FINAL ORDERS*

These matters have been heard on appeal (by complaint counsel and respondent in No. 7717, and by complaint counsel in No. 7721) from initial decisions of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission, without adjudicating any of the issues raised by these appeals, has determined that the public interest would not be served by entry of cease-and-desist orders in these proceedings and that the complaints in these matters should be dismissed. Accordingly,

It is ordered, That the initial decisions be, and they hereby are, vacated and set aside.

It is further ordered, That the complaints against respondents be, and they hereby are, dismissed.

Commissioner MacIntyre not concurring in the result.

IN THE MATTER OF

CHESEBROUGH-PONDS, INC.**

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

Dockets 8491–8500, 8502–8508. Complaints, June 13, 1962—Decisions, July 27, 1964

Orders setting aside initial decisions—respondents having ceased making the alleged discriminatory payments—and opinion setting forth declaratory findings defining the requirements of the law as a binding guide for future conduct in cases in which complaints charged 17 manufacturers of drugs, cosmetics and sundries with violating Sec. 2(d) of the Clayton Act by making payments for advertising in customer-owned publications including (1) wholesalers' catalogs distributed to retailer customers for use in ordering merchandise, and (2) catalogs distributed by wholesalers to retailers for dissemination to the buying public.

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*In the following related cases of Max Factor & Company, Docket No. 7717 and Shulton, Inc., Docket No. 7721.

**And the following related cases: Union Carbide Corporation, Docket No. 8492; Becton, Dickinson & Company, Docket No. 8493; Warner-Lambert Pharmaceutical Company, Docket No. 8494; Julius Schmid, Inc., Docket No. 8495; The Mennen Company, Docket No. 8496; Eversharp, Inc., Docket No. 8497; Sterling Drug, Inc., Docket No. 8498; Corn Products Company, Docket No. 8499; White Laboratories, Inc., Docket No. 8500; Chemway Corporation, Docket No. 8502; The d-Con Company, Inc., Docket No. 8503; Hazel Bishop, Inc., Docket No. 8504; Philip Morris, Incorporated, Docket No. 8505; Lehn & Fink Products Corporation, Docket No. 8506; B. T. Babbitt, Inc., Docket No. 8507; Youngs Rubber Corporation, Docket No. 8508.

The Complaints and Final Orders in these cases were consolidated by the compiler.

COMPLAINTS

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

PARAGRAPH 1. Respondent Chesebrough-Pond's, Inc., Docket No. 8491, 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 485 Lexington Avenue, New York, New York.

Respondent Union Carbide Corporation, Docket No. 8492, 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 30 East 42nd Street, New York, New York.

Respondent Becton, Dickinson & Company, Docket No. 8493, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Rutherford, New Jersey.

Respondent Warner-Lambert Pharmaceutical Company, Docket No. 8494, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Morris Plains, New Jersey.

Respondent Julius Schmid, Inc., Docket No. 8495, 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 423–439 West 55th Street, New York, New York.

Respondent The Mennen Company, Docket No. 8496, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Hanover Avenue, Morristown, New Jersey.

Respondent Eversharp, Inc., Docket No. 8497, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 350 Fifth Avenue, New York, New York.

Respondent Sterling Drug, Inc., Docket No. 8498, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1450 Broadway, New York, New York.

Respondent Corn Products Company, Docket No. 8499, is a corpo-

ration organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 717 Fifth Avenue, New York, New York.

Respondent White Laboratories, Inc., Docket No. 8500, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Kenilworth, New Jersey.

Respondent Chemway Corporation, Docket No. 8502, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Fairfield Road, Wayne, New Jersey.

Respondent The d-Con Company, Inc., Docket No. 8503, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1450 Broadway, New York, New York.

Respondent Hazel Bishop, Inc., Docket No. 8504, 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 445 Park Avenue, New York, New York.

Respondent Philip Morris Incorporated, Docket No. 8505, is a corporation organized, existing and doing business under the laws of the State of Virginia with its office and principal place of business located at 100 Park Avenue, New York, New York.

Respondent Lehn & Fink Products Corporation, Docket No. 8506, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 445 Park Avenue, New York, New York.

Respondent B. T. Babbitt, Inc., Docket No. 8507, 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 625 Madison Avenue, New York, New York.

Respondent Youngs Rubber Corporation, Docket No. 8508, 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 145 Hudson Street, New York, New York.

Par. 2. Respondent Chesebrough-Pond's, Inc., Docket No. 8491, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics, toiletries, drugs and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $66,000,000 in the year 1959.

Respondent Union Carbide Corporation, Docket No. 8492, through

its division, Union Carbide Consumer Products Company, formerly National Carbon Company, is now and has been engaged in the business of manufacturing, selling and distributing dry cell batteries, flashlights and related battery and flashlight products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $1,200,000,000 in the year 1959.

Respondent Becton, Dickinson & Company, Docket No. 8493, is now and has been engaged in the business of manufacturing, selling and distributing medical thermometers, syringes, needles, household gloves and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $26,000,000 in the year 1959.

Respondent Warner-Lambert Pharmaceutical Company, Docket No. 8494, through its divisions and subsidiaries, is now and has been engaged in the business of manufacturing, selling and distributing cold remedies, anodynes, toothpastes, antiseptics and related products. It sells these products to wholesalers of drugs and sundries throughout the United States. Respondent's total sales are substantial, having exceeded $190,000,000 in the year 1959.

Respondent Julius Schmid, Inc., Docket No. 8495, is now and has been engaged in the business of manufacturing, selling and distributing prophylactic rubber products, gynecological products, and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's sales were approximately $8,000,000 in the year 1959.

Respondent The Mennen Company, Docket No. 8496, is now and has been engaged in the business of manufacturing, selling and distributing toilet articles which include men's deodorants, shaving lathers, lotions, talcs, baby powders, baby oils, foot powder and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $20,000,000 in the year 1959.

Respondent Eversharp, Inc., Docket No. 8497, through its division Schick Safety Razor Company, is now and has been engaged in the business of manufacturing, selling and distributing razors, razor blades and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $18,000,000 in the year 1959.

Respondent Sterling Drug, Inc., Docket No. 8498, through its division Glenbrook Laboratories, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics, toilet-

ries, proprietary drugs, sundries and related products. It sells its products to wholesalers of drugs and sundries located throughout the United States. Respondent's total sales are substantial, having exceeded $200,000,000 in the year 1959.

Respondent Corn Products Company, Docket No. 8499, through its division Best Foods, is now and has been engaged in the business of manufacturing, selling and distributing shoe dressings, household dyes, color removing agents and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $500,000,000 in the year 1959.

Respondent White Laboratories, Inc., Docket No. 8500, is now and has been engaged in the business of manufacturing, selling and distributing drugs, pharmaceuticals and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $15,000,000 in the year 1959.

Respondent Chemway Corporation, Docket No. 8502, through its divisions Dunbar Laboratories and Household Products, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics, toiletries, insecticides, proprietary drugs and related products. It sells its products to wholesalers of drugs and sundries throughout the United States. Respondent's total sales are substantial, having exceeded $7,000,000 in the year 1959.

Respondent The d-Con Company, Inc., Docket No. 8503, is now and has been engaged in the business of manufacturing, selling and distributing rodenticides, insecticides, cleansing and deodorizing agents, lighter fluids, shoe dressings and related products. It sells its products to drugs and sundries wholesalers located throughout the United States. Respondent's total sales are substantial having exceeded $4,000,000 in the year 1959.

Respondent Hazel Bishop, Inc., Docket No. 8504, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics and related products. It sells these products to wholesalers of drugs and sundries throughout the United States. Respondent's total sales are substantial, having exceeded $8,000,000 in the year 1959.

Respondent, Philip Morris Incorporated, Docket 8505, through its division American Safety Razor Company, is now and has been engaged in the business of manufacturing, selling and distributing razors, razor blades and related products. It sells its products to its customers located in all of the States of the United States and the

District of Columbia. Respondent's total sales are substantial, having exceeded $500,000,000 in the year 1960.

Respondent, Philip Morris Incorporated, Docket No. 8505, on May 3, 1960, purchased all of the assets and business of A.S.R. Products Company, a corporation organized under the laws of the State of Virginia with its office and principal place of business located at 308 Madison Avenue, New York, New York. Prior to said acquisition A.S.R. Products Company was engaged in the business of manufacturing, selling and distributing among other things, razors, razor blades and allied products. It sold its products to drug and sundries wholesalers located throughout the United States. Sales by A.S.R. Products Company were substantial having exceeded $32,000,000 in the year 1959. [Paragraph Three in separate complaint.]

Since Philip Morris Incorporated acquired A.S.R. Products Company on May 3, 1960, Philip Morris Incorporated has carried on the business of A.S.R. Products Company as a Division of Philip Morris Incorporated, and has changed the name of the Division from A.S.R. Products Company to American Safety Razor Company. [Paragraph Four in separate complaint.]

Respondent Lehn & Fink Products Corporation, Docket No. 8506, is now and has been engaged in the business of manufacturing, selling and distributing disinfectants, deodorants, skin creams, hair rinses, bath preparations, feminine hygiene products and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $32,000,000 in the year 1959.

Respondent B. T. Babbitt, Inc., Docket No. 8507, through its divisions and subsidiaries, is now and has been engaged in the business of manufacturing, selling and distributing household cleansing products, hair creams, sprays, shampoos and related products. It sells its products to wholesalers and retailers throughout the United States. Respondent's total sales are substantial having exceeded $23,000,000 in the year 1959.

Respondent Youngs Rubber Corporation, Docket No. 8508, is now and has been engaged in the business of manufacturing, selling and distributing prophylactic rubber products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded $6,000,000 in the year 1959.

PAR. 3. In the course and conduct of their business, respondents have engaged and are now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and

cause their products to be transported from the respondents' principal place of business, to customers located in other States of the United States. [Paragraph Five in separate complaint, *In the Matter of Philip Morris, Inc.*, Docket 8505.]

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products. [Paragraph Six in separate complaint, *In the Matter of Philip Morris Inc.*, Docket No. 8505.]

PAR. 5. For example, during the year 1959 respondent Chesebrough-Pond's, Inc., Docket No. 8491, contracted to pay and did pay to McKesson & Robbins, Inc. at least $1,774 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Union Carbide Corporation, Docket No. 8492, contracted to pay and did pay to McKesson & Robbins, Inc. at least $3,208.73 as compensation or as an allowance for advertising and at least $1,500 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Becton, Dickinson & Company, Docket No. 8493, contracted to pay and did pay to McKesson & Robbins, Inc. at least $1,468 as compensation or as an allowance for advertising and at least $2,250 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its

offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Warner-Lambert Pharmaceutical Company, Docket No. 8494, contracted to pay and did pay to McKesson & Robbins, Inc. at least $6,483 as compensation or as an allowance for advertising services and at least $1,500 as compensation or in consideration for special merchandising services, or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Julius Schmid, Inc., Docket No. 8495, contracted to pay and did pay to McKesson & Robbins, Inc. at least $3,852 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent The Mennen Company, Docket No. 8496, contracted to pay and did pay to McKesson & Robbins, Inc. at least $2,100 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Eversharp, Inc., Docket No. 8497, contracted to pay and did pay to McKesson & Robbins, Inc. at least $18,800 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of

products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Sterling Drug, Inc., Docket No. 8498, contracted to pay and did pay to Druggists' Service Company, Inc., a membership service corporation composed of wholesale druggists, at least $4,069 as compensation or as an allowance for advertising or other services or facilities furnished by or through Druggists' Service Company, Inc. or its members in connection with the offering for sale or sale of products sold to such wholesale members by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with the wholesale members of Druggists' Service Company, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Corn Products Company, Docket No. 8499, contracted to pay and did pay to McKesson & Robbins, Inc. at least $2,400 as compensation or as an allowance for advertising and at least $1,000 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent White Laboratories, Inc., Docket No. 8500, contracted to pay and did pay to McKesson & Robbins, Inc. at least $3,758 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Chemway Corporation, Docket No. 8502, contracted to pay, and did pay, to McKesson & Robbins, Inc. at least $1,388.10 as compensation or as an allowance for advertising or other services or facilities furnished by or through

McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent The d-Con Company, Inc., Docket No. 8503, contracted to pay and did pay to McKesson & Robbins, Inc. at least $4,761.78 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Hazel Bishop, Inc., Docket No. 8504, contracted to pay, and did pay, to McKesson & Robbins, Inc. at least $2,100 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1961 respondent Philip Morris Incorporated, Docket No. 8505, contracted to pay and did pay to McKesson & Robbins, Inc. at least $1,376 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Prior to respondent's acquisition of A.S.R. Products Company the latter corporation, during the year 1959, contracted to pay and did pay to McKesson & Robbins, Inc. at least $3,500 as compensation or as an allowance for advertising, and at least $1,500 as compensation or in consideration for special merchandising services or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by A.S.R. Products Company. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing

with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent. [Paragraph Seven in separate complaint, *In the Matter of Philip Morris Inc.*, Docket No. 8505.]

For example, during the year 1959 respondent Lehn & Fink Products Corporation, Docket No. 8506, contracted to pay and did pay to Druggists' Service Company, Inc., a membership service corporation composed of wholesale druggists, at least $690 as compensation or as an allowance for advertising or other services or facilities furnished by or through Druggists' Service Company, Inc. or its members in connection with its offering for sale or sale of products sold to such wholesale members by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with the wholesale members of Druggists' Service Company, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent B. T. Babbitt, Inc., Docket No. 8507, contracted to pay and did pay to McKesson & Robbins, Inc. at least $1,400 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

For example, during the year 1959 respondent Youngs Rubber Corporation, Docket No. 8508, contracted to pay and did pay to McKesson & Robbins, Inc. at least $3,852 as compensation or as an allowance for advertising or other services or facilities furnished by or through McKesson & Robbins, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with McKesson & Robbins, Inc. in the sale and distribution of products purchased from respondent.

Par. 6. The acts and practices of respondents, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.* [Paragraph Eight in separate complaint, *In the Matter of Philip Morris Inc.*, Docket No. 8505.]

**In the Matter of Philip Morris Incorporated*, Docket No. 8505, the acts and practices of respondent, as alleged, are a continuation of the acts and practices of A.S.R. Products Company prior to its acquisition by respondent.

OPINION OF THE COMMISSION*

The posture of all seventeen of these cases is substantially similar. The complaints, issued on June 13, 1962, charge the respondents violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by making discriminatory promotional payments to certain customers. Each of the complaints sets out as an example of the allegedly unlawful payments a specified amount paid to either McKesson & Robbins (hereinafter McKesson) or Druggist's Service Council, Inc. (hereinafter DSC). After hearings the examiners found and concluded that the law had been violated in several respects and their initial decisions contain orders directing the respondent to cease and desist from the activities found unlawful.

With the exception of the *Mennen* case (Docket 8496), in which the Commission *sua sponte* stayed the effective date of the initial decision, and *Lehn & Fink Products Corp.* (Docket 8506), where only respondent appealed, the cases are before us for consideration of the cross-appeals of respondents and complaint counsel. The appealed cases were fully briefed by both sides and argued before the Commission.

The unusual similarity of these matters extends through a common factor which the Commission deems most persuasive—each of the respondents discontinued the payments which the hearing examiners held were unlawful either before or immediately upon receipt of the first official notice that the Commission intended to issue a complaint. Moreover, respondents and their counsel have given assurances that the payments will not be resumed unless and until the Commission holds them to be lawful.

Each of the respondents pleads that because of their voluntary discontinuance of the challenged payments an order to cease and desist is unnecessary since its object has already been accomplished. In weighing pleas of abandonment or discontinuance, the Commission considers a wealth of factors, but in the final analysis the decision must be based upon a conviction that the practice has been surely stopped and will not be resumed in the future. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 330–331 (7th Cir. 1934). In these cases the Commission in the exercise of its discretion has concluded that the pub-

*In the following related cases: Chesebrough-Ponds, Inc., Docket No. 8491; Union Carbide Corporation, Docket No. 8492; Becton, Dickinson & Company, Docket No. 8493; Warner-Lambert Pharmaceutical Company, Docket No. 8494; Julius Schmid, Inc., Docket No. 8495; The Mennen Company, Docket No. 8496; Eversharp, Inc., Docket No. 8497; Sterling Drug, Inc., Docket No. 8498; Corn Products Company, Docket No. 8499; White Laboratories, Inc., Docket No. 8500; Chemway Corporation, Docket No. 8502; The d-Con Company, Inc., Docket No. 8503; Hazel Bishop, Inc., Docket No. 8504; Philip Morris, Incorporated, Docket No. 8505; Lehn & Fink Products Corporation, Docket No. 8506; B. T. Babbitt, Inc., Docket No. 8507; Youngs Rubber Corporation, Docket No. 8508.

lic interest will best be served by terminating this expensive litigation at this stage with acceptance of the respondents' assurances that the practices found unlawful by the hearing examiners will not be resumed.

At oral argument several counsel expressed the thought that whatever the Commission's final ruling, it should state its position with respect to the various types of payments which the records show were made by the respondents. Counsel argued that respondents are honestly interested in full compliance with the law, but feel in need of guidance with respect to promotional payments made to customers. In view of our disposal of these matters without orders to cease and desist, such a declaratory statement is an absolute necessity, for respondents must be informed as to our understanding of the law and the activities which we feel respondents are bound to refrain from in the future.

These cases are primarily concerned with respondents' payments for advertising in customer-owned publications. The publications are of two types. The first type consists of buying guides or catalogs published by or for wholesalers, which they distribute to their retailer customers to be used by the retailers in ordering merchandise from the wholesaler. McKesson's "Profitunities" and DSC's "Buying Guide" are examples of these types of customer-owned or controlled publications. The second type of publication is a catalog prepared by or for wholesalers which they distribute to retailers for dissemination to the buying public. Examples of these consumer-directed catalogs were the "Gift Books" distributed by both McKesson and DSC. The hearing examiners concluded that discriminatory payments (*i.e.*, not made available to competing customers on proportionally equal terms) to customers for advertisements in such customer-owned publications were unlawful, and the Commission has decided that this legal conclusion is entirely correct. Many of the respondents argued that DSC members and McKesson received no "discriminatory benefit" from their retailer-directed catalogs ("Buying Guide" and "Profitunities") since retailers could and on occasion did utilize the publications in making purchases from other wholesalers. As a factual matter, we are not convinced that McKesson and DSC received no special benefit from their publications. The fact that some retailers occasionally ignored the invitation to buy from the wholesaler-publisher whose name appeared on the catalog is a not entirely unforeseen risk assumed by any advertiser of products available from alternate sources.

Several respondents carry the argument one step farther pleading that since retailers are motivated by the catalog advertisements to purchase from both publisher-wholesalers and their competitors, the respondent suppliers receive the primary benefit from the advertise-

ments and hence the law is not violated. The rule espoused is "If the primary benefit is received by the supplier, rather than by the customer, then there is no violation." As we see it, all promotional payments made by suppliers to their reselling customers are intended to benefit both supplier and customers. To require the Commission to measure which of the parties received the preponderance of the benefit is unrealistic in the extreme, for objective measurement of such a factor is all but impossible. Pursuit of such will-of-the-wisps would effectively stultify enforcement of the Act against this type of discriminatory payment.

While the evidence adduced in these proceedings dealt only with discriminations between the respondents' wholesale customers, the thrust of the proceedings is against a discriminatory practice without regard to the resale competitive level affected. As we said in our opinion dealing with a substantially similar practice in the toy industry, "* * * the distinctive feature in this case is the mode of advertising, not the class of customer by whom that advertising facility was provided. There is no basis, either in logic or in the record, for supposing that an offer by, say, a retail customer, or group of retail customers, to furnish respondents with space in an advertising catalog would have been turned down on the ground that it came from retailers rather than from jobbers * * *." *Transogram Company, Inc.*, Docket No. 7978, September 19, 1962, p. 12 of Opinion [61 F.T.C. 629, 702]. It is our understanding from the assurances found in the records and given at oral argument that the respondents have ceased making discriminatory payments for advertising in all customer-owned publications and our action herein is based in large extent upon this understanding. Any questions which may arise concerning future conduct should be referred to the Commission for an advisory opinion pursuant to § 1.51–1.54 of the General Procedures (August 1963).

In addition to the payments made for advertising in customer-owned publications, all but two of the respondents made payments to DSC for various consulting services and for exhibit space rental at the DSC annual trade show. Six respondents made payments to McKesson for its consulting and advisory services. The hearing examiners found these payments did not violate 2(d) for there was no showing that they fitted the statutory definition of payments "* * * for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of * * *" respondents' products. The facts adduced in these proceedings afford no basis for disturbing the examiners' findings. However, these customer programs will be more fully examined and probed in the matters now in

trial in which McKesson and DSC are charged with having violated Section 5 of the Federal Trade Commission Act by inducing discriminatory payments.[1] The record of those proceedings in which the customers rendering the services are fully represented should prove a more adequate basis for a decision on the legality of these payments.

During 1959 and 1960, DSC had in operation a point-of-retail-sale promotional plan which it termed "Monthly Promotional Service." Six of the respondents made payments to DSC for participation in this program. Under the program DSC prepared seasonal promotional kits (e.g., "Springtime Specials", "Back to School Specials", etc.) consisting of banners, posters and similar in-store promotional material. The products of suppliers contributing to the program were featured in the promotional material. DSC member wholesalers sold the kits to retail druggists at a total charge of $10 or $15 per year. The program proved unsuccessful, was abandoned, and, according to the DSC president, will not be revived. The hearing examiners felt that the payments for this promotion violated the Act and we agree, but here again we can discern no need for a formal order to cease and desist. The practice was short lived, was discontinued for business reasons two years before the complaint issued, and its sponsor has no plans to revive it. Moreover, the pending proceeding against DSC is a more appropriate vehicle to probe the true nature of this program and the chances of its resumption.

Section 5(d) of the Administrative Procedure Act authorizes agencies, including the Commission, "* * * in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The Commission's action in these cases is an exercise of this authorized discretion. Although we are not issuing an injunctive order, we have found that certain practices are unlawful, relying upon respondent's advance assurances that these declaratory findings will be looked upon by them as a binding guide to future conduct. A cease and desist order is not always, and in all circumstances, the most appropriate and effective disposition of a proceeding where the primary need is to define and declare the requirements of the law. As the Supreme Court has held, *Moog Industries* v. *F.T.C.*, 355 U.S. 411, the Commission must exercise its administrative discretion in determining the kind of remedial action which will best meet the needs of the situation and serve the public interest.

[1] *McKesson & Robbins, Inc.*, Docket No. 8510; *Druggists' Service Council, Inc., et al.*, Docket No. 8511.

To make sure that there is no misunderstanding on either side as to the import of this decision and its expected and intended effects upon the respondents' conduct, we shall direct each of them to inform the Commission within thirty days of the manner and form of their observance of Section 2(d) as herein interpreted.

FINAL ORDER*

These matters having come on to be heard upon the cross-appeals of respondents and complaint counsel from the hearing examiners' initial decisions; and

The Commission having concluded for the reasons stated in the accompanying opinion that the public interest does not require the entry of orders to cease and desist and that the initial decisions containing such an order should be set aside:

It is ordered, That the initial decisions be, and they hereby are, set aside.

It is further ordered, That respondents shall, within thirty (30) days after service of this order upon them, file with the Commission a report describing the manner and form of their compliance with the requirements of Section 2(d) of the Clayton Act, as amended, as interpreted in the accompanying opinion.

IN THE MATTER OF

GENERAL MOTORS CORPORATION ET AL.

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

Docket C-795. Complaint, July 27, 1964—Decision, July 27, 1964

Consent order requiring the manufacturer of "Frigidaire" washing machines, its advertising agency, and a company engaged in conducting tests of materials and commodities for manufacturers, to cease representing falsely—as was done in radio and television broadcasts and in advertising circulars—that Frigidaire washers were superior in overall performance to

*In the following related cases: Chesebrough-Ponds, Inc., Docket No. 8491; Union Carbide Corporation, Docket No. 8492; Becton, Dickinson & Company, Docket No. 8493; Warner-Lambert Pharmaceutical Company, Docket No. 8494; Julius Schmid, Inc., Docket No. 8495; The Mennen Company, Docket No. 8496; Eversharp, Inc., Docket No. 8497; Sterling Drug, Inc., Docket No. 8498; Corn Products Company, Docket No. 8499; White Laboratories, Inc., Docket No. 8500; Chemway Corporation, Docket No. 8502; The d-Con Company, Inc., Docket No. 8503; Hazel Bishop, Inc., Docket No. 8504; Philip Morris, Incorporated, Docket No. 8505; Lehn & Fink Products Corporation, Docket No. 8506; B. T. Babbitt, Inc., Docket No. 8507; Youngs Rubber Corporation, Docket No. 8508.

washers produced by five other leading manufacturers in washing ability, amount of lint removed, water use, and cost of operations through its misleading testing claims.

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 General Motors Corporation, Dancer-Fitzgerald-Sample, Inc., and United States Testing Company, Inc., corporations, hereinafter referred to as respondents, have violated the provisions of the 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 General Motors Corporation 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 3044 West Grand Boulevard, Detroit 2, Michigan.

Respondent Dancer-Fitzgerald-Sample, 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 347 Madison Avenue, New York 17, New York.

Respondent United States Testing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1415 Park Avenue, Hoboken, New Jersey.

PAR. 2. Respondent General Motors Corporation is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of washing machines designated "Frigidaire Washer" and various other products to distributors and to retailers for resale to the public.

Respondent Dancer-Fitzgerald-Sample, Inc., is now, and for some time last past has been, an advertising agency representing respondent General Motors Corporation, and prepares and places, and for some time last past has prepared and placed, for publication advertising material, including radio and television commercials, but not limited to that hereinafter set forth, to promote the sale of the aforesaid "Frigidaire Washer" and other products.

Respondent United States Testing Company, Inc., is now, and for some time last past has been, a company engaged in conducting tests of materials and commodities for manufacturing and merchandising

concerns engaged in advertising, offering for sale, selling and distributing to the purchasing public such tested articles, including the aforesaid "Frigidaire Washer."

PAR. 3. In the course and conduct of its business, respondent General Motors Corporation now causes, and for some time last past has caused, its said "Frigidaire Washer," when sold, to be shipped from its factories or plants in the State of Ohio 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 product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of its business, at all times mentioned herein, respondent General Motors Corporation has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of washing machines.

In the conduct of its business, at all times mentioned herein, respondent Dancer-Fitzgerald-Samples, Inc., has been in substantial competition, in commerce, with corporations, firms and individuals in the advertising business.

In the conduct of its business, at all times mentioned herein, respondent United States Testing Company, Inc., has been in substantial competition, in commerce, with corporations, firms, and individuals in the testing of materials and commodities.

PAR. 5. For the purpose of inducing the sale of Frigidaire Washers, respondent General Motors Corporation engaged United States Testing Company, Inc., to conduct tests comparing Frigidaire Washers with the washing machines of competing manufacturers. These tests were paid for by respondent General Motors Corporation. Respondent General Motors Corporation, with the aid and participation of respondent Dancer-Fitzgerald-Sample, Inc., has caused the publication and circulation of advertisements for Frigidaire Washers utilizing the results of the aforesaid tests. These advertisements have been used in radio and television broadcasts of interstate transmission and have appeared in advertising circulars of general circulation in various States of the United States.

