The freight charges are fairly uniform, being based on the published tariffs of the Railroad Commission of Texas, which fixes the shipping rates for molasses in terms of the length of the haul.

29. To the extent that a distributor's profit comes out of his freight charges, the amount of the profit would, of course, depend on his cost of hauling the molasses to his customer's place of business. The

[13] As previously indicated, the complaint also alleges injury in the primary line of commerce but, in accordance with the statements made by complaint counsel at the prehearing conference, this claim has been dropped.

[14] Among the distributors using the latter method is Marco Chemical. While testifying that his company charged a flat price, rather than cost plus freight, Marco's president stated that "the customer sits down and mentally calculates this is so much over the Houston price, you are too high or too low" (R. 509).

record contains considerable evidence as to the cost-per-mile of hauling molasses. Such costs varied from a low of 16½¢ (exclusive of administrative costs and depreciation) to a high of 25–28¢ per mile. Since such costs were in many instances not related to any gross return per mile, it is not possible to determine the net return of a number of the distributors. However, in the case of two of the distributors, figures of the gross return per mile do appear in the record, and it is possible to make a reasonable estimate of net return.

The most precise breakdown of costs and net return is that involving Alamo Feed Mills, a distributor selling in the East-Texas area.[15] Alamo's figures, which were introduced into evidence by respondents, reveal that its costs (exclusive of certain administrative costs) were 23.58¢ per mile and that its average return per mile from the sale of molasses was 25.63¢, leaving a net return of 2.05¢ per mile.[16] Based on an average trip of 270 miles from Houston to Fort Worth, the net return on an average truckload of 17 tons would be $5.54 or 33¢ a ton, which is less than ¼¢ a gallon. Another set of figures in the record is that of C. & R. Molasses, which charged 25¢ a running mile above the cost of the molasses, and whose cost of hauling was estimated at 19.4¢. This would mean a net return of 5.6¢ per mile, which figure is probably high since the estimated cost of 19.4¢ was based on all 161 of C. & R.'s trucks, only three of which hauled molasses and on which costs were somewhat higher than on other types of trucks. In any event, based on an average 270-mile trip from Houston to Fort Worth and a truckload of 17 tons, C. & R.'s net return would be $15.12 of 89¢ a ton, which is little more than ½¢ a gallon.

30. In addition to the evidence of costs and return per mile, discussed above, the record also contains evidence of net profits on a per-gallon basis. The president of Marco Chemical called as a witness by respondents, estimated his company's net profit from the sale of molasses at 1½¢ per gallon. However, Marco also hauls tallow, cottonseed oils and other liquids as a backhaul in its trucks, and the estimated profit of 1½¢ per gallon on molasses takes into account the saving in cost of having another product to backhaul. To the extent that a distributor does not have a backhaul business and brings his trucks back empty, his net return would be lower. The testimony of other distributors indicates that the net profit on a gallon of molasses is nearer to ½¢ or even less.

[15] Alamo purchased only 85 tons from Pacific in 1955, but had purchased almost 5,000 tons in 1954 and over 7,500 tons in 1953.

[16] In their proposed findings, respondents (at page 24) refer to Alamo's profit as 2.05¢ per gallon. However, it is clear from the exhibit (RX 70) and the testimony (R. 742) that the return is on a per mile, and not on a per gallon, basis.

(b). *Importance of Discounts*

31. Whatever may be the precise margin of profit of distributors of molasses purchasing from Pacific's Houston terminal, the distributors called by both sides in this proceeding were almost unanimous in their testimony as to the importance of discounts of ¼¢ or ½¢ per gallon, in their ability to operate at a profit and to retain or obtain customers. Thus, the president of Alamo Feed, called as a witness by respondents, testified that a discount of ½¢ a gallon was "very important * * * [b]ecause that represents in a small margin approximately all that is made off of molasses".[17] According to Marco's president, also called as respondents' witness, the receipt of a discount of ½¢ a gallon had enabled him to sell to customers to whom he could not otherwise sell, and he had had to lose certain customers "because people were selling molasses * * * so cheap we felt we could not afford to handle it".[18] The representative of Fort Worth Molasses, the most favored customer and likewise a witness for respondents, left no doubt as to the importance of a ½¢ discount to his company, testifying that "it meant quite a bit of money" in terms of the volume he was handling. When asked whether "that is rather important", he stated: "And a wee bit more, yes".[19] Both W. L. Hunt and Houston Molasses regarded ¼¢ a gallon as important, and the latter's representative indicated that he had had to cut his price by that amount in order not to lose customers.

32. The record establishes that a discount of ¼¢ or ½¢ a gallon is not only important in the retention or obtaining of customers, but even to a distributor's survival in business. Thus, it appears that two of the distributors which received no discounts, J. C. Barnes and C. & R. Molasses, went out of the molasses business in the latter part of 1955. Barnes testified that he couldn't compete with other distributors because he "couldn't meet the price" and "just couldn't stay in business any longer".[20] C. & R. Molasses decided to sell its molasses trucks because the company was losing money on its molasses operations.[21]

33. Respondents contend that there were approximately 16 other distributors serving the same general area who went out of business during the same period as Barnes and C. & R., and that since 12 of

[17] R. 754–755. The same witness answered in the affirmative when asked: "You are saying a half a cent of it is the terms of your net profit?" (R. 755).

[18] R. 510, 527.

[19] R. 478. When asked whether he had told Pacific a discount of ½¢ was important to him at the time he discussed the matter of doing business with them, the witness stated: "I don't recall telling them that, because I supposed they knew it was important" (R. 480).

[20] R. 134, 139.

[21] R. 279–280.

them had received discounts (mainly from Pacific's competitior), Pacific's price reductions to some of its own distributors could not have been a factor in the departure from business of some of its nonfavored customers. Aside from the fact that the evidence relied upon by respondents to the effect that 12 of the departing distributors had received discounts is unreliable hearsay, the bare fact that such distributors had received some discount is of little probative value in the absence of reliable evidence as to the extent and duration of the discounts received by them in comparison with those who survived.

34. Respondents also point out that there are a number of other factors, in addition to the price of molasses, which may affect the profitability of a distributor's operations or his ability to survive. Among those referred to are, (a) whether the distributor has a backhaul business of other commodities to help defray the cost of operating his trucks, (b) whether the distributor uses a 17-ton or a 20-ton truck (the use of the latter, according to respondents, resulting in a saving of 1¢ per gallon on a trip of 916 miles from Houston to Oklahoma City, which is considerably longer than the distance travelled by many distributors), and (c) whether the distributor uses a gasoline-powered, or diesel-powered, truck (the use of the latter, according to respondents, resulting in a saving of .7¢ per gallon on the same 916-mile trip).

The fact that a nonfavored customer could cut the losses resulting from his lack of price parity with a favored customer by building up a backhaul business or by buying a 20-ton truck or a diesel-powered one is, in the opinion of the examiner, irrelevant on its face. If these facts have any relevance, it is that they attest to the narrowness of the margins in the molasses business, which causes distributors to buy the more expensive rigs required for backhauls, or to buy larger and costlier trucks of other types, in order to defray their truck operating costs and try to save sums as minute as .7¢ on a gallon of molasses hauled. It is also significant that among the distributors who stressed the importance of a discount of ¼¢ or ½¢ a gallon in the operation of their business, a number had a backhaul business or operated 20-ton trucks.[22] Despite these supposed advantages, they found it difficult to compete with the favored customer or customers.