Typical of said advertisements, but not all inclusive, is the following:

> Say, if you need a new washing machine * * * and all the claims and sales talk have you confused * * * let me give you some solid facts about which machine *is* or *isn't* the best buy. No fooling. Here's the straight story from the United States Testing Company * * * the world's *largest* independent testing laboratory. Listen: And I quote—THE FRIGIDAIRE AUTOMATIC WASHER IS RATED NO. 1 FOR ALL-AROUND PER-

> FORMANCE BY U.S. TESTING CO., INC. THE FRIGIDAIRE WASHER *PROVED BEST* OF 6 LEADING AUTOMATIC WASHERS IN CONTROLLED LABORATORY TESTS CONSIDERING THE FOLLOWING POINTS: WASHING ABILITY, AMOUNT OF LINT FORMED AND REMOVED, DRYNESS OF SPIN, AUTOMATIC CARE OF MAN-MADE WASH'N WEAR GARMENTS, SIMPLICITY OF USE AND FLEXIBILITY, AMOUNT OF WATER USE, WASHING TIME, AND COST OF OPERATION. Report number 57745, dated May 21, 1959. Un-quote! Impressive, huh? Well that's the 1960 Frigidaire automatic washer. Rated #1 * * * *your best buy!* So why fool with any other washer? See your Frigidaire dealer, real soon.

PAR. 6. Through the use of advertisements described in Paragraph Five, respondents have represented that the aforesaid tests established that Frigidaire washers on the market are superior in over-all performance to washers on the market produced by five other leading manufacturers.

PAR. 7. In truth and in fact, the aforesaid tests did not establish that the Frigidaire washers on the market are superior in overall performance to washers on the market made by other manufacturers because they did not provide a fair or accurate comparison of the performance of Frigidaire washers with those manufactured by competitors.

PAR. 8. The advertisements described in Paragraph Five also had the tendency to deceive consumers into believing that the aforesaid tests established that Frigidaire washers were superior to the washers produced by five other leading manufacturers with respect to each of the points listed in the advertisements, *i.e.*, washing ability, amount of lint formed and removed, dryness of spin, automatic care of man-made wash'n wear garments, simplicity of use and flexibility, amount of water use, washing time and cost of operation.

PAR. 9. In truth and in fact, on the basis of the tests performed the Frigidaire washers did not rank first in each of the aforesaid test categories.

PAR. 10. The advertisements described in Paragraph Five had the tendency to mislead purchasers into believing that the tests were independently designed by United States Testing Company, Inc.

PAR. 11. In truth and in fact such tests were not independently designed by United States Testing Company, Inc.

PAR. 12. By furnishing to General Motors Corporation the results of said tests, respondent United States Testing Company, Inc., has provided the means and instrumentality whereby the public has been misled in the manner described above.

PAR. 13. 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 respondent's products by reason of said erroneous and mistaken belief.

PAR. 14. 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 and deceptive acts and practices and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an 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 General Motors Corporation 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 3044 West Grand Boulevard, Detroit 2, Michigan.

Respondent Dancer-Fitzgerald-Sample, 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 347 Madison Avenue, New York 17, New York.

Respondent United States Testing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1415 Park Avenue, Hoboken, New Jersey.

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

ORDER

PART I

It is ordered, That respondent General Motors Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of washing machines or any other household appliance 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 any product has been tested, either alone or in comparison with other products, and that such test proves or supports a claim as to the performance of such product, unless such representations clearly and accurately reflect the test results and unless the tests themselves are so devised and conducted as to constitute a creditable basis for any such representation. This paragraph shall not prohibit any advertisement which does not reasonably imply that a test had been made. References in advertising or promotional material to standards or certifications promulgated, generally recognized and used by the industry as a basis for measuring or testing the performance characteristics of household appliances, such as those standards promulgated by NEMA and other recognized trade associations, where such references merely claim that an appliance will perform in a stated fashion when measured in accordance with a specified NEMA or other recognized standard, will not constitute a violation of this paragraph as long as the household appliance performs in accordance with such advertised claim. The use in sales promotion or advertising of references to results of tests by wholly independent, disinterested and non-commercial testing agencies, such as Consumers Union or Underwriters Laboratories, will not violate this paragraph so

long as the representation involved fairly and accurately reflects the published results of the tests.

2. Making any representations of the type described in Paragraph 1 above where the products upon which the tests are made are not representative, with respect to the factors tested, of such products advertised, offered for sale or sold to members of the purchasing public by the respective manufacturers of the products tested.

3. Failing to disclose clearly and conspicuously, in conjunction with any over-all performance test results claimed for a product, each performance characteristic of the product, a test of which serves as a basis for such claim, and the relative position of the advertised product in the test of each such performance characteristic.

4. Failing to reveal clearly and conspicuously, in conjunction with any representations concerning tests of any product, that the testing methods or procedures were not independently and finally determined by the testing agency, if such is the fact. This paragraph of the order will not apply to tests conducted by wholly independent, disinterested, non-commercial testing agencies, such as Consumers Union or Underwriters Laboratories.

PART II

It is ordered, That respondent Dancer-Fitzgerald-Sample, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising of washing machines or any Frigidaire household appliance 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 any product has been tested, either alone or in comparison with other products, and that such test proves or supports a claim as to the performance of such product, unless such representations clearly and accurately reflect the test results and unless respondent, if it did not participate in the tests, requires a written test report from those making the tests, and the tests themselves as reflected in such report or as participated in by respondent, as the case may be, constitute a creditable basis for any such representation; provided that this paragraph shall not prohibit any advertisement which does not reasonably imply that a test had been made. References in advertising or promotional material to standards or certifications promulgated, generally recognized and used by

the industry as a basis for measuring or testing the performance characteristics of household applicances, such as those standards promulgated by NEMA and other recognized trade associations, where such references merely claim that an appliance will perform in a stated fashion when measured in accordance with a specified NEMA or other recognized standard, will not constitute a violation of this paragraph as long as the household appliance performs in accordance with such advertised claim. The use in sales promotion or advertising of references to results of tests by wholly independent, disinterested and non-commercial testing agencies, such as Consumers Union or Underwriters Laboratories, will not violate this paragraph so long as the representation involved fairly and accurately reflects the published results of the tests.

2. Making any representations of the type described in Paragraph 1 above where the products upon which the tests are made are not representative, with respect to the factors tested, of such products advertised, offered for sale or sold to members of the purchasing public by respondent and by the manufacturers of the other products tested; provided that respondent shall not be in violation of this paragraph if it acts in good faith upon a written certification, signed by the testing agency or the manufacturer or seller, that the products tested are representative, with respect to the factors tested, of such products advertised, offered for sale or sold to members of the purchasing public by the respective manufacturers of the products tested.

3. Failing to disclose clearly and conspicuously, in conjunction with any over-all performance test results claimed for a product, each performance characteristic of the product, a test of which serves as a basis for such claim, and the relative position of the advertised product in the test of each such performance characteristic.

4. Failing to reveal clearly and conspicuously in conjunction with any representations concerning tests of any product that the testing methods or procedures were not independently and finally determined by the testing agency, if such is the fact. This paragraph of the order will not apply to tests conducted by wholly independent, disinterested, noncommercial testing agencies, such as Consumers Union or Underwriters Laboratories.

PART III

It is further ordered, That respondent United States Testing Company, Inc., a corporation, and its officers, agents, representatives and

employees, directly or through any corporate or other device, in connection with the conducting of tests of any washing machines or any other household appliance and the furnishing of reports of such tests to any manufacturer or seller of such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Furnishing any reports of any tests that prove or purport to prove or support a claim as to the performance of such product, either alone or in comparison with other products, with knowledge or reason to know that such test reports or any information contained therein will be used by such manufacturer or seller to advertise any of such products, unless such reports clearly and accurately reflect the test methods and test results and unless the tests themselves are so devised and conducted as to constitute a creditable basis for the test results or for any representation in the report of the quality or merits of the product tested.

2. Authorizing or approving any advertisement referring to or based upon any report of the type described in Paragraph 1 above of any test or tests made by respondent of any such product, unless such report clearly and accurately reflects the test methods and test results and unless the tests themselves are so devised and conducted as to constitute a creditable basis for the test results, or for any representation in such report, or for any representation in any such advertisement of the quality or merits of the product tested and included in such report; provided that this paragraph shall not apply to any advertisement that does not reasonably imply that a test had been made.

3. Authorizing or approving any advertisement referring to or based upon any report of the type described in Paragraph 1 above of any test or tests made by respondent of any such product which advertisement fails to disclose clearly and conspicuously in conjunction with any over-all performance test results claimed for such product each performance characteristic, a test of which serves as a basis for such claim, and the relative position of the advertised product in the test of each such performance characteristic.

4. Authorizing or approving any advertisement referring to or based upon any report of the type described in Paragraph 1 above of any test or tests made by respondent of any such product which advertisement fails to reveal clearly and conspicuously, in conjunction with any representations concerning tests made by respondent of any product, that the testing methods or procedures

were not independently and finally determined by the testing agency, if such is the fact.

5. Authorizing or approving any advertisement referring to or based upon any report of the type described in Paragraph 1 above of any test or tests made by respondent of any such product:

(a) Without having obtained from the manufacturer or seller for whom such tests are made a certification that the product or products, which are supplied or furnished by such manufacturer or seller and upon which the tests are made, are representative with respect to the factors tested, of such products to be advertised or being advertised or to be offered for sale or being offered for sale, or to be sold or being sold, to members of the purchasing public by such manufacturer or seller and by the manufacturers or sellers of any other products tested, and

(b) with knowledge or reason to know, as to those products that are not supplied or furnished by such manufacturer or seller, that the product or products upon which the tests are made are not representative, with respect to the factors tested, of such products as are being advertised, or are being offered for sale or being sold to members of the purchasing public at the time that the products tested are obtained.

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

MONROE AUTO EQUIPMENT COMPANY

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

Docket 8543. Complaint, Nov. 5, 1962—Decision, July 28, 1964

Order requiring a Monroe, Mich., manufacturer of automotive products—consisting of shock absorbers, sway bars, load levelers, power steering components and related products to cease discriminating in the price of such products of like grade and quality by granting warehouse distributors and certain jobbers owned or controlled by such warehouse distributors discounts of 20 percent on products of the respondent when such favored jobbers are in competition with other automotive jobbers not affiliated with warehouse distributors.

COMPLAINT

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

PARAGRAPH 1. Respondent Monroe Auto Equipment Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 1426 East First Street, Monroe, Michigan.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of a line of automotive products, consisting of shock absorbers, sway bars, load levelers, power steering components, and related products. Respondent sells its said products to a large number of purchasers for use or resale within various States of the United States and the District of Columbia. Respondent's sales of its products are substantial, exceeding $28,000,000 annually.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Michigan to purchasers located in other States of the United States, and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. Respondent sells its automotive products in the so-called "aftermarket". "Aftermarket" purchasers of respondent's automotive products are classified by respondent generally within two separate classifications, namely, "warehouse distributors" and "jobbers." Respondent sells directly only to those customers classified as warehouse distributors. Respondent extends and sets terms and conditions of sale for each such classification as follows.

Warehouse Distributors: A purchaser classified as a warehouse distributor normally resells only to jobbers. A warehouse distributor purchases respondent's automotive products at prices set forth in respondent's published "Suggested Net Jobber Cost Sheet." Warehouse distributors sell respondent's automotive products to jobbers at the same prices set forth in respondent's published "Suggested Net Jobber Cost Sheet." Warehouse distributors receive an allowance amounting to 20% of the value of all such sales reported to respondent. According to the terms of respondent's "Warehouse Distributor Agree-

ment," respondent grants such an allowance to warehouse distributors only on sales made to jobbers who are signed to contracts which are approved by respondent and only on sales made at prices set forth in respondent's published "Suggested Net Jobber Cost Sheet."

Respondent sells to approximately 300 customers classified as warehouse distributors located throughout the United States.

Jobbers: A purchaser classified as a jobber is normally engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade serving the general public. Jobbers purchase from respondent's warehouse distributors at prices set forth in respondent's published "Suggested Net Jobber Cost Sheet."

Such jobber purchasers are signed to "Monroe Auto Equipment Company Jobber Agreements" with a warehouse distributor. Such agreements are approved and signed by a manufacturer's representative of respondent and an official of respondent. Respondent exercises such a degree of control over sales by its warehouse distributor customers to its jobber customers as to make such sales in all essential respects sales by the respondent. There are approximately 11,000 such jobber purchasers located throughout the United States.

PAR. 5. In the course and conduct of its business in commerce, respondent has been, and is now, discriminating in price between different purchasers of its automotive products of like grade and quality by selling said products to some purchasers at higher and less favorable prices than the same products are sold to other purchasers who are in competition with the purchasers paying the higher prices.

PAR. 6. For example, among respondent's purchasers are certain warehouse distributors who own, or control, jobber establishments which have been classified and approved by respondent as jobber accounts of the warehouse distributors. Respondent also allows such warehouse distributors a 20% allowance on so-called "sales" to said jobber establishments which are owned, or controlled, by said warehouse distributors. Many such owned, or controlled, jobber establishments are in competition with other automotive jobbers who are not affiliated with, or associated with, a warehouse distributor, and who purchase respondent's products at respondent's regular jobber prices.

In other instances, respondent classified as warehouse distributors certain so-called "buying groups" which are organizations owned, or controlled, by automotive jobbers which have been classified and approved by respondent as jobber customers of such group-buying organizations. Such organizations in reality merely function as a buying agent for the jobber members thereof. On so-called "sales"

by the buying group to its jobber members, or owners, respondent grants, or allows, the 20% warehouse distributor discount. Many of the jobber members, or owners, of such buying-groups are in active and substantial competition with other automotive jobbers who are not affiliated with, or associated with, a warehouse distributor, and who purchase respondent's products at respondent's regular jobber prices.

Respondent's approval of and granting of the 20% warehouse distributor's allowance on so-called "sales" to jobber establishments which are owned, or controlled, by a warehouse distributor, and to jobber establishments which are members, or owners, of buying groups or other organizations classified as warehouse distributors, results in the granting of higher and more favorable price discounts to said jobber purchasers than are granted to other jobber purchasers who are in competition with said favored jobber purchasers, and who purchase respondent's products at respondent's regular jobber prices and do not receive the discounts available to respondent's aforementioned favored purchasers.

PAR. 7. The effect of such discriminations in price made by respondent in the sale of its products, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the favored purchasers from respondent are engaged, or to injure, destroy or prevent competition with said favored purchasers.

PAR. 8. The discriminations in price made by respondent in the sale of its products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Richard B. Mathias and *Mr. R. C. Palmer, Jr.*, supporting the complaint.

Halfpenny, Hahn & Ryan, Chicago, Ill., by *Mr. Harold T. Halfpenny* and *Mr. James F. Flanagan* for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

JANUARY 6, 1964

The Federal Trade Commission issued its complaint against the respondent on November 5, 1962, charging it with violating subsection (a) of Section 2 of the Clayton Act, as amended, by discriminating in price between different purchasers of its automotive products. Respondent's answer admitted certain of the allegations of the com-

plaint, but denied discriminating in price between competing purchasers and denied any violation of the Clayton Act as alleged, and further stated that if any price differentials existed that such price differentials were cost justified or were made in good faith to meet equally low prices of competitors.

A short hearing was held at which many facts were agreed to in a stipulation which appears in the record beginning at page 3. One witness was called to implement the stipulation in support of the charges of the complaint and ten exhibits were received in evidence. The respondent offered no evidence. The record was closed, proposed findings of fact were filed by the parties, and thereafter the record was reopened upon the hearing examiner's own motion and order. Thereafter, additional evidence was offered in support of the complaint and the record was again closed and additional findings of fact were filed by both parties.

This proceeding is before the hearing examiner for final consideration upon the record as hereinabove described, and the proposed findings of fact and conclusions filed by both parties. Consideration has been given to the proposed findings of fact and conclusions and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

Monroe Auto Equipment Company (hereinafter sometimes referred to as Monroe) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 1426 East First Street, Monroe, Michigan. (Tr. 4)

Monroe has been and is now engaged in the manufacture, sale and distribution of a line of automotive products, consisting of shock absorbers, sway bars, load levelers, power steering components and related products. Monroe sells its said products to a large number of purchasers for use or resale within various states of the United States and the District of Columbia. Monroe's sales of its products are substantial, exceeding $28,000,000 annually. (Tr. 4)

Monroe sells and causes its products to be transported from its principal place of business in the State of Michigan to purchasers located in other states of the United States, and in the District of Columbia. There has been at all times mentioned herein a continuous

course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended. (Tr. 4)

Monroe sells its products to "warehouse distributors" in the automotive aftermarket, pursuant to the terms and provisions of a "Warehouse Distributor Agreement." (CX 1) A warehouse distributor purchases Monroe Automotive products at prices set forth in Monroe's published "Suggested Net Jobber Cost Sheet." (CX 2) Monroe sells to approximately 300 customers classified as warehouse distributors located throughout the United States. A warehouse distributor normally resells only to jobbers. (Tr. 4–5)

A jobber is normally engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade servicing the general public. Jobbers purchase Monroe products from Monroe's warehouse distributors at prices set forth in Monroe's published "Suggested Net Jobber Cost Sheet." (Tr. 5)

Monroe grants to the warehouse distributors to which it sells an allowance of 20 percent of the sales price on all sales made by the warehouse distributors to jobbers who are signed to "Monroe Auto Equipment Company Jobber Agreements" (CX 3) with the warehouse distributor. These agreements are approved and signed by a manufacturer's representative of Monroe and an official of Monroe. There are approximately 11,000 such jobbers located throughout the United States. (Tr. 5–6)

Among Monroe's purchasers are certain warehouse distributors who own, or control, jobber establishments which have been classified and approved by Monroe as jobber accounts of the warehouse distributors. Monroe allows such warehouse distributors its regular 20 percent allowance on sales to said jobber establishments. Many such owned or controlled jobber establishments are in active and substantial competition in the resale of Monroe products with other automotive jobbers who are not affiliated with, or associated with, a warehouse distributor, and who purchase Monroe products at Monroe's regular jobber prices. (Tr. 6, 194–232, 234–299)

Monroe has entered into its "Warehouse Distributor Agreement" (CX 1) with certain organizations which are owned or controlled by automotive jobbers. These warehouse distributors have in turn entered into Monroe contracts (CX 3), which have been approved and signed by a representative and an official of Monroe, with their jobber owners. On sales by the distributor to the jobber owners, Monroe grants the 20 percent warehouse distributor discount. Many of these jobbers are in active and substantial competition in the resale of Monroe products with other automotive jobbers who are not in control of, or owners of,

a warehouse distributor, and who purchase Monroe products at Monroe's regular jobber prices. (Tr. 6, 97–194, 300–331)

The sales to, resales by, and competition between, the various jobber purchasers of Monroe products, referred to hereinabove, involve substantial quantities and dollars amounts of Monroe products of like grade and quality, involving commodities of the same product lines and often identical items within the several product lines involved. (Tr. 7)

The automotive parts jobbing business is highly competitive, involving small net margins of profit. The net margin of profit of automotive parts jobbers is usually between 1 percent and 5 percent, averaging less than 4 percent after taxes. Automotive parts jobbers consider the 2 percent cash discount, normally allowed by their suppliers, important in determining their profit margins and in the successful operation of their businesses. (Tr. 7)

The principal issue of fact and law to be decided in this proceeding is whether or not an indirect purchaser relationship (within the meaning of subsection (a) of Section 2 of the Clayton Act, as amended) existed between respondent and the jobber purchasers of respondent's products. Respondent appeared to concede that this was the only issue remaining in the case, but in its proposed findings of fact and conclusions it contends that the discriminations here involved were not proved to have resulted in injury to competition.

Monroe closely supervises the resale of Monroe products by its warehouse distributors. By the terms of its "Warehouse Distributor Agreement," Monroe's warehouse distributors purchase at Monroe's suggested jobber prices set forth on Monroe's price lists (CX 2), employ as many roadmen and salesmen as Monroe deems necessary in the warehouse distributors' area, train their salesmen to work with Monroe salesmen in selling Monroe products to jobbers, appoint jobbers approved by Monroe in such numbers and at such places as (in the opinion of Monroe) may be necessary, sell Monroe products to jobbers at prices and on terms and conditions set by Monroe, receive 20 percent of the cost to warehouse distributors of such products purchased from Monroe at jobbers' prices and resold to approved Monroe jobbers at jobbers' prices. Shipments of Monroe products were made by Monroe to warehouse distributors who make all deliveries to the jobbers approved by Monroe. (Tr. 18)

The Monroe Auto Equipment Company Jobber Agreement entered into between Monroe's warehouse distributors and jobbers, must be approved and signed by two representatives of Monroe, and further provides that the warehouse distributor will sell to jobbers and jobbers

will buy Monroe products at jobber prices set forth in price lists issued by Monroe. (CX 63)

The warehouse distributor reports sales of Monroe products to such jobbers to Monroe on a "Report of Sales to Contracted Monroe Jobbers" form (CX 4) to claim the 20 percent warehouse distributor allowance. Monroe periodically audits the sales by its warehouse distributors. During such audit Monroe representatives examine invoices of sales by warehouse distributors to jobbers to verify such sales have been to approved jobbers, and the dollar amounts of such sales, together with the prices for which Monroe products are sold. (Tr. 21, 61) Monroe maintains records of purchases of Monroe products by jobbers (Tr. 29); holds contests for jobbers and establishes purchase quotas which jobbers must exceed to win such contests. (Tr. 69)

Monroe's sales personnel regularly contact jobbers purchasing Monroe products from warehouse distributors. Monroe's district and division managers deal directly with jobbers and dealers. (Tr. 22) Their dealings with jobbers include the following: attempting to sell Monroe products; taking orders for Monroe products; supplying advertising and promotional material; checking inventories; and arranging sales meetings with jobbers and dealers. (Tr. 23, 24) Monroe district and division managers make regular reports to Monroe of their activities and dealings with jobbers. (CX 7) Monroe sales engineers perform similar duties. They make calls with warehouse distributor salesmen and jobber salesmen and take orders for Monroe products. (Tr. 24, 63) They also assist warehouse distributor personnel in the signing of prospective jobber accounts to Monroe Jobber Agreements. (Tr. 27, 62) Monroe sales engineers make daily reports to Monroe of their calls on jobbers and other purchasers of Monroe products, indicating their activities and the results of such calls. (CXs 5, 6)

Monroe can and sometimes does cancel a Monroe Jobber Agreement existing between a warehouse distributor and a jobber and notifies the jobber of his cancellation in such cases. (CX 8, 9) After a jobber has been cancelled the warehouse distributor does not receive the 20 percent warehouse distributor allowance for subsequent sales to that jobber. (Tr. 65) Since the warehouse distributor buys Monroe products at Monroe's suggested jobber prices and only receives the 20 percent warehouse distributor allowance for sales to jobbers approved by Monroe, the warehouse distributor cannot sell Monroe products to unapproved or cancelled jobbers at Monroe's suggested jobber prices and realize any profit. (Tr. 54, 65) Such sales would in fact result in a financial loss of the expenses involved in handling the product and making such a sale.

Respondent's approval of and granting of the 20 percent warehouse distributor allowance on so-called "sales" to jobber establishments which are owned, or controlled, by warehouse distributors, and indirectly to jobber establishments which are members or owners of organizations classified as warehouse distributors, as hereinabove described, results in the granting of higher and more favorable price discounts to said jobber purchasers than are granted to other jobber purchasers who are in competition with said favored jobber purchasers, and who purchase respondent's products at respondent's regular jobber prices and do not receive the discounts available to respondent's aforementioned favored purchasers. The amount of such discrimination is several times the amount of the average net profit usually earned by automotive parts jobbers and is therefore of such magnitude that it necessarily enhances the competitive opportunities of the recipient as opposed to his competitor who does not receive the discount.

The effect of such discriminations in price made by respondent in the sale of its products to competing purchasers, as hereinabove found, may be substantially to lessen competition, or to injure, destroy, or prevent competition with said favored purchasers.

Respondent contends that it did not deal directly with jobbers and is therefore outside the indirect purchaser doctrine of *American News Company* v. *F.T.C.* 300 F. 2d 104 (1962). As found above, respondent did deal directly with these jobbers, although usually its representatives were accompanied by warehouse distributor representatives, and fixed the terms upon which the jobbers bought, thus falling squarely within the rationale and holding of that case.

Except for relationships between certain jobbers and distributors there would be no unlawful discrimination shown in this record. There are situations shown in which distributors own and control jobbers with the result that in practical effect the jobbers are sold at the distributor's price, and there are other situations shown in which jobbers own and control distributors with the same result.

It is true that the distributors and jobbers are separate corporate entities, but the effect of the relationships between them is that the jobbers get the benefit of the distributor price which is lower than the price paid by competing jobbers who are indirect customers of respondent. Recently In the Matter of *Joseph A. Kaplan & Sons, Inc.*, Docket No. 7813 [63 F.T.C. 1308, 1339], the Commission in dealing with a similar situation said:

It is contended by respondent that AWC was a distinct corporate entity operating as a wholesaler. However, the purpose or effect of purchasing respondent's products through AWC was clearly to provide special prices to the retailers

owning the corporation. The corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute.

It would appear that in this case the corporate entities should be disregarded because a failure to do so would enable the corporate device to be used to enable certain of respondent's customers to obtain a price advantage over their competitors which would clearly violate the statute if the corporate device were absent.

CONCLUSIONS

Monroe deals directly with jobbers, and fixes the prices, terms, and conditions of sale upon which the jobbers buy by means of its contractual relationship with the jobbers and by means of its contracts with the warehouse distributors. Although jobbers obtain respondent's products from warehouse distributors, respondent has entered into a course of dealing with warehouse distributors and jobbers which has resulted in the establishment of an indirect purchaser relationship between respondent and jobbers purchasing respondent's products. The discriminations in price made by respondent in the sale of its products, as hereinbefore found, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent Monroe Auto Equipment Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating in the price of such products of like grade and quality:

> By selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price.

OPINION OF THE COMMISSION

JULY 28, 1964

By REILLY, *Commissioner:*

I

This matter is before us on appeal by respondent from the hearing examiner's decision sustaining the complaint, which charged a viola-

tion of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). A stipulation of facts was entered into and three (3) days of hearings were held.

Holding that "except for relationships between certain jobbers and distributors there would be no unlawful discrimination shown in this record * * * " the examiner concluded:

It would appear that in this case the corporate entities should be disregarded because a failure to do so would enable the corporate device to be used to enable certain of respondent's customers to obtain a price advantage over their competitors which would clearly violate the statute if the corporate device were absent.

He therefore ordered respondent to "cease and desist * * * selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price."

II

Monroe, a manufacturer of auto parts,[1] distributes the majority of its products to warehouse distributors (hereinafter referred to as "WD's"). The WD's in turn sell to jobbers, with the jobbers selling to filling stations, garages, etc.

Monroe signs a "Warehouse Distributor" agreement with each WD, providing inter alia:

In consideration of the services to be performed by WD hereunder, MONROE shall pay to WD compensation in an amount equal to 20 per cent of the cost to WD of such products purchased from MONROE at Jobbers' prices and resold to approved MONROE Jobbers at Jobbers' prices * * *.[2]

The WD in turn contracts with jobbers to sell Monroe products.[3] This contract must be approved by Monroe before Monroe will pay the 20% rebate to the WD, on its sales to approved jobbers.[4]

This case concerns itself with organizations purchasing goods at the WD level, and the jobber level. For purposes of our analysis the horizontal composition of that WD level consists of the following:

(1) WD's who resell only to jobbers with whom the WD's have no connection except that of the arms' length relationship between seller and buyer.