35. Respondents' present position, that a ¼¢ or ½¢-a-gallon discount is not important in the competitive picture, hardly squares with the statement made by respondent Doyle to respondent Ferguson in April 1953 (in the letter previously referred to) that as a result of

[22] Among those equipped for a backhaul business were Marco, Thompson, Barnes, Yoakum, Parris, and Alamo. At least Parris and Marco had 20-ton trucks, the latter even having some of 25-ton capacity.

Southwestern's granting of a ½¢ discount to some of its distributors "these firms are able to compete with us" and "[w]e therefore find ourselves operating in an extremely competitive market".[23] If a primary importer finds it difficult to compete with secondary distributors because of a discount of ½¢ a gallon from a basic price the same as its own, it seems self-evident that secondary distributors buying from Pacific and not receiving such a discount would be at a disadvantage in competing with other distributors who received a discount.

36. Of final significance in determining the importance of discounts of ¼¢ or ½¢ a gallon is Pacific's own price schedule during the period at issue. Its prices, f.o.b. Houston, between January 1 and October 1, 1955, remained within the narrow range of 10¼¢ to 12¢ per gallon and those f.o.b. New Orleans ranged from 9¾¢ to 11½¢ per gallon. Such changes as occurred were generally in multiples of ¼¢ or ½¢ per gallon, upwards or downwards. It seems evident in the light of this price structure that sums as small as ¼¢ to ½¢ a gallon were significant and important in the industry.

37. Based on the facts discussed above, and from the record as a whole, it is concluded and found that discounts of ¼¢ and ½¢ are substantial in relation to prices and margins, and are important to distributors selling blackstrap molasses from the Houston terminal area, and that the effect of Pacific's granting discounts of this order of magnitude to certain of its distributor-customers and denying them to others, and of granting discounts of this order of magnitude to some distributor-customers over and above discounts granted to others may be substantially to lessen, injure, destroy or prevent competition between and among Pacific's distributor-customers purchasing blackstrap molasses out of its Houston terminal.

Defense of Meeting Competition

38. Respondents contend that in granting discounts to Fort Worth Molasses during most of 1955, and to a few other distributor-customers at periodic intervals, respondent Pacific did so in good faith in order to meet the equally low prices of its principal competitor, Southwestern Sugar & Molasses Company. They contend that respondent Doyle had received reports during 1953 that Southwestern was granting a discount of ½¢ a gallon to virtually every trucker in the area, that this situation continued in 1954 and was aggravated by Southwestern's extending the discounts to certain large users and by absorbing the 3% transportation tax, and that Pacific "begin to lose significant amounts of business" and was finally compelled to reduce its prices to some of its customers, including Fort Worth Molasses, in order to meet Southwestern's competition.

[23] RX 21-A. (See page 692 and fn. 12, *supra*).

39. Reduced to its legal essentials Pacific's defense is that, (a) so far as it was aware Southwestern's discount of ½¢ a gallon was being granted to all of its distributor-customers and was therefore a lawful price, (b) Pacific acted defensively by granting discounts to some of its existing customers, and not to acquire new customers, and (c) it merely met Southwestern's equally low price and, in some instances, even granted lesser discounts where it was possible to retain a customer on that basis. It is the opinion and finding of the examiner that the record does not sustain respondents' position since it is by no means clear that Pacific, (a) had reason to believe it was meeting a uniform discount to distributors by Southwestern when it elected to grant some distributors a discount, (b) used discounts solely on a defensive basis in order to retain existing customers and not to obtain new customers, and (c) in all instances limited the amount of its discounts to those granted by Southwestern. To a consideration of the facts which form the basis of these findings the examiner now turns.

40. Pacific entered the Houston market in late 1949 with the purchase of the terminal and storage facilities of Ralston-Purina Company. Its sole competitor at that time was Southwestern Sugar & Molasses Company, which also operated a terminal at Houston. Additional competitors entered the Texas market in 1953 and 1954, when Standard Molasses Company and Molasses Trading Company opened terminals at Beaumont and Corpus Christi, respectively.

41. From late 1949 to the end of 1952 Pacific occupied a relatively minor position in the market served by terminals located in the East-Texas area. However, in late 1952 respondent Doyle went to work for Pacific as sales manager in charge of its Gulf Division, which included the Houston terminal. Doyle undertook an aggressive campaign to increase Pacific's sales out of its Houston terminal. His efforts were marked with considerable success, so that by July 1953, he was able to report to respondent Ferguson that Pacific was "getting approximately one-third of the molasses business in Texas".[24] While complaining to Ferguson that Southwestern was cutting prices by granting some distributors and brokers a discount of ½¢ a gallon Doyle, nevertheless, advised Ferguson that: "The outlook for Pacific under these conditions is to pretty well hold our own, and at the same time continue to pick up a small number of customers from time to time." As late as November 2, 1953, Doyle advised Ferguson that Pacific had acquired four new customers who had previously been buying from Southwestern.[25]

42. Up to about the middle of 1954 Pacific engaged mainly in direct selling to ultimate users of molasses, such as feed mills and feed lots.

[24] RX 22-A.
[25] RX 23.

In addition to its terminal in Houston it also had a sales office in Houston and employed several salesmen to contact customers and potential customers. However, Pacific also sold to a few distributor-customers, the principal one being Alamo Products Company, located in San Antonio and serving an area in southeast Texas which Pacific felt could be better served by a distributor rather than on a direct basis. Up to about the middle of 1954 Pacific sold to both ultimate users and distributors on the basis of its Houston quoted price, without any discount. However, in the spring of 1954 it began to give its user-customers, to whom it was selling on a delivered basis, reductions from its freight charges equivalent to ½¢ a gallon. It also granted Alamo a discount of ¼¢ a gallon from the f.o.b. Houston price. During the summer of 1954 Pacific closed its Houston sales office and began to concentrate on selling to distributors, rather than to ultimate users. The principal distributor-customer acquired by Pacific was Fort Worth Molasses, which became its customer in January 1955. Pacific's sales to distributors increased from approximately 20,000 tons in 1953 to 29,000 in 1954 and 54,000 in 1955. Most of the increase in 1955 was accounted for by sales to Fort Worth, which amounted to approximately 22,750 tons.

43. The record fails to sustain respondents' position that in granting discounts to some distributor-customers Pacific acted in the good faith belief that its competitor, Southwestern, was granting discounts to all of its distributor-customers. The record does disclose that in the middle of 1953 Pacific had received information to the effect that some of Southwestern's larger distributor-customers, including particularly Fort Worth Molasses and Graves Molasses Company (another distributor located in Fort Worth), were receiving a discount of ½¢ a gallon.[26] It also appears that in February 1954 Pacific had reason to believe this discount was being extended to other "secondary distributors",[27] and that by the end of March 1954 it suspected that Southwestern was "giving all independent truckers a discount of ½¢ per gallon".[28] However, by May 1954 Pacific had received information indicating that Southwestern had changed to a quantity discount system, under which the customer received no discount if he ordered less than four loads a week, but received a discount of ¼¢ a gallon on orders of four loads, and a discount of ½¢ a gallon on five loads or more.[29] When advised of this system by respondent Doyle, respondent Ferguson replied on June 2, 1954: [30]

[26] RX 21–A, RX 22–A.
[27] RX 24.
[28] RX 25–A.
[29] RX 30.
[30] RX 32.

This system of discount, in our opinion, is actually in violation of the Robinson-Patman Act unless Kaplan [Southwestern] can show that a saving is made to warrant the discount, *and we doubt if that is possible.* [Emphasis supplied.]

While there is some reference in the correspondence between Doyle and Ferguson during July and August 1954, to Southwestern's giving a ½¢ a gallon discount "to independent truckers and to larger accounts",[31] it is by no means clear that they understood Southwestern had abandoned the quantity discount system and was then giving a discount to all distributor-customers.

44. With the exception of Alamo Products, Pacific did not grant any discounts to its distributor-customers until January 1955, when it made its contract with Fort Worth Molasses to sell to it at the New Orleans price. Despite the granting of discounts by Southwestern, Pacific was admittedly able to maintain its market position "[u]ntil late 1954".[32] While respondents contend that Pacific's market position thereafter deteriorated, thus impelling it to grant discounts to Fort Worth and to others, the examiner is not satisfied from the record that this is so. There is no substantial evidence in the record of any deterioration of Pacific's market position in late 1954. Pacific introduced no figures of its over-all sales during the period, and the record discloses that its sales to distributors increased by over 9,000 tons from 1953 to 1954. On February 9, 1955, at a time when the arrangement with Fort Worth had hardly begun to show any results, respondent Doyle advised his company's president that he was of "the opinion that we have a nice volume at Houston".[33]

45. From a careful reading of the correspondence between Doyle and Ferguson and from their testimony as a whole, the examiner is convinced that the granting of discounts to Fort Worth and a few other distributors was not due to any significant decline in Pacific's sales, but to the conviction that its interests would be better served by concentrating more on sales to distributors and less on direct sales to users. Undoubtedly the fact that Southwestern had been granting discounts to some of the major distributors had played a part in this decision since it had placed these distributors in a better position to compete with Pacific in sales to ultimate users. However, Southwestern had also purportedly cut its prices to some of its user-customers. This combination of factors had caused Pacific to cut its freight charges to some of its larger customers, and presumably resulted in some narrowing of its profit margins. Up to that time it had been reluctant to give any discounts to distributors because it did not wish to see their growth encouraged as an intermediary between the large

[31] RX 34-A, RX 35.
[32] Respondents' Proposed Findings, page 46.
[33] RX 37-B.

importers and the users of molasses.[34] By the end of 1954 and early 1955 Pacific had come to the realization that the truck distributors were there to stay and that it would serve its interests to do business with them.[35]

46. In entering into business relations with Fort Worth Molasses, Pacific did not do so as a defensive measure to keep from losing a customer, but to gain a customer and enhance its market position. There is no record basis for the contention, advanced in respondent's findings (page 48), that "at no time did Pacific gain new customers as a result of selective price reductions". It is true that Fort Worth had purchased some molasses from one of Pacific's terminals on the West Coast in the early 1940's. However, Fort Worth had never been a customer of Pacific's Houston terminal from the time operations there were commenced in late 1949 until January 1955. In fact, Fort Worth was actually a competitor of Pacific's in selling to molasses users. Pacific recognized Fort Worth as being Southwestern's customer, and began to make overtures to Fort Worth in the latter part of 1954 to do business with it. These efforts culminated in the January 1955 contract.

47. In offering Fort Worth a discount not only did Pacific not do so for the purpose of retaining a customer, but it gave Fort Worth a better price arrangement than the latter then had with Southwestern, in order to induce Fort Worth to change suppliers. As the testimony of Fort Worth's president indicates, he told respondent Ferguson in January 1955 that "if he could sell me on the same basis that I was buying it [from Southwestern], I would be glad to buy some from him".[36] At that time Fort Worth, to Ferguson's knowledge, was getting a discount of ½¢ a gallon from Southwestern. Ferguson conceded in his testimony that "it was obvious to us that a half cent was the figure we would have to meet".[37] Despite this, Ferguson offered Fort Worth not a half cent discount from the Houston price, but the lower New Orleans price, which was never less than ½¢ a gallon below Houston and for substantial periods was 1¢ and more below Houston.[38] The reason for this more favorable arrangement was that Ferguson wanted to do more than merely have Fort Worth buy "some" of its molasses from Pacific, as the testimony of the Fort Worth representative indicates. Ferguson sought to offer the Fort Worth official a better

[34] On March 30, 1954, Doyle had advised Ferguson (RX 25–B): "Your comment in regards to taking one-half cent off the freight rate is certainly *far better than giving one-half cent to these truckers and encouraging their growth and development*". [Emphasis supplied.]

[35] As Doyle advised Ferguson on February 9, 1955, referring to the Fort Worth market: "The independent truckers have almost all this business and are becoming more important factors in the Texas market all the time" (RX 37–A).

[36] R. 469.

[37] R. 972.

[38] During the time the contract between Pacific and Fort Worth was in effect the maximum differential was 1¢. However, later in the year it increased to 1½¢ and finally to 2¢.

arrangement than he was then getting from Southwestern in order to tie Fort Worth to a "long-term contract".[39] Ferguson accordingly "pointed out to him * * * the advantage of the New Orleans price".[40]

48. Respondents contend that in granting Fort Worth the benefit of the New Orleans price Pacific was really giving the latter the equivalent of a ½¢ a gallon discount since the "normal" differential between the Houston and New Orleans terminals was ½¢ a gallon. Contrary to respondents' contention, ½¢ a gallon was the *minimum* differential between the two cities, and both Pacific and Fort Worth were fully aware that the latter stood to obtain even greater discounts by paying the New Orleans price. The quid pro quo for this more favorable arrangement was Fort Worth's agreement to sign a long-term requirements contract. It may be noted that in September 1955, when Pacific's supplies became short and it was apparently not as anxious to continue the Fort Worth arrangement as it formerly had been, it had no trouble in finding appropriate language to specifically fix Fort Worth's discount "at ½¢ per gallon below our prevailing Houston price".[41]

49. It is significant that in granting Fort Worth a discount, which at times was over ½¢ a gallon, Pacific did so despite indications in the record that it was able to maintain its position by keeping its price within ¼¢ of Southwestern's. Thus, on March 30, 1954, in advising Ferguson that Southwestern was granting "independent truckers a discount of ½ cent per gallon", Doyle stated: "We have found that we can effectively sell against Southwestern and their truckers if we are no more than ¼¢ per gallon higher".[42] The reason for this was that Pacific had convinced some distributors and users that its molasses was of a more uniform brix content than Southwestern's, and that the loading services at its terminal were better. In line with this, Pacific had limited its discounts to Alamo Products in 1954 to ¼¢ a gallon, and those to Marco and Parris in 1955 to ¼¢ a gallon. Significantly, these were all existing customers of Pacific and the granting of discounts to them was in line with Pacific's professed policy of offering discounts to meet Southwestern's competition "only in the instances of our established customers".[43] Yet in the case of Fort Worth, Pacific not only exceeded its normal ¼¢ discount, but gave its new customer a somewhat better proposition than it was getting from Southwestern. The reason for this obviously was Fort Worth's substantial volume, and the fact that it was willing to sign a long-term requirements contract.

[39] As Ferguson testified (R. 973): "We were admittedly trying to arrange a long-term contract with Fort Worth Molasses Company, and we were trying to present Fort Worth with the best possible offering that we could make".

[40] R. 973.

[41] RX 66-A.

[42] RX 25-A.

[43] RX 24.

50. Based on the facts discussed above, and from the record as a whole, it is concluded and found that respondent Pacific has failed to establish that the granting of discounts by it was limited to circumstances where it was acting in good faith to meet the equally low prices of a competitor. On the contrary, the record establishes that at least in the case of Fort Worth Molasses respondent acted in other than a defensive manner and exceeded the discounts being granted by its principal competitor, Southwestern Sugar & Molasses Company.