(2) Entities comprised of several corporations, one corporation allegedly functioning as a WD and the remaining corporations allegedly

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[1] Monroe stipulated that it sells "* * * shock absorbers, swing bars, load levellers, power steering components and related products." (R.4)

[2] CX 1B.

[3] CX 11A and 11B.

[4] CX 11B.

functioning as jobbers. These entities receive a 20% rebate on reported sales to approved independent jobbers and the approved intra-enterprise jobbers.

Commission counsel argue that the independent jobbers (the group described in (1) above), are discriminated against in favor of the jobbing arm of the group described in (2). They urge that the independent jobbers are indirect purchasers from Monroe; and that the independent jobbers merely purchase at jobber list price, receiving no part of the 20% discount given to the WD's who supply them.

We have carefully examined the contracts between the WD's and Monroe, the contract between the WD's and jobbers, and the testimony in the record with respect to these agreements. The preponderance of reliable, substantial and probative evidence indicates to us that independent jobbers are in fact indirect purchasers from Monroe. The prices, terms and conditions of sale used by both the WD and the jobber are fixed by the manufacturer or are subject to its approval. See *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962) *cert. denied*, 371 U.S. 824 (1962). Under such circumstances it is clear to us that the "indirect purchaser" doctrine applies and that the independent jobbers here fall within that category. See *In the Matter of Purolator Products, Inc.*, Docket 7850 (Commission Opinion, p. 15.

In regard to the WD-Jobber entities described in number (2) above, the respondent stipulated as follows:

> Among Monroe's purchasers are certain warehouse distributors who own, or control jobber establishments which have been classified and approved by Monroe as Monroe jobber accounts of the warehouse distributors. Monroe allows such warehouse distributor its regular 20% allowance on sales [to said jobber establishments]. [Many such owned or controlled jobber] establishments are in active and substantial competition in the resale of Monroe products with other automotive jobbers who are not affiliated with, or associated with a warehouse distributor, and who purchase Monroe's products at Monroe's regular jobber prices. (R.6)

Despite this stipulation, the hearing examiner concluded that further testimony was needed so that he could decide whether "* * * the particular jobber establishments owned or controlled by warehouse distributors were or were not purchasers from respondent."

Complaint counsel declared at the first day of hearings held for the above purpose that: "the sole remaining issue of fact or law involved in this matter is the question of whether or not an *indirect purchaser* relationship exists between the Monroe Auto Equipment Company and the jobber-purchaser of these products * * *." (R. 12) (Emphasis added.)

With respect to the independent jobber, we agree with this position and hold that the independent jobbers are indirect purchasers. To the extent that counsel's statement was intended to comprehend the owned or controlled jobbers as indirect purchasers, we reject it. In our view, the entity composed of WD and jobber is a direct purchaser. Respondent has admitted that the jobber arms of the WD-jobber entity compete with independent jobbers; and, therefore, we feel that the sole remaining question is whether there is sufficient identification of the WD with the jobber to give rise to the conclusion that a discount given to one will inure to the benefit of the other. To resolve the issue of identity, we have examined the testimony and we find the following:

A. *Hart's Automotive Parts Company, Inc.*

R. Henry Hart, Jr., testified that he is the president and controlling stockholder of Hart's Automotive Parts Company and that the firm was founded as a corporation in 1929. He also testified that in 1946, another company, Auto Parts Warehouse Company was incorporated and a few years later, Hart's Automotive Parts Company was merged into Auto Parts Warehouse Company which then took the name "Hart's Automotive Parts Company, Inc." In the physical plant of Hart's Automotive Parts Company, Inc. in Chattanooga is a counter where a jobber can purchase—as from a WD. There is also a counter where a garage man can purchase as from a jobber. (R. 113)

Within Chattanooga there are three other locations which operate under the name "Hart's Automotive Parts Company." These are not separate corporations; Hart's Automotive Parts Company, Inc. operates all these firms as jobbers. Referring to Hart's Automotive Parts Company, Inc. located in Chattanooga, complaint counsel asked:

Q. Does it also sell to the dealer trade which would include gas stations, garages, fleet accounts?

A. Yes. Hart's Automotive Parts Company as a corporation does. (R. 111)

Later Hart was questioned on this point:

Q. Do each of these outlets [the unincorporated branches in Chattanooga] function at these various levels?

A. No. They do not have any warehouse business or business sales to jobbers whatsoever. (R. 123)

* * * * * * *

A. They sell only to what we call the dealer trade, including the filling stations, etc. (R. 123)

So within Chattanooga, there is no question that one organization—Hart's Automotive Parts Company, Inc.—functions both as a WD and a jobber.

The evidence also indicates that Hart's Automotive Parts Company, Inc. has signed, and Monroe has approved, jobber agreements with each of these "locations", which are also designated "Hart's Automotive Parts Company". Therefore, Hart's Automotive Parts, Inc., selling as a WD under the name "Auto Parts Warehouse Company, a division of Hart's Automotive Parts Company", and as a jobber under the name Hart's Automotive Parts Company or Hart's Automotive Parts Company, Inc., admittedly competing with other jobbers, received a 20% discount which goes into the corporate treasury of Hart's Automotive Parts Company, Inc., located in Chattanooga, Tennessee. These facts conclusively prove that Hart's Automotive Parts Company, Inc., in Chattanooga is one entity functioning as a WD and jobber. Respondent has introduced no evidence to the contrary.

Outside Chattanooga there are, according to Mr. Hart, four separate corporations, all called Hart's Automotive Parts Company. Each of these firms functions solely as a jobber; each of them was signed by Hart's in Chattanooga to a Monroe approved jobber contract. Thus for sales to each of them, Hart's Automotive Parts Company, Inc. in Chattanooga receives a 20% rebate.

Respondent discusses Mr. Hart's testimony at pp. 1 and 2 of its "Additional Findings of Fact and Conclusions of Law" addressed to the hearing examiner. It states that the four branches outside Chattanooga buy all their lines from Hart's Automotive Company. According to respondent, "each company employs a salesman, maintains its own bank balance, borrows money, has its own officer and stockholders meetings and maintains its own inventory. The profits, if any, are paid in dividends to the stockholders. Each company completely manages its own affairs."

However, there is other evidence in the record as follows:

(1) Mr. Hart is President, Chairman of the Board of all the corporations.

(2) He is the controlling stockholder of each corporation but one.

(3) The Chattanooga general manager of the Hart's Automotive Parts Company, Inc.:

Is responsible for the operation of the other Hart's Automotive Parts Companies. This general manager is an officer of all the companies and a stockholder in all the other companies.

Makes "the arrangements to buy a product."

Controls whether the branches must buy an item through Chattanooga.

Supervises the credit operations of the branches.

Makes up the bills for the branches.

(4) Some person from the Chattanooga operation must cosign all checks issued by the out of town corporation.

(5) The Chattanooga operation makes up all the monthly statements for the out of town branches.

(6) No commissions are given for "sales" to the branch operations.

(7) The same individuals are purchasing agent and sales manager for all corporations. They are paid by the Chattanooga operation.

(8) A consolidated profit and loss statement reflecting the financial position of this entire operation is maintained.

On balance, we can only conclude that for all purposes, relevant to the Robinson-Patman Act, the many seemingly separate corporations here are one entity.

The evidence with respect to the WD-jobber entities, R. T. Clapp Company and TVK Automotive Warehouse, both of which receive 20% discounts for sales to their owned jobbing arms, is as strong if not stronger.

B. *R. T. Clapp Company*

(1) This organization operates in Knoxville as a "Central warehouse distributor of automotive parts * * *." (R. 195) It operates two incorporated jobbing branches under the same name, one in Asheville, North Carolina, the other in Oak Ridge, Tennessee. Both these firms are approved jobbers and Clapp gets a rebate of 20% on sales to them. The same individual, A. Dewey Moody, who testified concerning Clapp's operations, is "the boss of the whole show * * *" including the branches. Salesmen who call on the branches receive a reduced commission—because "it is more or less of a captive market."

(2) The general manager expects all orders to come from the branches to the Knoxville headquarters.

(3) The branches put off paying Knoxville until all other creditors have been paid. And when in fact the branches pay Knoxville, the general manager of Knoxville may, and has, written out checks in payment of said debts.

(4) The accounts payable are maintained at Knoxville and Knoxville pays the bills for the branches.

(5) Knoxville is owed about $100,000 by the branches—this "debt" is not secured in any way.

C. *TVK Automotive Warehouse, Inc.*

(1) Joseph Black, who is its President, General Manager and Sales Manager, testified on behalf of this firm. The organization receives a 20% discount from Monroe for sales to its Monroe approved jobber branches which are technically separate corporations. The headquarters

is in Knoxville with jobbing branches in Knoxville itself, Sweetwater, Tennessee, Loudon, Tennessee, and Fountain City, Tennessee (the jobbing branch at Fountain City is unincorporated and does business under the name of Broadway Automotive Supply").

(2) The jobber branches buy all their requirements, including Monroe products from TVK. Indeed, the local manager of one branch was fired because of failure to comply with this policy.

(3) The books of the branches are maintained at TVK's headquarters in Knoxville.

(4) TVK's office force in Knoxville pays all bills for the branches.

(5) TVK's office in Knoxville posts the daily invoices of the branch locations and sends a monthly billing statement to the customers of the branch locations.

(6) None of the managers of the branches have any authority to sign checks. Even for petty cash purposes they must receive a check from TVK in Knoxville.

(7) TVK is the last "creditor" paid by the branches.

(8) In Knoxville, TVK has not bothered to incorporate its jobber outlets. It operates as a jobber out of its own warehouse and also has another location on "Broadway" in Knoxville where it simply sells as a jobber, no effort having been made to incorporate its jobbing activities at this address.

III

From all the above evidence, we conclude that Monroe has sold to purchasers who function at both the WD and the jobber level. It has paid the 20% rebate to such purchasers. The evidence also established that for all practical purposes these organizations operate as a single unit so that any benefit conferred on one would in the light of the business realities shown on this record, result in a direct benefit to the other. Complaint counsel has established these facts and in our view they amount to a prima facie showing of price discrimination among competing customers. Respondent on its part, has introduced evidence to rebut the unity which complaint counsel has proven. We conclude that such rebuttal evidence has fallen short of the mark.

Moreover, the enforcement of a statute such as the Robinson-Patman Act cannot pivot solely on the existence or non-existence of particular forms of business organization. Accord, *National Parts Warehouse, et al.*, Docket No. 8039 (Commission Opinion December 1963) [63 F.T.C. 1692, 1712]. And to "pierce the corporate veil" as we have done here, is no more than has been done in innumerable cases before administrative agencies. Thus, "The existence of a separate corporate

entity should not be permitted to frustrate the purpose of a federal regulatory statute * * *" *Corn Products Refining Co.* v. *Benson, Secretary of Agriculture*, 232 F. 2d 554, 565 (2d Cir. 1956).

Under these circumstances, we are bound by the Supreme Court's language in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475 (1952):

> * * * there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers * * *.

The nature of its purchasers' internal operations might at first seem to be a harsh basis on which to hold Monroe. However, Monroe intruded into the WD–Jobber relationship even to the extent of insisting upon the right to approve WD's jobbers. It investigated all WD's and jobbers' credit. Its agents visited these organizations often. Monroe has been dealing with these firms for a substantial period of time. Monroe therefore knew or should have known that these WD's were so identified with their jobbing arms that the discounts paid to these WD's inevitably benefitted the jobbing arms.

From the identity between the WD's and jobbers established by complaint counsel on this record, the conclusion is inescapable that a discount to one arm of the entity must naturally flow to and benefit the other arm of the entity. Obviously, there are varying degrees of control and identity. But on this record the requisite control and identity have been established.

The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission. The order contained in the initial decision adequately covers the practices engaged in by respondent.

Commissioner Dixon concurred and has filed a concurring opinion.

Commissioner Elman dissented and has filed a dissenting opinion.

CONCURRING OPINION

JULY 28, 1964

By DIXON, *Commissioner:*

Because this case presents a factual situation of almost classic simplicity, today's ruling might be read as proving too much with too

little. In the hope of forestalling such a conclusion, I have set down briefly my own particular views.

To some extent, this Commission's activities in the automotive parts field might be pictured as a classic example of an administrative agency, with small resources and limited manpower, nibbling away at complex economic problems in a vast and rapidly changing industry. But under the Robinson-Patman amendments to Section 2 of the Clayton Act, we were instructed to hit hard at certain trade practices. To a great degree our discretion was limited. Even the early debates on the creation of this agency recognized this inhibiting factor:

> * * * [I]f there is any well-known practice upon which there is a fair agreement of opinion that it is an unfair practice, we should by law prohibit that and take it out of the "twilight zone" definition power at the hands of the commission. (51 Cong. Rec. 14259 (1914).)

This specificity is one of the crucial differences between Federal Trade Commission Act and Clayton Act enforcement. And even if we possessed broad discretion to abandon Robinson-Patman Act enforcement—because we believed that law a square peg trying to plug round holes—the present case would still require our attention.

We are not faced here with a hard case which will make bad law. The record does not teeter nervously between proof and failure of proof. Nor is the central issue befogged by a maze of factual contradictions. To the contrary, the record clearly establishes that single business entities competing at both the warehouse distributor and jobber levels received a 20% discount on "sales" to themselves. The seller (respondent here) has not attempted to cost justify the 20% discount. Nor did it argue, as have respondents in prior cases, that its purchasers' cost offset the 20% discount and thereby prevented any inference of probable competitive injury.[1]

Thus, it should be emphasized, the majority opinion does not attempt in any way to analyze cost savings attributable to the warehouse distributor-jobber method of business. Instead, it examines the facts of record which show unity and control over the jobbing arm of the warehouse distributor. The recipients of Monroe's 20% discount are not affiliated, yet separately functioning firms; nor are they jobbers who have banded together for the sake of efficiency. These are com-

[1] In *Purolator Products, Inc.*, Docket 7850 (April 3, 1964) [65 F.T.C. 8, 30], this Commission ruled that the purchaser's costs were irrelevant in a 2(a) proceeding:

> * * * [W]e conclude that even though respondent's cost studies demonstrate that warehouse distributors spend more in reshipping than respondent granted through its internal redistribution discount for this operation, such fact does not demonstrate an absence of competitive injury.

panies so closely held under such tight common control that we are forced to view them as one.

There is, of course, no question that warehouse distributors and jobbers perform valuable functions in the distribution of automobile parts. But what we have here is a record conclusively showing both functions being performed under "the same roof." The *modus operandi* of these customers of Monroe might or might not represent a true stimulus to competition and an aid to efficient and inexpensive distribution. In the present state of our knowledge, neither this Commission nor the respondent is in a position to proclaim with certainty that either efficiency or inefficiency will be the inevitable result of such multi-level competition. It would appear, in any event, that there is less than universal recognition of its virtues for, as the record shows, a number of automobile parts manufacturers other than Monroe refuse to give a 20% discount on "sales" to these entities for redistribution to their own jobbing arms. Some of the jobbing branches are profitable; others are losing money. And the public pays no less a price because of this method of distribution.

We have, of course, had similar issues before us in past cases.[2] Recently, in *Mueller Co.*, Docket 7514 (January 12, 1962), *aff'd*, 323 F. 2d 44 (7th Cir. 1963), the full Commission, with no dissent, interpreted its prior stand on functional discounts allegedly justified solely by vertical integration, as follows:

> Although the initial decision is not quite clear on this point, it appears that the hearing examiner interpreted the above quoted language [in Doubleday] as either holding that a price differential granted as compensation for services performed by a purchaser for the seller will not result in injury to competition or as holding that a price differential granted for this purpose is permissible regardless of injury to competition. There is nothing in the amended Clayton Act or in the applicable case law, however, to support either of these propositions. The latter interpretation would add a defense to a *prima facie* violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b). The other interpretation, that injury will not result from a functional discount "reasonably related to the expenses assumed by the buyer", ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller. *Consequently, we disagree with both interpretations and, insofar as the language in Doubleday stands for either of them, it is rejected.* We might add in this connection that the views expressed in *Doubleday* with respect to functional pricing were, in effect, overruled by the Commission in a later decision. In the matter of *General Foods Corporation*, 52 F.T.C. 798 (1956) * * *. (Emphasis added.)

There always has been a substantial sentiment in this country that small local enterprises should be encouraged and that their numbers

[2] See, *e.g.*, *Doubleday & Company, Inc.*, 52 F.T.C. 169 (1955).

should grow. That emotion was translated into legislation such as the Robinson-Patman amendments to the Clayton Act. To some, our strong enforcement of this Act now seems a childish clinging to a bygone era. And it is, of course, true that today's dissent may in fact be tomorrow's majority view. In some future case this Commission may march in solemn troop to pay unqualified homage to "vertical integration." But the clarion call to form such a dramatic procession is hardly sounded by this unadorned record. I remain unpersuaded that the will of Congress should not be executed in this case.

I note that Monroe's tight control over its warehouse distributors and jobbers might be construed as a separate restraint of trade. But no such charge was made in the complaint, nor was such an issue ever alluded to during the trial. In these circumstances, we could not, without violating fundamental principles of due process, issue an order enjoining respondent from fixing prices.

Dissenting Opinion

JULY 28, 1964

By Elman, *Commissioner:*

I

Respondent is a manufacturer of automotive parts. It sells exclusively, and at a single price (the jobber's price), to some 300 warehouse distributors located throughout the country. The warehouse distributors resell to jobbers, dealers, and even, occasionally, to garages or repair shops. On sales to jobbers (of whom there are some 11,000) who have been approved by respondent and have agreed with the warehouse distributor to purchase at the jobber's price set by respondent, the warehouse distributor receives a rebate from respondent of 20% of the jobber's price. Thus, if the jobber's price of one of respondent's parts is $1.00, and the warehouse distributor (who must pay respondent the jobber's price to obtain the part) resells to an approved jobber at that price, respondent will rebate 20¢ to the warehouse distributor.

According to the stipulation entered into between complaint counsel and counsel for respondent, some of the warehouse distributors to whom respondent sells own or control or are owned or controlled by jobber establishments that respondent has classified and approved as jobber accounts of the warehouse distributor, and accordingly receive the 20% rebate for redistributing respondent's parts to them. The record contains evidence concerning three such warehouse distributors.

One is a corporation having several jobber subsidiaries. Another has jobber branches that are not separate corporations, and is controlled by an individual who has a controlling interest in several jobber corporations. The third has two jobber subsidiaries (out of the 50 or so approved jobbers with whom it deals), one wholly, the other partly, owned by it.

There is affirmative and uncontradicted evidence that it costs these warehouse distributors as much to redistribute respondent's parts to their jobber affiliates as to independent jobbers, with the possible exception that salesmen's commissions may be reduced or eliminated on such transactions. Each of these warehouse distributors does the majority of his redistributing to independent, rather than affiliated, jobbers.

The rather skimpy record in the present case does not cast much light on the system of distribution in the auto parts industry, but that system should be familiar to the Commission from the large number of Robinson-Patman Act cases that it has brought in this industry, and should provide the background against which to consider respondent's warehouse distributor-jobber setup.

As every car owner knows, most auto repairs are not "deferrable"; one cannot wait weeks to have a broken fanbelt or a burnt-out bearing replaced. Hence, "ready availability" to the ultimate consumer of replacement parts is an essential requirement of the "automotive aftermarket". Due to the variety of makes and types of motor vehicles sold in this country, and to the speedy obsolescence of many parts, the number of items that must be made readily available in all parts of the country is immense; a single manufacturer of auto parts may produce 100,000 different items. The industry is thus faced with an acute problem of distribution. No indivdual garage or repair shop can afford to stock the complete lines of a number of manufacturers. On the other hand, it would be prohibitively expensive for an individual manufacturer to maintain a complete nationwide network of local warehouses and sales forces, as would be necessary to sell to, and provide inventory for, a vast number of garages and repair shops.

To bridge the gap has been the function of the warehouse distributor-jobber system. The jobber is a local wholesaler who carries many different manufacturers' lines and deals directly with the garages and repair shops. His scale of operations is too small to justify the maintenance of an extensive inventory. That is the warehouse distributor's principal function, and it is a substantial one, due to the number of parts which must be carried in order to provide ready availability. Thus, a warehouse distributor (who also carries many different manufacturers'

lines) may carry as many as 37,000 different parts in inventory. Since manufacturers do not distribute through exclusive jobber outlets, another important function that the warehouse distributor performs for the manufacturer is to "buy distribution" for the manufacturer's parts by redistributing to as many jobbers as possible. For this purpose, a warehouse distributor must maintain substantial selling, as well as warehousing, facilities.

The contractual relationship between respondent and its warehouse distributors is typical of the industry. The warehouse distributor performs a redistribution service for respondent and is compensated for it at a fixed rate (20%) per resale. If the warehouse distributor did not perform the service, respondent would have to perform it itself, which would require the establishment of branch warehouses and elaborate selling facilities. There is no suggestion that the 20% rebate which respondent's warehouse distributors receive for the service of redistributing to the jobbers is at all excessive or unearned.[1]

The foregoing description of the structure of distribution in the auto parts industry is vastly oversimplified. Apparently, few manufacturers use so simple—and, from the Commission's standpoint, one might suppose, so innocent—a system as the present repondent, who, unlike most, does no direct dealing with any links in its chain of distribution except the first, the warehouse distributors. The very simplicity of the structure brings into sharp focus the problems raised by the Commission's general approach in this industry.

II

Section 2(a) of the Clayton Act forbids a seller "to discriminate in price between different purchasers * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition * * *." The hearing examiner in his initial decision entered a cease and desist order forbidding respondent to sell its products "to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price." He justified this order on the following reasoning: (1) Independent jobbers purchasing from the warehouse distributors are "purchasers" from respondent within the meaning of the statute because respondent controls the terms and conditions of sale (including price) by warehouse

[1] The 20% warehouse distributor's rebate or discount appears to be standard in the industry. See, e.g., *American Ball Bearing Co.*, 57 F.T.C. 1259, 1262, where the warehouse distributor's function is briefly described.

distributor to jobber; (2) a jobber affiliated with a warehouse distributor receives the "benefit" (not further explained by the examiner) of the warehouse distributor's 20% rebate on resales to it and must, therefore, be deemed to be purchasing from respondent at a price 20% less than that paid by competing independent jobbers.

The Commission, in its decision, adopts the examiner's order and step 1 of his analysis, but modifies step 2. The Commission's test for imputing the warehouse distributor's rebate to the jobber is not whether the two are affiliated (*i.e.*, whether the jobber is owned or controlled by the warehouse distributor or vice versa), but whether the two are "one entity," or "a single unit." In applying its test, the Commission mentions a number of factors (drawn from the testimony concerning the three warehouse distributors with jobber affiliates) that suggest, in the Commission's view, a degree of integration between warehouse distributor and jobber affiliate: whether the jobber's establishment is physically contiguous to the warehouse distributor's; whether the warehouse distributor and jobber are one or separate corporations; whether the officers are the same; whether the jobber obtains all of its requirements of respondent's products from the affiliated warehouse distributor; whether the two have a common set of books; whether the warehouse distributor pays the jobber's bills; whether the warehouse distributor supervises the credit operations of the jobber; whether the warehouse distributor pays sales commissions on redistributions to the jobber; and others. Except for the matter of saved sales commissions, the factors relied on by the Commission seem to go primarily to the managerial and financial, rather than operational, integration of the affiliated warehouse distributors and jobbers.

III

The Commission's disposition of this case raises two initial questions. The first relates to the order. The Supreme Court has held that Commission orders must be, "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360, 368. Had the Commission in this case adopted the hearing examiner's rationale, the order would be, at all events, clear and precise in its meaning and application: a jobber would be a "purchaser" from respondent at the warehouse distributor's price (*i.e.*, jobber's price minus 20%) if it was under common ownership or control with a warehouse distributor. Under the Commission's rationale, however, such a jobber is to be deemed the purchaser only if it and its affiliated warehouse distributors are a "single unit" or "entity." These words have no established meaning, so

far as I am aware, in the context of Robinson-Patman Act enforcement. Since they are the critical terms in applying and interpreting the order, the Commission should give some indication of what it intends by them. It has not done so. It has merely enumerated a number of criteria to be used to determine whether or not affiliates are a "single unit," or "entity," without indicating the weight of each enumerated factor or whether the list given is an exclusive one.

For example, the Commission suggests at one point that, if the jobber branches are not separate corporations, the warehouse distributors and the branches are "conclusively" demonstrated to be "one entity." (P. 289.) But such a result would be inconsistent with the Commission's readiness to disregard corporate forms. (P. 291.) The Commission will only say that, "From all the above evidence, we conclude that Monroe has sold to purchasers who function at both the WD and the jobber level." (P. 291.) With all deference, I think the Commission has failed in its duty to provide guidance to respondent with respect to what degree of integration between affiliates makes them, in the Commission's eyes, a "single unit" or "entity."

An additional ambiguity in the order arises from the Commission's understandable concern with the possible unfairness of charging respondent with knowledge of the intimate corporate relations of its warehouse distributor purchasers. The Commission concludes that in view of respondent's contacts with the jobbers, respondent "knew or should have known" of their affiliation with warehouse distributors. (P. 292.) Does this mean that, in a proceeding to enforce the order, respondent has a defense if it can show it neither knew nor had reason to know of a warehouse distributor's relationship with a jobber? The order does not say; but if the defense is not available, great unfairness could result. Suppose that a warehouse distributor and a jobber are separate corporations with different names, but the majority stockholder in each is the same man, and the firms have coordinated their activities to a certain extent—enough to make them an "entity" under the order. Would it be either practical or fair in such a case to charge respondent with notice of the relations between ostensibly independent firms? Must its scrutiny of its 300 warehouse distributors and 11,000 jobbers be so exacting? If so (and the order, read in light of the Commission's opinion, is ambiguous on this score), the order seems unnecessarily harsh and oppressive.

IV

My second point relates to the Commission's application of the so-called "indirect purchaser" doctrine to hold that the independent job-

bers, who purchase from warehouse distributors only, are in reality purchasers from respondent. The Commission reasons that since the terms and conditions of sale on which the warehouse distributors sell to the jobbers are fixed, or subject to approval by, respondent, the doctrine applies. The hearing examiner emphasized, in addition, the close contacts which respondent maintains with the jobbers—advising them on sales strategy, etc.—but the Commission apparently does not rely on such contacts.

Section 2(a) of the Clayton Act forbids discrimination only between a seller's purchasers. If a disfavored purchaser is not a purchaser from the seller charged with violating 2(a), but is at some lower point in the chain of distribution, the Commission is without jurisdiction to enter an order against him. If, in order to evade Section 2(a)'s prohibitions, a seller (or buyer) employs a straw or dummy as an intermediary between him and his intended purchaser (or seller), I have no difficulty with the position that such a sham, evasive transaction does not oust the Commission of jurisdiction. See *American News Co.* v. *F.T.C.*, 300 F. 2d 104, 109–10 (2d Cir. 1962). At least to that extent, the "indirect purchaser" doctrine is clearly a valid gloss on the statute.