Functional Discounts

50. As a further defense, respondents contend that the favored customers of Pacific performed "distinctly different services or functions" than did nonfavored customers, and therefore "had inherently higher costs" than nonfavored customers not performing such functions or services. It points out, in this connection, that both Fort Worth Molasses and Marco Chemical had storage facilities which enabled them to store large quantities of molasses, thereby relieving Pacific's limited storage capacity in Houston. Also cited is the fact that these companies employed salesmen thus, presumably, relieving Pacific of the necessity for putting additional sales effort in the field.

51. The legal sufficiency of these facts as a defense to the granting of discounts will be hereafter discussed. However, it may be noted at this point that the granting of the discounts to these customers was in no way related to, or conditioned on, any special functions or services rendered by them. C. & R. Molasses and Houston Molasses both had storage facilities, and yet no special discount was granted to them. Marco received a discount for only a brief period, although it was capable of performing, and did perform, the same storage of molasses during the entire time that it bought from Pacific. It is clear from the contract between Pacific and Fort Worth that the latter received the benefit of a special price not because of any storage or sales services to be rendered for Pacific, but because it agreed to buy its total requirements of molasses from Pacific. It is concluded and found that the record fails to establish that the discounts granted by Pacific to certain of its distributor-customers were granted in contemplation of any special services or functions performed by them or because of any special cost incurred by them on behalf of Pacific.

CONCLUSIONS

1. The complaint alleges, the answer admits, and the record establishes, that respondent Pacific Molasses Company is engaged in the importation, distribution and sale of "offshore" molasses throughout the United States, and that its sales are substantial. The record also establishes that it imports and sells substantial quantities of blackstrap molasses from its Houston, Texas terminal to customers who are lo-

cated in various other States of the United States or who transport such molasses to various other States of the United States. It is, accordingly, concluded in accordance with the foregoing and with the admissions of respondents, that respondent Pacific Molasses Company, both generally and at its Houston, Tex. terminal, is engaged in commerce, within the meaning of the Clayton Act.

2. The record establishes that the respondent Pacific Molasses Company, at its Houston, Tex. terminal, has charged different prices to different purchasers of blackstrap molasses of like grade and quality, and that one or more of such purchases involved sales or shipments across State lines. It is, accordingly, concluded that respondent Pacific Molasses Company, in the course of commerce, has discriminated in price between different purchasers of blackstrap molasses of like grade and quality, and that one or more of the purchases involved in such discriminations was in commerce.

Respondents concede that under *FTC* v. *Anheuser-Busch*, 363 U.S. 536, a difference in price ordinarily constitutes a discrimination in price. However, they seek to add a gloss to the holding of the *Anheuser-Busch* case, *viz*, that the differences in price must involve "reasonably contemporaneous" transactions in order to constitute a discrimination. Respondents cite, in this connection, the holding in *Atalanta* v. *FTC*, 258 F. 2d 365 (2 Cir., 1958), that "the time interval is a determining factor" in determining whether the granting of the advertising allowances there involved was discriminatory, in violation of Section 2(d) of the Clayton Act. Respondents contend that in the instant case "[m]any of the sales at a discount were not contemporaneous with sales at the published Houston price and hence, cannot be considered discriminatory."

In the opinion of the examiner there is no requirement that sales at different prices must be "contemporaneous" in order to constitute a discrimination. So long as the sales are not so remote in time as to suggest that the prices were determined by different market conditions, the differences in price must be considered discriminatory. Depending on the industry, sales separated by days, weeks or even months may be considered discriminatory, unless it is established by the party arguing to the contrary that such differences in price were the result of different market conditions. In the instant case the record establishes that respondent Pacific Molasses Company's quoted Houston price remained stable for periods as long as several weeks and even several months.[44] All customers buying from it during any such period were entitled to equality of price treatment, and those not receiving such treatment were being discriminated against, within the meaning of

[44] The price from March 19 to May 2, 1955, remained stationary at 11½¢ a gallon. From August 2 to November 19, 1955, the price was unchanged at 12¢.

the Robinson-Patman Act. In any event, while respondents contend that "many" of the sales at different prices were not "contemporaneous", they apparently concede that many were. The record contains numerous instances of sales at different prices being made on the same day or within a matter of a few days of one another. Certainly even under respondents' definition, assuming arguendo there is such a requirement in the law, such sales would be deemed to be "reasonably contemporaneous".

3. In most instances the differences in price between and among customers were the result of the granting of a specific discount or price below respondent Pacific Molasses Company's quoted price at its Houston terminal. Such differences in price were clearly discriminatory. However, as heretofore found, in some instances such differences resulted from forward-booking contracts involving future deliveries, or from the granting of price protection for brief periods following a price change.

Insofar as forward-booking contracts are concerned, the record establishes the respondent Pacific Molasses Company periodically makes general offerings to its customers to enter into such contracts, on specified terms. So far as appears from the record such offers are extended to all customers. On occasion, the corporate respondent accepts bids from individual customers to enter in contracts for future deliveries, other than pursuant to general offerings made by it. The record fails to establish that said respondent has tended to favor any particular customer or group of customers in periodically accepting such bids. It also appears from the record that said respondent has granted price protection to individual customers, so as to permit them to fill a contract for the resale of molasses based on said respondent's lower price prior to a price change. The record fails to establish that the corporate respondent has tended to favor any particular customer or group of customers in the granting of price protection.

Counsel supporting complaint makes no contention as to the illegality of forward-booking contracts entered into by the corporate respondent pursuant to general offers made to customers. Counsel does, however, question the legality of forward contracts made pursuant to a bid received from an individual customer, apparently contending if such an offer is accepted the respondent must offer other customers an opportunity to enter into similar contracts. The examiner notes, in this connection, that in the *Corn Products Refining Co.* case, 34 F.T.C. 850, 877, the Commission specifically exempted from its order prohibiting discriminations in price, sales "for future delivery which do not involve such discriminations in price at the time of actual sale." It is also

noted that the draftsman of the bill which became the Robinson-Patman Act stated, "[o]n the question of futures", that the bill would not prohibit a sale to "a purchaser of futures * * * in May, at one price, for delivery in December, when the price of the market in December for spot purchases would be different" and, further, that "the bill does not affect the relationship between future and spot purchases [because] [t]hey are different things and are based on market conditions at different times or relating to different times. It would require the equal treatment of future buyers of the same goods, buying at the same time and in the same future." [45]

So far as appears from the record in the instant case, distributors purchasing pursuant to general offers to sell on a forward basis received equal treatment, except for one distributor whose contract was amended to add a ¼¢ discount. In the case of forward contracts not made pursuant to general offerings, it is the opinion of the examiner that there is no discrimination involved merely because the seller has not offered similar contracts to its other customer, in the absence of substantial evidence (which does not appear in this record) that the seller has tended to favor a particular customer or group of customers in accepting such offers or has turned down similar bids from other customers made at or about the same time as the one accepted.

Complaint counsel has advanced no separate contention with respect to the corporate respondent's practice of granting price protection, but presumably contends, as in the case of forward contracts, that such arrangements are discriminatory unless made with all distributors. The examiner finds himself in disagreement with this contention. So far as appears from the record, price protection is granted only where the customer has demonstrated that he had already committed himself to resell the merchandise at a lower price based on the corporate respondent's price prior to a price change. To require said respondent to permit other customers, who had made no such commitments, to purchase at its former price would be to give such customers the equivalent of a price advantage. In any event, the corporate respondent's practice of granting price protection to individual customers does not involve amounts of such substantiality as to have any significant effect on competitive relations, since it occurs only sporadically and covers purchases made for only a day or two following a price change. Furthermore, the record fails to establish that respondent has tended to favor any particular customer or group of customers in the periodic granting of price protection.

4. The differentials in price which have heretofore been found to be discriminatory ranged from ¼¢ to 1¢ per gallon. The record estab-

[45] *Hearings Before House Committee on Judiciary on Bills to Amend Clayton Act,* 74th Cong., 1st Sess. 24 and 36 (1935).

lishes the existence of substantial competition between favored and nonfavored customers, and between and among customers receiving more favorable price treatment than others. It has also been found that profit margins of distributors of blackstrap molasses are very narrow and generally are around ½¢ per gallon or even less. It has likewise been found that price differentials of as little as ¼¢ or ½¢ per gallon are important to distributors of blackstrap molasses, and substantially affect their ability to compete and even their ability to survive in business. It is, accordingly, concluded that the discriminations here found to have occurred fall within the proscription of the statute, insofar as having the requisite competitive effect, since the record clearly establishes that the effect of such discriminations may be substantially to lessen, injure, destroy or prevent competition with customers receiving the benefit of such discriminations.

This conclusion is inevitable in the light of the Commission's holdings, based on the Supreme Court's decision in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948) that "in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial." [46] There is abundant evidence in the record for concluding that the amount of the discriminations here involved was substantial. This is clear from the findings previously made that profit margins in the industry are small and that price differentials of as little as ¼¢ or ½¢ a gallon are important, in that they significantly affect a distributor's ability to retain or gain customers, to operate at a profit and even to survive in business.

Respondents contend that there has been no showing of competitive injury, within the meaning of the *Morton Salt* case, because it has not been established that the differentials in price are substantial "with reference to the number of purchases made from Pacific compared to the number made from others".[47] Respondent's argument does not properly reflect the holding of the *Morton Salt* case. The Court's reference to substantiality was in terms of the amount of differential, not in terms of the total amount of the purchases. Thus, the Court stated (at page 50) that in a case involving competition between customers of the same seller the statutory test is met by a showing that the seller sells goods "to some customers substantially *cheaper* than they sell like goods to the competitors of these customers" [emphasis supplied]. The Court

[46] *American Oil Company*, Docket 8183, June 27, 1962 [60 F.T.C. 1786]; see also, *United Biscuit Co. of America*, Docket 7817, June 28, 1962 [60 F.T.C. 1893]; *Tri-Valley Packing Association*, Docket 7225, May 10, 1962 [60 F.T.C. 1134]; and *The Borden Company*, Docket 7129, Jan. 30, 1963 [62 F.T.C. 130].

[47] Respondent's Proposed Findings, page 24.

specifically overruled an argument as to the lack of probability of an adverse competitive effect based on the fact that the amounts involved in the sales to nonfavored customers were "very small in comparison with the total volume of its [the seller's] business" and that the item involved in the discrimination was "a small item" in the customers' businesses, the Court stating (at page 49):

> Congress intended to protect a merchant from competitive injury attributable to discriminatory prices * * * *whether the particular goods constituted a major or minor portion of his stock.* [Emphasis supplied.]

In any event, the record here establishes that the discriminations involved were substantial, not only in terms of the differentials in price, but in terms of the total amounts of the purchases of both the favored customer and many of the nonfavored customers.

Respondents further contend that no finding of competitive injury can be made because the record does not establish "the requisite intensive competition between favored and nonfavored customers". Respondents' contention in this respect is lacking in merit. In the first place, there is no requirement under the *Morton Salt* case that competition between customers must be "intensive". It is sufficient, in the opinion of the examiner, that there is substantial competition between them. It may be noted, in this connection, that in the recent *Tri-Valley* case the existence of competition between favored and nonfavored customers in the resale of the goods involved in the discrimination was held to be unnecessary. In the earlier case of *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726 (1945), there was no competition between purchasers in the resale of the products sold by respondent, since the product was used as an ingredient of another product manufactured by the customers. In that case the Court also held that it was unnecessary that the differential in price be reflected in the price at which the goods were resold by the favored customers, thus suggesting that intensive competition in the resale of the products need not be shown.

In any event, even assuming arguendo that there must be a showing that competition in the resale of blackstrap molasses is "intensive" or "keen" (as respondents also refer to it), the record contains abundant evidence of the existence of such competition. As has already been found, many of the distributors sell in the same general area to the same class or classes of customers. They are in keen competition, not only with one another, but with the primary importers such as respondent Pacific Molasses Company and Southwestern Sugar & Molasses Company, both of which sell to feed mills and feed lot operators as well as to distributors. As previously found, the corporate respondent itself, ante litem motam, acknowledged that it was operating "in an extremely competitive market" in the sale of molasses in com-

petition with favored distributors. It seems self evident that non-favored distributors would find themselves in even greater difficulty in operating such a market.

Finally respondents contend that there has been no showing that any of the distributors were injured, and that if a few did suffer any loss of business or profits, it was due to factors other than their failure to receive discounts. Respondents' argument presupposes that a showing of the prescribed competitive effect requires evidence of actual injury to competition. This, however, is unnecessary. As the Supreme Court has pointed out: "The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co.* v. *FTC*, *supra*, at 738. The effect of price discriminations in any particular case must be looked at prospectively, in terms of what is reasonably to be anticipated, given a price differential of a certain size and certain margins and competitive relationships in the industry. The fact that other factors may lessen the blow of the differentials or that other factors may have played a part in business mortalities are immaterial where, as here, the evidence establishes that the discriminations are reasonably calculated to play a significant role in the ability of competitors to compete with the favored customer or customers. The conclusion here reached, it should be noted, that the statutory test has been met, is not based on any minimal prima facie showing under the *Morton Salt* doctrine. Aside from evidence as to the substantiality of the discounts, there is abundant evidence in the record to show that such discriminations are bound to have an adverse competitive effect.

5. Respondent has failed to sustain the burden of establishing that its discriminations in price among its distributor-customers were granted in good faith to meet the equally low price of a competitor, within the meaning of Section 2(b) of the Clayton Act. The essence of the defense under Section 2(b) is that "wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain the customer, may in good faith meet that lower price." *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 242 (1951). The prerequisites of establishing a Section 2(b) defense thus are, (1) that the seller acted in the good faith belief that the lower price of the competitor which is being met is "lawful", (2) that the discount is granted defensively in order to "retain" a customer, and not aggressively to gain new business, and (3) that the lower price being afforded by the seller is granted to meet its competitors' equally low price.

Insofar as the first requirement is concerned, the record fails to establish that, at the time respondent Pacific Molasses Company began

to grant discounts to Fort Worth Molasses Company, its competitor Southwestern Sugar & Molasses Company was then uniformly granting the same discounts to its distributors. The record indicates that shortly prior thereto Southwestern was granting quantity discounts up to ½¢ a gallon to some distributors and that the corporate respondent's president had expressed doubt that the price differentials could be cost justified. Thus, said respondent has failed to meet the burden of proving, at least in the case of the discounts granted to Fort Worth Molasses, that it was acting in the good faith belief it was meeting the lawful price of its competitor. Secondly, the record establishes taht, at least in the case of Fort Worth Molasses, the most favored customer, the discounts were granted to obtain a new customer, insofar as the corporate respondent's Houston terminal is concerned. Respondents suggest that in view of the Circuit Court's decision in *Sunshine Biscuit Co.* v. *FTC*, 306 F. 2d 48 (7 Cir., 1962), it is unnecessary to establish that the favored customer is an existing customer. However, in addition to the Supreme Court's holding to the contrary in the *Standard Oil* case, *supra*, the Second Circuit in *Standard Motor Products, Inc.* v. *FTC*, 265 F. 2d 674, 677, *cert. den.*, 361 U.S. 826 (1959), has likewise held that "it is well settled that a lowered price is within Section 2(b) * * * only if it is used defensively to hold customers rather than to gain new ones."