Warehouse distributors in the automotive parts industry are not the straws, dummies, brokers, agents, or creatures of either their manufacturer-suppliers or their jobber-customers. On this record, certainly, the Commission has no basis for so concluding. To be sure, the manufacturer has an active concern with how the jobber fares. The jobber's success in achieving wide distribution of the manufacturer's parts is a very important service which the jobber renders the manufacturer. But the fact that a manufacturer has a stake in the successful functioning of his chain of distribution surely does not make every link in that chain a purchaser from the seller.

That is true even where, as here, the resale price of the intermediary is fixed by his supplier. See *Klein* v. *Lionel Corp.*, 237 F. 2d 13 (3d Cir. 1956). By virtue of the "fair trade" exemption written into the antitrust laws, many manufacturers may lawfully fix their distributors' resale prices. But it would completely distort the meaning of the word "purchaser" to view purchasers from such distributors as purchasers from the manufacturer himself; and resale price maintenance is not simply a device for evading the prohibitions of Section 2(a) by resort to straw or dummy intermediaries. Since respondent's warehouse distributors are not mere sales agents (compare *Champion Spark Plug Co.*, 50 F.T.C. 30, 44–45), and since the warehouse distributors, rather than respondent, select the jobbers to whom they resell (compare *Whitaker Cable Corp.*, 51 F.T.C. 958, 972–73, aff'd, 239

F. 2d 253 (7th Cir. 1956)), I cannot agree that the "indirect purchaser" doctrine is properly applicable in the present case.

There is another point. The resale price-fixing clause in respondent's contracts is not sheltered by the fair-trade exemption (see R. 64), and would appear to be an outright price-fixing agreement in clear violation of the Sherman and Federal Trade Commission Acts. It seems a curious result to predicate Section 2(a) jurisdiction on respondent's openly violating the Sherman and Trade Commission Acts. In such a case, it would seem, the Commission ought to undertake prompt remedial action to eliminate the violation, even if in so doing it disabled itself from entering an order under Section 2(a). This suggests the futility of the Commission's attempted reliance on the "indirect purchaser" doctrine here. The price-fixing clause is apparently the principal basis on which the Commission relies for applying the doctrine. Therefore, should respondent, either to escape the Commission's order or to bring its conduct into conformity with the Sherman Act, delete that clause from its contracts with warehouse distributors, what would be the Commission's jurisdictional basis for enforcing the order? Even if the Commission's application of the "indirect purchaser" doctrine to the facts of the present case is technically correct, it serves little practical purpose. By relatively minor changes in the forms of its transactions with distributors, respondent can probably render the order ineffectual.

To the extent that the "purchaser" requirement of Section 2(a) might, in a particular situation, prevent the Commission from entering an order under 2(a) to prevent discriminatory, anticompetitive conduct contrary to the policy of the statute, the Commission is not without remedy. Section 5 of the Federal Trade Commission Act authorizes the Commission to prevent, as an unfair method of competition, a practice contrary to the policy of the price-discrimination law even if it is technically not subject to that law. See, e.g., *Grand Union Co.* v. *F.T.C.*, 300 F. 2d 92 (2d Cir. 1962). Cf. *Fred Meyer, Inc.*, F.T.C. Docket 7492 (decided July 9, 1963) (separate opinion) [63 F.T.C. 1].

V

The central issue of the case is whether respondent has discriminated, in a manner injurious to competition among its customers, by virtue of the affiliation or integration between certain warehouse distributors to which it sells and jobbers. The examiner's reasoning (which the Commission does not adopt) is that where two firms in a chain of distribution are under common ownership or control, the lower price to the firm higher in the chain should be imputed to the

affiliate because the "benefit" of the lower price must, in view of the firms' relationship, enure to the latter. This notion of "benefit" has no factual content; it is merely a restatement of the examiner's conclusion, as an example will show:

W is a warehouse distributor located in Cleveland, Ohio. It redistributes to a number of jobbers in cities throughout the state. All but one of these jobbers—Jobber *J* in Dayton—are completely independent corporations. *J* is a separate corporation from *W*, and none of its operations—managerial, financial or operational—is integrated with *W*'s, but the same person owns 51% of the stock of *W* and 51% of the stock of *J*. The examiner would conclude that the "benefit" of respondent's 20% rebate to *W* enures to *J*. It is obvious, however, that no benefit in fact accrues to *J* in these circumstances, and that there is no discrimination between *J* and his independent jobber competitors when all pay the same price to *W*. Cf. *Nuarc Co.* v. *F.T.C.*, 316 F. 2d 576 (7th Cir. 1963).

The Commission attempts to give a factual content to the notion of "benefit" by requiring that a degree of actual integration in the activities of the affiliate firms be shown. However, of the various facts adduced by the Commission to demonstrate a benefit arising from integration, only one is susceptible of any degree of precise measurement on this record: the reduced sales commissions—4% instead of the normal 6%—paid by R. T. Clapp Company on sales to its jobber affiliates.[2] The Commission makes no attempt to "quantify" the savings, if any, produced by the limited financial and managerial integration shown on this record. However, it seems very unlikely that those savings substantially reduce the cost of redistributing respondent's products to an affiliated jobber. Respondent's warehouse distributors and jobbers handle a number of manufacturers' lines besides respondent's. Hence, any savings derived from the managerial or financial integration of a warehouse distributor and jobber would reduce the cost of redistributing *all* products handled by the affiliated firms, not just respondent's. I would guess that the share of these general savings allocable to respondent's line is quite small, but there is, in any event, no evidence on the point.[3]

[2] The record shows that Hart's Automotive Parts Company, on its sales to affiliated jobbers located outside Chattanooga, paid no sales commissions—but the record does not show what the normal commission rate was. TVK Automotive Warehouse, Inc., the third warehouse distributor as to which there is any evidence, paid sales commissions on all of its sales to jobber affiliates.

[3] The Commission's present emphasis on bookkeeping savings is in sharp contrast to its earlier position, in the jobber-group cases, that the bookkeeping savings from pooled ordering and billing operations are insignificant. See, e.g., *American Motor Specialties Co.*, 55 F.T.C. 1430, 1446, *aff'd*, 278 F. 2d 225 (2d Cir. 1960).

On this record, then, the 2% saving (which, I assume, means 2% of the jobber price) is the only tangible competitive advantage that an affiliated jobber can be said to derive from his relationship with a warehouse distributor. This saved amount could, presumably, be passed on by the warehouse distributor to his jobber affiliates, to be used by the latter to strengthen their competitive position against the nonaffiliated jobbers. But can the existence of such an advantage justify the order entered by the Commission?

An example will show that the Commission's order, which forbids respondent to grant its warehouse distributors any compensation, however slight, on resales to affiliated jobbers, is supportable under no tenable theory of Robinson-Patman Act liability. Suppose that respondent's jobber price for a spark plug is $1.00. R. T. Clapp Company, then, would receive a 20¢ rebate for redistributing such a spark plug to its Oak Ridge, Tennessee, jobber subsidiary, and the same rebate for redistribution to independent jobbers competing with the Oak Ridge subsidiary. The Commission does not challenge the uncontroverted evidence that Clapp deals in the same manner with its affiliated as with its 50 unaffiliated jobbers (R. 226; see also R. 232), except, of course, that Clapp saves 2¢ of the sales commission on redistributing to the former. Nor is there any basis in the record to believe that the 20¢ rebate includes more than a normal profit—say 2¢.

Consider the effect of the Commission's order in these circumstances. On spark plugs intended for redistribution to the Oak Ridge subsidiary, Clapp must pay respondent the full $1.00 jobber's price; it cannot receive any rebate whatever. For Clapp to redistribute spark plugs to its Oak Ridge subsidiary involves out-of-pocket costs of 16¢ (that part of the rebate not represented by Clapp's profit of 2¢ or by the saved sales commission of 2¢). Thus, just to break even Clapp must recover $1.16 from the Oak Ridge subsidiary, and the Oak Ridge subsidiary must therefore resell respondent's spark plug for at least $1.16 to avoid incurring a net loss. The competitors of the Oak Ridge subsidiary are nonaffiliated jobbers who pay Clapp (or some other warehouse distributor) only $1.00 for respondent's spark plug. In view of the low profit margins prevailing in the industry, it is most unlikely that the Oak Ridge subsidiary can compete on those terms. Clapp will be forced to discontinue doing business with it. The Oak Ridge subsidiary must either satisfy its requirements of respondent's products from another warehouse distributor or discontinue carrying respondent's line.

Unless Section 2(a) of the Clayton Act forbids, *per se*, integration between firms at different levels in the structure of distribution, I can-

not agree that the Commission's order is proper. To be sure, it could be argued that since the affiliated jobber derives a 2¢ advantage by virtue of its relationship with a warehouse distributor, and since in the auto parts industry a 2% differential in the price to competitors is likely to have the adverse competitive effects specified in the statute, some order correcting this inequality is justifiable. But that would surely not justify an order, such as the one entered by the Commission, flatly forbidding any rebate, however small, to the warehouse distributor.[4]

Moreover, even if the 2¢ differential may be said to cause competitive injury sufficient to justify an order, that fact cannot justify the Commission's order because the order is not based on any such finding. The Commission's reasoning is not that the 2¢, or any other, benefit of integration is a competitive detriment to non-integrated competitors. It is, rather, that the existence of such a benefit demonstrates that the warehouse distributor and its jobber affiliates are one entity receiving a rebate of 20% that competitors—the nonaffiliated jobbers—do not receive. The source of competitive injury, in the Commission's view, is the rebate, not the much smaller benefit from integration. The benefit is just a device the Commission uses for imputing the warehouse distributor's entire 20% rebate to its jobber affiliates.

The thrust of the Commission's reasoning seems clear from its reliance on *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470. Respondent in that case sold its roofing materials directly to wholesalers, retailers, and roofing contractors (known as "applicators"). The Commission found that respondent granted substantial "distribution commissions" and "wholesale discounts" to some but not all of its customers competing in the resale of its products as retailers and as applicators. The Commission did not find that there had been discrimination among wholesalers, but decided that its order should forbid respondent to

[4] *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, is clearly distinguishable on this point. The Court there rejected respondent's argument "that the order went too far in prohibiting *all* price differentials between competing purchasers, although only differentials of 5 percent or more were found", stating that "the Commission was not required to limit its prohibition to the specific differential shown to have been adopted in past violations of the statute. In the absence of any indication that a lesser discrimination might not affect competition there was no need to afford an escape clause through which the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5 percent." 343 U.S., at 473–74. Here, by contrast, the "indication" referred to by the Court is present. Nothing on this record can justify the Commission in predicting that an 18% or less rebate by respondent on warehouse distributor's sales to jobber affiliates could have an adverse effect on competition. To allow respondent no opportunity under the order to demonstrate that a rebate to warehouse distributors on sales to jobber affiliates merely covers the distributor's out-of-pocket costs of redistribution is completely unsupportable. Even complaint counsel would concede that if the warehouse distributor receives no rebate on sales to its jobber affiliates, it suffers "a financial loss of the cost of any expenses involved in handling the product and making such a sale". Complaint Counsel's Proposed Findings, p. 4.

discriminate between any of its customers, however classified, because "the particular designations given purchasers [by respondent] are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator." 46 F.T.C. 386. On these facts, the Court held that the Commission was justified in ignoring respondent's functional classification of its customers, arbitrary and ambiguous as it was, and ordering respondent to treat all alike.

The *Ruberoid* principle is a sound one, but it has no application to the facts of the present case. This is not a case where a manufacturer arbitrarily designates a jobber or group of jobbers as a "warehouse distributor" in order to mask a price discrimination (as the Commission found to be the case in its recent decision in *National Parts Warehouse*, F.T.C. Docket 8039 (December 16, 1963)) [63 F.T.C. 1692], or where a warehouse distributor sells simultaneously as a jobber (see *Purolator Products, Inc.*, F.T.C. Docket 7850 (decided April 3, 1964)) [65 F.T.C. 8]. The warehouse distributors who have jobber affiliates and to whom respondent granted its normal 20% rebate for redistributing to those affiliates operate, as we have seen, in all essential respects just like unaffiliated distributors; and the affiliated jobbers operate just like unaffiliated jobbers.

In *National Parts Warehouse*, the Commission attempted to bring the respondent (a limited partnership among a group of jobbers formed to obtain for the members the functional discount accorded warehouse distributors) within the *Ruberoid* principle by adducing evidence that respondent was not a *bona fide* warehouse distributor. The Commission relied, for example, on the fact that the manufacturers did a great deal of drop-shipping to the members, bypassing respondent, and that respondent did not perform the selling function characteristic of warehouse distributors but was merely the agent of the jobber partners. The present record is devoid of any such facts. Respondent does no drop-shipping to the jobber affiliates of its warehouse distributors (see R. 18). The distributors are not merely the agents of their jobber affiliates. On the contrary, most of their business is done with wholly independent jobbers. So also, in view of the very limited integration between the warehouse distributors and affiliated jobbers the Commission cannot properly rely on *Purolator Products*, which involved the performance of more than a single distributional function by a purchaser classified as a warehouse distributor.

In sum, if the record of the present case showed that any of respondent's warehouse distributors in fact was merely a front for a jobber affiliate, or that any distributor was in fact himself selling as a jobber, the Commission's position would derive support from prior decisions. But the record affirmatively shows the contrary. Nothing in the existing law of Section 2(a) justifies what is in effect a *per se* rule barring a warehouse distributor from selling to a jobber with which it is affiliated in the manner shown on this record. Indeed, the Commission, just recently, expressly disavowed any such position. The hearing examiner in *Joseph A. Kaplan & Sons, Inc.*, F.T.C. Docket 7813 (decided by the Commission on November 15, 1963) [63 F.T.C. 1308], in a portion of his initial decision adopted by the Commission, stated:

> This is not to say, however, that the buying stores have no right to own stock in a wholesale corporation. Rather, it is the nature of the wholesaling function which controls. Where the sole *raison d'etre* of the wholesaling corporation lies in the benefits it can confer upon its own retailer stockholders to whom it makes all, or practically all, of its sales, it can be no longer be [*sic*] called a true wholesaler but becomes a mere dummy or front for such retailer stores. Such is the characteristic that * * * distinguishes this case from * * * those cases [where] the subsidiary or intermediary was not created and doing business solely for the benefit of the parent or supplier but was, apparently, in business for all desirable trade. [Initial decision, May 21, 1962, 63 F.T.C. 1308, 1325.]

VI

The most difficult issue raised by the present case is whether Section 2(a) would authorize the Commission to enter, upon a proper finding of probable injury to competition, an order forbidding respondent to rebate the 2% represented by saved sales commissions. I would conclude not. As explained at greater length in my separate opinions in *National Parts Warehouse*, *supra*, and *Purolator Products*, *supra*, the price-discrimination law is designed to deal with price discrimination, rather than with the problems of vertical integration as such. The 2% saving to warehouse distributors having jobber affiliates does not raise a question of price discrimination.

From respondent's standpoint, certainly, there is no discrimination. The service rendered by the warehouse distributor to respondent in exchange for the 20% rebate is no less valuable to respondent merely because on some resales the distributor is able to reduce his costs. It would be different if, as the Commission found in the jobber-group cases, a buyer classified as a "warehouse distributor" and allowed the warehouse distributor's discount did not relieve the seller of having to perform the warehouse distributor's function (particularly warehousing) on sales to the group. In such a case, the effect of the discount (in the absence of cost justification by the seller) would be to reduce, on the particular sale, the seller's normal return. Nothing of that sort

is involved here. Respondent incurs no added expense whatever in selling to warehouse distributors for redistribution to their jobber affiliates.

Thus the question is squarely posed whether Section 2(a) requires respondent to subsidize its less efficient distributors and thereby discriminate against the more efficient. The 2% reduced commission is not a result of market power. The record of this case offers no basis for supposing that the warehouse distributors having jobber affiliates are the kind of powerful buyers at which the Robinson-Patman Act was aimed. The saving is a *bona fide* efficiency created by lawful integration. I cannot agree that the objectives of antitrust policy would be served by an order forcing respondent to deprive its customers of the benefit of whatever efficiencies of distribution they may be able to achieve through integration. Such an order, no less than the more sweeping order entered by the Commission, would be tantamount to a *per se* prohibition of integrated operations in distribution, because it would prevent the integrated distributor from realizing any profit from the efficiencies conferred by integration. Such a result seems to me far beyond the proper reach of the price-discrimination law.

Mr. Justice Holmes cautioned repeatedly against the unfortunate tendency of legal principles to be erected into uncritical absolutes or pushed to unwarranted extremes. See, e.g., *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355. Such a tendency is apparent in the Commission's enforcement of the price-discrimination law in the auto parts industry, culminating in the present case. The earliest cases involved apparently conventional applications of the *Ruberoid* principle to manufacturers using functional discounts to mask price concessions granted powerful buyers.[5] The Commission then applied the principle to jobber buying groups,[6] finding that such groups were

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[5] See *Champion Spark Plug Co.*, 50 F.T.C. 30; *General Motors Corp.*, 50 F.T.C. 54; *Electric Auto-Lite Co.*, 50 F.T.C. 73; *Thompson Products, Inc.*, 55 F.T.C. 1252. Cf. *P. Sorensen Mfg. Co.*, 52 F.T.C. 1659, 1668–69, aff'd *per curiam*, 246 F. 2d 687 (D.C. Cir. 1957).

[6] The genesis and operation of such groups have been described as follows:

"Starting as early as 1936 when the Act was passed but more often some time thereafter, various automotive parts jobbers (wholesalers selling to retailers) gathered into groups to conduct their purchasing on a cooperative basis. Their intention was generally to pool their market power. Price advantages were usually the main initial consideration, but in some instances other benefits may have been primary. Quantity discounts prevailed in the industry, and group aggregation of purchases achieved substantial rewards for member jobbers. Such quantity discounts were most often cumulative in nature and paid in the form of rebates. The buying group, after deducting expenses, paid over such receipts to each member in proportion to his patronage. Purchase orders to sellers could be sent by member jobbers directly or through the group office. Invoicing by the seller was to the group only, which paid the bills and generally eliminated credit and collection problems for the seller. Shipments of parts were usually made by the seller directly to the member jobbers; only to a very limited extent did the group headquarters handle the goods or have warehouse facilities for doing so." Fleming. *Group Buying Under the Robinson-Patman Act: The Automotive Parts Cases*, 7 Buff. L. Rev. 231, 232–33 (1958).

merely bookkeeping devices for obtaining discriminatory concessions for the members of the groups.[7] The Commission may have overlooked some genuine services rendered by the groups to the manufacturer, but it had grounds for its conclusion that they did not perform a warehouse distributor's function and so were not entitled to the warehouse distributor's discount or rebate.

Subsequently, however, the Commission, still relying on the *Ruberoid* doctrine, challenged "second generation" jobber groups, which had undertaken to perform a warehouse distributor's function on behalf of their members in order legitimately to earn the warehouse distributor's discount.[8] The Commission's orders in this class of case seem highly questionable. If a jobber group in fact performs for the manufacturer services equivalent to those traditionally performed by warehouse distributors, an order forbidding the manufacturer to compensate it for those services has the effect of insulating the warehouse distributors from competition by the group. Such orders can only discourage legitimate innovations and improvements in distribution and thereby rigidify the channels of distribution, without advancing the basic policy and objectives of the Robinson-Patman Act. The present case represents the most extreme and unjustified application of the *Ruberoid* principle, for here the warehouse distributors whose discount is challenged are not successors to outlawed jobber groups, and the genuineness of their functional classification cannot be impugned on that ground.

By a process of excessive and uncritical generalization, the *Ruberoid* principle has been transformed by the Commission into the dogma that the character of the purchaser's selling is the exclusive criterion of whether a functional allowance may lawfully be granted him. No matter what service or function he performs for his seller as a dis-

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[7] *Namsco, Inc.*, 49 F.T.C. 1161; *Moog Industries, Inc.*, 51 F.T.C. 931, aff'd, 238 F. 2d 43 (8th Cir. 1956), aff'd on other grounds, 355 U.S. 411; *Whitaker Cable Corp.*, 51 F.T.C. 958, a'ffd, 239 F. 2d 253 (7th Cir. 1956); *E. Edelmann & Co.*, 51 F.T.C. 978, a'ffd, 239 F. 2d 152 (7th Cir. 1956); *C. E. Niehoff & Co.*, 51 F.T.C. 1114, modified, 241 F. 2d 37 (7th Cir. 1957), rev'd on other grounds *sub nom. Moog Industries* v. *F.T.C.*, 355 U.S. 411; *P. & D. Mfg. Co.*, 52 F.T.C. 1155, aff'd, 245 F. 2d 281 (7th Cir. 1957); *P. Sorensen Mfg. Co.*, 52 F.T.C. 1659, aff'd *per curiam*, 246 F. 2d 687 (D.C. Cir. 1957); *Standard Motor Products, Inc.*, 54 F.T.C. 814, aff'd, 265 F. 2d 674 (2d Cir. 1959); *D & N Auto Parts Co.*, 55 F.T.C. 1279, aff'd *sub nom. Mid-South Distributors* v. *F.T.C.*, 287 F. 2d 512 (5th Cir. 1961); *American Motor Specialties Co.*, 55 F.T.C. 1430, aff'd, 278 F. 2d 225 (2d Cir. 1960); *Eis Automotive Corp.*, 55 F.T.C. 1473; *American Ball Bearing Co.*, 57 F.T.C. 1259; *Tung-Sol Electric, Inc.*, F.T.C. Docket 8514 (decided Sept. 12, 1963) [63 F.T.C. 632].

[8] *Alhambra Motor Parts*, 57 F.T.C. 1007, remanded, 309 F. 2d 213 (9th Cir. 1962); *Ark-La-Tex Warehouse Distributors, Inc.*, F.T.C. Docket 7592 (order of June 5, 1963 [62 F.T.C. 1557], remanding to hearing examiner in light of court of appeals' *Alhambra* decision); *Automotive Jobbers, Inc.*, F.T.C. Docket 7590 (decided Jan. 4. 1962) [60 F.T.C. 19]; *National Parts Warehouse, supra; Dayton Rubber Co.*, F.T.C. Docket 7604 (appeal pending before Commission). Cf. *Purolator Products, supra.*

tributor, he is entitled to no greater compensation than any other purchaser reselling in competition with him. This result is sometimes explained on the theory that a manufacturer who compensates a class of purchasers for the extra distributional costs they incur is "subsidizing their internal operation" and thus, in effect, insulating the inefficient against the consequences of their "higher internal expenses." *Purolator Products, supra*, p. 11 [65 F.T.C. 8, 29].

I certainly agree that where the effect of a price discrimination is to subsidize the inefficient operations of the purchaser, it is no defense to argue that the discrimination will be offset or neutralized by the favored purchaser's higher internal expenses and hence confer no competitive advantage upon him in the struggle with his more efficient competitors. In such a case, there is injury to competition because the discrimination will assist the inefficient, favored purchaser to hold his own, undeservedly, against the competition of the more efficient—a result patently inconsistent with the policy of competition. Competition, if effective, should promote efficiency by forcing the inefficient to become efficient or to go under if they do not.

It is a complete perversion of that principle to apply it to legitimate functional classifications. A warehouse distributor having jobber affiliates does not receive a rebate of 20% of the jobber's price from the manufacturer for redistributing to the affiliates because it is inefficient, but because it renders a legitimate and valuable service to the manufacturer which jobbers do not. Indeed, to the extent that there are real efficiencies in redistributing to jobber affiliates, efficiency is penalized if the wholesale distributor is not allowed the regular warehouse distributor's rebate for performing the redistribution function on sales to its jobber affiliates.

In sum, where a functional classification is not arbitrary or unjustified, as it was in *Ruberoid* or, arguably, the jobber-group cases, the *Ruberoid* principle is inapplicable. Any notion that competing distributors must in any and all circumstances pay exactly the same price to the manufacturer, regardless of the different functions they perform, is a completely unwarranted gloss on *Ruberoid* (a case which involved no such question). The Commission itself has so recognized:

In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier

from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it. [*Doubleday & Co.*, 52 F.T.C. 169, 209.]

The Commission has indicated that it regards the *Doubleday* Principle as overruled. *Mueller Co.*, F.T.C. Docket 7514 (decided Jan. 12, 1962) [60 F.T.C. 120], *aff'd* on other grounds, 323 F. 2d 44 (7th Cir. 1963). In fact, however, the Commission seems to be vacillating in this area. Thus, in its recent order in *Ark-La-Tex*, *supra*, the Commission, in remanding to the examiner, stated that one of the questions to be answered was "Whether respondent Ark-La-Tex was a legitimate wholesale distributor, entitled as such to a wholesale distributor discount, or whether it was merely a sham whose jobber-members should be viewed as the actual purchasers". The Ninth Circuit's *Alhambra* decision strongly suggests that the courts of appeals will not accept the Commission's attempt to equate jobber groups performing genuine and substantial services to the old "order desk" buying groups which the Commission found to be mere bookkeeping devices for the obtaining of discounts for the jobber members. Indeed, in at least two of the old jobber-group cases, the courts of appeals expressly based affirmance of the Commission's order on the fact that no actual efficiencies in distribution from the jobber-group type of operation had been shown. *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152, 155 (7th Cir. 1956); *Standard Motor Products, Inc.* v. *F.T.C.*, 265 F. 2d 674, 676 (2d Cir. 1959). The courts seem increasingly skeptical of strained attempts to use the price-discrimination law as a weapon against integration as such. See *Nuarc Co.* v. *F.T.C.*, 316 F. 2d 576 (7th Cir. 1963). Cf. *Mueller Co.* v. *F.T.C.*, 323 F. 2d 44, 47 (7th Cir. 1963). In short, the storm warnings are up. The dogma on which decisions such as that in the present case rest may be less unshakable than is sometimes assumed.

VII

In granting the Federal Trade Commission concurrent jurisdiction to enforce the antitrust laws, Congress never intended that the Commission would expend its resources in the pursuit of every technical

complaint of price discrimination that might come to its attention, however minimal the effect on competition. It was intended that the Commission, utilizing its flexible administrative powers of economic inquiry and investigation, would focus on practices having a real and substantial adverse impact on competitive processes. Certainly, the Commission should not institute a series of lawsuits (whether under Section 2(a) of the Clayton Act or any other antitrust provision) in an industry without first informing itself in depth of the industry's market structure and competitive needs and conditions.

Thus, before the Commission enters an order that, in practical effect, forbids warehouse distributors in the automotive parts industry to resell to their jobber affiliates, the Commission should know more about this industry than it does. What is the relative bargaining power of the various tiers of distributors? How prevalent is vertical integration? What forms does vertical integration take, and what is the competitive significance of these forms? What structural changes would render competition more effective in the industry? What are the long-term trends in industry structure? What firms in the industry, if any, possess substantial market or monopoly power? In the numerous cases which the Commission, over the years, has brought in the automotive parts industry, questions such as these do not seem to have been asked, or answered, or their relevance even perceived. The result has been some striking paradoxes:

(1) Although the industry seems to be permeated by resale price maintenance,[9] the Commission has taken virtually no remedial action against it[10]—perhaps because it is too occupied pursuing scattered instances of alleged price discrimination. If the price-fixing were eliminated, however, the companies allegedly discriminated against would no longer be "indirect purchasers" (see p. 301, *supra*).