In any event, even if the distinction between old and new customers is ignored, it is still necessary to establish that the seller's granting of a discriminatory price is a purely defensive move. As the authority whose views are reflected in the *Sunshine Biscuit* case has expressed it:[48]

* * * a Section 2(b) justification should be acceptable *if it realistically maintains or restores the seller's market share*, losing some accounts while gaining others. * * * Basically, if a seller's lower price to meet competition *is genuinely a defensive reaction*, the incidental securing of new customers or regaining of lost accounts should not be disqualified under Section 2(b). [Emphasis supplied.]

The record here fails to establish, at least in the case of the discounts granted to Fort Worth Molasses, that respondent Pacific Molasses Company was acting merely to maintain or restore its market share, or that its actions were genuinely a defensive reaction to the discounts being granted to Fort Worth Molasses by its then supplier, Southwestern Sugar & Molasses Company. As has heretofore been found, the record does not disclose any deterioration of respondent's market position prior to the granting of the discount to Fort Worth Molasses. The granting of the discount was part of a policy decision by

[48] Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), page 247.

respondent Pacific Molasses Company to extend its business among distributors. This was not due primarily to the fact that Southwestern had granted a discount to Fort Worth Molasses, but was a result of the competition which the respondent was meeting from the prices being charged to user-customers by both distributors and by Southwestern Sugar & Molasses itself. Despite the fact that the corporate respondent had admittedly been able to retain or obtain customers by granting a discount of only 1/4¢ it granted Fort Worth a discount in excess of the 1/2¢ discount the latter was then getting from Southwestern, and tied it to a long-term exclusive contract. This can hardly be called a genuinely defensive reaction. By its action the corporate respondent did not merely maintain or restore its market share, but almost doubled its sales to distributors. Not only was the respondent's action not purely defensive, but it did more than merely "meet an equally low price" of its competitor, and thus it failed to meet the third requirement of a Section 2(b) defense.

6. As has heretofore been found, respondents have failed to establish that the discounts which Pacific Molasses Company granted to certain customers were given in return for the performance of certain functions or services by such customers for its account. However, even assuming that some of such discounts were granted for this purpose, the fact that discounts are of a functional nature is not recognized as a defense to a charge of price discrimination under Section 2(a) of the Clayton Act. Discriminations in price which fall within the proscription of Section 2(a), and which have the proscribed competitive effect, can be justified only if they fall within the purview of the Section 2(b) defense. The latter section does not include functional discounts within its scope. To the extent that a seller grants functional discounts, he does so at his own risk if the beneficiary of such discounts competes with other customers not so favored, unless the seller can justify such discounts under Section 2(b) or grants them on proportionally equal terms, within the meaning of Section 2(d) of the Clayton Act. *General Foods Corp.*, 52 F.T.C. 798 (1956); *Mueller Co.*, Docket 7514, January 12, 1962 [60 F.T.C. 120].

7. It is concluded that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and that the discriminations in price by respondent Pacific Molasses Company, as hereinabove found, constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

THE REMEDY

1. Two questions have been raised with respect to the scope of the order which should be issued in this proceeding. The first is whether

the order should include respondents Ferguson, Earnhardt and Doyle in their individual capacities. The second is whether the provision of the order prohibiting price discrimination should be the usual broad provision prohibiting all discriminations by respondent in the secondary line of commerce, or whether it should prohibit discrimination only among distributors purchasing from the corporate respondent's Houston terminal. To a consideration of these two questions the examiner now turns.

2. While complaint counsel has proposed to include the three individual respondents in the order, he has advanced no reasons, either in his proposed findings or in his reply memorandum, why they should be so included. Respondents contend that in the event any cease and desist order is issued the three individual respondents should not be included. In the case of the respondent Earnhardt, there is not even a semblance of justification for including him since he had no connection with the events at issue. With respect to respondents Ferguson and Doyle, the record does disclose that they played a prominent role in the events, Doyle as adviser and Ferguson as the man who made the ultimate decisions. However, in all instances they acted within their sphere as officers or employees of the corporate respondent. No reason has been advanced as to why the order should extend to them in their individual capacities. The corporate respondent is a wholly owned subsidiary of United Molasses Company, which is a publicly held corporation. Respondent Ferguson has only a small stock interest in the parent company. The record contains no evidence indicative of any possibility of evasion of the order by the corporate respondent, so as to require that the individual respondents be held. Accordingly, the order to be issued in this case will exclude the other three respondents in their individual capacities.

3. With respect to the scope of the provision prohibiting price discrimination, complaint counsel contends that a broad order should be issued despite the fact that the evidence of price discrimination is largely limited to the Houston terminal, since price discrimination by the corporate respondent cannot otherwise be effectively terminated. Conversely, respondents argue that since the evidence of discrimination involved only the Houston terminal the order should be so limited.

4. In the opinion of the examiner it is not necessary, in order to justify a broad order, to offer evidence of price discrimination in more than one area. Once evidence of a violation of Section 2(a) has been adduced, the burden is on the party asserting that the order should be limited to adduce evidence to justify such a limitation. The record in this proceeding does not contain any evidence from which it can be inferred that conditions at the corporate respondent's other terminals are so materially different from those at Houston, as to justify

excluding its other operations from the order. The examiner is not unmindful of the fact that the order, issued pursuant to consent agreement, against the corporate respondent's competitor, Southwestern Sugar & Molasses Company, is operative on a terminal-by-terminal basis.[49] However, the facts there before the examiner and the Commission indicated that there was no substantial competition between that respondent's terminals. In the instant case the record indicates that some competition does exist between or among the Houston, New Orleans and El Paso terminals, and is silent as to whether it exists in the case of approximately ten other terminals. Accordingly, it is the opinion of the examiner, that the order to be issued should broadly prohibit price discrimination among competing customers, as is customary in Commission proceedings. To the extent that there is no substantial competition between and among customers of different terminals this would, of course, permit the corporate respondent to maintain a differential among the terminals involved.

ORDER

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

> Discriminating, directly or indirectly, in the price of blackstrap molasses by selling said product to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality who, in fact, competes in the resale and distribution of said respondent's blackstrap molasses as such with the purchasers paying the higher price, or who competes in the resale and distribution of said respondent's blackstrap molasses as an ingredient of other products with the purchaser paying the higher price.

The term "net price" as used in this order includes rebates, allowances, commissions, discounts, terms, and conditions of sale and delivery, or other forms of direct or indirect price reductions, by which net prices are effected.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to James M. Ferguson, F. W. Earnhardt and Bascom Doyle in their individual capacities, and is dismissed as to that portion of Paragraph Five as alleges a competitive effect in the line of commerce in which respondents are engaged.

[49] Docket 7463, order adopting initial decision issued September 12, 1962 [61 F.T.C. 525].

313-121—70——46

TABLE 1.—*Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors*

Houston quoted price, dollars/ton	Time period—1955	Fort Worth				Marco Chemical					
		Fort Worth's invoice price	Difference from Houston price	Tonnage bought	Total savings over Houston price	Marco's invoice price	Difference from Houston price	Price disadvantage versus Fort Worth	Tonnage bought	Total savings over Houston price	Total disadvantage versus Fort Worth
$17.95	Jan. 17 to Feb. 27	$17.10	$0.85	6,815.8	$5,793.43	$17.95	None	$0.85	1,009.1	None	$857.74
18.81	Feb. 28 to Mar. 18	[1]17.10	1.71	205.9	352.09	[4]17.95	$0.86	.85	186.2	$159.13	158.27
		17.95	.86	1,825.4	1,509.84	[5]18.81	None	.86	281.0	None	241.66
					1,921.93						399.93
19.66	Mar. 19 to May 2	17.95	1.71	1,242.7	2,125.10	19.24	$0.42	.43	425.1	$178.54	182.79
		[2]18.81	.85	2,029.0	1,724.65						
					3,849.75						
18.81	May 3 to June 28	17.95	.86	3,944.0	3,391.84	18.38	.43	.43	553.3	237.92	237.92
19.66	June 29 to July 20	18.81	.85	1,131.7	961.96	19.24	.42	.43	225.0	94.50	96.75
20.52	July 21 to Oct. 1	18.81	1.71	4,514.1	7,719.11	[6]20.09	.43	1.28	81.7	35.13	104.58
		[3]19.66	.86	988.0	849.68	[7]20.52	None	1.71	1,051.1	None	1,797.38
					8,568.79						1,901.96
20.52	Oct. 2 to Nov. 22					20.52	None		1,139.9	None	
						20.52	$0.85		67.9	$57.72	
21.37	Nov. 23 to Dec. 7					21.37	None		272.1	None	
22.23	Dec. 8 to Dec. 19					22.23	None		336.2	None	
						22.23	$0.85		33.7	$28.65	
23.08	Dec. 20 to Dec. 31					23.08	None		318.4	None	
	Total for Jan. 17–Dec. 31			22,696.6	24,487.70				5,980.7	$791.59	3,677.0

[1] $17.10 price effective on Mar. 1 only.
[2] $18.81 price began on Apr. 1.
[3] $19.66 price was effective between July 26 and July 29, Sept. 26 and Oct. 1. Fort Worth's last purchase was made Oct. 1.
[4] Mar. 1–7.
[5] Mar. 7–18.
[6] July 21–28.
[7] July 28–Nov. 22.

TABLE 1.—*Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors*—Continued

Houston quoted price, dollars/ton	Time period—1955	C. & R.						Parris					
		C. & R.'s invoice price	Difference from Houston price	Price disadvantage versus Fort Worth	Tonnage bought	Total savings over Houston price	Total disadvantage versus Fort Worth	Parris' invoice price	Difference from Houston price	Price disadvantage versus Fort Worth	Tonnage bought	Total savings over Houston price	Total disadvantage versus Fort Worth
$17.95	Jan. 17 to Feb. 27	$17.95	None	$0.85	842.4	None	$716.04	$17.95 17.53	None $0.42	$0.85 .43	184.4 223.6	None $93.91	$156.74 96.15
													252.89
18.81	Feb. 28 to Mar. 18	17.95 18.38	$0.86 .43	.85 .43	19.2 283.1	$16.51 121.73	16.41 121.73	17.53	1.28	+.42	209.1	267.63	−87.82
						138.24	138.14						
19.66	Mar. 19 to May 2	[8] 18.38 [9] 18.38	1.28 1.28	.43 +.43	247.6 320.3	316.93 409.98	106.47 −137.73	[11] 17.53 [12] 19.24	2.13 .42	+.42 .43	167.2 86.1	356.14 36.16	−70.22 37.02
						726.91	−31.26					392.30	−33.20
18.81	May 3 to June 28	18.38 18.81	.43 None	.43 .86	76.5 324.6	32.90 None	32.90 279.16	18.38	.43	.43	218.1	93.78	93.78
							312.06						
19.66	June 29 to July 20	19.66	None	.85	133.9	None	113.82	19.24	.42	.43	69.7	29.27	29.97
20.52	July 21 to Oct. 1	19.66 20.52	$0.86 None	.85 .86	57.5 343.8	$49.45 None	48.88 295.67	19.24 20.52	1.28 None	.43 .86	52.1 239.6	66.69 None	22.40 206.06
							344.55						228.46
20.52	Oct. 2 to Nov. 22	[10] 20.52	None		55.4	None		20.52	None		154.0	None	
21.37	Nov. 23 to Dec. 7							21.37	None		68.6	None	
22.23	Dec. 8 to Dec. 19							22.23	None		51.5	None	
23.08	Dec. 20 to Dec. 31							23.08	None		17.0	None	
	Total for Jan. 17–Dec. 31				2,704.3	$947.50	1,593.35				1,741.0	$943.60	484.08

[8] Mar. 19–31.
[9] Apr. 1–May 2.
[10] Last purchase Oct. 7.
[11] Mar. 19–Apr. 15.
[12] Apr. 16–May 2.

TABLE 1.—*Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors*—Continued

Houston quoted price, dollars/ton	Time period—1955	B. G. Thompson						W. L. Hunt					
		Thompson's invoice price	Difference from Houston price	Price disadvantage versus Fort Worth	Tonnage bought	Total savings over Houston price	Total disadvantage versus Fort Worth	Hunt's invoice price	Difference from Houston price	Price disadvantage versus Fort Worth	Tonnage bought	Total savings over Houston price	Total disadvantage versus Fort Worth
$17.95	Jan. 17 to Feb. 27	$17.95	None	$0.85	279.6	None	$237.66	(13)					
18.81	Feb. 28 to Mar. 18	17.95	$0.86	.85	14.3	$12.30	12.16	(13)					
		18.81	None	.86	140.8	None	121.09						
							133.25						
19.66	Mar. 19 to May 2	19.66	None	.85	308.5	None	262.23	(13)					
18.81	May 3 to June 28	18.81	None	.86	334.1	None	287.33	(13)					
19.66	June 29 to July 20	19.66	None	.85	52.5	None	44.63	$19.66	None	$0.85	160.4	None	$136.34
20.52	July 21 to Oct. 1	20.52	None	1.71	378.1	None	646.55	20.52	None	1.71	318.9	None	545.32
20.52	Oct. 2 to Nov. 22	20.52	None		148.6	None		20.52	None		275.6	None	
21.37	Nov. 23 to Dec. 7	21.37	None		26.1	None		(13)					
22.23	Dec. 8 to Dec. 19	22.23	None		67.0	None		22.23	None		13.7	None	
23.08	Dec. 20 to Dec. 31	22.23	$0.85		13.5	$11.48		(13)					
		23.08	None		39.5	None							
	Total for Jan. 17–Dec. 31				1,802.6	$23.74	1,611.65				768.6		681.66

[13] No sales to Hunt during period.

TABLE 1.—*Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors*—Continued

Houston quoted price, dollars/ton	Time period—1955	J. C. Barnes						Yoakum					
		Barnes' invoice price	Difference from Houston price	Price disadvantage versus Fort Worth	Tonnage bought	Total savings over Houston price	Total disadvantage versus Fort Worth	Yoakum invoice price	Difference from Houston price	Price disadvantage versus Fort Worth	Tonnage bought	Total savings over Houston price	Total disadvantage versus Fort Worth
$17.95	Jan. 17 to Feb. 27	$17.95	None	$0.85	51.7	None	$43.95	$17.95	None	$0.85	53.2	None	$45.22
18.81	Feb. 28 to Mar. 18	18.81	None	.85	31.8	None	27.03	(14)					
19.66	Mar. 19 to May 2	19.66	None	.85	95.9	None	81.51	19.66	None	.85	17.6	None	14.96
18.81	May 3 to June 28	18.81	None	.86	215.8	None	185.59	(14)					
19.66	June 29 to July 20	19.66	None	.85	95.9	None	81.51	(14)					
20.52	July 21 to Oct. 1	20.52	None	1.71	125.7	None	214.94	20.52	None	1.71	35.6	None	60.88
20.52	Oct. 2 to Nov. 22	20.52	None		287.6	None		20.52	None		35.9	None	
21.37	Nov. 23 to Dec. 7	21.37	None		96.6	None		21.37	None		17.9	None	
22.23	Dec. 8 to Dec. 19	22.23	None		63.7	None		22.23	None		17.2	None	
23.08	Dec. 20 to Dec. 31	23.08	None		75.1	None		(14)					
	Total for Jan. 17–Dec. 31				1,139.8		624.53				177.4		121.06

[14] No sales made to Yoakum during period.