(2) The vast majority of the Commission's proceedings in the auto parts industry have been against jobber buying groups (see note 7, *supra*). The primary impetus for cooperative buying by independent jobbers came, apparently, from the pricing systems employed by the manufacturers, which heavily favored large-volume purchasers and warehouse distributors. The Commission, however, has not taken effective action against either the pricing systems as such or the

[9] See pp. 299–301, *supra*; *Whitaker Cable Corp.* v. *F.T.C.*, 239 F. 2d 253, 255 (7th Cir. 1956); *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152, 155 (7th Cir. 1956); *Standard Motor Products, Inc.*, 54 F.T.C. 814, 828, *aff'd*, 265 F. 2d 674 (2d Cir. 1959); *Thompson Products, Inc.*, 55 F.T.C. 1252, 1272; *P. & D. Mfg. Co.*, 52 F.T.C. 1155, 1173, *aff'd*, 245 F. 2d 281 (7th Cir. 1957); *Purolator Products, Inc.*, F.T.C. Docket 7850 (decided April 3, 1964), p. 20 [65 F.T.C. 8, 36].

[10] But see *Rayco Mfg. Co.*, 57 F.T.C. 96 (consent order); *Dayton Rubber Co.*, F.T.C. Docket 7604 (appeal pending before Commission).

large-volume purchasers and warehouse distributors. It has proceeded primarily against the independent jobbers' efforts to survive by pooling their buying power.

(3) When the independent jobbers attempted to compete with the warehouse distributors, by the formation of jobber cooperatives to perform the warehouse distributor's function, the Commission brought a new series of proceedings directed against this effort at self-protection (e.g., *National Parts Warehouse*, *supra*). The present case, involving jobbers who have become affiliated with warehouse distributors, seems part of this enforcement pattern.

(4) As everyone connected with the automotive parts industry well knows, the Commission's multitude of proceedings has had only a minimal effect on competitive methods. Jobber buying groups continue to grow and flourish (which suggests that they may be responsive to a real competitive need), while the Commission makes little attempt to enforce its hard-won orders. Since the structure of distribution in the industry has been undergoing continuous change,[11] the Commission's old orders are probably even less realistic today than when they were entered.

(5) In the most comprehensive study of the auto parts industry of which I am aware, Professor Charles Davisson of the University of Michigan has concluded that the complex system of distribution that characterizes the industry, involving competition between distributors who perform different functions and accordingly purchase at different prices, has been a force for promoting competition and efficiency at all levels, and that the elimination of this system of "functional pricing"—which the Commission regards as unlawful *per se* under the price-discrimination law—would discourage competition, promote inefficiency, and, in general, prove completely impracticable.[12]

If Professor Davisson is right, the Commission's approach to the problem of price discrimination in this industry is fundamentally wrong, and the Commission should devote its attention not to eliminating functional pricing but to assuring "freedom of access to the favored function." [13] The trouble is, of course, that the Commission, never having undertaken a study in depth of the auto parts industry, is in no position either to accept or reject Professor Davisson's thesis. On the basis of its present knowledge and experience, the Commission

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[11] See, e.g., *Wall Street Journal*, May 8, 1963, p. 1, Sept. 10, 1958, p. 1; *Barron's*, Apr. 23, 1962, p. 1.

[12] Davisson, The Marketing of Automotive Parts 866, 930–31, 937, 946, 951–54 (1954).

[13] Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 251 (1954). See *Mueller Co.* v. *F.T.C.*, 323 F. 2d 44 (7th Cir. 1963); *Ark-La-Tex Warehouse Distributors, Inc.*, F.T.C. Docket 7592 (order of June 5, 1963) [62 F.T.C. 1557]; *National Parts Warehouse*, F.TC. Docket 8039 (decided Dec. 16, 1963), pp. 6–7 (separate opinion) [63 F.T.C. 1692, 1743–1744].

cannot fulfill its basic duty of devising the "enforcement policy best calculated to achieve the ends contemplated by Congress" (*Moog Industries* v. *F.T.C.*, 355 U.S. 411, 413) in the auto parts industry. Before it enters still another cease-and-desist order premised on highly questionable legal and economic assumptions, the Commission should use its administrative powers, as Congress intended it would, to conduct an economic study of the structure of distribution in this industry.

Final Order

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondent, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions, and having determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

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

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

Commissioner Dixon concurring and Commissioner Elman dissenting.

In the Matter of

PHILIP SHLANSKY & SONS, INC., ET AL.

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

Docket C–796. Complaint, July 30, 1964—Decision, July 30, 1964

Consent order requiring four affiliated manufacturers of ladies' coats and suits of New York City, to cease misbranding their wool, fur, and textile fiber products, furnishing false guaranties that their wool products are not misbranded, and failing to maintain required records of fiber content of their textile fiber products.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the Fur Products Labeling Act and the Textile Fiber Products Identification Act and

by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Philip Shlansky & Sons, Inc., Donnybrook, Ltd., Brookleigh, Ltd., Mansfield Tailleurs, Ltd., corporations, and Philip Shlansky, Irwin Shlansky and Martin Shlansky, 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, the Fur Products Labeling Act, and the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof, would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Philip Shlansky & Sons, Inc., Donnybrook, Ltd., Brookleigh, Ltd., Mansfield Tailleurs, Ltd., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondents Philip Shlansky, Irwin Shlansky and Martin Shlansky are officers of said corporate respondents and formulate, direct and control the acts, policies and practices of said corporate respondents, including the acts and practices hereinafter referred to. The respondents are engaged in the manufacture and distribution of ladies' coats and suits and have their office and principal place of business located at 500 Seventh Avenue, New York, New York.

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

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 of 1939 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 were ladies' coats containing interlinings labeled or tagged by respondents as "interlining 90% wool, 10% other fiber" whereas, in truth, and in fact, said interlinings contained a substantial quantity of reprocessed or reused wool.

Also, among such misbranded wool products, but not limited thereto were ladies' coats, containing lining labeled or tagged by respondents

as "Acetate Rayon Lining" whereas, in truth, and in fact, said lining contained no Rayon.

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

Among such misbranded wool products, but not limited thereto, were ladies' coats, used to promote or effect the sales of such wool products in commerce, without labels.

Also, among such misbranded wool products, but not limited thereto, were ladies' coats containing interlinings with labels which, with respect to said interlinings, failed:

(1) to disclose reprocessed wool or reused wool present, and

(2) to disclose the percentage of such reprocessed or reused wool.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(1) Samples, swatches or specimens of wool products used to promote or effect sales of wool products, in commerce, were not labeled or marked to show their respective fiber contents and other required information, in violation of Rule 22 of the Rules and Regulations.

(2) The respective percentages of fibers contained in the front and back of pile fabrics were not set out in such a manner as to give the ratio between the face and back of such fabrics where an election was made to separately set out the fiber content of the face and back of wool products containing pile fabrics, in violation of Rule 26 of said Rules and Regulations.

PAR. 6. The respondents furnished false guaranties that certain of their said wool products were not misbranded, when respondents in furnishing such guaranties had reason to believe that the wool products so falsely guaranteed might be introduced, sold, transported, or distributed in commerce, in violation of Section 9(b) of the Wool Products Labeling Act of 1939.

PAR. 7. The acts and practices of 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 or deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 8. 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 manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported, and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 9. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products without labels.

PAR. 10. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of the said Rules and Regulations.

(b) Samples of fur products used to promote and effect sales of fur products were not labeled to show the required information, in violation of Rule 33 of the said Rules and Regulations.

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

PAR. 11. 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 respect:

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

PAR. 12. The aforesaid acts and practices of the respondents, 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.

PAR. 13. Subsequent to the effective date of the Textile Fiber Prod-

ucts 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. 14. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provision of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products without labels.

PAR. 15. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder and in the following respects:

(a) Samples, swatches, and specimens of textile fiber products subject to the aforesaid Act, which were used to promote or effect sales of such textile fiber products, were not labeled to show their respective fiber content and other information required by Section 4(b) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in violation of Rule 21(a) of the aforesaid Rules and Regulations.

(b) The respective percentages of fibers contained in the front and back of pile fabrics were not set out in such a manner as to give the ratio between the face and back of such fabrics where an election was made to separately set out the fiber content of the face and back of textile products containing pile fabrics, in violation of Rule 24 of said Rules and Regulations.

PAR. 16. 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 Regulations promulgated thereunder.

PAR. 17. 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.

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 Wool Products Labeling Act of 1939, the Fur Products Labeling Act, and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondents Philip Shlansky & Sons, Inc., Donnybrook, Ltd., Brookleigh Ltd., Mansfield Tailleurs, Ltd., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their office and principal place of business at 500 Seventh Avenue, in the city of New York, State of New York.

Respondents Philip Shlansky, Irwin Shlansky and Martin Shlansky 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 Philip Shlansky & Sons, Inc., Donnybrook, Ltd., Brookleigh Ltd., Mansfield Tailleurs, Ltd., corporations and their officers, and Philip Shlansky, Irwin Shlansky, and Martin Shlansky, 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 introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, delivery for shipment, shipment, or distribution in commerce, of any wool product as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool 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 to or place on each such wool 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.
3. Failing to affix labels to samples, swatches, or specimens of wool products used to promote the sale of wool products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.
4. Failing to set forth respective percentages of fibers contained in the front and back of pile fabrics in such a manner as to give the ratio between the front and back of each such fabric where an election is made to separately set out the fiber content of the face and back of wool products containing pile fabrics.

It is further ordered, That respondents Philip Shlansky & Sons, Inc., Donnybrook, Ltd., Brookleigh Ltd., Mansfield Tailleurs, Ltd., corporations, and their officers and Philip Shlansky, Irwin Shlansky, and Martin Shlansky, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device do forthwith cease and desist from furnishing a false guaranty that any wool product is not misbranded under the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder when there is reason to believe that any wool product so guaranteed may be introduced, sold, transported or distributed, in commerce as the term "commerce" is defined in the aforesaid Act.

It is further ordered, That respondents Philip Shlansky & Sons, Inc., Donnybrook, Ltd., Brookleigh Ltd., Mansfield Tailleurs, Ltd., corporations, and their officers and Philip Shlansky, Irwin Shlansky, and Martin Shlansky, 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 introduction, or manufacture for introduction, into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

A. Misbranding fur products by:

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

2. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

3. Failing to affix labels showing each element of the information required under the Fur Products Labeling Act and the Rules and Regulations thereunder to samples of fur products used to promote or effect the sale of fur products.

4. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by failing to set forth on invoices the item number or mark assigned to fur products.

It is further ordered, That respondents Philip Shlansky & Sons, Inc., Donnybrook, Ltd., Brookleigh Ltd., Mansfield Tailleurs, Ltd., corporations and their officers, and Philip Shlansky, Irwin Shlansky, and Martin Shlansky, 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 introduction, delivery for introduction, manufacture for introduction, sale, advertising or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the

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

A. Misbranding textile fiber products by:

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

2. Failing to affix labels showing the respective fiber content and other required information to samples, swatches and specimens of textile fiber products subject to the aforesaid Act which are used to promote or effect sales of such textile fiber products.

3. Failing to set forth respective percentages of fibers contained in the front and back of pile fabrics in such a manner as to give the ratio between the front and back of each such fabric where an election is made to separately set out the fiber content of the face and back of textile products containing pile fabrics.

It is further ordered, That respondents Philip Shlansky & Sons, Inc., and Donnybrook, Ltd., Brookleigh Ltd., Mansfield Tailleurs, Ltd., corporations and their officers, and Philip Shlansky, Irwin Shlansky, and Martin Shlansky, indivdually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of textile fiber products; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, textile fiber products, which have been advertised or offered for sale in commerce; or in the connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of textile fiber products, whether

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, do forthwith cease and desist from 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 promulgated thereunder.

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

ALVA LABORATORIES, INC., ET AL.

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

Docket C-797. Complaint, July 30, 1964—Decision, July 30, 1964

Consent order requiring a Chicago distributor of a drug preparation designated "Alva-Tranquil," and its advertising agency, to cease representing falsely in advertising that all persons can take the preparation safely without a doctor's advice, and that the drug is a newly discovered kind of medicine and miraculous in results.

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 Alva Laboratories, Inc., a corporation, and Emile Gerchenson and Samuel Karper, individually and as officers of said corporation, and Olian and Bronner, 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, Alva Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 1017 Diversey Parkway, in the city of Chicago, State of Illinois.

Respondents Emile Gerchenson and Samuel Karper are 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 the corporate respondent.

Respondent Olian and Bronner, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 35 East Wacker Drive, in the city of Chicago, State of Illinois.

PAR. 2. Respondents Alva Laboratories, Inc., and Emile Gerchenson and Samuel Karper are now, and for some time last past have been, engaged in the sale and distribution of a preparation containing ingredients which come within the classification of drugs, as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondents for said preparation and the formula thereof are as follows:

Designation: Alva-Tranquil.
Formula:
Each tablet contains in grams:

Ingredient	Grams
Potassium Bromide	0.1950
Potassium Salicylate	.0850
Methapyrilene HCl	.010
Thiamin HCl	.0025
Niacin	.0042
Niacinamide	.0042

PAR. 3. The respondents referred to in PARAGRAPH TWO hereof cause said preparation, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Olian and Bronner, Inc., is now, and for some time last past has been, the advertising agency of the respondents referred to in Paragraph Two hereof, and now prepares and places, and for some time last past has prepared and placed, for publication, advertising material, including the advertising hereinafter set forth, to promote the sale of the said preparation. In the conduct of its business, at all times mentioned herein, respondent Olian and Bronner, 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 said business, respondents have disseminated and caused the dissemination of, certain advertise-

ments concerning said preparation by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and have disseminated, and caused the dissemination of, advertisements concerning said preparation 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 of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

> Alva-Tranquil tablets are 100% safe, taken as directed.
> Faster * * * 100% safe.
> * * * Alva-Tranquil tablets are a new and successful kind of medication.
> * * * thanks to newly-discovered miracle-like Alva-Tranquil tablets.

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 all persons can safely take the preparation without the advice or direction of a physician if they follow the directions for use appearing on the label.

2. That said preparation is a newly discovered kind of medicine, different from other drugs available to the public and is miraculous in action and results.

PAR. 7. In truth and in fact:

1. The labeling for Alva-Tranquil states that certain persons should not use the preparation unless directed by a physician.

2. Said preparation is not materially different from certain other products on the market, its ingredients have been known to and prescribed by physicians for some time, and neither its actions nor results are miraculous.

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.

DECISION AND ORDER

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

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

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

1. Respondent Alva Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 1017 Diversey Parkway, in the city of Chicago, State of Illinois.

Respondents Emile Gerchenson and Samuel Karper are officers of the corporate respondent, and their address is the same as that of said corporate respondent.

Respondent Olian and Bronner, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 35 East Wacker Drive, in the city of Chicago, State of Illinois.

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 Alva Laboratories, Inc., a corporation, and its officers, and Emile Gerchenson and Samuel Karper, individually and as officers of said corporation, and Olian and Bronner, Inc., a corporation, and its officers, 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 the product "Alva-Tranquil," or any other preparation of similar composition or possessing substantially similar properties, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any representation:

(a) For safe use which, directly or by implication, is inconsistent with any statement appearing on the label or in the labeling as to groups of persons who should not use the product at all or groups of persons who should not use the product unless directed by a physician.

(b) That any such preparation is a new or different or unique medication, or is miracle-like in action or results.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragarph 1 hereof.

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

THE NESTLE-LEMUR COMPANY AND LANOLIN PLUS, INC.

ORDERS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Dockets 7716 & 7722. Complaints, Jan. 1960—Decisions, July 31, 1964*

Orders dismissing complaints charging two cosmetic manufacturers—one with main office in New York City and the other in Newark, N.J.—with discriminating in price in violation of Sec. 2(d) of the Clayton Act by such practices as paying allowances for advertising to J. Weingarten, Inc., of Houston, Tex., in connection with the sale of their products while not making proportionally equal payments available to Weingarten's competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more

*The Complaints were consolidated by the compiler.

particularly described, have violated the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint, stating its charges with respect thereto as follows:

PAR. 1. Respondent, The Nestle-LeMur Company, Docket No. 7716, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 902 Broadway, New York, New York.

Respondent, Lanolin Plus, Inc., Docket No. 7722, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 37 Empire Street, Newark, New Jersey.

PAR. 2. Respondent, the Nestle-LeMur Company, Docket No. 7716, is now and has been engaged in the manufacture, sales and distribution of cosmetics, toiletry items and pharmaceutical products. It sells its products to a large number of customers throughout the United States, including wholesalers, jobbers, retailers and large retail chain store organizations. Respondent The Nestle-LeMur Company is a substantial competitive factor in the cosmetic and toiletry field, having total sales for the year 1958 in excess of $12,500,000. Respondent also makes sales of its cosmetics and toiletry items through other wholly-owned subsidiary corporations, including Harriet Hubbard Ayer, Inc., a New York corporation whose sales and business policies it directs, formulates and controls.

Respondent, Lanolin Plus, Inc., Docket No. 7722, is now and has been engaged in the business of manufacturing, selling and distributing cosmetics to retail chain store organizations, department stores, independent drug stores, wholesalers and jobbers. Sales made by respondent are substantial and exceed $10,000,000 per annum.

PAR. 3. In the course and conduct of their business, respondents have engaged and are now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and cause their products to be transported from the respondents' principal place of business to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their business in commerce, respondents paid, or contracted for the payment of, something of value to or for the benefit of some of their customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by said respondents, and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of respondents' products.

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PAR. 5. For example, during the year 1958 respondent, The Nestle-LeMur Company, Docket No. 7716, contracted to pay and did pay to Sidney Myers, Inc., of Houston, Texas, a wholly-owned buying subsidiary of J. Weingarten, Inc. of Houston, Texas, $1,500 as compensation or as an allowance for advertising or other service or facility furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of respondent's products.

For example, during the year 1958 respondent, Lanolin Plus, Inc., Docket No. 7722, contracted to pay and did pay to J. Weingarten, Inc., Houston, Texas, $881.14 as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc. in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondents, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Frederic T. Suss for the Commission.

Whiteford, Hart, Carmody & Wilson, by *Mr. John J. Carmody*, Washington, D.C., for respondent, The Nestle-LeMur Company.

Rogers, Hoge & Hills of New York, N.Y., and *Obermayer, Rebmann, Maxwell & Hippel* of Philadelphia, Pa., for respondent, Lanolin Plus, Inc.

FINAL ORDERS*

Complaint counsel and respondents in these matters entered into consent agreements which provide, in essence, that the effective date of the orders therein shall be stayed pending the issuance of final orders by the Commission in the closely related cases of *Max Factor & Co.*, Docket 7717, and *Shulton, Inc.*, Docket 7721 [p. 184 herein]. The complaints in the present matters are in all material respects identical to the complaints in Dockets 7717 and 7721. The Commission, having determined that the public interest would not be served by

*In the related cases of The Nestle-LeMur Company, Docket No. 7716 and Lanolin Plus, Inc., Docket No. 7722.

entry of cease and desist orders in Dockets 7717 and 7721, and that the complaints in those matters should be dismissed, has determined that the complaints in the present matters should be dismissed on the same grounds. Accordingly,

It is ordered, That the initial decisions be, and they hereby are, vacated and set aside.

It is further ordered, That the complaints against respondents be, and they hereby are, dismissed.

IN THE MATTER OF

INLAND CONTAINER CORPORATION ET AL.

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

Docket 7993. Complaint, June 24, 1960—Decision, July 31, 1964

Order requiring one of the Nation's largest producers of corrugated boxes and its wholly owned subsidiary to divest themselves of the Louisville, Ky., corrugator shipping container plant of the General Box Co. which they acquired in June 1958.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of Section 7 of the Clayton Act (15 U.S.C., Sec. 18), hereby issues its complaint pursuant to Section 11 of the aforesaid Act (15 U.S.C., Sec. 21) charging as follows:

PARAGRAPH 1. Respondent, the parent Inland Container Corporation, is a corporation organized in 1930 under the laws of the State of Indiana and existing under those laws, with its office and principal place of business in Indianapolis, Indiana. Its mailing address is Post Office Box 1054, Indianapolis, Indiana.

PAR. 2. Respondent, the subsidiary Inland Container Corporation, is a corporation organized in 1944 under the laws of the State of Indiana and existing under those laws, with its office and principal place of business in Indianapolis, Indiana. Its mailing address is Post Office Box 1054, Indianapolis, Indiana.

PAR. 3. Inland Container Corporation (1930) owns all, or substantially all, of the stock of Inland Container Corporation (1944), and directs and controls the acts and policies of that corporation. Inland Container Corporation (1944) has acted for and on behalf of Inland

Container Corporation (1930) as well as for itself and on its own behalf in doing and performing all acts and practices hereinafter alleged. References hereinafter to "Inland" are intended to include each corporation and both corporations and all matters hereinafter alleged are specifically alleged with respect to each, and with respect to both.

PAR. 4. Inland is engaged in the manufacture and sale of corrugated shipping containers and related corrugated fibre products in commerce, as "commerce" is defined in the Clayton Act. These products constituted approximately 85% of Inland's consolidated gross sales for the fiscal year ended December 27, 1959. In 1959, Inland was the third largest shipper of corrugated shipping containers in the United States.

Inland also sells kraft liner board, produces and sells folding cartons and specialty paperboard products, and purchases and sells fruit and vegetable packaging products, hatchery supplies and poultry equipment.

PAR. 5. The manufacture for sale of corrugated shipping containers is a line of commerce of rapidly growing importance and increasing integration. In less than twenty years, total shipments of corrugated shipping containers have increased approximately threefold. Production is generally to the order and specifications of each individual customer. The cost of freight and the requirements of customer service generally necessitate the location of manufacturing facilities relatively close to customers.

PAR. 6. Inland operates 18 manufacturing plants in the United States with a total estimated annual capacity to produce 8,300 million square feet of corrugated shipping containers. Its sales are principally in the area east of the Mississippi River where 16 of its 18 plants are located.

Inland's percentage of total United States shipments of corrugated shipping containers has increased steadily in each of the five past years. That increase is due, at least in part, to the acquisition of plants at Biglerville, Pennsylvania, in 1955, at Baltimore, Maryland, and Philadelphia, Pennsylvania, in 1957, and at Louisville, Kentucky, in 1958, for an aggregate acquisition cost of approximately $5,743,000.

PAR. 7. The General Box Company, hereinafter referred to as "General", is a corporation organized and existing under the laws of the State of Delaware. Its principal offices are located at 1825 Miner Street, Des Plaines, Illinois. General presently is engaged in, and for a number of years has been engaged in, the manufacture and sale of

various types of boxes and containers in commerce, as "commerce" is defined in the Clayton Act.

In 1954 General built a modern plant in Louisville, Kentucky, for the manufacture of corrugated shipping containers. Immediately thereafter, and at other times during the following four years, Inland expressed to General the desire to purchase General's newly constructed corrugated shipping container plant at Louisville. General rejected these offers. During the same period Inland commenced to acquire capital stock of General. The capital shares of General are listed securities, traded on the Midwest Stock Exchange, Chicago, Illinois. By May 27, 1958, Inland had acquired in excess of 50% of the outstanding capital stock of General.

PAR. 8. On June 30, 1958, Inland acquired from General, in exchange for 1,084,000 shares of General stock owned by Inland, certain assets of General consisting of the Louisville, Kentucky, corrugated shipping container plant, including 19.46 acres of land, together with the buildings and fixtures located thereon, and certain other assets and items of property owned by General and used in connection with the operation of the Louisville plant. The total acquired assets are hereinafter referred to as the "plant".

The acquisition of the aforementioned plant was in accordance with an agreement between Inland and General made on June 27, 1958. The cost to Inland of the General stock which it exchanged for the plant was in excess of $3,000,000.

PAR. 9. Prior to the acquisition alleged in Paragraph Eight hereof, the plant of General was an important factor in the manufacture and sale of corrugated shipping containers in the Louisville, Kentucky, area as well as the more widespread marketing areas which that plant served. General's plant was one of six corrugated shipping container plants located within a ten-mile radius of Louisville. In 1957, the year prior to the acquisition, the total consumption of corrugated shipping containers in the Louisville area was 678 million square feet. Of this amount General supplied 99.5 million square feet, representing 14.7%, and Inland, which maintained a warehouse in Louisville and was a substantial factor in that area, supplied 81 million square feet, representing 11.9%.

PAR. 10. The effects of the acquisition alleged in Paragraph Eight hereof, and of the things done in furtherance thereof, were and are, or may be, substantially to lessen competition, or to tend to create a monopoly, in the manufacture for sale of corrugated shipping containers in the Louisville area and elsewhere, in the following ways, among others:

1. General's plant has been foreclosed as an actual or potential independent source of supply;

2. Each and every form of actual competition between Inland and General's Louisville plant has been eliminated;

3. Each and every form of potential competition between Inland and General's Louisville plant has been eliminated;

4. The actual competitive power of Inland has been enhanced to the detriment of actual and potential competition;

5. The potential competitive power of Inland has been enhanced to the detriment of actual and potential competition; and

6. Concentration of market share and market power has been increased generally and has been increased substantially in Inland.

PAR. 11. The foregoing acquisition, acts and practices of Inland, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18), as amended and approved December 29, 1950.

Mr. Mark E. Richardson, *Mr. Ronald A. Kronowitz*, *Mr. Lars Janson* and *Mr. David McKean* for the Commission.

Barnes, Hickam, Pantzer & Boyd by *Mr. Alan W. Boyd* and *Mr. Louis A. Highmark*, Indianapolis, Ind., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

DECEMBER 17, 1962

The respondents on June 30, 1958, acquired from the General Box Company a corrugated box plant located at Louisville, Kentucky, including 19.46 acres of land, together with the buildings and fixtures located thereon and certain other assets and items of property used in connection with the operation of the plant. On June 24, 1960, the Federal Trade Commission filed a complaint against the respondents, charging that such acquisition violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

The respondents in their answer filed on August 3, 1960, admit the acquisition, but deny that the effects of the acquisition may be substantially to lessen competition or tend to create a monopoly in the manufacture for sale of corrugated shipping containers in the Louisville area or elsewhere as specified in the complaint.

On July 21, 1960, the Hearing Examiner met informally with counsel for the parties, at which time they outlined a program whereby they agreed to the exchange of information and to explore areas of stipulation which would expedite the proceeding. Thereafter counsel

met from time to time and progress reports were made to the Hearing Examiner. A stenographically reported prehearing conference was held on January 6, 1961, at which time complaint counsel reported that he had been supplied a substantial amount of material, in fact, all that he had requested, by the respondents. Counsel agreed to certain procedures to be employed in connection with hearings. Thereafter hearings were held in Washington, D.C., and Louisville, Kentucky, at which 52 witnesses were called for the Commission and two were called for the respondents. Of the witnesses called by the Commission, 4 were officers or employees of Inland, 41 were from companies which purchased and used the product involved, 6 were from companies which manufactured and sold the product, and one was a banker who, on behalf of Inland, purchased some General Box stock. Complaint counsel also offered in evidence the depositions of six persons, which had been taken in an independent action, relating to the purchase of General Box Company stock by Inland. The depositions were received in evidence by agreement of counsel with the understanding that the same were to be treated as the testimony of such individuals as if given in this proceeding. Approximately 900 exhibits were received in evidence.

After both parties had completed their case on April 17, 1962, the Hearing Examiner asked counsel if it would serve any purpose, before they proceeded to prepare proposed findings, for counsel to prepare a stipulation as to the matters where there is an area of agreement. The Hearing Examiner expressed the opinion that such a procedure would help counsel in submitting the proposed findings and point out the real controversy that existed between the parties, and furthermore it would be helpful to the Hearing Examiners and to the Commission or anyone else who may be called upon to consider the record in the case. Counsel welcomed the opportunity to work out something of that sort and the hearing was adjourned to a later date. A hearing was held on July 31, 1962, at which time there was offered and received in evidence a stipulation which had been entered into by the parties. The same will be hereinafter set forth in the findings. The record was closed for the receipt of evidence and a time was fixed for the filing of proposed findings. Proposed findings of fact, conclusions of law and order, and briefs in support thereof were filed by counsel for the parties, and on October 11, 1962, they orally argued their contentions before the Hearing Examiner.

The Hearing Examiner has given consideration to the proposed findings filed by the parties hereto, and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith

rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

The respondent, the parent Inland Container Corporation, is a corporation organized in 1930 under the laws of the State of Indiana and existing under those laws, with its office and principal place of business in Indianapolis, Indiana. Its mailing address is Post Office Box 1054, Indianapolis, Indiana.

The respondent, the subsidiary Inland Container Corporation, is a corporation organized in 1944 under the laws of the State of Indiana and existing under those laws with its office and principal place of business in Indianapolis, Indiana. Its mailing address is Post Office Box 1054, Indianapolis, Indiana.

The parent Inland Container Corporation owns all the stock of the subsidiary Inland Container Corporation. The parent corporation directs and controls the acts and policies of the subsidiary corporation. The subsidiary corporation has acted for and on behalf of the parent corporation as well as for itself and on its own behalf in doing and performing all the acts and practices alleged in the complaint.

For the purposes of these findings, except as otherwise clearly indicated, references hereinafter to "Inland" include each and both corporations and all matters found with respect to one are found with respect to the other.

Inland is engaged in the manufacture and sale of corrugated shipping containers and related corrugated fibre products in commerce, as "commerce" is defined in the Clayton Act.

The stipulation by and between counsel supporting the complaint and counsel for respondents, hereinbefore referred to, reads:

A. *Definitions*

1. The terms listed below are used herein in the sense defined unless otherwise indicated by their context.

(a) *Corrugated shipping container*. A container or box consisting of a combination of liner board material with a fluted inner material which is formed into sheets on a corrugator machine and finished into containers or boxes by processes commonly referred to as scoring, slitting, printing and closure of the joint. Containers are shipped by the manufacturer to the user in a knocked down or flat position. The users of such containers are manufacturers and producers of products which are shipped in such containers for distribution or use.

(b) *Containerboard*. Paperboard used for the manufacture of corrugated shipping containers.

(c) *Liner*. The outer smooth members of a corrugated fibreboard.

(d) *Corrugating medium*. A term applied to the paperboard used for the fluted or corrugated component of corrugated fibreboard. Corrugated medium may be either semi-chemical, which is made from virgin pulpwood, or "bogus", which is made from waste.

(e) *Kraft.* Virgin pulp used for the manufacture of liner board.

(f) *Jute.* A containerboard used in the manufacture of fibreboard boxes made of wood pulp and waste paper.

(g) *Corrugator.* A machine which combines linerboard with corrugating medium to form corrugated sheets.

(h) *Corrugator plant.* A plant for the manufacture of corrugated shipping containers which is equipped with one or more corrugators.

(i) *Mill-site plant.* A corrugated plant located adjacent to a mill manufacturing containerboard which supplies it with its requirements.

(j) *Corrugated sheet.* The sheet material comprised of the liner board and fluted material which is cut and formed into corrugated boxes.

(k) *Sheet plant.* A plant which performs the same functions as a corrugator plant in the manufacture of corrugated shipping containers except that it does not manufacture, but purchases corrugated sheets.

(l) *MM Sq. Ft.* Million square feet.

(m) *M Sq. Ft. Thousand square feet.*

B. *The Industry*

2. (a) Prior to 1914 the railroads refused to accept products shipped in corrugated shipping containers at rates comparable to products shipped in wood and other types of shipping containers. Comparable rates were established in 1914. In 1923 total shipments of corrugated shipping containers in the United States amounted to approximately 6,600,000 M square feet with a dollar volume of $83,960,000. In 1959 total shipments amounted to 108,743,000 M square feet with a dollar volume of $1,749,612,800. In 1960 total shipments amounted to 107,280,000 M square feet, for a value of $1,738,286,000.

(b) Initially the use of corrugated containers for shipping was limited to light weight articles. At the present time there are few items that cannot be so shipped and present end uses include food and kindred products, beverages, paper products, tobaccos, textiles, carpets, rugs, and other floor covering, apparel, lumber and lumber products, stone, clay, and glass products, primary and fabricated metal products, machinery, electric appliances, motor vehicles, and equipment, as well as other miscellaneous manufacturing.

3. The customers for corrugated shipping containers are manufacturers and producers of products which ship their products to wholesalers, retailers, distributors and consumers. Corrugated shipping containers are of varying degrees of complexity and are not generally stockpiled or sold off the shelf, but are individually designed and tailored to fit the requirements of each particular customer. An important factor in the selling of corrugated shipping containers is the service rendered by the manufacturer in designing containers suitable for the particular uses of the customer.

4. In 1925 approximately 50 companies and 125 plants were engaged in the manufacture of corrugated shipping containers in the United States. At the end of 1960 approximately 425 companies and 812 plants were so engaged. In the period 1952–1960, 120 new companies entered the industry and 283 new plants were established.

C. *Inland Container Corporation*

5. Inland Container Corporation as used herein means the respondent corporations unless the context shows otherwise.

6. The original Inland Container Corporation was organized by Herman C.

Krannert in 1925 with a corrugator plant at Indianapolis, Indiana. In 1930 Inland acquired a second plant at Middletown, Ohio, and the respondent Inland Container Corporation (1930) succeeded the original corporation. Subsequently Inland established plants at Milwaukee, Wisconsin (1933), Evansville, Indiana (1938), Macon, Georgia (millsite plant, 1947), Orlando, Florida (sheet, 1954), Rome, Georgia (millsite plant, 1955), Dallas, Texas (sheet, 1957), Chicago, Illinois (1958), Omaha, Nebraska (sheet, 1958), and South Haven, Michigan (sheet, 1960), and acquired plants at Detroit, Michigan (1944), Ashtabula, Ohio and Erie, Pennsylvania (1952), Biglerville, Pennsylvania (1955), Baltimore, Maryland and Philadelphia, Pennsylvania (1957), and Louisville, Kentucky (1958).

Inland has a half interest in two mills manufacturing containerboard, built jointly by Inland and Mead. The first was built at Macon, Georgia in 1945, and the second at Rome, Georgia in 1954. Inland's share of the production of said mills was sufficient to supply more than 50% of its containerboard requirements since 1955.

7. The major companies in the industry, including Container Corporation, Weyerhaeuser, St. Regis, Crown-Zellerbach, International Paper, Owens-Illinois, West Virginia, Mead, Union Bag, Continental Can, Packaging Corporation of America, Hankins, Hoerner, Stone, Alton, St. Joe Paper Co. and Olin-Mathieson, own their own mills supplying their corrugator plants with containerboard.

D. *Louisville Area Plants Prior to the Acquisition*

8. The term Louisville area as used herein means the area within a ten-mile radius of the city limits of Louisville, Kentucky.

(a) The Mengel Company established the first corrugator plant at Louisville in 1911 and for many years was the only manufacturer of corrugated shipping containers in Louisville. The plant at Louisville has an area of approximately 263,000 square feet and a capacity of approximately 40,000,000 square feet per month. In 1954 Container Corporation of America purchased a controlling interest in the stock of the Mengel Company and subsequently purchased the balance of said stock. Mengel was operated as a separate company until 1960 when it became a division of Container Corporation. The name Mengel has been retained because Container Corporation considers it an advantage in the Louisville area. Prior to the acquisition, Container Corporation plants closest to Louisville were at Cincinnati, Ohio, and Anderson, Indiana.

(b) The second plant established in the Louisville area for the manufacture of corrugated shipping containers was that of General Box Company. General Box Company was originally and primarily a manufacturer of wirebound boxes and was a leading company in that field in the United States. Its original corrugator plant was established in a part of its wirebound plant at Louisville prior to 1947. In 1953 the corrugator plant was destroyed by fire, and in the fall of 1954 General Box completed a new corrugator plant in the Louisville area with an area of approximately 115,000 square feet and a capacity of approximately 300,000,000 square feet per year.

(c) Midwest Box Company, a sheet plant, was established in the Louisville area in 1948 and has since been and is engaged in the manufacture of corrugated shipping containers in said area.

(d) Miller Container Company, a sheet plant, was established in Louisville in 1954. On July 1, 1958, it was acquired by the Mead Corporation. In 1958, Mead was the eleventh largest manufacturer of corrugated shipping containers in the

United States with 2.33% of the total national shipments, and in all years since has been one of the six or seven largest companies.

(e) Embry Container Company, a sheet plant, was established in Louisville in 1955. In 1957 it was acquired by Alton Box Board Company, which was the nineteenth largest shipper of corrugated shipping containers in the United States in 1958 and 1959, and the seventeenth largest by 1960.

(f) In 1954, Boone Box Company, a sheet plant, was established in Louisville. Boone manufactures corrugated shipping containers, but has specialized in interior packaging and finished containers have constituted less than a fourth of its business. It is affiliated with Union Bag-Camp, which since 1959 has been one of the ten largest manufacturers of corrugated shipping containers in the United States.

E. *The Acquisition*

9. Prior to the acquisition of the Louisville plant of General Box involved in this proceeding. Inland had no plant in Louisville for the manufacture of corrugated shipping containers. Its nearest plants to Louisville were at Evansville, Indiana. Indianapolis, Indiana, and Middletown, Ohio, each of which is approximately 125 miles from Louisville. For a number of years prior to 1954, Inland supplied certain accounts in Louisville from its plants at Evansville, Indiana and Indianapolis, Indiana, and its millsite plant at Macon, Georgia. Prior to 1954, it employed a salesman who covered the Louisville area as a part of a larger sales area, including parts of southern Indiana, and part of Kentucky south of Louisville extending almost to the Tennessee border, and maintained no facility of any character at Louisville.

10. Prior to 1954, the refrigerator plant of General Electric at Erie, Pennsylvania, was a major customer of Inland's plant at Erie, Pennsylvania. In 1953 General Electric Company announced that it would move all of its principal appliance plants to Louisville, Kentucky. As a result, Inland began to consider the establishment of a Louisville plant because of the belief that it would afford a better opportunity to retain its General Electric business, and obtain additional General Electric business, as well as other new business which might be attracted to the Louisville area as a result of the General Electric move. In 1953 Inland began investigating plant sites in Louisville and in August 1954 selected a site which it purchased in the latter part of 1954.

11. In October 1954, Inland had discussions with William C. Embry, a vice-president and director of General Box Company and general manager of its Louisville plant, regarding the possibility of acquiring that plant. Discussions took place between Embry and officials of Inland in the latter part of 1954 and the early part of 1955, but never reached a final agreement.

12. As a result of learning of the possibility of acquiring stock in General Box Company, Inland delayed proceeding with its new plant and in the latter part of 1954 rented 800 square feet of storage space in a public warehouse at Louisville which was used only for the purpose of storing corrugated shipping containers for General Electric shipped to Louisville from Inland plants.

13. In the Spring of 1955, Embry resigned from General Box Company and established the sheet plant in Louisville previously referred to herein under the name of Embry Container. Inland resumed going forward with plans for the construction of a sheet plant and warehouse, but in June 1955 it developed that adequate water facilities which the seller had agreed to provide, had not been

provided. The water difficulty continued until January 1957 when construction of an adequate water line by the seller was finally completed.

14. Following Embry's retirement from General Box Company, he and certain other members of his family sold their General Box stock to Inland in the Fall of 1955. The purchase was handled by Earl R. Muir, a Louisville banker. Subsequently, additional stock was purchased for Inland by Muir, and by April 1957 Inland had acquired 194,000 shares, or about 9% of the General Box stock, all of which had been transferred into the name of Robert Carrier, a resident of Louisville selected by Muir. Inland was aware of the fact that Container Corporation had acquired a controlling interest in Mengel by stock purchases in 1954, and that as soon as Container's interest in Mengel became known the cost of acquiring the stock had increased substantially, and believed that the price of the General Box stock would be similarly affected if its interest became known.

15. Inland had a continuing interest in acquiring the General Box Louisville plant, and made such purchases with the hope that a deal of some character with General Box would develop where the ownership of such stock would be helpful. Continuing purchases of General Box stock were made for the same purpose.

16. After suitable water facilities for the property purchased by Inland for a plant site had been completed in early 1957, Inland officials decided to explore further the possibility of a General Box deal before proceeding with construction plans. In negotiations which followed in the Spring of 1957, Inland offered to purchase for cash either the Louisville plant alone, or that plant together with General Box sheet plants at Kansas City, Missouri and Houston, Texas. Its offers were refused by the General Box management.

17. Approximately 138,000 additional shares of General Box stock were purchased for Inland's benefit through Muir in the late Spring and early Summer of 1957, with funds supplied through Herman C. Krannert, Chairman of the Board of Directors of Inland Container Corporation, after the failure of the 1957 negotiations with the General Box officials. In July 1957, Krannert contacted one Walter Koch and discussed with him the acceptance of an assignment to act for Inland in investigating and evaluating the entire General Box operation, including its wirebound box business, with a view to an ultimate direct offer to the General Box stockholders to purchase all of their stock. Koch had been president of International Steel Company at Evansville, Indiana, prior to his resignation in the Spring of 1957. He accepted the assignment and as a part of the program purchased with his own funds 24,000 shares of General Box stock. During the Fall of 1957 all of the stock which had been purchased either by Inland or for its benefit was put in Koch's name and together with the stock purchased by Koch amounted to approximately 17% of the total outstanding stock. Koch visited the General Box officials several times and discussed its operation and business and also visited certain of its plants and interviewed employees. After each visit he reported to officials of Inland the information which he received, together with his own evaluations of the operation and personnel. The General Box officials were not advised of any interest of Inland in the stock in Koch's name during these visits.

18. In the early part of 1958, Koch obtained a list of the names and addresses of all General Box stockholders and thereafter presented to General Box officials an offer by Inland Container Corporation to be made to the stockholders to purchase all of the stock of General Box, and solicited their support of the offer. The latter refused to present the offer to the stockholders and said offer was made direct by Inland on April 19, 1958.

19. At the expiration of the offer on May 26, 1958, Inland had obtained in all 1,084,000 shares or approximately 52% of the outstanding General Box stock. On June 12, 1958, an agreement was reached under which Inland exchanged 975.000 shares of General Box stock for the land, buildings, machinery, supplies and other equipment, valued at $2,540,000, and inventory, net accounts receivable, and prepaid expenses, valued at $385,000. General Box agreed to purchase the remaining 109,000 shares held by Inland at $3.00 per share with a substantial down payment and notes in equal installments extending over a five-year period in payment of the balance. The agreement was carried out and on June 30, 1958, Inland acquired the Louisville plant, which is the subject of this proceeding.

Competitive Facts

Total Louisville Usage and Amounts Supplied by Inland and General Box 1955–1960

20. 1955 was the first full year of operation of the new General Electric appliance plants in Louisville. The following tabulation shows the approximate total of corrugated shipping container usage of General Electric and of all customers in the Louisville area in each of the years 1955 through 1960, and the amounts supplied by Inland and General Box, respectively:

MM Sq. Ft.

	Total usage	Inland shipments	General Box shipments
1955:			
G.E.	207	74	33.5
Total	654.3	123.2	68.1
1956:			
G.E.	260	62	53
Total	743.7	116.9	86.8
1957:			
G.E.	241	20.5	40.5
Total	784.8	79.8	109.3
1958:			
G.E.	184	37	[1] 15
Total	780.8	126.7	[1] 55.7
1959:			
G.E.	289	65	
Total	906.2	215.5	
1960:			
G.E.	285	55.5	
Total	905	196.7	

[1] General Box figures represent first six months in 1958.

Although the recited stipulation does not cover all the facts shown by the record, there is little, if any, dispute between the parties as to all of the facts involved for a determination of the issues. The primary controversy arises as to conclusions to be drawn therefrom.

The Act involved provides in pertinent part:

> That * * * no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The record herein establishes, all of which is admitted, that Inland, a corporation subject to the jurisdiction of the Federal Trade Commission, acquired part of the assets of General Box Company, a corporation engaged in commerce, and that corrugated shipping containers constitute the line of commerce. The remaining issues are (1) what is the appropriate section of the country, and (2) whether the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly.

With reference to the first issue, it is the position of complaint counsel that the primary geographic market is Louisville, Kentucky, and the surrounding territory within a ten mile radius, while respondents contend that the area to gauge the impact on competition is an area within at least one hundred and fifty miles of Louisville.

In the brief filed on behalf of the respondents in support of their position, it is said in part:

> The undisputed evidence in this case establishes that in Louisville and elsewhere, the Louisville plants have always been, and still are, in competition with plants outside the Louisville area at distances up to 150 and even 300 miles. Prior to the acquisition, the Respondent competed for Louisville business with plants located at Evansville, Indiana, Indianapolis, Indiana, and Rome and Macon, Georgia. The first two are more than 100 miles from Louisville and the Georgia millsite plants are several hundred miles distant. Since the acquisition, General Box Company has continued to compete in Louisville with a plant located at Nashville, Tennessee, and has established a warehouse in Louisville in order to serve Louisville customers. The evidence shows that Gaylord is a major supplier of the Louisville market. Gaylord maintains a warehouse at Louisville as do the other major suppliers, but its nearest plants are at St. Louis, Missouri and Chicago, Illinois. International Paper Company formerly competed from St. Louis, but now has a plant in the Cincinnati area. All of the Cincinnati plants, except those owned by Container Corporation and Mead, which have Louisville plants, compete in Louisville. Other companies with outside plants competing in Louisville will hereinafter be identified. Under the undisputed evidence all of these manufacturers are not only willing to, but do in fact, compete for business in the Louisville area. Louisville purchasers not only can practically turn to any of such plants for supplies, but have repeatedly done so, and continue to do so.

The foregoing quote accurately reflects the facts herein, but the record would seem to require the acceptance of the Louisville area suggested by complaint counsel as the relevant market. This is where General Box made the great bulk of the sales from its Louisville plant. It is in this area that a determination will have to be made of the effect of the elimination of General Box as a market factor. In 1957, the last full year in which General Box operated the Louisville plant, its total sales of corrugated shipping containers from said plant were 153 million square feet, of which 109 million square feet, or ap-

proximately 71% was to the Louisville area. The record shows that General Box made sales in 1957 outside of the Louisville area in cities located in the States of Kentucky, Illinois, Indiana, Missouri, Wisconsin, Tennessee, New York and New Hampshire but there is nothing to indicate that General Box was a market factor in such places. It is therefore found that the appropriate section of the country is Louisville, Kentucky, and the surrounding territory within a ten-mile radius.

The second issue to be resolved is whether the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly.

There was no attempt on the part of complaint counsel to show, nor is there any evidence in the record to show, that the acquisition had any vertical effect. The sole question relates to the horizontal effect.

In *Brown Shoe Co.* v. *United States* (1962), 370 U.S. 294, 321, 322, the court said:

> * * * Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.

Certain data with respect to the twenty largest manufacturers of corrugated shipping containers in the United States, including shipments in millions of square feet of such product by these manufacturers, the percentage of these shipments to total U.S. industry shipments, the dollar value of such shipments by each such manufacturer, the percentage of these shipments to the total dollar sales of all products manufactured by these twenty companies, and the total dollar sales of all products manufactured by each of these companies, for the years 1950, 1957, 1958, 1959, 1960 and 1961 are set forth in Appendix A through F attached hereto.

It will be noted from the tables that in 1950 Inland's sales of corrugated containers were 42 million dollars. From there its sales progressively increased to $71 million in 1957, to $74 million in 1958, to $85 million in 1959, and dropped to $83 million in 1960.

During the period since 1950 the total national sales of corrugated containers have risen from $995,454,100 to $1,542,931,400 in 1957, this

decreased to $1,537,633,800 in 1958, rose to $1,749,612,800 in 1959 and dropped to $1,738,286,000 in 1960.

In 1950 Inland had approximately 4.15% of the corrugated container market. Its market share went to 4.9% in 1957, 5.12% in 1958, 5.19% in 1959, 5.08% in 1960 and 5.03% in 1961.

The ranking of Inland in the industry with respect to total corrugated shipments is illusory with respect to its relative economic strength. While it has been in the first four since 1950 with respect to corrugated containers it ranks far below many of its competitors both in total product sales and total assets. In 1950 six of the fourteen companies whose figures were available, had larger total product sales and larger total assets than Inland. In 1960, twelve of the first twenty companies had larger sales and total assets than Inland. (No figures are shown as to 3 of 20 companies.) This statement, however, does not adequately describe the relative economic positions of the companies. In 1960 the twelve companies with larger sales and larger assets had an average total sales of $489,000,000 as compared with $93,000,000 for Inland and average total assets of $412,000,000 as compared with $88,000,000 for Inland.

During the years prior to the acquisition the acquired Louisville plant total shipments never exceeded .17% of the national total and since the acquisition it has not exceeded .19% of such total, an obvious de minimus, so there can be no serious contention that the acquisition significantly affected Inland's national position in the industry.

In general, two types of plants manufacture corrugated shipping containers. These are corrugator plants and sheet plants. A sheet plant is one which has a limited amount of finishing equipment principally a slitter, printer and closing equipment, but no corrugating machine. It purchases corrugated sheets ordinarily cut to particular sizes and specifications from a corrugator plant which often manufactures sheets for sheet plants and for its own use in producing finished containers. Some corrugator plants are known as millsite plants because located in the immediate vicinity of a mill which supplies them with board. These are usually multi-corrugator plants. Because of economies arising out of the fact that they are so located, millsite plants can compete effectively with corrugator plants not so located, as to volume business, over an area of up to 1000 miles as compared with a range of 200 to 300 miles of such plants generally.

The number of companies and plants engaged in the manufacture of corrugated shipping containers in the United States for the period of 1940 to 1960 is revealed in Appendix G. At the end of 1960, 425 com-

panies and 812 plants were so engaged as compared to 234 and 355, respectively, in 1940.

In the period from 1940 to the end of 1952 there were decreases in the number of companies during seven of the years, but since 1952 there has been no year in which an increase has not occurred. From 1952 to the end of 1960, 129 new companies entered the industry and 283 new plants were constructed.

There are no longer any patents on corrugated boxes, although there are certain patents on special features and designs. All patents on boxes expired in the 1920's and were not renewed.

In the stipulated facts heretofore set forth, the names of seventeen major companies in the industry who own their own mill supplying their corrugator plants with container board is given. There are 30 to 40 companies in the country owning kraft mills. One witness testified he thought that an integrated operation was an advantage to a box operation "because they have all of the facilities at their command and are not strained to go out on a market basis and purchase at whatever it might be at that time." However, there is no evidence in the record that lack of integration is a significant disadvantage. It could be so only if the market price for board was not effectively controlled by competition and there is not the slightest evidence that that situation has ever existed or is reasonably likely to exist. The uncontradicted evidence is that there are approximately 140 mills in the United States making all kinds of container board and paperboard. A company is classified as integrated only when it manufactures as much as 50% of the board which it uses. All but fully integrated companies are required to buy the portion of board requirements which they do not manufacture. The evidence with respect to Inland's status as an integrated company is that it has supplied more than 50% of its board requirement since 1955. It had no mill facilities at all prior to the completion of the Macon Mill in 1948, in which year its percentage of the total national shipments was 4.13%. In 1949, the first year after its first mill was finished, its percentage was 4.28% and dropped to 4.15% in 1950. In 1955 the first year in which it could be classified as an integrated company, its national percentage was 4.56%. The subsequent net increase to 1961 even with the acquisitions of Biglerville and Philadelphia and Baltimore and Louisville, the building of new corrugator plants at Chicago and Evansville in 1958, has been less than .5%. Obviously no inference can be drawn that any significant increase has resulted because of integration. General Box Company had no mill facilities and purchased all of its paperboard used in its Louisville corrugator plant. In 1955, William C. Embry, who at the time was Vice-President of General Box

and manager of the Louisville plant, made a report to the director of his company, wherein it is said: "There is somewhere between 20 and 25% more papermaking capacity today than there is demand."

The record includes the story of developments in the Cincinnati area during the period involved here which is also very enlightening as to what happened with respect to a new entrant. Counsel for the complaint called as a witness, T. C. Thompson. Thompson started as a sales representative of General Box on January 1, 1954, and continued with Inland for one year after its Louisville acquisition to June 30, 1959. While a representative of General Box, he solicited in the Cincinnati Area, and when he left Inland established a sheet plant of his own in Cincinnati where he is in business under the name of Thompson Container Corporation. When Thompson began selling in Cincinnati in 1954, there were four corrugator plants and no sheet plants operating there. The corrugator plants were Container Corporation of America, Mead, Nivison-Weiskoff and River Raisin, now a Union Bag plant, but then new in Cincinnati. In 1958 Olin Mathieson established a Cincinnati plant. International Paper Company established a plant in the area the same year. St. Joe Paper Company established a new plant there in 1959. Hinde and Dauch (West Virginia) also established a new plant 30 to 40 miles north of Cincinnati in 1957. All of these plants are competitors for Louisville business. Substantially all of the Cincinnati plants were selling in the Louisville area when Thompson was working for General Box and Inland, although Container Corporation competed in that area from its Louisville, rather than its Cincinnati plant, and Mead presumably has done the same thing since it established its Louisville corrugator plant. Likewise just about all the outside companies compete in the Cincinnati area just as they do in Louisville. Mr. Thompson testified that notwithstanding the four new plants at Cincinnati since 1957, the results of his own sheet plant operation had been satisfactory, and that he felt that he was benefited by mergers as long as his business remained small because he sold personalized service and bigger organizations tend to become impersonal. He also testified that he purchased corrugated sheets from three sources, namely Owens-Illinois, International Paper and River Raisin, and he did not have any difficulty getting as much sheet as he needed from those plants or from others.

The foregoing facts give a picture of the industry involved on a national basis. In the production of corrugated shipping containers in the United States, there is a large number of competing sellers to which the buyers may look for such products, a lack of obstacles restraining new entrants into the business and a want of domination by a few sellers. There are more strong companies today than there have ever

been and the number of companies in the business has steadily increased. This is obviously not an industry that has seen a recent trend toward domination by a few leaders.

There were three plants in Louisville before 1954, Mengel, General Box and Midwest, a sheet plant. In that year two additional sheet plants, Miller Container Company and Boone Box Company, were established and in the following year, still another sheet plant, Embry Container Company commenced business. Details of the six companies are set forth heretofore in the stipulated facts. In late 1957 or early 1958, following the acquisition of Embry Container by Alton, a new corrugator was installed, increasing its capacity from that of a sheet plant (3,500 to 4,500 M sq. ft. per month) to 30,000 M sq. ft. per month. Therefore, at the time of acquisition, the Louisville manufacturers consisted of three corrugator plants and three sheet plants. At the beginning of 1959, following the acquisition of Miller Container by Mead, Mead purchased a building with an area of approximately 350,000 square feet and installed a new corrugator. The capacity of the Mead plant is 30,000,000 to 40,000,000 square feet per month since such purchase. Boone Box Company built a new plant at Louisville in 1960, with an area of 100,000 square feet, which is used in part to warehouse corrugated shipping containers manufactured by Union Bag-Camp, of which Boone is an affiliate, and shipped to Louisville for the General Electric Louisville plants. In November 1961, a new sheet plant was established in the Louisville area under the name of Independent Box Makers, Inc.