Opinion of the Commission

MAY 21, 1964

By DIXON, *Commissioner:*

The hearing examiner found that respondent Pacific Molasses Company, in the sale of its "blackstrap" molasses in Texas and adjoining States, has discriminated in favor of certain of its customers and against certain others in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13; that respondent's largest and most favored customer received price concessions totaling some $24,487.70 during the first nine months of 1955; that these concessions ranged from ½¢ per gallon up to 1¢ per gallon, the latter being a reduction of nearly 10% from the published prices charged other customers; that, among Pacific's other customers, some received concessions of ½¢ per gallon (roughly 5% off the list price), others ¼¢ (some 2½% off the list price), and others no concessions at all; that the business of reselling molasses is highly competitive, with total net profit margins ranging around ½¢; that, in a market where net profits are only ½¢ per gallon, price discriminations that put other customers at competitive disadvantages ranging from ¼¢ to 1¢ per gallon are plainly injurious to competition; and that these price discriminations were not, as contended by respondents, made in good faith to meet competitors' prices. The record fully supports these and the examiner's other essential findings.

Nor do we see any denial of due process in the hearing examiner's failure to follow a pre-trial order requiring counsel supporting the complaint to give respondents a list of his witnesses and exhibits 15 days in advance of the hearing. Pre-trial orders of this nature, being discretionary with the hearing examiner in the first place, and subject to modification by the hearing examiner himself at the hearing (Rules, Sec. 3.8; Rule 16, Federal Rules of Civil Procedure; Note, "Federal Pre-Trial Practice: A Study of Modification and Sanctions," 51 Georgetown Law Journal 309 (Winter 1963)), cannot be said to confer constitutional "rights." While it is to be regretted that the order was not followed in this case, there was no bad faith involved (the hearing examiner and complaint counsel inadvertently overlooked the order and were not reminded of its existence until arrangements for the hearing were already under way) and there was no prejudice to respondents; they were given express permission to recall any of complaint counsel's witnesses in the presentation of their own case, with the right to cross-examine them as adverse witnesses, Rules, Sec. 3.16 (c), and were further given a 40-day continuance during the presentation of their own case for additional investigation and preparation.

Whatever "surprise" respondents may have experienced on the first day of the hearing, it is clear that their right to present a full and complete defense was in no way prejudiced. *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, 983–984 (D.C. Cir. 1963); *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511, 519 (6th Cir. 1944). Under these circumstances, nothing but delay would be accomplished by a remand.

The hearing examiner correctly dismissed the complaint as to one of the corporate officials in his individual capacity. The duties of F. W. Earnhardt, a vice president and secretary-treasurer of the corporate respondent, relate primarily to accounting, financial and tax matters; he neither authorized nor participated in the unlawful acts in question. But James M. Ferguson, president of respondent Pacific Molasses, testified that he personally ordered the discriminatory pricing. And Bascom Doyle, now vice president in charge of respondent Pacific's Gulf Division, formerly manager of its New Orleans branch office and in charge of Houston sales, testified that he executed those orders for the discriminatory pricing. The Clayton Act, like the Sherman Act, should be contrued "in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction," including the officer who "*authorizes*, *orders*, or *helps perpetrate* the crime—regardless of whether he is acting in a representative capacity." *United States* v. *Wise*, 370 U.S. 405, 409, 416 (1962) (emphasis added). See also *Coro, Inc.*, Dkt. 8346 (July 9, 1963) [63 F.T.C. 1164], at p. 1204; *Fred Meyer, Inc.*, Dkt. 7492 (March 29, 1963) [63 F.T.C. 1], at pp. 71, 72. While professional managers owning little or no stock in their corporations are generally unlikely or unable to evade an order by dissolving the corporation and using its assets to create another, they not infrequently resign from their posts to take comparable positions in other companies in the same industry, and sometimes resign to start new companies of their own in that same industry. We see no reason why these two corporate officers, having once been found guilty of deliberate and purposeful price discrimination that seriously injured others in the industry, should be left free to give and execute the same kind of unlawful orders on behalf of some other molasses company.

The exceptions filed by respondent Pacific Molasses Company are denied and the initial decision, modified to conform to the views expressed in this opinion, will be adopted as the decision of the Commission.

Commissioner Elman dissented, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

Final Order

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondent Pacific Molasses Company, upon the Commission's order placing the case on its docket for review as to the individual respondents, and upon briefs and oral arguments in support of and in opposition to the initial decison; and the Commission having ruled on said exceptions, and having determined that the order to cease and desist contained in said initial decision should be supplemented and modified to conform with the views expressed in the accompanying opinion:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

> *It is ordered*, That respondents Pacific Molasses Company, a corporation, its officers, representatives, agents and employees, and James M. Ferguson and Bascom Doyle, individually and as officers of Pacific Molasses Company, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of blackstrap molasses in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:
>
> > Discriminating, directly or indirectly, in the price of blackstrap molasses by selling said product to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality who, in fact, competes in the resale and distribution of said respondents' blackstrap molasses as such with the purchasers paying the higher price, or who competes in the resale and distribution of said respondents' blackstrap molasses as an ingredient of other products with the purchaser paying the higher price.
>
> The term "net price" as used in this order includes rebates, allowances, commissions, discounts, terms, and conditions of sale and delivery, or other forms of direct or indirect price reductions, by which net prices are effected.
>
> *It is further ordered*, That the complaint be, and the same hereby is, dismissed as to F. W. Earnhardt in his individual capacity, and is dismissed as to that portion of Paragraph Five as alleges a competitive effect in the line of commerce in which respondents are engaged.

It is further ordered, That respondent Pacific Molasses Company's exceptions to the initial decision be, and they hereby are, denied, and that the hearing examiner's initial decision, as modified and supple-

mented by this order, be, and it hereby is, adopted as the decision of the Commission.

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

Commissioner Elman dissenting, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

COUNTRY TWEEDS, INC., ET AL.

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

Docket 8085. Complaint, Aug. 24, 1960—Decision, May 21, 1964

Order modifying an order of November 29, 1962, 61 F.T.C. 1250, pursuant to a decision of U.S. Court of Appeals, Second Circuit, 326 F. 2d 144 (7 S.&D. 835), by eliminating from said order paragraph 4 which prohibited respondent from misrepresenting "in any manner" the quality of its cashmere.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Second Circuit their petition to review and set aside the order to cease and desist issued herein on November 29, 1962; and the court having rendered its decision on January 3, 1964, and having entered its final decree on January 28, 1964, modifying, and as modified, affirming and enforcing said order to cease and desist; and the time for filing a petition for certiorari having expired and no such petition having been filed;

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

It is ordered, That respondents, Country Tweeds, Inc., a corporation, and its officers, and Marcus Weisman, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of ladies' cashmere coats or any other merchandise, composed of fabrics of any kind, or products made therefrom, in