The total corrugated container shipments and Louisville area shipments of all Louisville plants for the years 1955–1961 so far as shown by the record is set forth in Appendix H through N attached hereto.

The combined capacity of Mengel, Mead, Alton and Inland is considerably in excess of Louisville usage. The square feet per year capacity of Mengel is 480 million, Mead is 360 to 480 million, Alton is 360 million and Inland is 300 million. Assuming the minimum Mead figure, the total capacity of the four named plants is 1,500 million square feet per year. The total estimated Louisville usage in 1958 was approximately 780 million square feet and reached a high in 1959, 1960 and 1961 of approximately 900 million square feet, or about 60% of the present capacity of the four Louisville corrugator plants.

In 1955, Inland supplied 123,000 M out of an estimated total usage of 654,300 M square feet in the Louisville area or approximately 19%, from plants, located at Evansville, Indiana, Indianapolis, Indiana, Middletown, Ohio, and Macon and Rome, Georgia. In 1956 and 1957, Inland supplied 116,900 M square feet, or 16%, and 78,900 M square feet, or 10%, respectively, in the Louisville area. For the same three

years the percentages General Box supplied in the Louisville area were approximately 10.5% in 1955, 11.5% in 1956, and 14% in 1957. For the three years prior to the acquisition, the combined percentage of Louisville business of Inland and General Box was 29½% in 1955, 27½% in 1956, and 24% in 1957. For the two years following the acquisition, the percentage of Inland's business in Louisville was 24% in 1959 and 22% in 1960.

Representatives of the five companies with plants located in the Louisville area which compete with Inland were called as witnesses by counsel supporting the complaint and there was no testimony by them that their companies had suffered any adverse effect as a result of acquisition. Plainly the uncontradicted evidence with respect to Louisville competitors of Inland discloses neither any lessening of competition of any character in that area as a result of Inland's acquisition of the Louisville plant nor any indication of the likelihood of any substantial future lessening. On the contrary, it discloses without dispute an abundance of capacity and of steadily increasing competition. Inland has been able to obtain no greater proportion of the Louisville business than the combined proportion of Inland and General Box at the time of the acquisition. Actually, it is slightly less.

The effect, if any, of the acquisition on the buyers of corrugated shipping containers located in the Louisville area will now be given consideration. As the respondents stated in their brief which accompanied their proposed findings, "It is unlikely that there has been any case previously before the Commission in which it was possible to present a customer-by-customer analysis of the character contained in the record in this case. The obvious reason why it is possible here is that the total number of customers available for manufacturers of corrugated shipping container plants is relatively small, and that this case involves only a single plant, which sells substantially all of its output in a single metropolitan area the size of Louisville." Evidence was introduced by counsel supporting the complaint with respect to corrugated shipping container purchases of 36 customers in the Louisville area. All but two witnesses furnished exhibits which were introduced in evidence. In general, figures were supplied for the years 1955–1960 and showed the annual dollar purchases and the suppliers of each purchaser.

The record shows in great detail the large number of manufacturers of corrugated shipping containers with no plant in the Louisville area which compete in such market. Such companies with plants within a

150 mile radius of Louisville, which have supplied Louisville area customers during the years 1955–1960, include:

Company:	*Location of plant*
Owens-Illinois (National Container Co.).	Aurora, Ind.
St. Joe (Ft. Wayne)	Hartford City, Ind., and Cincinnati, Ohio
Packaging Corp. of America (Pomeroy, Ohio Box Board).	Vincennes, Ind., and Middletown, Ohio
Union Bag (River Raisin)	Cincinnati, Ohio
International Paper Co	Mason, Ohio
West Virginia (Hinde & Dauch)	Eaton, Ohio
Olin-Mathieson	Cincinnati, Ohio
Wabash Fibre Box	Terre Haute, Ind.
Flintkote (Hankins)	Marion, Ind.
Belle Fibre Box	Do.
U.S. Corrugated	Indianapolis, Ind., and Dayton, Ohio
Diamond Gardner (Hoosier Container).	Newcastle, Ind.

Owens-Illinois, International Paper Company, Union Bag and West Virginia are among the ten largest manufacturers of shipping containers in the United States, Packaging Corporation was included in the first ten in 1958, and is currently the twelfth largest manufacturer in the United States. Flintkote (Hankins) is the fourteenth largest shipper of corrugated containers in the United States. Both St. Joe and Olin-Mathieson are large companies and their figures, which are not included in the Fibre Box Association Reports, may qualify them for inclusion in the twenty largest suppliers. Prior to its acquisition by St. Joe in 1959, Fort Wayne was the eighteenth largest shipper in 1958 and 1959, the most recent years for which its figures are available. The Wabash plant at Terre Haute, Indiana, a division of Weston Paper Co., had total annual shipments averaging approximately 440,000 M sq. ft. in the years 1957–1960.

Companies without a plant within the 150-mile Louisville radius, but having a plant or plants within a 300-mile Louisville radius, which have supplied Louisville area customers during the years 1955–1960 are:

Company:	*Location of plant*
Gaylord (Division of Crown-Zellerbach).	St. Louis, Mo., Chicago, Ill., Bogalusa, La.
Weyerhaeuser Co	Belleville, Ill., Mount Vernon, Ohio, Three Rivers, Mich.
General Box Co	Nashville, Tenn.
Continental Can (Gair Division)	Chicago, Ill.

Gaylord (Div. of Crown-Zellerbach) has been one of the six largest manufacturers of corrugated shipping containers in the United States for many years and since 1957 has supplied all of the refrigerator requirements of General Electric which constitute approximately half of the total corrugated shipping container purchases of General Electric, principally from its millsite plant at Bogalusa, Louisiana. Weyerhaeuser Company (Kieckhefer-Eddy) has been one of the three largest manufacturers of shipping containers in the United States for many years and is a large supplier of the Louisville area plant of Colgate-Palmolive. General Box Company maintains a warehouse at Louisville and solicits and supplies Louisville area business from its Nashville, Tennessee plant since the acquisition of its Louisville plant by Inland. Continental Can (Gair) is the eleventh largest manufacturer of corrugated shipping containers in the United States and has been included in the first twelve for many years.

Companies with no plant within a 300-mile Louisville radius, which have supplied Louisville area customers during the years 1955–1960 are:

Company:	*Location of plant*
Krafco	Monroe, La.
Interstate Container Co.	Long Island, N.Y., Reading, Pa.
Highland Container Co. (Union Bag)	Jamestown, N.C.
Kohlman Box Co.	New Orleans, La.
Fairbanks Container Co.	Not shown.
Downing Box Co.	Milwaukee, Wis.
Star Corrugated Box Co.	Long Island, N.Y.
Lehigh Container Co.	New Hyde Park, N.Y.
Rock City Box Co.	Norcross, Ga.

Interstate Container Company has been the largest supplier of P. Lorillard since 1956 and has been included in the twenty largest manufacturers of corrugated shipping containers in the United States since 1959. In 1961 it was the eighteenth largest company.

The extent of the purchases of the four largest users of corrugated shipping containers in the Louisville area from outside sources for the year immediately preceding and the year after the acquisition is of particular interest as reflected in the following tabulations:

Purchaser	Total purchases	Purchases from outside suppliers	
		Dollar value	Percent
1957			
General Electric	$2,650,594	$2,051,559	77.4
Colgate-Palmolive	841,000	429,751	51.1
Brown & Williamson	536,778	155,128	28.9
P. Lorillard Co.	408,259	330,731	81.5
Total	4,436,631	2,967,169	
1959			
General Electric	3,530,215	2,421,727	68.6
Colgate-Palmolive	957,000	253,605	26.5
Brown & Williamson	567,611	81,735	14.4
P. Lorillard Co.	451,984	256,726	56.8
Total	5,506,810	3,013,793	

The record shows that Louisville users of corrugated shipping containers have bought and do now buy substantial amounts of such products from sellers having plants outside the Louisville area and such users have more than an adequate number of sources to assure the most vigorous competition. The competition of outside sellers affects the prices which Louisville manufacturers can charge for their product and the service they are required to render customers in order to obtain business. In the period since the acquisition, competition in the Louisville area has brought about lower prices and increased services by sellers to customers in that area.

The evidence establishes that General Box has never ceased to compete for Louisville business. The record shows that it continues to supply some of its former customers and serve Louisville buyers that it did not previously supply. The full extent of its current Louisville business is not shown, but it does maintain a warehouse at Louisville. Even if the effect of the acquisition had been to eliminate General Box completely as a factor in the Louisville market, the number and strength of the remaining competitors, including both local plants and outside plants, preclude any reasonable inference that the vigor of competition could have been adversely affected.

CONCLUSION

The Hearing Examiner concludes that the evidence has failed to establish that the effect of the acquisition in question may be sub-

stantially to lessen competition or tend to create a monopoly in the production and sale of corrugated shipping containers in the Louisville area or in any section of the country. The respondents have not violated Section 7 of the Clayton Act.

ORDER

It is ordered, That the complaint be, and the same hereby is, dismissed.

APPENDIX A

U.S. Fibre Box Industry Total Assets and Net Sales of Top 20 Companies Based on 1950 Shipments

Company	1950 U.S. fibre box shipments: MM sq. ft. (a)	1950 U.S. fibre box shipments: MM sq. ft. Percent U.S. industry	1950 U.S. fibre box shipments: MM (b)	1950 U.S. fibre box shipments: MM Percent total company sales	1950 total sales, MM c	1950 total assets, MM c
1. Container Corporation	4,999	6.38	$65	42	$155	$74
2. Kieckhefer-Eddy (Weyerhaeuser, 1957)	3,564	4.55	46	NA	NA	NA
3. International Paper	3,419	4.36	44	9	498	409
4. Inland Container	3,254	4.15	42	100	42	31
5. Gaylord Container (Crown Zellerbach, 1955)	3,158	4.03	41	66	62	47
6. National Container (Owens-Illinois, 1956)	2,810	3.58	37	79	47	44
7. Hinde & Dauch (West Virginia, 1953)	2,719	3.47	35	90	39	24
8. Gair (Continental Can, 1956)	1,756	2.24	23	40	57	36
9. Union Bag	1,412	1.80	18	23	80	59
10. Ft. Wayne (Continental Can-St. Joe, 1959)	1,196	1.53	15	100	15	11
11. Stone	1,064	1.36	14	82	17	10
12. Kress (St. Regis, 1958)	1,064	1.36	14	NA	NA	NA
13. Hankins (Flintkote, 1958)	1,015	1.29	13	NA	NA	NA
14. Hoerner	905	1.15	11	100	11	NA
15. River Raisin (Union Bag, 1960)	819	1.04	11	78	14	9
16. General Container (St. Regis, 1955)	805	1.03	10	NA	NA	8
17. Mengel (Container Corp., 1954-56)	805	1.03	10	24	42	22
18. Seaboard (National, 1954; Owens-Ill., 1956)	777	.99	10	100	10	7
19. Fairfield (Gaylord, 1951; Crown Zellerbach, 1955)	738	.94	9	NA	NA	NA
20. Ohio Boxboard (Packaging Corp. America, 1959)	645	.82	8	NA	NA	NA
Subtotal, 1-20	36,924	47.10				
All other	41,469	52.90				
U.S. total	78,393	100.00				

[a] Source—Fibre Box Association National Shipment Summary.
[b] Estimated at $13.00 M sq. ft. average price.
[c] Source—Company annual reports.
NA—Not available. (Company privately owned.)
NOTE.—The names in parentheses indicate those companies which have subsequently acquired the named company and the date of acquisition.

APPENDIX B

U.S. Fibre Box Industry, Total Assets and Net Sales of Top 20 Companies Based on 1957 MM sq. ft. Shipments

Company	1957 U.S. fibre box shipments				1957 total sales, MM[c]	1957 total assets, MM[c]
	MMsq. ft.		MM			
	([a])	Percent U.S. industry	([b])	Percent total company sales		
1. Container Corporation (Incl. Mengel)	7,449	7.70	$112	44	$256	$180
2. Weyerhaeuser (Kieckhefer-Eddy)	4,958	5.13	74	18	421	521
3. Inland Container Corporation	4,736	4.90	71	97	73	62
4. Owens Illinois (National)	4,338	4.49	65	13	511	617
5. Crown Zellerbach (Gaylord)	4,025	4.17	60	13	461	537
6. International Paper	3,845	3.98	58	6	940	802
7. West Virginia (Hinde & Dauch)	2,959	3.06	44	23	191	186
8. Continental Can (Gair)	2,802	2.90	42	4	1,046	664
9. Fibreboard	2,131	2.23	32	25	126	125
10. St. Regis (Incl. Pollock)	1,899	1.97	28	8	361	376
11. Mead	1,773	1.84	27	14	193	184
12. Longview	1,717	1.78	26	43	60	70
13. Union Bag-Camp	1,654	1.71	25	15	161	165
14. Hoerner	1,536	1.59	23	86	26	14
15. Stone	1,490	1.54	22	61	36	17
16. Hankins	1,427	1.48	21		NA	NA
17. Ft. Wayne	1,419	1.47	21	88	24	15
18. Ohio Box Board	1,137	1.18	17		NA	NA
19. Central Fibre	1,092	1.13	16	40	60	36
20. F. J. Kress	1,078	1.12	16		NA	NA
Subtotal, 1-20	53,485	55.37				
All other (362 Cos.)	43,152	44.63				
U.S. total (382 Cos.)	96,637	100.00				
General Box	232	.24	3	15	20	18

[a] Source—1957 National Co. Shipment Summary of Fibre Box Association (Issued 1-15-58).
[b] Estimated at $15.00 M sq. ft. average price.
[c] Source—Company Annual Reports for 1957 year.
NA—Not available.

NOTE.—The names in parentheses are of companies which the named company has acquired.

APPENDIX C

U.S. Fibre Box Industry, Total Assets and Net Sales of Top 20 Companies Based on 1958 MM sq. ft. Shipments

Company	1958 fibre box shipments				1958 total sales, MM[b]	1958 total assets, MM[c]
	MM		MM sq. ft.			
	([a])	Percent U.S. total	([b])	Percent total company sales		
1. Container Corporation (Incl. Mengel)	7,448	7.69	$112	43	$259	$195
2. Inland Container Corp. (Incl. Penn-Mar)	4,961	5.12	74	96	77	66
3. Weyerhaeuser (Kieckhefer)	4,883	5.04	73	18	410	538
4. St. Regis (Incl. Growers and Kress)	4,492	4.63	67	18	377	392
5. Owens-Illinois (National)	4,320	4.46	65	13	508	455
6. Crown-Zellerbach (Gaylord)	4,317	4.45	65	14	469	548
7. International Paper	3,763	3.88	56	6	915	844
8. American Packaging Corp. (pro-forma)	3,278	3.38	49	42	118	111
9. West Virginia (H&D)	3,107	3.21	47	23	208	238
10. Continental Can (Gair)	2,836	2.93	43	4	1,080	688
11. Mead (Incl. Mead-Atlanta)	2,261	2.33	34	13	256	215
12. Union Bag-Camp (Incl. Allied and Highland)	2,239	2.31	34	22	157	187
13. Fibreboard	2,148	2.22	32	28	115	130
14. Longview	1,982	2.04	30	52	58	73
15. Flintkote (Incl. Hankins)	1,842	1.90	28	18	156	127
16. Hoerner	1,535	1.58	23	89	26	16
17. Stone	1,475	1.52	22	61	36	18
18. Ft. Wayne (Sold in 1959)	1,245	1.28	19	90	21	15
19. Alton	1,094	1.13	16		NA	NA
20. River Raisin	867	.89	13	72	18	11
Subtotal, 1-20	60,093	61.99				
All other (380 Cos.)	36,828	38.01				
U.S. total (400 Cos.)	96,921	100.00				

[a] Source—1958 National Shipment Summary of Fibre Box Association (Issued 1-21-59).
[b] Estimated at $15.00 M sq. ft. average price.
[c] Source—Company Annual Reports for 1958.
NA—Not available.

NOTE.—The names in parentheses are of companies which the named company has acquired.

APPENDIX D

U.S. Fibre Box Industry Total Assets and Net Sales of Top 20 Companies Based on 1959 MM sq. ft. Shipments

Company	1959 fibre box shipments				1959 total sales, MM [c]	1959 total assets, MM [c]
	MM sq. ft.		MM			
	([a])	Percent U.S. total	([b])	Percent total company sales		
1. Container Corporation (Incl. Mengel)	8,113	7.40	$122	38	$322	$226
2. Inland Container Corporation	5,694	5.19	85	91	93	84
3. Weyerhaeuser (Kieckhefer)	5,374	4.90	81	18	458	568
4. Crown-Zellerbach (Gaylord)	4,878	4.45	73	14	527	568
5. Mead (Incl. York & Evert)	4,832	4.41	72	22	324	244
6. St. Regis [1]	4,828	4.40	72	15	474	450
7. Owens-Illinois (National)	4,695	4.28	70	13	553	492
8. International Paper	4,344	3.96	65	6	1,030	901
9. Union Bag-Camp (Incl. Allied, Eastern & River Raisin)	3,831	3.49	57	31	181	215
10. Continental Can (Gair)	3,666	3.34	55	5	1,147	751
11. Packaging Corp. America	3,656	3.33	55	46	120	111
12. West Virginia (H&D)	3,650	3.33	55	24	233	260
13. Fibreboard	2,207	2.01	33	28	120	134
14. Flintkote (Incl. Hankins)	2,085	1.90	31	14	221	179
15. Longview (Incl. General)	1,953	1.78	29	49	59	75
16. Hoerner	1,772	1.62	27	93	29	24
17. Stone	1,653	1.51	25	60	42	21
18. St. Joe	1,616	1.47	24		NA	NA
19. Alton	1,333	1.22	20		NA	NA
20. Interstate (Incl. Allcraft)	1,205	1.10	18		NA	NA
Subtotal, 1-20	71,385	65.09				
All other	38,242	34.91				
U.S. total	109,637	100.00				

[1] Includes Pollock, Kress, Cornell, Rathborne & Birmingham.
[a] Source—1959 National Shipment Summary of Fibre Box Association (Issued 1-29-60).
[b] Estimated at $15.00 M sq. ft. average price.
[c] Source—Company Annual Reports or 1959.
NA—Not available.

NOTE.—The names in parentheses are of companies which the named company has acquired.

APPENDIX E

U.S. Fibre Box Industry Total Assets and Net Sales of Top 20 Companies Based on 1960 MM sq. ft. Shipments

Company	1960 U.S. fibre box shipments				1960 total sales, MM[c]	1960 total assets, MM[c]
	MM sq. ft.		MM			
	([a])	Percent U.S. total	([b])	Percent total company sales		
1. Container Corp. (Incl. Mengel)	7,870	7.25	$119	36	$327	$240
2. Inland Container	5,514	5.08	83	89	93	88
3. Weyerhaeuser (Kieckhefer-Eddy)	5,286	4.88	80	17	458	578
4. St. Regis [1]	5,137	4.73	77	14	536	563
5. Owens-Illinois (National)	4,705	4.33	71	13	561	492
6. Crown-Zellerbach (Gaylord)	4,684	4.30	71	13	554	575
7. Mead (Incl. York & Evert)	4,509	4.15	68	20	339	251
8. International Paper	4,368	4.02	66	6	1,013	930
9. West Virginia (H&D)	3,740	3.44	57	23	250	271
10. Union Bag-Camp (Incl. Allied, Eastern & River Raisin)	3,728	3.43	56	26	213	235
11. Continental Can (Gair)	3,598	3.31	54	5	1,117	767
12. Packaging Corp. of America	3,509	3.23	53	38	138	112
13. Longview (Incl. General & Downing)	2,598	2.39	39	54	72	82
14. Flintkote (Incl. Hankins)	2,013	1.85	30	12	252	230
15. Hoerner	1,765	1.62	27	93	29	23
16. Stone	1,670	1.54	26	58	45	24
17. Alton	1,331	1.23	20		NA	NA
18. Interstate (Incl. Allcraft)	1,164	1.07	18		NA	NA
19. Connelly	857	.79	12	100	12	4
20. Weston Paper-Wabash	817	.75	12		NA	NA
Subtotal, 1-20	68,863	63.39				
All other [2]	39,668	36.61				
U.S. total	108,531	100.00				

[1] Includes Cornell, Federal, Growers, Kress, National Kraft, Nifty, Pollock, Rathborne and Sherman.
[2] Includes non-members such as Olin-Mathieson, Fibreboard and St. Joe, whose shipments may qualify them for inclusion in Top 20 of industry.
([a]) Source—National Shipment Summary of Fibre Box Association; adjusted to include shipments by subsidiaries, affiliates and acquisitions.
([b]) Estimated at $15.00 M sq. ft. average price.
([c]) Source—Company annual reports for 1960.
NA—Not available.

APPENDIX F

U.S. Fibre Box Industry Net Sales of Top 20 Companies Based on 1961 MM sq. ft. Shipments

Company	1961 fibre box shipments				1961 total sales, MM [c]
	MM sq. ft.		MM		
	([a])	Percent U.S. total	([b])	Percent total company sales	
1. Container Corp. (Incl. Mengel)	8,187	7.16	$123	37	$330
2. Inland Container	5,745	5.03	86	87	99
3. Weyerhauser (Kieckhefer-Eddy)	5,715	5.00	86	17	492
4. St. Regis [1]	5,467	4.78	83	15	565
5. Crown-Zellerbach (Gaylord)	5,060	4.43	77	14	563
6. Mead (Incl. York & Evert)	5,014	4.39	75	18	407
7. Owens-Illinois (National)	5,003	4.38	75	13	596
8. International Paper	4,831	4.23	72	6	1,045
9. West Virginia (H & D)	4,034	3.53	60	24	252
10. Union Bag-Camp [2]	3,943	3.45	59	26	228
11. Continental Can (Gair)	3,776	3.30	57	5	1,153
12. Packaging Corp. of America	3,708	3.24	56	43	129
13. Longview (Incl. General & Downing)	2,687	2.35	41	56	73
14. Flintkote (Incl. Haskins)	2,081	1.82	32	13	249
15. Hoerner Boxes, Inc	1,897	1.66	29	93	31
16. Stone Container	1,760	1.54	27	57	47
17. Alton Box	1,423	1.24	21		NA
18. Interstate Cont. (Incl. Allcraft)	1,191	1.04	18		NA
19. Western Kraft	874	.76	14		NA
20. Georgia Pacific	864	.76	14	6	238
Subtotal, 1-20	73,260	64.09			
All others [3]	41,050	35.91			
U.S. total	114,310	100.00			

[1] Includes Cornell, Kress, National Kraft, Nifty, Pollock & Sherman.
[2] Includes Allied Container, Eastern Box and River Raisin.
[3] Includes non-members such as Olin-Mathieson, Fibreboard and St. Joe, whose shipments may qualify them for inclusion in the top 20 companies.
[a] Source—National Shipment Summary of Fibre Box Association; adjusted to include shipments by subsidiaries, affiliates and acquisitions.
[b] Estimated at $15.00 MM sq. ft. average price.
[c] Source—Company Annual Reports for 1961.
NA—Not available.

APPENDIX G

Companies and Plants Manufacturing Corrugated Shipping Containers

	Companies		Plants					
			Total		Corrugator		Sheet	
Year	Number	Increase [1]	Number	Increase [1]	Number	Increase	Number	Increase [1]
1960	425	9	812	47	428	27	384	20
1959	416	16	765	53	401	9	364	44
1958	400	18	712	36	392	14	320	22
1957	382	6	676	37	378	14	298	23
1956	376	27	639	43	364	8	275	35
1955	349	27	596	33	356	22	240	11
1954	322	13	563	37	334	14	229	23
1953	309	13	526	(3)	320	2	206	(5)
1952	296	(12)	529	29	318	11	211	18
1951	308	(1)	500	19	307	3	193	16
1950	309	21	481	8	304	59	177	59
1949	288	(8)	473	(7)				
1948	296	(19)	480	63				
1947	315	49						
1946	256	14	417	29				
1945	242	16	388	25				
1944	226	(4)	363	8	245	3	118	5
1943	230	(3)	355		242		113	
1942	233	3						
1941	230	(4)						
1940	234		355					

[1] Figures in parenthesis denote Decrease.

Source: Fibre Box Association.

APPENDIX H

1955

Companies	Total M sq. ft.	Dollars	Louisville area only	
			M sq. ft.	Dollars
Mengel	345, 652	5, 506, 575. 00	[1 2] 225, 000	[3] 3, 579, 273. 00
General Box	165, 000	Not shown	68, 100	Not shown
Alton (Embry)	9, 393	160, 923. 18	4, 998	$5, 171. 46
Miller	Not shown	Not shown	Not shown	Not shown
Midwest [3]	Not shown	Not shown	Not shown	Not shown
Boone Box	Not shown	105, 866. 57	Not shown	105, 066. 57

[1] Mengel's Louisville shipments were not shown separately until 1958 when they amounted to approximately 65% of the total. The evidence was that the proportion in 1955-1957 was substantially the same:

[2] Estimated.

[3] Midwest's shipments amounted to $300,000 in 1954, and increased each year thereafter. In 1958, the total was $541,000. There is no evidence as to the exact increase in the years 1955-1957. 95% of its sales were in the Louisville area.

NOTE.—Total Louisville area usage: 654,300 M sq. ft:

APPENDIX I

1956

Companies	Total M sq. ft.	Dollars	Louisville area only	
			M sq. ft.	Dollars
Mengel	350,476	5,748,691	[1] 228,000	[1] 3,736,649
General Box	153,000	Not shown	86,800	Not shown
Alton (Embry)	36,466	701,440	32,334	621,992
Miller	30,000	Not shown	Not shown	Not shown
Midwest	Not shown	Not shown	Not shown	Not shown
Boone Box	Not shown	188,758	Not shown	188,758

[1] Estimated.

NOTE.—Total Louisville area usage: 743,700 M sq. ft.

APPENDIX J

1957

Companies	Total M sq. ft.	Dollars	Louisville area only	
			M sq. ft.	Dollars
Mengel [1]	322,026	5,123,541.00	[2] 209,000	[2] 3,303,301
General Box	153,000	2,537,925.80	109,300	Not shown
Alton (Embry)	51,181	884,166.00	36,755	634,530
Miller	50,000	Not shown	Not shown	Not shown
Midwest	Not shown	Not shown	Not shown	Not shown
Boone Box [3]	50,000	140,344.00	Not shown	140,344

[1] Mengel total shipments include sheet furnished to its Lexington plant sales in the amount of approximately 17,000 M sq. ft.
[2] Estimated.
[3] Boone M sq. ft. includes inner packaging. Corrugated shipping containers represented by dollar figure were less than 25% of its total business.

NOTE.—Total Louisville area usage: 784,800 M sq. ft.

APPENDIX K

1958

Companies	Total M sq. ft.	Dollars	Louisville area only	
			M sq. ft.	Dollars
Mengel [1]	348,670	5,471,656	226,056	3,837,220
General Box [2]		1,191,686	55,700	Not shown
Inland [3]	167,000	1,419,834	126,000	Not shown
Alton [4]	144,443	1,879,676	104,706	1,276,688
Mead (Miller) [5]	68,000	641,078	Not shown	486,529
Midwest	50,000	541,000	Not shown	514,000
Boone Box [6]	80,000	118,437	Not shown	118,437

[1] Mengel total shipments include sheet furnished to its Lexington plant in the approximate amount of 42,000 M sq. ft. Mengel Louisville sales include General Electric 7,742 M sq. ft.
[2] General Box plant total square footage for 1st 6 months of 1958 included in Inland plant total.
[3] Total shipments consist of total General Box 1st 6 months, total Inland 2d 6 months. Inland Louisville area sales include 1st 6 months shipments from other Inland plants. Dollar sales for 2d 6 months only.
[4] Alton Louisville sales include General Electric 19,527 M sq. ft.
[5] Mead (Miller) dollar figures are for 2d 6 months only. 1st 6 months not shown.
[6] Boone square footage includes inner packaging. Dollar figure represents shipping containers only.

NOTE.—Total Louisville area usage: 780,800 M sq. ft.

APPENDIX L

1959

Companies	Total M sq. ft.	Dollars	Louisville area only	
			M sq. ft.	Dollars
Mengel[1]	347,000	5,493,830	283,700	4,546,317
Inland	209,000	Not shown	215,500	Not shown
Alton[2]	193,145	2,901,982	116,600	1,631,254
Mead[3]	106,600	1,652,361	85,400	1,290,447
Midwest	50,000	560,000	Not shown	532,000
Boone Box[4]	100,000	125,202	Not shown	125,202

[1] Mengel total shipments include sheet furnished to Lexington plant. Mengel Louisville sales include General Electric 6,529 M sq. ft.

[2] Alton Louisville sales include General Electric 10,700 M sq. ft.

[3] Mead Louisville sales include General Electric 3,864 M sq. ft.

[4] Boone square footage includes inner packaging. Dollar figures include only shipping containers.

NOTE.—Total Louisville area usage: 906,200 M sq. ft.

APPENDIX M

1960

Companies	Total M sq. ft.	Dollars	Louisville area only	
			M sq. ft.	Dollars
Mengel[1]	347,000	5,653,514	272,000	4,446,481
Inland	191,000	Not shown	196,700	Not shown
Alton[2]	163,100	2,671,911	73,390	1,445,759
Mead[3]	120,000	1,932,485	98,415	1,541,863
Midwest	50,000	642,000	Not shown	610,900
Boone Box[4]	120,000	203,313	Not shown	Not shown

[1] Mengel total shipments include sheet furnished to Lexington plant. Mengel Louisville sales include General Electric 7,350 M sq. ft.

[2] Alton Louisville sales include General Electric 3,495 M sq. ft.

[3] Mead Louisville sales include General Electric 4,437 M sq. ft.

[4] Boone Box square footage figure includes inner packaging. Dollar figure represents shipping containers only.

NOTE.—Total Louisville area usage: 905,500 M sq. ft.

APPENDIX N

1961[1]

Companies:	*Total M sq. ft.*
Mengel[2]	305,000
Inland	217,000
Alton	176,000
Mead	189,000
Midwest	45,000
Boone[3]	125,000
Independent Box Makers, Inc.[4]	Not shown

[1] There are no complete figures in the record with respect to 1961 Louisville sales of each Louisville plant except as to Inland's square footage.

[2] Excludes sheet shipped to Lexington plant.

[3] Includes inner packaging. Shipping containers less than 25%.

[4] Commenced business November 1961.

NOTE.—Total Louisville area usage: 900,800 M sq. ft.

OPINION OF THE COMMISSION

JULY 31, 1964

By DIXON, *Commissioner:*

Respondents, Inland Container Corporation and its wholly owned subsidiary of the same name, are charged with having violated Section 7 of the Clayton Act, as amended, in their acquisition of the Louisville, Kentucky, corrugator shipping container plant of General Box Company on June 30, 1958. The hearing examiner held that the evidence failed to establish the required adverse competitive effect and ordered that the complaint be dismissed. Counsel supporting the complaint have appealed.

The hearing examiner found, and there is no dispute on this appeal, that corrugated shipping containers constitute the proper line of commerce (relevant product market) in this proceeding.[1] Inland was, and has been for the past several years, one of the largest producers in this industry. It ranked fourth in industry shipments in 1950, with 4.15% of the national total, third in 1957 with 4.9% and second in 1958 with 5.12%. Most of its customers are located east of the Mississippi River where sixteen of its eighteen manufacturing plants are located. Prior to its acquisition of the Louisville plant of General Box Company, Inland did not have a plant in Louisville for the manufacture of corrugated shipping containers. Its nearest plants to Louisville were in Evansville, Indiana, Indianapolis, Indiana, and Middletown, Ohio, each of which is about 125 miles from Louisville. In 1957, the year prior to the acquisition of General Box, Inland supplied 10.1% of the total usage of corrugated shipping containers in the Louisville area from its Evansville and Indianapolis plants and a millsite[2] plant at Macon, Georgia.

The acquired company, General Box, manufactures and sells various types of wirebound and wood boxes as well as corrugated shipping containers. In 1955, it operated nine wirebound and wood box plants, the one corrugator plant in Louisville and two plants in which corru-

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[1] A corrugated shipping container as aptly defined in the initial decision is a container or box consisting of a combination of liner board material with a fluted inner material which is formed into sheets on a corrugator machine and finished into containers or boxes by processes commonly referred to as scoring, slitting, printing and closure of the joint. Containers are shipped by the manufacturer to the user in a knocked down or flat position. The users of such containers are manufacturers and producers of products which are shipped in such container for distribution or use.

[2] A millsite plant is a plant for the manufacture of corrugated shipping containers which is located adjacent to a mill which manufactures and supplies the corrugator plant with paperboard.

gated sheets were fabricated into corrugated boxes.[3] These last two were located in Houston, Texas, and Kansas City, Missouri. General Box was not among the largest producers in the corrugated box industry, accounting for only .23% of industry shipments in 1951, .23% in 1953, .26% in 1955 and .17% in 1957. In this latter year, which was just prior to the acquisition, General Box accounted for 13.9% of the corrugated box shipments in the Louisville area.

Prior to considering the specific aspects of Inland's acquisition of General Box, we deem it important to briefly review the industry setting in which this acquisition took place.

During the past four decades the physical volume of shipments of corrugated boxes has witnessed a sixteen-fold increase and the dollar value of the industry shipments has risen twenty-fold. During slightly over a decade, between 1950 and 1961, concentration in the largest shippers of corrugated boxes increased substantially on a nationwide basis as shown below:

Changes in Concentration of U.S. Shipments of Corrugated Boxes, 1950–61

Largest companies in each year	Percent of total shipments		Percent increase in concentration ratios
	1950	1961	
4 largest	19.44	21.97	13.0
8 largest	32.76	39.40	20.3
12 largest	38.81	52.92	36.4
2 (largest	47.10	64.09	36.1

The effect of the merger movement in this industry is shown by the fact that of the twenty largest box makers in 1950, only six remain on the list, the other fourteen having been merged with or acquired by other companies since that time. Moreover, the fact that mergers contributed in no small part to the increase in concentration in 1961 is revealed by the fact that all of the top twenty corrugated box companies in that year except four (the eighth, sixteenth, nineteenth and twentieth) have acquired other box companies since 1950.

Another significant change in the corrugated box industry has been the trend to integration. The industry classifies an integrated company

[3] These two plants are known as sheet plants. Whereas the corrugator plant fabricates the liner board and fluted material into three-ply sheets, the sheet plant must obtain its corrugated sheets from other sources. It performs only the finishing process of scoring, slitting, printing and closure of the joints. The sheet plant's investment in equipment is considerably less than that of the corrugator plant as the machine for fabricating corrugated sheets is by far the largest and most expensive piece of equipment in the standard corrugated box factory. Sheet plants, while numerous (almost half of all firms manufacturing corrugated boxes are sheet plants) accounted for only 9.0% of the total corrugated box shipments in 1959.

as one owning a paper mill which supplies 50% or more of the container board for its box plant. Using this definition, the record reveals that of the top twenty corrugated box companies in 1961 all but one, the eighteenth, was integrated. In 1960, integrated companies accounted for 67.4% of the total shipments of corrugated boxes, whereas in 1940 integrated companies made only 42.4% of such shipments.

We turn next to a consideration of the setting in the Louisville area in which the acquired corrugator box plant of General Box Company is located.

The most significant development with respect to this area occurred several years prior to this acquisition when, in 1953, the General Electric Company announced that it would move all of its principal appliance plants from Erie, Pennsylvania, to Louisville. At the time of this announcement, General Electric was a major customer of Inland, being supplied by Inland plants located in Erie and in Astabula, Ohio. Inland had acquired these two plants in 1952 to serve General Electric in Erie.

Although Inland was doing business in Louisville at the time, it had no intention of either building or acquiring a plant in that area until the General Electric decision. However, as a result of the General Electric move, it began to consider establishing a plant in Louisville in the belief that this would afford a better opportunity to retain its General Electric business and also to obtain any additional business both from General Electric and any other businesses that might be attracted to Louisville by the General Electric move.

In the latter part of 1954, Inland purchased land in Louisville with the evident intention of building a sheet plant. At about the same time, Inland became interested in buying General Box's corrugator plant. This was a new plant just going into production, having replaced General's previous plant which was destroyed by fire in 1953. Inland delayed construction of its plant for several months until it appeared that there was no prospect of acquiring the General Box plant. When it decided to go forward with its own construction, adequate water facilities had not been provided.

Inland acquired some General Box stock in 1955. When an adequate water supply became available in 1957, it again decided to explore the possibility of a General Box deal before beginning construction. Its offers to purchase were refused by the General Box management. Inland then proceeded with its purchase of General Box stock until it had obtained about 52% of the outstanding shares in May 1958. It then reached an agreement with General Box whereby it exchanged a substantial portion of the stock for the Louisville plant and sold the

remaining stock to General Box. The agreement was carried out on June 30, 1958.

The evidence discloses that, prior to the acquisition, Inland's sales of corrugated boxes in the Louisville area were decreasing whereas those of General Box were on the increase. Thus, in 1955, out of a total of 654.3 million square feet sold in the Louisville area, Inland supplied 123.2 million square feet and General Box 68.1 million. In 1957, Inland's share of a total of 784.8 million square feet was 79.8 million while General Box supplied 109.3 million.

In 1954, in addition to General Box, there were two other companies engaged in the manufacture of corrugated boxes in the Louisville area. The oldest of these was The Mengel Company, which established a corrugator plant in 1911, and had at all times been the largest producer of corrugated boxes in Louisville. In 1954, a controlling interest in the stock of this company was purchased by Container Corporation of America, an integrated company which ranks as one of the largest manufacturers of corrugated boxes in the country.

The other company in existence in Louisville in 1954 was Midwest Box Company, a sheet plant which was established in 1948.

In 1954 two new sheet plants were established in Louisville. One, Miller Container Company, was acquired by The Mead Corporation in 1958. In that year, Mead, an integrated company, was the eleventh largest manufacturer of corrugated boxes in the country. After the acquisition, Mead installed a corrugator machine. Boone Box Company, a sheet plant established in 1954, became affiliated in 1959 with Union Bag-Camp Paper Corporation, an integrated company which since 1959 has ranked among the top ten manufacturers of corrugated boxes in the country.

In the following year, 1955, Embry Container Company, a sheet plant, was established in Louisville. In 1957, it was acquired by Alton Board Company, another integrated company which was the nineteenth largest shipper of corrugated boxes in 1958 and 1959. Finally, in 1961, Independent Box Makers, Inc., a sheet plant, was established in Louisville. The record contains little information with respect to its operation.

The hearing examiner held that Louisville and the surrounding territory within a ten mile radius constitutes the relevant geographic market. He based this ruling principally on the fact that General Box made the great bulk of its sales in that area, pointing out that the year before the acquisition, 71% of the General Box sales were in the Louisville area. Inland argued before the hearing examiner and still contends in its brief in answer to complaint counsel's appeal, that

the area in which the principal shipments of the acquired plant are made is not the proper test to determine the relevant geographic market. In support of its position that, in determining this market, the examiner should have given consideration to the area to which purchasers in the Louisville area could practically turn for supplies, Inland relies on the *Tampa Electric* case [4] and the following language in the *Philadelphia Bank* case [5] which was decided subsequent to the filing of the initial decision herein:

> * * * The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. See Bock, Mergers and Markets (1960), 42. This depends upon "the geographic structure of supplier-customer relations."

There is no dispute that the Louisville area was an "area of competitive overlap" between Inland and General Box. The anomaly here is that the test urged by Inland is the basis for the examiner's finding of no likelihood of competitive injury as a result of the acquisition. However, as we recognized in our recent decision in *Permanente Cement* case,[6] the position taken by Inland is correct and we will give consideration to sources of supply for Louisville purchasers in delimiting the geographic market.

As noted by the Supreme Court in the *Philadelphia Bank* case, convenience of location is essential to effective competition in most service industries. The corrugated box industry is "very much a service business."[7] Corrugated boxes are custom made and promptness of delivery is "vitally important."[8] The importance of this service is best summed up in the testimony of Inland's president that:

> * * * our services today are not on a matter of weeks or days. Because of the advent of the trucks instead of rail sidings, many customers do not have rail sidings, they get delivery by trucks and they did not build their truck docks adequate to handle the movement in and out and there are delays there. In many cases the customer will say he wants his boxes between ten and four o'clock, and that is the only ti[m]e he will accept them for delivery and he wants them on his dock at seven o'clock in the morning, not eight o'clock in the morning because his production line will be starting at that time and if it is not there his line will be down.[9]

An even clearer picture of the present market conditions in the sale of corrugated boxes is given in the testimony of Inland's Louisville

[4] *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961).

[5] *United States v. Philadelphia National Bank,* 374 U.S. 321, 357 (1963).

[6] *In the Matter of Permanente Cement Co.,* Docket No. 7939, April 24, 1964 [65 F.T.C. 410].

[7] Testimony of Inland's president, tr. 205.

[8] Tr. 224.

[9] Tr. 224–225.

plant manager, Mr. J. T. McClamrock, that: "Whereas eight or nine years ago our customers' demands were such that it was possible to ship in from an area of a hundred or 150 miles away, since that time, today's market, the demands of our customers are much greater." [10] He further testified that customers were cutting down their inventories in an effort to reduce overhead and were requesting box plants to run orders on shorter lead time so that today, having a local plant is "a much more important factor." Additionally delivery service is one of the things emphasized by Inland in its promotional literature.

The facts testified to by the Inland representatives are borne out by the events which have taken place in the Louisville area. In the first place, Inland found it advisable to move into Louisville rather than try to service the area from 125 miles away. This move was prompted at least in part on advice by General Electric that it would favor Inland having a local facility to provide storage and service. Second, two other large companies, Container Corporation of America and Mead, which had been servicing Louisville from plants located a short distance away in Cincinnati, acquired box plants in Louisville within the eight or nine year period referred to by Mr. McClamrock.

The initial decision contains a tabulation showing purchases of the four largest users of corrugated boxes in the Louisville area from outside sources in 1957 and 1959. While in these years, these four did make substantial purchases from outside sources, the tabulation shows that the extent of outside purchases of all four declined in 1959 and, with respect to three of these purchasers, the decline was substantial—roughly 40%. The record discloses that this decline continued in 1960. Additionally, the record discloses that out of a total Louisville usage of 784.8 million square feet in 1957, outside plants supplied 47.8%. In 1960, purchases from outside plants had dropped to 29.7% of an expanding Louisville usage of 905.5 million square feet.

The record establishes a positive correlation between the size of the customer and the extent to which outside sources are employed. The large users, such as those in the hearing examiner's tabulation, have extensive plant facilities which enable them to maintain an inventory of boxes and purchase in large quantities. However, there are numerous other purchasers in the Louisville area who maintain little or no inventory. It is obvious from the above-quoted testimony of Inland's president and from the testimony of numerous Louisville users [11] that

[10] Tr. 600.

[11] Tr. 559, 618, 646, 673–4, 699, 716, 723, 762, 795, 862, 990–2, 1043, 1049, 1108, 1150. Also the statements of Inland's Louisville plant manager are supported by the testimony of the Mead representative (tr. 1203–4).

box companies outside of Louisville are no longer regarded as a practical source of supply for these purchasers.

The Supreme Court in the *Philadelphia Bank* case pointed out that large borrowers may find it practical to do a large part of their banking business outside their home community whereas very small borrowers may be confined to banks in their immediate neighborhood. It reached its decision as to the relevant geographic market by selecting an area in which customers that are neither very large nor very small find it practical to do their business.

The facts of this case, *i.e.*, the importance of prompt delivery, the change in consumer demands to avoid expensive inventories, the dramatic decline in purchases from outside sources, and the movement by box manufacturers with plants nearby into the Louisville area clearly establish that with the possible exception of the very largest buyers, the practical source of supply for Louisville purchasers of corrugated boxes is the Louisville area. Accordingly, we hold that Louisville and the surrounding territory within a ten mile radius constitutes the relevant geographic market within which to measure the effect of this acquisition.

In measuring the effect of this conventional horizontal merger on competition in the Louisville area, we are guided by the holding of the Supreme Court in the *Philadelphia Bank* case that:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. 374 U.S. at 363.

In that case, the acquiring firm as a result of a proposed merger would have controlled 30% of the business in the relevant geographic area and together with the largest firm, would have controlled 59% of the business. In this case, by its acquisition of the General Box plant, Inland increased its market share in Louisville by well over 100%. As we have previously noted, Inland's share of the corrugated box market in Louisville in 1957 was 10.1%. In 1959, the year after the merger, its market share was 23.7%. Whereas, in 1957 the combined share of the two largest box manufacturers in Louisville (The Mengel Company and General Box) was 40.5%, the combined share of the two largest in 1959 (The Mengel Company and Inland) increased to 55.1%.

In the context of the competitive situation existing in the sale of corrugated boxes in the Louisville area, we are of the opinion that the market share percentage resulting from Inland's acquisition of General Box threatens undue concentration and meets the test of presumptive illegality as declared in the *Philadelphia Bank* case. In holding that the combined market share in that case met the test, the Supreme Court made reference to the "prima facie unlawfulness" theory of several economists and expressly relied upon certain decisions interpreting other sections of the Clayton Act in which the same language as to competitive effects is employed. In the opinion of the economists and in two of the three cases relied upon, the percentage of the market illegally foreclosed was about the same or less than the combined market shares of Inland and General Box. Moreover, as the court pointed out, integration by merger is more suspect than integration by contract (as in the cases upon which it relied), because of the permanence of the former. We conclude, therefore, that this concentration in the Louisville area resulting from the merger of the second and third largest firms in that area, as reflected in the market share of the combined companies and the combined shares of the two largest companies, creates an inference that the effect of the merger may be substantially to lessen competition.

This inference can be rebutted only by evidence "clearly showing" that the merger is not likely to have such anticompetitive effects. Such evidence is lacking in this record.

In our findings as to the relevant geographic market, we have rejected the examiner's conclusion concerning the significance of competition by outside suppliers in the Louisville area. The recent change in the needs and demands of the customers in this area, as reflected in the drastic decline in purchases from outside sources and the movement of nearby companies into Louisville clearly establish that the effect on competition of outside plants can be of significance only to the few largest buyers in Louisville.

In considering the evidence with respect to probable competitive effects, we note that a new sheet plant was established in Louisville in 1961. There is no evidence in the record as to its sales and the hearing examiner placed no reliance on this entry. The mere entry of one sheet plant in a five-year period in which the total usage of corrugated boxes in Louisville rose from 654,300 million square feet to 905,500 million square feet falls far short of the clear showing required to rebut the anticompetitive effects of the merger. In fact, the entry of only one new plant in this vastly expanded market strongly sug-

gests the absence of competitive opportunities for potential competitors.

Significantly, Inland's own potential, planned competition was eliminated as a result of its acquisition of General Box. Thus, prior to this acquisition, it became obvious to Inland management that to protect its declining share of the Louisville market and to obtain additional business, it would have to establish a plant in that area. Moreover, it appears that such a move was further necessitated by the fact that Inland's shipments to the Louisville area were needed elsewhere.[12] However, Inland abandoned its intention to build which, as previously mentioned, had been implemented to the extent of purchasing the land, and acquired General Box.[13] By so doing, Inland not only protected its market share, it more than doubled its share at the expense of an independent company. Moreover, General Box was a company which, with a recently completed plant, was competing vigorously in the Louisville area as reflected in its steadily increasing market shares from 10.4% in 1955 to 13.9% in 1957. Additionally, this elimination of a well-established company took place in a market which itself was expanding with a corresponding availability for more competitors.

General Box was replaced in the Louisville area by a company which was the third largest corrugated box producer in the United States the year before the acquisition. In 1958, the year it acquired General Box, Inland became the second largest producer. This follows a regular increase in Inland's growth from fourth place in the industry in 1950—growth which was accomplished in part by internal expansion and in significant part by other acquisitions. Also, the acquisition followed a pattern which had already been established in Louisville—the replacement of independents by the giant integrated companies of the industry. In this regard, we must reject the hearing examiner's holding that there is no significant advantage in integration in the corrugated

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[12] In a letter of October 14, 1955, to Mr. George B. Elliott, president of Inland, recommending immediate completion of a corrugator plant in Louisville, Mr. C. F. Smith, in charge of Inland's sales and marketing and vice-president of the company, stated: "Our experience during the past several months indicates that the full capacity of our Indianapolis, Evansville, and Middletown plants is required to service the respective marketing areas and our growing volume in the south is taking a larger share of our Macon production." CX 103.

[13] In commenting on a company's decision to acquire rather than build, the Supreme Court in the *Brown Shoe* case has stated that:

"* * * Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry." *Brown Shoe Co. v. United States,* 370 U.S. 294, 345, n. 72 (1962).

box industry. There is direct testimony by competing box manufacturers as to the importance of box companies owning their own sources of supply of paperboard. Inland itself has recognized the significance of integration in its statement that "Inland believes that the integration which has permitted it to acquire Kraft linerboard from its 50%-owned corporations has resulted in *substantial* advantages to it."[14]

That an integrated company may possess competitive advantages over non-integrated rivals is a well-recognized fact of economic life. In addition to the integrated company's capacity to control quality and to enjoy certain cost advantages over the independent box manufacturers, the integrated firm is insured a steady supply of raw materials in times of shortage. The non-integrated box manufacturer, on the other hand, is subject to the problems of any independent firm facing competitors acting in a dual role—that is, competitors who are also sources of supply. In short, the non-integrated firm is usually forced to buy its raw materials from an integrated competitor.

In dismissing the importance of integration, the examiner found that the supply of containerboard is and has been plentiful and held that it is not "reasonably likely" that the market price for containerboard will not be controlled by competition. This holding loses sight of the fact that the percentage of corrugated box sales by integrated companies in this country rose from 42.4% in 1940 to 67.4% in 1960. Considering this trend toward a substantial segment of the containerboard industry supplying its own box plants, we are of the opinion that the examiner's forecast is not well grounded.

We have in this decision outlined the changes taking place in structure of the corrugated box suppliers in the Louisville area as a result of acquisitions. Specifically, the Louisville market is being transformed from one of small independent suppliers into a market dominated by the integrated giants of the industry. Viewed against the background of this change in market structure, it is our opinion that this acquisition falls squarely within the holding of the Supreme Court that: "Preservation of Rome [General Box], rather than its absorption by one of the giants, will keep it 'as an important competitive factor,' to use the words of S. Rep. No. 1775, p. 3. Rome [General Box] seems to us the prototype of the small independent that Congress aimed to preserve by § 7." *United States* v. *Aluminum Co. of America*, —— U.S. —— (1964). See also *The Procter & Gamble Company*, Docket No. 6901 (decided November 26, 1963), p. 56 [63 F.T.C. 1465, 1573]; *Foremost Dairies, Inc.*, Docket No. 6495 (decided April 30, 1962), p. 50.

[14] CX 11, p. 8 (emphasis supplied).

Under the foregoing circumstances, we conclude that the hearing examiner erred in holding that the acquisition of the General Box plant by Inland does not violate Section 7. Accordingly, the initial decision will be modified and an appropriate order of divestiture will be entered. By so ordering, of course, we do not preclude Inland from the Louisville area. The record clearly establishes that Inland has the know-how, resources and, prior to acquiring General Box, the definite intention to establish a plant in Louisville. Should Inland determine that the expanded Louisville usage warrants, there is no bar to entering by way of internal expansion.

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 the appeal of counsel supporting the complaint from the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted and that the hearing examiner's initial decision should be modified to conform to the views expressed in said opinion:

It is ordered, That the initial decision be modified by striking the findings and conclusion beginning on page 340 thereof with the words "With reference to the first issue" and ending on page 350 with the words "Clayton Act" and substituting therefor the findings and conclusions in the accompanying opinion beginning on page 363 with the words "There is no dispute" and ending on page 369 with the words "will be entered."

It is further ordered, That the initial decision be modified by striking the order on page 350 and substituting therefor the following:

It is ordered, That:

I

Respondents, Inland Container Corporation and its wholly owned subsidiary also known as Inland Container Corporation, and their officers, directors, agents, representatives and employees shall within one (1) year from the date this order becomes final, divest themselves absolutely and in good faith, of all stock, assets, properties, rights and privileges, tangible or intangible, including

but not limited to all contract rights, properties, plants, machinery, equipment, trade names, trademarks and good will acquired by said respondents as a result of their acquisition of the stock of General Box Company and the subsequent acquisition of the assets of the Louisville, Kentucky, corrugated plant of General Box Company, together with such plants, machinery, buildings, improvements, equipment and other property of whatever description that has been added to or placed on the premises of said corrugator plant, as may be necessary to restore that plant as a going concern and effective competitor in the manufacture and sale of corrugated shipping containers.

II

Pending divestiture, respondents shall not make any changes in the plant, machinery, buildings, equipment, or other property of whatever description, which might impair the present capacity for the production of its respective corrugated box products, or its market value, unless such capacity or value is restored prior to divestiture.

III

By such divestiture, none of the stock, assets, properties, rights or privileges, described in paragraph I of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of respondents or any of respondents' subsidiary or affiliated corporations, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Inland Container Corporation, or to any purchaser who is not approved in advance by the Federal Trade Commission.

IV

If respondents divest the assets, properties, rights and privileges, described in paragraph I of this order, to a new corporation, the stock of which is wholly owned by respondents, and if respondents then distribute all of the stock in said corporation to the stockholders of respondents in proportion to their holdings of respondents' stock, then paragraph III of this order shall be inapplicable, and the following paragraphs V and VI shall take force and effect in its stead.

V

No person who is an officer, director or executive employee of respondents, or who owns or controls, directly or indirectly, more

than one (1) percent of the stock of respondents, shall be an officer, director or executive employee of any new corporation described in paragraph IV, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation described in paragraph IV.

VI

Any person who must sell or dispose of a stock interest in respondents or the new corporation described in paragraph IV in order to comply with paragraph V of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation is made to stockholders of respondents.

VII

As used in this order, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

VIII

Respondents shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of their actions, plans, and progress in complying with the provisions of this order and fulfilling its objectives.

It is further ordered, That the initial decision as supplemented by the accompanying opinion and as modified herein be, and it hereby is, adopted as the decision of the Commission.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

SEARS, ROEBUCK AND CO.

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

Docket 8069. Complaint, Aug. 4, 1960—Decision, July 31, 1964

Order dismissing—following findings in the companion Section 2(a) case, Universal-Rundle Corp., Docket 8070, 65 F.T.C. 924, that the "Homart" brand fixtures sold to Sears and those sold under the manufacturer's brand name were not of like grade and quality, and consequent dismissal of the charge—